SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MAY 4, 2018

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, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

1530

CA 17-01222

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

DONNA JONES, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SMOKE TREE FARM, A NEW YORK PARTNERSHIP, ROBERT F. SMITH, INDIVIDUALLY AND AS A PARTNER OF SMOKE TREE FARM AND/OR DOING BUSINESS AS SMOKE TREE FARM, BENEDETTE SMITH, INDIVIDUALLY AND AS A PARTNER OF SMOKE TREE FARM AND/OR DOING BUSINESS AS SMOKE TREE FARM, DIANE VAN PATTEN, INDIVIDUALLY AND AS A PARTNER OF SMOKE TREE FARM AND/OR DOING BUSINESS AS SMOKE TREE FARM, AND DON VAN PATTEN, INDIVIDUALLY AND AS PARTNER OF SMOKE TREE FARM AND/OR DOING BUSINESS AS SMOKE TREE FARM, DEFENDANTS-RESPONDENTS.

MICHAELS & SMOLAK, P.C., AUBURN (MICHAEL G. BERSANI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, CAMILLUS (ERIN K. SKUCE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered May 15, 2017. The order, among other things, granted defendants' cross motion for summary judgment dismissing the amended complaint.

It is hereby ORDERED that the order so appealed from is modified on the law by denying the cross motion and reinstating the amended complaint, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that she sustained when she fell from a horse during a riding lesson at defendants' stables. Prior to the lesson, plaintiff signed a release, which provided that the "[u]ndersigned assumes the unavoidable risks inherent in all horse-related activities, including but not limited to bodily injury and physical harm to horse, rider, employee and spectator." Plaintiff moved for, inter alia, partial summary judgment dismissing defendants' affirmative defense of release on the ground that the release signed by plaintiff was void under General Obligations Law § 5-326. Defendants cross moved for summary judgment dismissing the amended complaint. Plaintiff appeals from an order that granted the cross motion and dismissed the amended complaint on the ground of assumption of the risk, and denied the motion as academic.

We agree with plaintiff that Supreme Court erred in granting the cross motion and dismissing the amended complaint, and we therefore modify the order accordingly. "The assumption of risk doctrine applies as a bar to liability where a consenting participant in sporting or recreational activities 'is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks' " (*Rosenblatt v St. George Health & Racquetball Assoc., LLC*, 119 AD3d 45, 56 [2d Dept 2014]). " 'If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them' " (*id.*). Nevertheless, " '[a]wareness of risk is not to be determined in a vacuum. It is, rather, to be assessed against the background of the skill and experience of the particular plaintiff' " (*Georgiades v Nassau Equestrian Ctr. at Old Mill, Inc.*, 134 AD3d 887, 889 [2d Dept 2015]). Ultimately, the doctrine of assumption of the risk "will not serve as a bar to liability if the risk is unassumed, concealed, or unreasonably increased" (*Rosenblatt*, 119 AD3d at 56). Here, it is undisputed that plaintiff was a beginner and had never before attempted to mount or ride a horse, and the deposition testimony relied upon by defendants raises questions of fact whether defendants unreasonably increased the risks associated with mounting the horse by failing to give plaintiff adequate instructions and assistance based on her size, athleticism, and obvious struggles in attempting to mount the horse, and whether there were concealed risks of mounting the horse, i.e., whether the horse was "tacked" properly (*see Georgiades*, 134 AD3d at 889; *Vanderbrook v Emerald Springs Ranch*, 109 AD3d 1113, 1115 [4th Dept 2013]; *Corica v Rocking Horse Ranch, Inc.*, 84 AD3d 1566, 1567-1568 [3d Dept 2011]). For the same reasons, we reject defendants' contention, as an alternative ground for affirmance, that the written release established as a matter of law that, as per the language of the release, plaintiff expressly assumed "the unavoidable risks inherent in all horse-related activities" (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Contrary to plaintiff's contention, she is not entitled to the dismissal of the affirmative defense of release inasmuch as the release is not void and unenforceable pursuant to General Obligations Law § 5-326. "Where a facility is 'used for purely instructional purposes,' section 5-326 is inapplicable even if the instruction that is provided relates to an activity that is recreational in nature" (*Tiede v Frontier Skydivers, Inc.*, 105 AD3d 1357, 1358 [4th Dept 2013]). Here, it is undisputed that plaintiff "enrolled in [a] course, paid tuition, not a fee, for lessons and was injured during one of her instructional periods" (*Lemoine v Cornell Univ.*, 2 AD3d 1017, 1019 [3d Dept 2003], *lv denied* 2 NY3d 701 [2004]), and the record establishes that any recreational use of defendants' facility was "ancillary to its primary educational purpose" (*id.*; *see Millan v Brown*, 295 AD2d 409, 411 [2d Dept 2002]; *cf. Vanderbrook*, 109 AD3d at 1115).

Finally, by failing to raise any issues in her brief with respect to that part of her motion seeking to preclude defendants from mentioning the release at trial, plaintiff has abandoned any such issue on appeal (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984

[4th Dept 1994]).

All concur except NEMOYER, J., who dissents in part and votes to affirm in the following memorandum: I respectfully dissent in part and would affirm.[1] The assumption of the risk doctrine is a complete bar to recovery where a participant in a sporting or recreational activity is injured as a result of a risk inherent in that activity (*see Turcotte v Fell*, 68 NY2d 432, 439 [1986]). "As a general rule, participants properly may be held to have consented, by their participation, to those injury-causing events which are known, apparent, or reasonably foreseeable consequences of the participation" (*id.*, citing *Maddox v City of New York*, 66 NY2d 270, 277-278 [1985]). "It is not necessary to the application of assumption of the risk that the injured plaintiff have *foreseen the exact manner in which his or her injury occurred*, so long as he or she is *aware of the potential for injury of the mechanism from which the injury results*" (*Maddox*, 66 NY2d at 278 [emphasis added]; *see Yargeau v Lasertron*, 128 AD3d 1369, 1371 [4th Dept 2015], *lv denied* 26 NY3d 902 [2015]; *Lamey v Foley*, 188 AD2d 157, 164 [4th Dept 1993]).

For our purposes, it is well established that the "risk[] of falling from a horse [is] inherent in the sport of horseback riding" (*Fenty v Seven Meadows Farms, Inc.*, 108 AD3d 588, 588 [2d Dept 2013]; *see Toro v New York Racing Assn., Inc.*, 95 AD3d 999, 1001 [2d Dept 2012], *lv denied* 19 NY3d 810 [2012]). Here, plaintiff did just that: she succumbed to gravity and fell off a horse – the very combination of forces that have plagued riders since men and women first mounted up. Whether mounting, riding, or dismounting, the risk of falling from a horse is always present, and it is necessarily assumed by any rider who chooses to engage in that sport. While plaintiff testified that she was unaware of such risk (despite acknowledging that she was required to wear a helmet), her lack of actual knowledge is immaterial under the circumstances, because falling from a horse is exactly the type of risk that is universally apparent or, at the very least, reasonably foreseeable to any rider, irrespective of skill level or inexperience (*see generally Turcotte*, 68 NY2d at 439; *Yargeau*, 128 AD3d at 1371).

Unlike the majority, I categorically reject plaintiff's theory that "saddle slipping" was an unreasonably increased or concealed risk that she did not assume. Saddles, of course, are not permanently affixed to horses, and it is therefore reasonably foreseeable that a saddle might move or slip. This is so irrespective of any instruction that plaintiff did or did not receive, and irrespective of the adequacy of the tacking. The cases upon which the majority relies for their contrary determination are easily distinguishable (*see Georgiades v Nassau Equestrian Ctr. at Old Mill, Inc.*, 134 AD3d 887, 888 [2d Dept 2015] [instructor insisted that the infant plaintiff perform a maneuver involving her feet being out of the stirrups,

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[1] I join the majority in rejecting plaintiff's argument that her signed release is void under General Obligations Law § 5-326.

despite the infant plaintiff telling the instructor that she felt uncomfortable doing so]; *Vanderbrook v Emerald Springs Ranch*, 109 AD3d 1113, 1115 [4th Dept 2013] [the defendant ranch outfitted the novice rider plaintiff with bitless bridle which prevented the plaintiff from being able to control the horse]; *Corica v Rocking Horse Ranch, Inc.*, 84 AD3d 1566, 1567 [3d Dept 2011] [the defendant ranch failed to provide even basic instructions to the first-time rider plaintiff, and trail guide failed to intervene, in violation of the ranch's policies, when that plaintiff's horse bucked multiple times before she fell]; *Lipari v Babylon Riding Ctr., Inc.*, 18 AD3d 824, 825 [2d Dept 2005] [the first-time rider plaintiff left unsupervised in violation of the defendant riding center's policies]).

In light of the foregoing, I would affirm Supreme Court's order dismissing the amended complaint on summary judgment.

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

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KA 11-01448

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KATHLEEN M. ECKERD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered June 14, 2011. The judgment convicted defendant upon a jury verdict of, inter alia, identity theft in the first degree and grand larceny in the third degree (five counts).

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of, inter alia, identity theft in the first degree (Penal Law § 190.80 [1]) and five counts of grand larceny in the third degree (§ 155.35 [1]). The conviction arises from a series of transactions in which defendant stole money from her employer by withdrawing money from a bank account that she unlawfully established in the name of her employer's corporation and then double-billed corporate clients and issued bad checks to cover up her thefts.

By failing to renew her motion to dismiss count one of the indictment at the close of proof, defendant failed to preserve for our review her contention that the evidence is legally insufficient to support the conviction of identity theft (*see People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]; *People v Smith*, 32 AD3d 1291, 1292 [4th Dept 2006], *lv denied* 8 NY3d 849 [2007]). In any event, defendant's contention is without merit. The People established that defendant assumed the identity of the victim by using his personal identifying information and used the personal identifying information of the victim to commit the theft. Thus, the evidence is legally sufficient with respect to identity theft (*see People v Roberts*, — NY3d —, —, 2018 NY Slip Op 03172, *5-7 [2018]; *People v Yuson*, 133 AD3d 1221, 1221-1222 [4th Dept 2015], *lv denied* 27 NY3d 1157 [2016]).

We reject defendant's further contention that she received ineffective assistance of counsel. There is nothing in the record to indicate that defendant was deprived of meaningful representation in the jury selection process or at trial (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). Moreover, there were legitimate, plausible explanations for defense counsel's handling of evidentiary matters at trial, and thus defendant failed "to demonstrate the absence of strategic or other legitimate explanations" for counsel's alleged shortcomings (*People v Rivera*, 71 NY2d 705, 709 [1988]; *see People v Kurkowski*, 117 AD3d 1442, 1443 [4th Dept 2014]). Defendant's contention that she received ineffective assistance because counsel failed to object to prosecutorial misconduct is without merit, inasmuch as the prosecutor did not engage in prosecutorial misconduct (*see People v Martinez*, 114 AD3d 1173, 1174 [4th Dept 2014], *lv denied* 22 NY3d 1200 [2014]). Viewing the evidence in light of the elements of the crime of identity theft as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is against the weight of the evidence with respect to that crime (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

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CA 17-00022

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

LARRY E. DRUM, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DON A. COLLURE, M.D., JASON BORTON, M.D.,
PROFESSIONAL EMERGENCY SERVICES, PLLC,
ROBERT N. SAWYER, JR., M.D.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., BUFFALO (COLLEEN K. MATTREY OF COUNSEL), FOR DEFENDANT-APPELLANT ROBERT N. SAWYER, JR., M.D.

E. STEWART JONES HACKER MURPHY, LLP, TROY (JAMES E. HACKER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered October 4, 2016. The order denied the motion of defendants Don A. Collure, M.D., Jason Borton, M.D., Professional Emergency Services, PLLC, and Robert N. Sawyer, Jr., M.D., for a protective order and directed counsel for defendant Robert N. Sawyer, Jr., M.D. to produce a PowerPoint slide show.

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

Memorandum: Plaintiff suffered a stroke and was treated briefly at the emergency department of Millard Fillmore Suburban Hospital (MFSH) before being transferred to Buffalo General Medical Center (Buffalo General). Both MFSH and Buffalo General are part of defendant Kaleida Health's hospital network. At Buffalo General, plaintiff began treating with defendant Robert N. Sawyer, Jr., M.D. According to plaintiff, at some point during that treating relationship, Sawyer showed plaintiff and plaintiff's daughter a PowerPoint slide show describing plaintiff's treatment. It is undisputed that Sawyer presented the same slide show to a quality control committee at MFSH, where he served as Chief of Stroke Services.

Plaintiff commenced the instant medical malpractice action and thereafter sought disclosure of the slide show. Defendants-appellants (hereafter, defendants) then moved for a protective order, asserting that the slide show is privileged under, inter alia, Education Law § 6527 (3). Supreme Court denied the motion and directed disclosure. We now affirm.

Education Law § 6527 (3) "shields from disclosure the proceedings [and] the records relating to performance of a medical or a quality assurance review function" (*Jousma v Kolli*, 149 AD3d 1520, 1521 [4th Dept 2017] [internal quotation marks omitted]; *see Logue v Velez*, 92 NY2d 13, 18 [1998]). The party invoking the privilege must establish that the document at issue was "generated in connection with a quality assurance review function pursuant to Education Law § 6527 (3)" (*Matter of Coniber v United Mem. Med. Ctr.*, 81 AD3d 1329, 1330 [4th Dept 2011] [internal quotation marks omitted]). Here, the court properly determined that Sawyer's affirmation, which was submitted in support of the motion for a protective order, met that burden. Unlike the conclusory affidavits in *Coniber* and *Slayton v Kolli* (111 AD3d 1314, 1314-1315 [4th Dept 2013]), Sawyer's affirmation outlined the quality assurance review procedure at MFSH in detail and explained that the slide show was created for MFSH's weekly quality assurance review meeting.

We nevertheless conclude that the disputed materials are discoverable under the exception to the privilege for "statements made by any person in attendance at . . . a [medical or quality assurance review] meeting who is a party to an action or proceeding the subject matter of which was reviewed at such meeting" (Education Law § 6527 [3]). Disclosure under that exception may be obtained where: (1) the statements were made during a quality assurance review meeting; (2) that review meeting concerned the same subject matter as the malpractice action; and (3) the statements were made by a defendant in the action (*see Koithan v Zornek*, 226 AD2d 1080, 1080-1081 [4th Dept 1996]). "Statements" include written statements, such as letters (*see Swartzenberg v Trivedi*, 189 AD2d 151, 153-154 [4th Dept 1993], *lv dismissed* 82 NY2d 749 [1993]), notes (*see Koithan*, 226 AD2d at 1081), and the PowerPoint slide show at issue here. The above three conditions are satisfied here inasmuch as plaintiff alleges malpractice beginning with his treatment at MFSH, Sawyer is named as a defendant in the action, and Sawyer admittedly presented the slide show at a quality assurance review meeting that concerned, inter alia, plaintiff's care. The court therefore properly denied the motion and directed disclosure of the disputed slide show.

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

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

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KA 15-01890

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARMEN M. DOTY, DEFENDANT-APPELLANT.

CARA A. WALDMAN, FAIRPORT, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.), rendered September 9, 2015. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the fifth degree and criminal sale of a controlled substance in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [1]) and criminal sale of a controlled substance in the fifth degree (§ 220.31). Defendant correctly concedes that she failed to preserve for our review her contention that her conviction is not supported by legally sufficient evidence because there was no evidence that the diazepam pills allegedly purchased from her by a confidential informant were a controlled substance (*see People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]). In any event, that contention is without merit inasmuch as diazepam is statutorily defined as a controlled substance (*see* § 220.00 [5]; Public Health Law § 3306 [schedule IV (c) (14)]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Contrary to defendant's contention, the testimony of the confidential informant was not incredible as a matter of law (*see People v Baker*, 30 AD3d 1102, 1102 [4th Dept 2006], *lv denied* 7 NY3d 846 [2006]; *see generally People v Gunter*, 109 AD3d 1199, 1200 [4th Dept 2013]).

Although we conclude that the verdict is not against the weight of the evidence, we nonetheless feel compelled to comment on the manner in which the prosecution presented this case to the jury. The prosecutor, in the direct examination of both the law enforcement witnesses and the confidential informant, purposely emphasized the purported "controlled" nature of the purchase by eliciting testimony regarding law enforcement's search of the confidential informant and her vehicle before and after the alleged sale. It was established on cross-examination of the confidential informant, however, that the informant had lived in the same household with defendant for at least a month before the sale occurred and thus had unfettered access thereto, rendering any control by law enforcement illusory. Although on redirect examination the prosecutor did not challenge the informant's testimony that she resided with defendant, on summation the prosecutor continued to rely on the purported controlled nature of the purchase. The prosecutor also elicited law enforcement testimony regarding the confidential informant's actions inside the house, despite the fact that the officers could not have seen those actions, and that testimony was not corroborated by the audio surveillance that purportedly recorded the transaction between defendant and the informant. Such conduct warrants a reminder that prosecutors have a duty to " 'deal fairly with the accused and be candid with the courts' " (*People v Colon*, 13 NY3d 343, 349 [2009], *rearg denied* 14 NY3d 750 [2010], quoting *People v Steadman*, 82 NY2d 1, 7 [1993]).

We nevertheless affirm the judgment because there is no evidence that the People were aware of the confidential informant's residency in the same household as defendant prior to the cross-examination of that witness, defense counsel did not raise any objection at trial to the conduct on which we now comment, and it is clear from the record that the pivotal issue of the credibility of the confidential informant was ultimately fully explored by the parties before submission of the case to the jury (*cf. id.*).

Defendant failed to preserve for our review her contention that the prosecutor engaged in misconduct during summation by making comments regarding the credibility of witnesses (*see People v Young*, 100 AD3d 1427, 1428 [4th Dept 2012], *lv denied* 20 NY3d 1105 [2013]). In any event, the specific comments that defendant challenges on appeal constituted fair comment on the evidence and fair response to the summation of defense counsel (*see People v Lewis*, 154 AD3d 1329, 1331 [4th Dept 2017]). Finally, the sentence is not unduly harsh or severe.

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

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CA 17-01390

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

TIMOTHY WHITE, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

MEHTAB SINGH BAJWA, M.D., ANESTHESIA GROUP OF ONONDAGA, P.C., TRACIE O'SHEA, C.R.N.A., ST. JOSEPH'S HOSPITAL, DEFENDANTS-RESPONDENTS-APPELLANTS, BRETT GREENKY, M.D., AND SYRACUSE ORTHOPEDIC SPECIALISTS, P.C., DEFENDANTS-RESPONDENTS.

HARRIS & PANELS, SYRACUSE (MICHAEL W. HARRIS OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (DANIEL P. LARABY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS MEHTAB SINGH BAJWA, M.D., ANESTHESIA GROUP OF ONONDAGA, P.C., AND TRACIE O'SHEA, C.R.N.A.

MAGUIRE CARDONA, P.C., ALBANY (KATHLEEN A. BARCLAY OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT ST. JOSEPH'S HOSPITAL.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (JAMES D. LANTIER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal and cross appeals from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered January 24, 2017. The order granted the motion of defendants Brett Greenky, M.D., and Syracuse Orthopedic Specialists, P.C., for summary judgment dismissing the complaint against them, denied the cross motion of defendants Mehtab Singh Bajwa, M.D., Anesthesia Group of Onondaga, P.C., and Tracie O'Shea, C.R.N.A., for partial summary judgment, and granted in part and denied in part the motion for summary judgment of defendant St. Joseph's Hospital.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying in part the motion of defendants Brett Greenky, M.D. and Syracuse Orthopedic Specialists, P.C. and reinstating the negligence cause of action against them concerning their surgical care of plaintiff to the extent that plaintiff relies on the doctrine of res ipsa loquitur, and denying the motion of defendant St. Joseph's Hospital in its entirety and reinstating the complaint against it in its entirety, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this medical malpractice action seeking damages for injuries he sustained to his left eye during hip

replacement surgery performed at defendant St. Joseph's Hospital (Hospital). Defendants Brett Greenky, M.D. and Syracuse Orthopedic Specialists, P.C. (SOS) were retained by plaintiff to perform the surgery, and defendants Mehtab Singh Bajwa, M.D., Tracie O'Shea, C.R.N.A., and the Anesthesia Group of Onondaga, P.C. (collectively, anesthesia defendants) were responsible for, inter alia, administering the anesthesia to plaintiff prior to the surgery. Plaintiff's complaint asserted two causes of action against all defendants, for negligence and lack of informed consent. In his bill of particulars, plaintiff alleged, inter alia, that all defendants were negligent in failing to protect and safeguard his eyes while he was under their care and were further negligent in his follow-up care by, inter alia, failing to refer him to an eye specialist for immediate care. Plaintiff also asserted that he would be relying on the doctrine of res ipsa loquitur in support of his negligence cause of action. All of the named defendants moved/cross-moved for summary judgment. Specifically, Greenky, SOS, and the Hospital sought dismissal of the complaint against them, while the anesthesia defendants sought dismissal of the complaint against them to the extent that plaintiff relied on the doctrine of res ipsa loquitur in his negligence cause of action. Supreme Court granted the motion of Greenky and SOS, denied the cross motion of the anesthesia defendants, and granted only that part of the motion of the Hospital with respect to plaintiff's reliance on the doctrine of res ipsa loquitur in his negligence cause of action. Plaintiff appeals, and the anesthesia defendants and the Hospital cross-appeal. We note at the outset that plaintiff raises no issues on appeal concerning the dismissal of his cause of action for lack of informed consent or the dismissal of that part of his negligence cause of action with respect to post-operative care against Greenky and SOS and is therefore deemed to have abandoned any such issues (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

We agree with plaintiff on his appeal that the court erred in granting those parts of the motions of Greenky, SOS, and the Hospital with respect to plaintiff's negligence cause of action concerning surgical care to the extent that plaintiff relies on the doctrine of res ipsa loquitur, and we therefore modify the order accordingly. We similarly conclude on the cross appeal of the anesthesia defendants that the court properly denied their cross motion with respect to those allegations in the negligence cause of action. "Ordinarily, a plaintiff asserting a medical malpractice claim must demonstrate that the doctor deviated from acceptable medical practice, and that such deviation was a proximate cause of the plaintiff's injury" (*James v Wormuth*, 21 NY3d 540, 545 [2013]). "Where the actual or specific cause of an accident is unknown, under the doctrine of res ipsa loquitur a jury may in certain circumstances infer negligence merely from the happening of an event and the defendant's relation to it" (*Kambat v St. Francis Hosp.*, 89 NY2d 489, 494 [1997]). "In a multiple defendant action in which a plaintiff relies on the theory of res ipsa loquitur, a plaintiff is not required to identify the negligent actor . . . That rule is particularly appropriate in a medical malpractice case such as this in which the plaintiff has been anesthetized" (*Schmidt v Buffalo Gen. Hosp.*, 278 AD2d 827, 828 [4th Dept 2000], *lv*

denied 96 NY2d 710 [2001]). Here, plaintiff was under the care and control of Greenky, SOS and the anesthesia defendants during the surgery, and the Hospital immediately after the surgery. During that time, plaintiff was either under anesthesia and/or not fully awake or oriented to his surroundings. While O'Shea testified that there was no indication of an eye injury when she delivered plaintiff to the recovery room, hospital staff testified that plaintiff's eye was noticeably irritated at that time. Consequently, there is an issue of fact whether plaintiff sustained the eye injury in the operating room or in the recovery room. " 'Plaintiff was rendered unconscious for the purpose of undergoing surgical treatment . . . [, and] it is manifestly unreasonable for [the defendants] to insist that [he] identify any one of them as the person who did the alleged negligent act' " (*id.*; *see Frank v Smith*, 127 AD3d 1301, 1302 [3d Dept 2015]; *DiGiacomo v Cabrini Med. Ctr.*, 21 AD3d 1052, 1054 [2d Dept 2005], *lv denied* 6 NY3d 703 [2006]).

Contrary to the Hospital's contention on its cross appeal, the court properly denied that part of its motion for summary judgment dismissing the negligence cause of action against it insofar as it is based on plaintiff's post-operative care. Even assuming, arguendo, that the Hospital met its initial burden, we conclude that plaintiff raised an issue of fact by his expert's affirmation, which adequately addressed defendants' departure from accepted practice and stated that defendants' omissions or departures were a competent producing cause of the injury (*see O'Shea v Buffalo Med. Group, P.C.*, 64 AD3d 1140, 1140 [4th Dept 2009], *appeal dismissed* 13 NY3d 834 [2009]). While we agree with the Hospital that " '[g]enerally, a hospital cannot be held vicariously liable for the malpractice of a private attending physician who is not its employee' " (*Spiegel v Beth Israel Med. Ctr.-Kings Hwy. Div.*, 149 AD3d 1127, 1129 [2d Dept 2017]) and that " 'a hospital is normally protected from tort liability if its staff follows the orders' of the patient's private physician" (*Warney v Haddad*, 237 AD2d 123, 123 [1st Dept 1997], quoting *Toth v Community Hosp. at Glen Cove*, 22 NY2d 255, 265 [1968], *rearg denied* 22 NY2d 973 [1968]), the Hospital may be liable for independent acts of negligence of its employees (*see Lorenzo v Kahn*, 74 AD3d 1711, 1712-1713 [4th Dept 2010]). Here, plaintiff's expert opined that Hospital staff should have obtained a referral for plaintiff to an eye specialist and that such failure, among others, was a departure from accepted practice and a competent producing cause of plaintiff's eye injury. The Hospital's contentions regarding the qualifications of plaintiff's expert are raised for the first time on appeal and are therefore not properly before us (*see Ciesinski*, 202 AD2d at 985).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

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KA 16-00627

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDGARDO J. MERCADO-RAMOS, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (JULIE BENDER FISKE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered December 2, 2015. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree, criminal possession of a weapon in the third degree and criminal contempt in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the first degree (Penal Law § 140.30 [3]), criminal possession of a weapon in the third degree (§ 265.02 [1]) and criminal contempt in the first degree (§ 215.51 [b] [v]). We reject defendant's contention that the evidence is legally insufficient to support the conviction of burglary in the first degree on the ground that the People did not establish that he entered the victim's house with intent to commit a crime therein (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). "[A] defendant's intent to commit a crime may be inferred from the circumstances of the entry . . . , as well as from defendant's actions and assertions when confronted" (*People v Maier*, 140 AD3d 1603, 1603-1604 [4th Dept 2016], *lv denied* 28 NY3d 933 [2016] [internal quotation marks omitted]). Here, we conclude that there is legally sufficient evidence from which the jury could infer defendant's intent to commit a crime inside the dwelling, including, inter alia, his unauthorized entry through a window while armed with mace and a machete and his violent conduct toward the victim shortly after being confronted inside the dwelling (*see People v Pendarvis*, 143 AD3d 1275, 1275 [4th Dept 2016], *lv denied* 28 NY3d 1149 [2017]; *see also People v Rivera*, 41 AD3d 1237, 1238 [4th Dept 2007], *lv denied* 10 NY3d 939 [2008]). We reject defendant's further contention that the evidence of his intoxication negated the element of intent for the crimes of which he was convicted

(*see People v Madore*, 145 AD3d 1440, 1440 [4th Dept 2016], *lv denied* 29 NY3d 1034 [2017]; *People v Jackson*, 269 AD2d 867, 867 [4th Dept 2000], *lv denied* 95 NY2d 798 [2000]). Viewing the evidence in light of the elements of the crime of burglary in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict finding defendant guilty of that crime is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We reject defendant's further contention that Supreme Court abused its discretion in denying his motions for a mistrial during jury deliberations. To the extent that defendant contends that the court should have granted his motions for a mistrial with respect to all three counts of the indictment, we reject that contention inasmuch as his motions were made after the jury indicated that it had reached a verdict on one of the counts (*see* CPL 310.70 [1] [a], [b]; *People v Rivera*, 15 NY3d 207, 210-211 [2010]). We also reject defendant's contention to the extent that he contends that the court erred in denying his motions with respect to the two counts on which the jury had not yet reached a verdict. On two occasions when the deliberating jury sent notes indicating that it was unable to reach a unanimous verdict on two of the counts, the court responded appropriately by providing a full *Allen* charge and instructing the jury to continue deliberating (*see People v Hardy*, 26 NY3d 245, 251-252 [2015]; *People v Huitt*, 149 AD3d 1481, 1481 [4th Dept 2017], *lv denied* 30 NY3d 950 [2017]). " '[A]t each of the two junctures the circumstances indicated that further deliberations might be fruitful,' and 'neither of the jury's notes was indicative of a hopeless deadlock' " (*Hardy*, 26 NY3d at 252). The jury had been deliberating for less than two days and had successfully reached a verdict on one of the counts. Moreover, nothing about the *Allen* charge issued by the court was coercive (*see Huitt*, 149 AD3d at 1481-1482; *People v Arguinzoni*, 48 AD3d 1239, 1242 [4th Dept 2008], *lv denied* 10 NY3d 859 [2008]; *cf. People v Aponte*, 2 NY3d 304, 308-309 [2004]).

Defendant failed to preserve for our review his further contention that he was denied a fair trial based upon misconduct by the prosecutor during summation. Defendant's objections to the prosecutor's comments "were sustained without any request for a curative instruction and the court is thus deemed to have corrected any error to defendant's satisfaction" (*People v Ennis*, 107 AD3d 1617, 1620 [4th Dept 2013], *lv denied* 22 NY3d 1040 [2013], *reconsideration denied* 23 NY3d 1036 [2014]). In any event, the comments by the prosecutor were not so egregious as to deny defendant a fair trial (*see People v Dizak*, 93 AD3d 1182, 1184 [4th Dept 2012], *lv denied* 19 NY3d 972 [2012], *reconsideration denied* 20 NY3d 932 [2012]), and any potential prejudice to defendant was alleviated by the court's rulings and instructions (*see People v Flowers*, 151 AD3d 1843, 1844 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018]), which the jury is presumed to have followed (*see People v Allen*, 78 AD3d 1521, 1521 [4th Dept 2010], *lv denied* 16 NY3d 827 [2011]). Finally,

defendant's sentence is not unduly harsh or severe.

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

289

CA 17-01430

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

IN THE MATTER OF JONMARK CORPORATION, DOING BUSINESS AS PREMIUM WINE & SPIRITS, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE LIQUOR AUTHORITY AND ADDYS WINE AND SPIRITS, INC., RESPONDENTS-RESPONDENTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (MATTHEW D. MILLER OF COUNSEL), FOR PETITIONER-APPELLANT.

CHRISTOPHER R. RIANO, GENERAL COUNSEL, NEW YORK STATE LIQUOR AUTHORITY, BUFFALO (JAIME C. GALLAGHER OF COUNSEL), FOR RESPONDENT-RESPONDENT NEW YORK STATE LIQUOR AUTHORITY.

WALSH, ROBERTS & GRACE, BUFFALO (MARK P. DELLA POSTA OF COUNSEL), FOR RESPONDENT-RESPONDENT ADDYS WINE AND SPIRITS, INC.

Appeal from a judgment of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered May 8, 2017 in a CPLR article 78 proceeding. The judgment, inter alia, dismissed the petition.

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

Memorandum: We affirm for reasons stated in the decision at Supreme Court, which determined that the decision of respondent New York State Liquor Authority to allow respondent Addys Wine and Spirits, Inc. (Addys) to move its licensed liquor store to a new location on the same street on which it was already located was not arbitrary and capricious. We add only that, contrary to the contention of petitioner, the court did not err in granting Addys' pre-answer CPLR 3211 (a) (7) motion to dismiss the petition against it. Where " 'evidentiary material outside the pleading's four corners is considered, and the motion is not converted into one for summary judgment, the question becomes whether the pleader has a cause of action, not whether the pleader has stated one' " (*Matter of Palmore v Board of Educ. of Hempstead Union Free Sch. Dist.*, 145 AD3d 1072, 1073 [2d Dept 2016], *lv denied* 30 NY3d 905 [2017]; *see generally Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Here, the facts essential to petitioner's causes of action have "been negated beyond substantial question by the [evidentiary material] submitted [with the petition] so that it might be ruled that [petitioner] does not have

[a] cause[] of action" (*Guggenheimer*, 43 NY2d at 275).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

312

CA 17-00709

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

BRANDI LEE GROFF AND BRANDON T. GROFF,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

KALEIDA HEALTH, DOING BUSINESS AS WOMEN AND CHILDREN'S HOSPITAL OF BUFFALO, FARKAD BALAYA, M.D., SAMADH RAVANGARD, D.O., NITA THAPA, M.B.B.S., ALLISON DAILEY, M.D.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DEMPSEY & DEMPSEY, BUFFALO (PATRICK MALONEY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered February 13, 2017. The order, insofar as appealed from, denied that part of the motion of defendants Kaleida Health, doing business as Women and Children's Hospital of Buffalo, Farkad Balaya, M.D., Samadh Ravangard, D.O., Nita Thapa, M.B.B.S., and Allison Dailey, M.D., for summary judgment dismissing the complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion with respect to defendants Samadh Ravangard, D.O., Nita Thapa, M.B.B.S., and Allison Dailey, M.D. and dismissing the complaint against them, and as modified the order is affirmed without costs.

Memorandum: After a rupture of her uterus, Brandi Lee Groff (plaintiff) underwent an emergency caesarean section at defendant Kaleida Health, doing business as Women and Children's Hospital of Buffalo (Kaleida Health). Plaintiff's condition gradually worsened while she was recovering after the procedure, and she was transferred to another hospital where it was discovered that she had a perforated bowel, which had resulted in sepsis in her abdominal cavity. Plaintiffs thereafter commenced this action seeking damages for the alleged medical malpractice of defendants in their diagnosis and/or treatment of plaintiff. Defendants Kaleida Health, Farkad Balaya, M.D., Samadh Ravangard, D.O., Nita Thapa, M.B.B.S., Allison Dailey, M.D. (Kaleida defendants), and defendant Olubunmi Alo, M.B.B.S. moved

for summary judgment dismissing the complaint against them, and defendants University Gynecologists & Obstetricians, Inc., Faye Justica-Linde, M.D., and Dennis Mauricio, M.D. (UGO defendants) likewise moved for summary judgment dismissing the complaint against them. In separate orders, Supreme Court denied the UGO defendants' motion and granted the Kaleida defendants' motion in part with respect to Dr. Alo. In appeal No. 1, we conclude that the court properly denied that part of the motion of the Kaleida defendants with respect to Kaleida Health and Dr. Balaya, but the court erred in denying that part of the motion with respect to Drs. Ravangard, Thapa, and Dailey (hereafter, resident physicians), and we therefore modify the order accordingly. In appeal No. 2, we conclude that the court properly denied the motion of the UGO defendants.

In order to meet his or her initial burden on a summary judgment motion seeking dismissal of the complaint in a medical malpractice action, a defendant must "present factual proof, generally consisting of affidavits, deposition testimony and medical records, to rebut the claim of malpractice by establishing that [the defendant] complied with the accepted standard of care or did not cause any injury to the patient" (*Cole v Champlain Val. Physicians' Hosp. Med. Ctr.*, 116 AD3d 1283, 1285 [3d Dept 2014]; *see Lake v Kaleida Health*, 59 AD3d 966, 966 [4th Dept 2009]). A defendant physician may meet the initial burden by submitting his or her own affidavit, as long as the affidavit is "detailed, specific and factual in nature" (*Toomey v Adirondack Surgical Assoc.*, 280 AD2d 754, 755 [3d Dept 2001]; *see Cole*, 116 AD3d at 1285), and it "address[es] each of the specific factual claims of negligence raised in [the] . . . bill of particulars" (*Wulbrecht v Jehle*, 89 AD3d 1470, 1471 [4th Dept 2011] [internal quotation marks omitted]). Once the defendant meets his or her burden, the burden shifts "to [the] plaintiff to raise an issue of fact by submitting a physician's affidavit establishing both a departure from the accepted standard of care and proximate cause" (*Chillis v Brundin*, 150 AD3d 1649, 1650 [4th Dept 2017]; *see Bagley v Rochester Gen. Hosp.*, 124 AD3d 1272, 1273 [4th Dept 2015]).

We agree with the Kaleida defendants in appeal No. 1 that they met their initial burden on their motion. In support of their motion, the Kaleida defendants submitted the expert affidavit of Dr. Balaya, the attending obstetrician and gynecologist. He explained how his conduct did not deviate from the accepted standard of medical care by setting forth why he ordered the emergency surgery, his observations during the surgery, and how he properly performed the surgery. Dr. Balaya's affidavit also addressed the care provided by the three resident physicians. Dr. Balaya averred that the resident physicians were all under his supervision and direction and, thus, they never exercised independent judgment or made an independent decision with respect to plaintiff's care or treatment (*see Bellafiore v Ricotta*, 83 AD3d 632, 633 [2d Dept 2011]). In addition, Dr. Balaya averred that none of the resident physicians could be held liable for failure to intervene in plaintiff's care and treatment on the ground that his alleged deviations from normal medical practice were so great that such intervention was warranted (*see id.*). We conclude that Dr. Balaya's expert affidavit was sufficiently detailed, specific and

factual to establish the Kaleida defendants' entitlement to judgment as a matter of law (*see Suib v Keller*, 6 AD3d 805, 806 [3d Dept 2004]; *see also Wulbrecht*, 89 AD3d at 1471).

Plaintiffs submitted the requisite expert affidavits in opposition to the motion (*see Brown v Soldiers & Sailors Mem. Hosp.*, 193 AD2d 1077, 1078 [4th Dept 1993]). We conclude, however, that the affidavits of plaintiffs' experts, a general surgeon and an expert in obstetrics and gynecology, raised a triable issue of fact only with respect to Kaleida Health and Dr. Balaya, but not with respect to the resident physicians. Thus, contrary to the contention of the Kaleida defendants, the court properly denied that part of their motion with respect to Kaleida Health and Dr. Balaya. Addressing Dr. Balaya first, we conclude that plaintiffs' experts raised an issue of fact whether he deviated from the standard of care by, inter alia, injuring plaintiff's cecum during the caesarean section and failing to recognize and repair that injury. The affidavits submitted by the parties therefore " 'present[ ] a credibility battle between the parties' experts' " with respect to whether Dr. Balaya deviated from the accepted standard of medical care and whether any such deviation caused plaintiff's injuries (*Selmensberger v Kaleida Health*, 45 AD3d 1435, 1436 [4th Dept 2007]; *see Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623, 624 [2d Dept 2003]). The court also properly denied that part of the motion of the Kaleida defendants with respect to Kaleida Health because it may be vicariously liable for any medical malpractice of its employee, Dr. Balaya (*see Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]).

We agree with the Kaleida defendants that the court erred in denying that part of their motion with respect to the resident physicians. Plaintiffs' submissions in opposition to the motion failed to raise an issue of fact whether any of the resident physicians exercised independent medical judgment in plaintiff's care or treatment, or neglected to intervene in plaintiff's care or treatment where the attending physician's directions greatly deviated from normal medical practice (*see Soto v Andaz*, 8 AD3d 470, 471-472 [2d Dept 2004]; *Cook v Reisner*, 295 AD2d 466, 467 [2d Dept 2002]).

Contrary to the contention of the UGO defendants in appeal No. 2, we conclude that the court properly denied their motion inasmuch as they failed to meet their "initial burden of establishing the absence [on their part] of any departure from good and accepted medical practice or that . . . plaintiff was not injured thereby" (*Williams v Sahay*, 12 AD3d 366, 368 [2d Dept 2004]; *see James v Wormuth*, 74 AD3d 1895, 1895 [4th Dept 2010]). Here, the expert affidavit submitted by the UGO defendants in support of their motion failed to address "each of the specific factual claims of negligence raised in [the] bill of particulars," and thus it "is insufficient to support a motion for summary judgment as a matter of law" (*Larsen v Banwar*, 70 AD3d 1337, 1338 [4th Dept 2010]; *see Terranova v Finklea*, 45 AD3d 572, 572-573 [2d Dept 2007]; *Kuri v Bhattacharya*, 44 AD3d 718, 718 [2d Dept 2007]). Among other things, the expert affidavit failed to address how the care and treatment of Drs. Justica-Linde and Mauricio was appropriate

in light of plaintiff's presentation of symptoms. Thus, the court properly denied the motion regardless of the sufficiency of plaintiffs' opposing submissions (*see Humphrey v Gardner*, 81 AD3d 1257, 1258-1259 [4th Dept 2011]; *see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

313

CA 17-00710

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

BRANDI LEE GROFF AND BRANDON T. GROFF,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

KALEIDA HEALTH, DOING BUSINESS AS WOMEN AND
CHILDREN'S HOSPITAL OF BUFFALO, ET AL., DEFENDANTS,
UNIVERSITY GYNECOLOGISTS & OBSTETRICIANS, INC.,
FAYE JUSTICA-LINDE, M.D., AND DENNIS MAURICIO, M.D.,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

SUGARMAN LAW FIRM, LLP, BUFFALO (BRIAN SUTTER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DEMPSEY & DEMPSEY, BUFFALO (PATRICK MALONEY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered February 13, 2017. The order denied the motion of defendants University Gynecologists & Obstetricians, Inc., Faye Justica-Linde, M.D., and Dennis Mauricio, M.D., for summary judgment dismissing the complaint against them.

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

Same memorandum as in *Groff v Kaleida Health* ([appeal No. 1] — AD3d — [May 4, 2018] [4th Dept 2018]).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

330

CA 17-01548

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

JAMES SALERNO AND MARY SALERNO,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

THE DIOCESE OF BUFFALO, N.Y., CATHOLIC CEMETERIES OF THE ROMAN CATHOLIC DIOCESE OF BUFFALO, INC.,
DEFENDANTS-APPELLANTS-RESPONDENTS,
ET AL., DEFENDANTS.

HODGSON RUSS LLP, BUFFALO (W. SETH CALLERI OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

PAUL WILLIAM BELTZ, P.C., BUFFALO (ANNE B. RIMMLER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered June 26, 2017. The order granted in part and denied in part the motion of defendants The Diocese of Buffalo, N.Y., and Catholic Cemeteries of the Roman Catholic Diocese of Buffalo, Inc., for summary judgment and denied the cross motion of plaintiffs for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion with respect to the Labor Law § 241 (6) claim insofar as it is based on the alleged violation of 12 NYCRR 23-1.5 (c) (3) and reinstating that claim to that extent, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by James Salerno (plaintiff) while he was working on a construction project at a cemetery in the Town of Tonawanda, Erie County, owned by defendants-appellants (defendants). As part of his work, plaintiff was ordered to operate a "Bobcat skid-loader," which had a safety bar that lowered onto the operator's lap. When plaintiff raised the safety bar to exit the machine, the safety bar allegedly fell and struck him.

Supreme Court thereafter granted those parts of defendants' motion seeking summary judgment dismissing plaintiffs' Labor Law §§ 200 and 240 (1) claims and the section 241 (6) claim insofar as it alleged a violation of, inter alia, 12 NYCRR 23-1.5 (c) (3), denied that part of defendants' motion seeking summary judgment dismissing

plaintiffs' section 241 (6) claim insofar as it alleged a violation of 12 NYCRR 23-9.2 (a), and denied plaintiffs' cross motion for partial summary judgment on liability under section 240 (1) against defendants. Defendants appeal, and plaintiffs cross-appeal. We now modify the order by denying that part of the motion with respect to the section 241 (6) claim insofar as it alleges a violation of 12 NYCRR 23-1.5 (c) (3), and we otherwise affirm.

Preliminarily, we reject defendants' contention that the court abused its discretion in refusing to strike plaintiffs' opposing papers as untimely (*see generally Sheng Hai Tong v K & K 7619, Inc.*, 144 AD3d 887, 890 [2d Dept 2016]).

Turning to the merits, we conclude that, contrary to plaintiffs' contention on their cross appeal, the court properly granted defendants' motion with respect to the Labor Law § 240 (1) claim because plaintiff was not injured as the result of any " 'physically significant elevation differential' " (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97 [2015]; *see Guallpa v Canarsie Plaza, LLC*, 144 AD3d 1088, 1091 [2d Dept 2016]; *Desharnais v Jefferson Concrete Co., Inc.*, 35 AD3d 1059, 1060 [3d Dept 2006]). We further conclude that, contrary to defendants' contention on their appeal, the court properly denied their motion with respect to the section 241 (6) claim insofar as it alleged a violation of 12 NYCRR 23-9.2 (a) because there are triable issues of fact whether plaintiff's employer had actual notice of a structural defect or unsafe condition regarding the safety bar (*see Misicki v Caradonna*, 12 NY3d 511, 520-521 [2009]; *Shields v First Ave. Bldrs. LLC*, 118 AD3d 588, 588-589 [1st Dept 2014]; *Salsinha v Malcolm Pirnie, Inc.*, 76 AD3d 411, 412 [1st Dept 2010]). Finally, we agree with plaintiffs on their cross appeal that the court erred in granting defendants' motion with respect to the section 241 (6) claim insofar as it alleges a violation of 12 NYCRR 23-1.5 (c) (3) because that regulation is sufficiently specific to support a claim under section 241 (6) (*see Perez v 286 Scholes St. Corp.*, 134 AD3d 1085, 1086 [2d Dept 2015]; *Becerra v Promenade Apts. Inc.*, 126 AD3d 557, 558 [1st Dept 2015]).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

332

CA 17-01232

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

PAUL MARACLE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

AUTOPLACE INFINITI, INC., DANIEL A. FABRIZIO REVOCABLE TRUST, SCHREIBER & SCHREIBER PROPERTY HOLDINGS, LLC, NORTHTOWN VOLVO OF BUFFALO, NORTHTOWN PORSCHE, LANDROVER BUFFALO, BHWL REAL LLC, AND WEST HERR TOYOTA SCION OF WILLIAMSVILLE, DEFENDANTS-RESPONDENTS.

FEROLETO LAW, BUFFALO (JOHN FEROLETO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF JOHN WALLACE, BUFFALO (JAMES J. NAVAGH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS AUTOPLACE INFINITI, INC. AND DANIEL A. FABRIZIO REVOCABLE TRUST.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (JOSHUA P. RUBIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS SCHREIBER & SCHREIBER PROPERTY HOLDINGS, LLC, NORTHTOWN VOLVO OF BUFFALO, NORTHTOWN PORSCHE, AND LANDROVER BUFFALO.

FELDMAN KIEFFER, LLP, BUFFALO (ADAM C. FERRANDINO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS BHWL REAL LLC AND WEST HERR TOYOTA SCION OF WILLIAMSVILLE.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered February 23, 2017. The order, insofar as appealed from, denied the motion of plaintiff for partial summary judgment and granted in part the motions of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action against defendants, Autoplace Infiniti, Inc., Daniel A. Fabrizio Revocable Trust (collectively, Autoplace defendants), Schreiber & Schreiber Property Holdings, LLC, Northtown Volvo of Buffalo, Northtown Porsche, Landrover Buffalo (collectively, Northtown defendants), BHWL Real LLC (BHWL), and West Herr Toyota Scion of Williamsville (collectively, West Herr defendants), seeking damages for injuries he allegedly sustained when he slipped on a landscaping rock on property owned by BHWL and maintained by the Autoplace

defendants, the Northtown defendants, and the West Herr defendants pursuant to an easement agreement. At the time of the accident, plaintiff was working for Ad-A-Sign, a sign maintenance and alteration company that had been retained by the Autoplace defendants and the Northtown defendants to perform work on the signs that were located near defendants' automobile dealerships. While plaintiff was attempting to remove letters and fascia from a sign for the dealerships of the Northtown defendants, he stepped onto a landscaping rock that was located below the sign. He lost his balance and slipped from the rock, injuring his foot and ankle. Plaintiff moved for partial summary judgment on the issue of liability on his Labor Law § 200 claim, as well as his section 240 (1) and 241 (6) causes of action, and the Autoplace defendants, the Northtown defendants, and the West Herr defendants each moved for, inter alia, summary judgment dismissing the amended complaint against them. We note that, at oral argument of the motions, plaintiff withdrew his section 200 and common-law negligence cause of action. Supreme Court denied plaintiff's motion and granted in part the motions of defendants by dismissing the amended complaint against them. We affirm.

Contrary to plaintiff's contention, the court properly denied that part of his motion and granted those parts of defendants' motions with respect to the Labor Law § 240 (1) cause of action. The record establishes that plaintiff was not "obliged to work at an elevation" (*Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681 [2007]), which is a necessary element for recovery under section 240 (1). Indeed, plaintiff's own deposition testimony submitted in support of his motion established that the work he was performing was at eye level and that he could have reached the sign from the ground. Thus, inasmuch as it was not necessary for plaintiff to stand on the rock to perform his work, he was not exposed to an elevation-related hazard of the type contemplated by section 240 (1) (*see Torkel v NYU Hosps. Ctr.*, 63 AD3d 587, 590 [1st Dept 2009]; *see also Broggy*, 8 NY3d at 681-682). Even assuming, arguendo, that a safety device was required to protect plaintiff from such a hazard, we note that plaintiff further testified during his deposition that either of the A-frame ladders that had been provided for his use probably could have straddled the rock, but he thought that a ladder was not necessary (*see Arnold v Barry S. Barone Const. Corp.*, 46 AD3d 1390, 1390 [4th Dept 2007], *lv denied* 10 NY3d 707 [2008]).

Contrary to plaintiff's further contention, the court properly denied that part of his motion and granted those parts of defendants' motions with respect to the Labor Law § 241 (6) cause of action, as based on the alleged violation of 12 NYCRR 23-5.2, 23-1.7 (d), 23-1.7 (e) (1) and (2), 23-3.3 (b) (5), and 23-3.3 (l). Contrary to plaintiff's contention, the rock was not a "scaffold" for purposes of section 23-5.2 (*see Johnson v Small Mall, LLC*, 79 AD3d 1240, 1241 [3d Dept 2010]; *see also* 12 NYCRR 23-1.4 [b] [45]), and subdivisions (d) and (e) of section 23-1.7 are inapplicable to the facts of this case inasmuch as plaintiff did not allege that the rock was slippery or that he tripped on the rock (*see Carrera v Westchester Triangle Hous. Dev. Fund. Corp.*, 116 AD3d 585, 585-586 [1st Dept 2014]; *see also Costa v State of New York*, 123 AD3d 648, 648-649 [2d Dept 2014]).

Finally, with respect to plaintiff's claims under subdivisions (b) and (l) of section 23-3.3, we conclude that plaintiff was not engaged in "[d]emolition work" (12 NYCRR 23-1.4 [b] [16]), and that the rock cannot be considered "accumulated debris or piled materials" (12 NYCRR 23-3.3 [l]).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

360

CA 17-01075

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

DARNELLE BRADY AND RONALDO PARKER,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF NORTH TONAWANDA, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

BROWN CHIARI LLP, BUFFALO (TIMOTHY M. HUDSON OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

WEBSTER SZANYI LLP, BUFFALO (BRITTANY JONES OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered March 31, 2017. The order, insofar as appealed from, granted that part of the motion of defendant City of North Tonawanda for summary judgment dismissing the amended complaint against it.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, that part of the motion of defendant City of North Tonawanda for summary judgment dismissing the amended complaint against it is denied, and the amended complaint against it is reinstated.

Memorandum: Plaintiffs commenced this action seeking damages for injuries they sustained when defendant Anthony D. Regalla, who was intoxicated, drove his vehicle up a paved driveway connecting the street to the paved park path where plaintiffs had been walking their dogs. As limited by their brief, plaintiffs contend that Supreme Court erred in granting that part of the motion of defendant City of North Tonawanda (City) for summary judgment dismissing the amended complaint against it. We agree.

Initially, we note that, while the City has a duty to maintain its roads in a reasonably safe condition (*see generally Tomassi v Town of Union*, 46 NY2d 91, 97 [1978]), plaintiffs' claims also implicate the City's "duty to maintain its park and playground facilities in a reasonably safe condition" (*Rhabb v New York City Hous. Auth.*, 41 NY2d 200, 202 [1976]; *see Gagnon v City of Saratoga Springs*, 51 AD3d 1096, 1098 [3d Dept 2008], *lv denied* 11 NY3d 706 [2008]). We thus reject the City's contention that it is immune from liability because plaintiffs' claims arise from its performance of a governmental

function. "It is well settled that regardless of whether or not it is a source of income the operation of a public park by a municipality is a quasi-private or corporate and not a governmental function" (*Caldwell v Village of Is. Park*, 304 NY 268, 273 [1952]). Furthermore, a "municipality may not ignore the foreseeable dangers [it created], continue to extend an invitation to the public to use the area and not be held accountable for resultant injuries" (*Rhabb*, 41 NY2d at 202). Similarly, where, as here, it is undisputed that the City did not consider and render a determination regarding any potential danger prior to paving the driveway, the City's maintenance of the intersection in question is also a proprietary function (*see Turturro v City of New York*, 28 NY3d 469, 479-480 [2016]; *Brown v State of New York*, 79 AD3d 1579, 1582 [4th Dept 2010]).

Here, plaintiffs allege in their amended complaint that the City was negligent in "creating driveway access" to the park path without "install[ing] any type of barricade, bollard, or like device to prevent or deter vehicles from entering the bike path on which pedestrian and bicycle traffic was expected." The City never disputed in its motion papers that it paved the driveway during its development of the park, thereby creating the condition of which plaintiffs now complain, but it instead argued that "[p]laintiffs have offered no evidence" that the City failed to adhere to applicable design standards or that the driveway created or enhanced a risk to park patrons. It is well established that "a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof" (*George Larkin Trucking Co. v Lisbon Tire Mart*, 185 AD2d 614, 615 [4th Dept 1992]; *see Ross v Alexander Mitchell & Son, Inc.*, 138 AD3d 1425, 1427 [4th Dept 2016]). Similarly, because the City relied exclusively on its argument, unsupported by any evidence, that a defective or dangerous condition did not exist for which a warning was required, it also failed to establish as a matter of law that it had no duty to warn of the foreseeable danger of collision created by this driveway access (*see generally Pioli v Town of Kirkwood*, 113 AD2d 59, 60-61 [3d Dept 1985]).

We also agree with plaintiffs that the court erred in concluding that Regalla's deposition testimony established that he did not intentionally turn his vehicle into the driveway area and that his actions were the sole proximate cause of plaintiffs' injuries. Contrary to the court's conclusion, Regalla had no coherent memory of the incident during his deposition, but instead he testified that on "the day of the accident [he] didn't know where the street end[ed]," and he "didn't know [he] was already to the end of the road." Thus, a jury could reasonably conclude that, in addition to Regalla's actions, the City's creation of an unobstructed, paved driveway directly connecting the street to the similarly paved park path was also a proximate cause of plaintiffs' injuries. Summary judgment should therefore have been denied without consideration of the sufficiency of plaintiffs' opposing papers (*see generally Alvarez v Prospect Hosp.*,

68 NY2d 320, 324 [1986]).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

364

CA 17-01744

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

IN THE MATTER OF TOWN OF CONCORD,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KRISTINE EDBAUER, RESPONDENT-APPELLANT.

KRISTINE EDBAUER, RESPONDENT-APPELLANT PRO SE.

HODGSON RUSS LLP, BUFFALO (AARON M. SAYKIN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Erie County Court (Michael F. Pietruszka, J.), entered July 21, 2017. The order affirmed a judgment of the Justice Court of the Town of Concord entered on August 22, 2016 which ordered respondent's dog to be humanely euthanized.

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

Memorandum: Respondent appeals from an order of County Court that affirmed the judgment of Justice Court (hereafter, court) directing the euthanization of her dog. Preliminarily, we reject respondent's contention that petitioner failed to meet its initial burden of establishing that her dog is a "dangerous dog" pursuant to Agriculture and Markets Law § 123 (2) (*see* § 108 [24] [a]). At the hearing before the court, the victim testified that the dog lunged at her without provocation, and bit her face, neck, arm, and hand, causing injuries that required external and internal stitches to close. Inasmuch as there is no evidence that the dog "was responding to pain or injury, or was protecting itself" (§ 123 [4] [c]; *see People v Jornov*, 65 AD3d 363, 366 [4th Dept 2009]), we conclude that the court's determination that the dog is a "dangerous dog" is supported by the requisite clear and convincing evidence (§ 123 [2]).

We reject respondent's further contention that County Court erred in affirming the judgment of the court directing euthanasia. The evidence establishes that the dog is a dangerous dog, and that "the dog, without justification, attacked a person causing serious physical injury or death" (Agriculture and Markets Law § 123 [3] [a]). The victim was treated at two different hospitals for her injuries, and she received more than 36 internal and external stitches in her face and neck. The victim's "serious or protracted disfigurement" constituted a serious physical injury (§ 108 [29]; *see People v Reitz*,

125 AD3d 1425, 1425 [4th Dept 2015], *lv denied* 26 NY3d 934 [2015], *reconsideration denied* 26 NY3d 1091 [2015]; *People v Robinson*, 121 AD3d 1405, 1407 [3d Dept 2014], *lv denied* 24 NY3d 1221 [2015]), thus presenting an aggravating circumstance pursuant to which the court was authorized to direct humane euthanasia (*see* § 123 [3] [a]).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

366

KA 16-00585

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN J. JOHNSON, DEFENDANT-APPELLANT.

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

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered June 29, 2015. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal sale of a controlled substance in the third degree (Penal Law §§ 110.00, 220.39 [1]). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our review of his challenge to the severity of his sentence (*see People v Davis*, 114 AD3d 1166, 1167 [4th Dept 2014], *lv denied* 23 NY3d 1035 [2014]), we conclude that the sentence is not unduly harsh or severe.

As the People correctly concede, however, the certificate of conviction and uniform sentence and commitment must be amended because they incorrectly reflect that defendant was sentenced as a second felony offender when he was actually sentenced as a second felony drug offender (*see People v Holmes*, 147 AD3d 1367, 1368 [4th Dept 2017], *lv denied* 29 NY3d 998 [2017]).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

371

KA 16-01138

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY BORCYK, DEFENDANT-APPELLANT.

EDELSTEIN & GROSSMAN, NEW YORK CITY (JONATHAN I. EDELSTEIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Monroe County Court (Vincent M. Dinolfo, J.), dated January 4, 2016. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Monroe County Court for a hearing pursuant to CPL 440.30 (5) in accordance with the following memorandum: Defendant appeals from an order that denied without a hearing his CPL 440.10 motion to vacate the judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]). Defendant was convicted of the murder of Maria Ortiz in 2005, and we affirmed the judgment of conviction on direct appeal (*People v Borcyk*, 60 AD3d 1489 [4th Dept 2009], *lv denied* 12 NY3d 923 [2009]). After two prior unsuccessful CPL 440.10 motions, defendant made the motion herein to vacate the judgment on the grounds of newly discovered evidence, ineffective assistance of counsel, and actual innocence. We conclude that County Court erred in summarily denying the motion and that defendant is entitled to a hearing with respect to his claims of ineffective assistance of counsel and actual innocence (*see* CPL 440.30 [5]).

Defendant's newly discovered evidence claim is based upon the affidavit of a witness (hereafter, witness) obtained by defendant's private investigator in 2014. The witness averred, inter alia, that her former boyfriend admitted to her in 2004 that he had murdered Ortiz. The record from defendant's trial establishes that the witness provided that information to the police when she was interviewed in 2004, and there is no dispute that the police report containing that information was provided to defense counsel prior to defendant's trial. We thus reject defendant's contention that the information concerning the murder contained in the affidavit from the witness

constitutes newly discovered evidence. Defendant failed to meet his burden of establishing that the information has been "discovered since the entry of [the] judgment" convicting him of the murder (CPL 440.10 [1] [g]; *see People v Backus*, 129 AD3d 1621, 1624-1625 [4th Dept 2015], *lv denied* 27 NY3d 991 [2016]). Therefore, the court properly denied without a hearing that part of defendant's motion.

On the other hand, we agree with defendant that the court erred in denying without a hearing that part of his motion based upon ineffective assistance of counsel. Defendant's specific claim is that defense counsel failed to secure the presence of a witness who had potentially exculpatory information, and we agree with defendant that such a failure may serve as the basis for a finding of ineffective assistance of counsel (*see People v Mosley*, 56 AD3d 1140, 1140-1141 [4th Dept 2008]; *People v Nau*, 21 AD3d 568, 569 [2d Dept 2005]). At trial, defense counsel stated on the record that the witness had been subpoenaed to testify on defendant's behalf. The witness did not testify, however, and there is nothing in the trial record indicating why. According to defendant's moving papers, when the witness did not appear to testify, defense counsel merely stated: "Oh, well." There is no dispute that defense counsel did not attempt to utilize the procedure for securing the trial testimony of a material witness (*see* CPL art 620), or to seek a continuance to obtain the witness's voluntary compliance with the subpoena. Notably, the witness avers in her affidavit that she was never subpoenaed.

The court denied that part of the motion based on its determination that defendant could have raised his claim on his direct appeal or in his prior CPL 440.10 motions (*see* CPL 440.10 [3] [a], [c]). That was error. Because the witness resided in another state and went by a different surname, it was not until 2014—after defendant made his two prior CPL 440.10 motions—that defendant was able to obtain an affidavit from her. The affidavit contains information not contained in the trial record and substantially supports defendant's claim of ineffective assistance. Significantly, it raises an issue of fact whether the witness was ever subpoenaed by defense counsel. That issue of fact is separate and distinct from the witness's information about the murder itself, which was known to defendant through the 2004 police report. Defendant could not have discovered and raised the issue of fact until 2014, when he was able to identify, locate, and obtain an affidavit from the witness. We therefore conclude that the court erred in determining that defendant could have asserted his present claim of ineffective assistance of counsel on his direct appeal or in his prior CPL 440.10 motions (*cf. People v Huggins*, 130 AD3d 1069, 1069 [2d Dept 2015], *lv denied* 26 NY3d 1089 [2015]; *see generally People v Coleman*, 10 AD3d 487, 487-488 [1st Dept 2004]). Furthermore, although defense counsel's failure to pursue readily available procedural means to secure the appearance of the witness may have been the result of a strategic decision, we agree with defendant "that his submissions 'support[] his contention that he was denied effective assistance of counsel . . . and raise[] a factual issue that requires a hearing' " (*People v Frazier*, 87 AD3d 1350, 1351 [4th Dept 2011]).

We further agree with defendant that the court erred in denying without a hearing that part of his motion based on his claim of actual innocence (*see People v Pottinger*, 156 AD3d 1379, 1380-1381 [4th Dept 2017]; *People v Hamilton*, 115 AD3d 12, 15 [2d Dept 2014]). We conclude that he made a prima facie showing of actual innocence sufficient to warrant a hearing on the merits (*see Pottinger*, 156 AD3d at 1380-1381).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

398

CA 17-01090

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

MICHELLE L. HARRIS AND ADAM M. PROSSER,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

MICHAEL R. HANSSEN AND TOWN OF ROYALTON,
DEFENDANTS-APPELLANTS-RESPONDENTS.

MICHAEL R. HANSSEN AND TOWN OF ROYALTON,
COUNTER-CLAIM PLAINTIFFS-APPELLANTS,

V

ADAM M. PROSSER, COUNTER-CLAIM
DEFENDANT-RESPONDENT.

BOUVIER LAW LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS AND COUNTER-CLAIM PLAINTIFFS-APPELLANTS.

FRIEDMAN & RANZENHOFER, P.C., AKRON (SAMUEL A. ALBA OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

LAW OFFICES OF DANIEL R. ARCHILLA, BUFFALO (MARTHA DONOVAN OF COUNSEL), FOR COUNTER-CLAIM DEFENDANT-RESPONDENT.

Appeal and cross appeal from an order and judgment (one paper) of the Supreme Court, Niagara County (Frank Caruso, J.), entered March 7, 2017. The order and judgment, inter alia, denied defendants' motion for summary judgment dismissing the complaints and to disqualify plaintiffs' counsel, and granted in part and denied in part plaintiffs' cross motion for partial summary judgment and for leave to amend the complaints.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying the cross motion in its entirety and granting defendants' motion in part and dismissing the complaints, and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiffs commenced separate actions, which were thereafter consolidated, seeking damages for injuries that they sustained when the vehicle in which they were traveling was struck by a snowplow owned by defendant Town of Royalton and operated by defendant Michael R. Hanssen. Hanssen was proceeding north on Ertman

Road, which ends at a T-intersection at State Route 93. Hanssen intended to turn right onto Route 93, deposit plowed snow off the right shoulder of that road, and then turn around and proceed south on Ertman Road. The accident occurred when Hanssen failed to stop at a stop sign and struck plaintiffs' vehicle, which was proceeding eastbound on Route 93. Defendants appeal and plaintiffs cross-appeal from an order and judgment that, inter alia, denied defendants' motion for summary judgment dismissing the complaints and to disqualify plaintiffs' counsel, denied that part of plaintiffs' cross motion for summary judgment on the issue whether defendants acted with reckless disregard for the safety of others, and granted those parts of plaintiffs' cross motion for summary judgment on the issue of defendants' negligence and for leave to amend the complaints to add a claim based on the standard of care of reckless disregard.

We agree with defendants on their appeal that Supreme Court erred in denying that part of their motion for summary judgment dismissing the complaints and we therefore modify the order and judgment accordingly. In support of their motion, defendants established as a matter of law that the reckless disregard standard of care, and not negligence, is applicable to this case pursuant to Vehicle and Traffic Law § 1103 (b), and plaintiffs failed to raise a triable issue of fact. Defendants submitted the deposition testimony of Hanssen, who testified that he was plowing snow and salting the roads on his assigned route at the time of the accident, and section 1103 (b) applies where, as here, a snowplow truck is "actually engaged in work on a highway" (*see Riley v County of Broome*, 95 NY2d 455, 461 [2000]). Contrary to plaintiffs' contention, although defendants also submitted the deposition testimony of plaintiffs that the plow blade was up at the time of the accident, that is not enough to raise an issue of fact inasmuch as it was uncontroverted that Hanssen was salting the road and was "working his 'run' or 'beat' at the time of the accident" (*Arrahim v City of Buffalo*, 151 AD3d 1773, 1773 [4th Dept 2017]; *see Matsch v Chemung County Dept. of Pub. Works*, 128 AD3d 1259, 1260-1261 [3d Dept 2015], *lv denied* 26 NY3d 997 [2015]).

We further conclude that defendants established as a matter of law that Hanssen did not act with reckless disregard for the safety of others, and plaintiffs failed to raise a triable issue of fact. Recklessness is the "disregard of a known or obvious risk so great as to make it highly probable that harm would follow and done with conscious indifference to the outcome" (*Campbell v City of Elmira*, 84 NY2d 505, 510 [1994]; *see Bliss v State of New York*, 95 NY2d 911, 913 [2000]). Hanssen testified at his deposition that he slowed down as he approached the stop sign and was moving at a speed of five miles per hour just prior to the intersection. He looked both ways for traffic, but did not see plaintiffs' approaching vehicle. That evidence, which was not controverted by the deposition testimony of plaintiffs, established that Hanssen did not act with reckless disregard for the safety of others (*see Rockland Coaches, Inc. v Town of Clarkstown*, 49 AD3d 705, 706-707 [2d Dept 2008]; *cf. Ruiz v Cope*, 119 AD3d 1333, 1334 [4th Dept 2014]; *see also Primeau v Town of Amherst*, 17 AD3d 1003, 1003-1004 [4th Dept 2005], *affd* 5 NY3d 844 [2005]). We likewise reject plaintiffs' contention on their cross

appeal that they were entitled to summary judgment on the issue of defendants' reckless conduct.

In light of our determination, defendants' remaining contentions are academic.

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

437

KA 16-00310

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC BACON, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (NICOLE K. INTSCHERT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered May 29, 2015. The judgment convicted defendant, upon a jury verdict, of assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the first degree (Penal Law § 120.10 [1]). The conviction arises from a dog attack that caused the victim to sustain injuries that included broken bones in his hands and the amputation of a portion of one of his fingers. The victim as well as witnesses to the attack testified that two pit bull terriers that had escaped their owner's property attacked the victim, biting at his arms and legs, as the victim attempted to protect his dog from the pit bulls. Defendant, who was a friend of the owner of the pit bulls, arrived at the scene in a van driven by another man. Defendant exited the van, retrieved the two pit bulls and placed them in the van. After the pit bulls were secured in the van, the victim stood in front of the van and angrily told defendant that the police had been called and "you're not going anywhere." Defendant responded by asking the victim, "you coming at me? Are you going to stop me from leaving?" At that point defendant opened the van door and issued a command to the larger pit bull, who attacked the victim a second time, inflicting the injuries to the victim's hands.

Defendant contends that the evidence is legally insufficient to support the conviction inasmuch as the People failed to prove that he intended to cause serious physical injury to the victim, that the victim's injuries resulted from the second attack, or that the dog was a dangerous instrument. At the outset, we note that defendant incorrectly concedes that he did not preserve his challenge to the

legal sufficiency of the evidence for our review because, while his motion for a trial order of dismissal was " 'specifically directed' " at certain alleged deficiencies in the proof (*People v Gray*, 86 NY2d 10, 19 [1995]), the renewed motion was not so directed. Contrary to defendant's concession, "defense counsel's renewal, directly referencing the earlier motion, is sufficient to preserve for our review his contention that the evidence is legally insufficient to establish that defendant" intended to cause serious physical injury to the victim (*People v Meacham*, 151 AD3d 1666, 1668 [4th Dept 2017], *lv denied* 30 NY3d 981 [2017]). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), however, we conclude that the evidence is legally sufficient to establish such intent (*see People v Mateo*, 77 AD3d 1374, 1374 [4th Dept 2010], *lv denied* 15 NY3d 922 [2010]). Defendant's remaining challenges to the sufficiency of the evidence are not preserved for our review (*see generally People v Simmons*, 133 AD3d 1227, 1227 [4th Dept 2015]).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We further conclude, contrary to defendant's contention, that defense counsel provided meaningful representation. Counsel pursued a legitimate trial strategy in declining Supreme Court's offer to charge the lesser included offense of assault in the second degree (*see People v Trotman*, 154 AD3d 1332, 1333 [4th Dept 2017], *lv denied* 30 NY3d 1109 [2018]), and opting not to pursue an intoxication defense (*see People v Harris*, 129 AD3d 1522, 1525 [4th Dept 2015], *lv denied* 27 NY3d 998 [2016]), or to present evidence that was "incredible and potentially harmful to the defense" (*People v Llanos*, 13 AD3d 76, 77 [1st Dept 2004], *lv denied* 4 NY3d 833 [2005]).

We agree with defendant that the prosecutor, in his opening statement, improperly commented on defendant's refusal to identify the driver of the van in response to police questioning (*see People v Williams*, 25 NY3d 185, 190 [2015]). The court, however, struck the prosecutor's comment and instructed the jury not to draw any inference adverse to defendant from his exercise of his constitutional right to refuse to answer the police officer's question. "The jury is presumed to have followed the court's curative instruction, and we conclude that it was sufficient to eliminate any prejudice to defendant" (*People v Reyes*, 144 AD3d 1683, 1685 [4th Dept 2016]).

Contrary to defendant's contention, we conclude that the court's supplemental instruction on intent "adequately conveyed the applicable principles of law to the jury and was a meaningful response to the jury's inquiry" (*People v Smith*, 21 AD3d 1277, 1278 [4th Dept 2005], *lv denied* 7 NY3d 763 [2006]).

Even assuming, arguendo, that defendant's complaints about defense counsel at sentencing constituted a " 'seemingly serious

request' " for new counsel (*People v Porto*, 16 NY3d 93, 100 [2010]), we conclude that the court made the requisite inquiry (*see id.*; *People v Jackson*, 120 AD3d 1601, 1602 [4th Dept 2014], *lv denied* 26 NY3d 1040 [2015]), and properly determined that substitution of counsel was not warranted (*see People v Pettaway*, 30 AD3d 257, 258 [1st Dept 2006], *lv denied* 7 NY3d 816 [2006]).

Finally, the sentence is not unduly harsh or severe.

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

442

CAF 16-01851

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

IN THE MATTER OF CHRISTOPHER M. BEYER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MELINDA G. HOFMANN, RESPONDENT-RESPONDENT.

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

BENGART & DEMARCO, LLP, TONAWANDA (JAMES C. DEMARCO, III, OF COUNSEL), FOR RESPONDENT-RESPONDENT.

JENNIFER PAULINO, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Brenda M. Freedman, J.), entered August 31, 2016 in a proceeding pursuant to Family Court Act article 6. The order dismissed without prejudice the petition seeking custody of petitioner's twin daughters.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is reinstated and the matter is remitted to Family Court, Erie County, for further proceedings.

Memorandum: Petitioner father appeals from an order dismissing without prejudice his petition seeking custody of his twin daughters on the ground that Pennsylvania is the home state of the children and matters concerning custody were pending in Pennsylvania. At the outset, we note that the order did not determine a motion made on notice, and thus it is not appealable as of right (*see Sholes v Meagher*, 100 NY2d 333, 335 [2003]; *Matter of Kelly v Senior*, 151 AD3d 1775, 1775 [4th Dept 2017]). Although the father did not request leave to appeal, we nevertheless treat the notice of appeal as an application for leave to appeal, and we grant the application in the interest of justice (*see Matter of Walker v Bowman*, 70 AD3d 1323, 1323-1324 [4th Dept 2010]; *see generally* CPLR 5701 [c]).

The subject children were born on June 5, 2015 and lived with both parties in New York until December 29, 2015, when the parties moved with the children to State College, Pennsylvania. In April 2016 the children and respondent mother moved to York, Pennsylvania without the father, and the father thereafter returned to New York. He commenced this proceeding on June 6, 2016, and the mother commenced a custody proceeding in Pennsylvania on August 9, 2016. Under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA),

adopted by New York (Domestic Relations Law art 5-A) and Pennsylvania (23 Pa Cons Stat Ann § 5401 *et seq.*), Family Court had jurisdiction to make an initial custody determination at the time the father commenced the instant proceeding (*see* Domestic Relations Law §§ 75-a [7]; 76 [1] [a]; *Matter of Balde v Barry*, 108 AD3d 622, 623 [2d Dept 2013]) and Pennsylvania had such jurisdiction at the time the mother commenced the proceeding in that state (*see* 23 Pa Cons Stat Ann §§ 5402, 5421 [a] [1]).

We agree with the father that Family Court erred in declining to exercise jurisdiction and dismissing the proceeding without following the procedures required by the UCCJEA (*see Matter of Frankel v Frankel*, 127 AD3d 1186, 1188 [2d Dept 2015]). The court, after determining that another child custody proceeding had been commenced in Pennsylvania, properly communicated with the Pennsylvania court (*see* Domestic Relations Law § 76-e [2]). The court erred, however, in failing either to allow the parties to participate in the communication (*see* § 75-i [2]; *Matter of Wnorowska v Wnorowski*, 76 AD3d 714, 715 [2d Dept 2010]), or to give the parties "the opportunity to present facts and legal arguments before a decision on jurisdiction [was] made" (§ 75-i [2]; *see Frankel*, 127 AD3d at 1188; *Matter of Andrews v Catanzano*, 44 AD3d 1109, 1110-1111 [3d Dept 2007]). The court also violated the requirements of the UCCJEA when it failed to create a record of its communication with the Pennsylvania court (*see* § 75-i [4]; *Frankel*, 127 AD3d at 1188). The summary and explanation of the court's determination following the telephone conference with the Pennsylvania court did not comply with the statutory mandate to make a record of the communication between courts.

We also agree with the father that there are insufficient facts in the record to make a determination, based upon the eight factors set forth in the statute (*see* Domestic Relations Law § 76-f [2] [a]-[h]), regarding which state is the more convenient forum to resolve the issue of custody. "Because Family Court did not articulate its consideration of each of the factors relevant to the . . . petition . . . and we are unable to glean the necessary information from the record, the court's [implicit] finding that New York was an inconvenient forum to resolve the [custody] petition is not supported by a sound and substantial basis in the record" (*Matter of Frank MM. v Lorain NN.*, 103 AD3d 951, 954 [3d Dept 2013]).

We therefore reverse the order, reinstate the petition and remit the matter to Family Court for further proceedings on the petition. We "note that the events subsequent to the entry of the order we are reversing may be relevant to and can be considered on remittal" (*Andrews*, 44 AD3d at 1111). In any event, the father should be afforded an opportunity to address those subsequent events as well as the threshold jurisdictional issue (*see id.*).

We have considered the father's remaining contention concerning the Parental Kidnapping Prevention Act (28 USC § 1738A) and conclude

that it lacks merit.

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

446

CA 17-01962

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

CARMEN VEGA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SHERRY M. CRANE, ADMINISTRATOR OF THE ESTATE OF COLLIN WARD CRANE, DECEASED, JEFFREY CRANE, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT. (APPEAL NO. 1.)

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

FARACI LANGE, LLP, ROCHESTER (CAROL A. MCKENNA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Emilio L. Colaiacovo, J.), entered February 10, 2017. The order, insofar as appealed from, granted that part of the cross motion of plaintiff for partial summary judgment on negligence against defendants Sherry M. Crane, as administrator of the estate of Collin Ward Crane, deceased, and Jeffrey Crane.

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

Memorandum: Plaintiff commenced this action alleging that she sustained a serious injury as defined by Insurance Law § 5102 (d) in a motor vehicle accident as a result of the negligence of decedent, Collin Ward Crane. Contrary to the contention of Sherry M. Crane, as administrator of decedent's estate, and Jeffrey Crane (defendants), Supreme Court properly granted that part of plaintiff's cross motion seeking partial summary judgment on negligence against them. The accident reconstruction report, which was submitted by plaintiff in support of the cross motion, established that decedent's vehicle " 'crossed the center line of the highway and struck [plaintiff's] vehicle,' " and, in opposition, defendants failed to provide evidence of a nonnegligent explanation for the collision (*Graham v Gerow*, 126 AD3d 1549, 1549 [4th Dept 2015]; *see Levi v Benyaminova*, 128 AD3d 779, 780 [2d Dept 2015]).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

447

CA 17-01439

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

APRIL M. ROZMUS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WESLEYAN CHURCH OF HAMBURG, XERTION YOUTH, INC., AND NORTHGATE CHRISTIAN COMMUNITY, DEFENDANTS-RESPONDENTS.

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

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

MURA & STORM, PLLC, BUFFALO (SCOTT D. STORM OF COUNSEL), FOR DEFENDANT-RESPONDENT XERTION YOUTH, INC.

CLAUDIA P. LOVAS, GARDEN CITY (STEVEN PEIPER OF COUNSEL), FOR DEFENDANT-RESPONDENT NORTHGATE CHRISTIAN COMMUNITY.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered November 22, 2016. The order granted the respective motions and cross motion of defendants for summary judgment dismissing the second amended complaint and cross claims against them.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motions and cross motion are denied and the second amended complaint and the cross claims are reinstated against defendants.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when a ladder struck her head as she exited the side door of a residence that was being painted as part of a neighborhood rehabilitation project. Plaintiff alleged in the second amended complaint (complaint) that defendants organized, directed, managed and supervised a group of volunteers who participated in the rehabilitation project. Plaintiff further alleged that defendants were negligent, inter alia, in failing to direct and supervise the volunteers properly, particularly with respect to the movement, placement and handling of ladders.

Supreme Court erred in granting defendants' respective motions and cross motion seeking summary judgment dismissing the complaint and cross claims against them. "Under the doctrine of respondeat superior, a principal is liable for the negligent acts committed by

its agent within the scope of the agency" (*Fils-Aime v Ryder TRS, Inc.*, 40 AD3d 917, 917-918 [2d Dept 2007]), and "[a] principal-agent relationship can include a volunteer when the requisite conditions, including control and acting on another's behalf, are shown" (*Paterno v Strimling*, 107 AD3d 1233, 1235 [3d Dept 2013]; *see* Restatement [Second] of Agency § 225). Here, defendants each failed to establish as a matter of law that the volunteers at the residence where plaintiff was injured may not be considered their servants for purposes of respondeat superior liability (*see Robinson v Downs*, 39 AD3d 1250, 1252 [4th Dept 2007]), or that the duty to ensure that the work was performed safely may not fairly be imposed upon them (*see generally Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 572 [2015]).

In addition, defendants cannot meet their burden on their respective summary judgment motions and cross motion based upon plaintiff's failure to identify the volunteer(s) who caused the ladder to strike her (*see Lyons v Schenectady Intl.*, 299 AD2d 906, 906 [4th Dept 2002]). "[I]n seeking summary judgment, '[a] moving party must affirmatively [demonstrate] the merits of its cause of action or defense and does not meet its burden by noting gaps in its opponent's proof' " (*Paternostro v Advance Sanitation, Inc.*, 126 AD3d 1376, 1377 [4th Dept 2015]). Defendants' failure to meet their burden requires denial of the motions and cross motion, "regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Finally, we reject the contentions of defendant Xertion Youth, Inc. (Xertion) that it is entitled to summary judgment dismissing the complaint against it on the ground that it is protected from liability by both the Volunteer Protection Act (42 USC § 14501 *et seq.*) and Not-for-Profit Corporation Law § 720-a. Neither statute extends such protection from liability to corporate entities (*see* 42 USC § 14503 [c]; Not-for-Profit Corporation Law § 720-a). Nor is Xertion entitled to protection from liability on the ground that its principal participated in the rehabilitation project as an individual, without compensation, and the statutes protect him as a volunteer or an uncompensated officer of Xertion. There is conflicting evidence whether the principal received compensation from Xertion, and, in any event, "courts are loathe to disregard the corporate form for the benefit of those who have chosen that form to conduct business" (*Hotaling v Sprock* [appeal No. 2], 107 AD3d 1446, 1447 [4th Dept 2013] [internal quotation marks omitted]).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

455

CA 17-01651

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

CARMEN VEGA, PLAINTIFF-APPELLANT,

V OPINION AND ORDER

SHERRY M. CRANE, ADMINISTRATOR OF THE ESTATE OF COLLIN WARD CRANE, DECEASED, JEFFREY CRANE, DEFENDANTS,
AND TAYLOR CRATSLEY, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

FARACI LANGE, LLP, ROCHESTER (CAROL A. MCKENNA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KEVIN E. HULSLANDER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Emilio L. Colaiacovo, J.), entered April 17, 2017. The order granted the motion of defendant Taylor Cratsley for summary judgment dismissing the complaint against her.

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

Opinion by TROUTMAN, J.:

This action arises from a two-vehicle accident that caused the death of one driver and serious injuries to the other driver. We hold that a person does not owe a common-law duty to motorists to refrain from sending a text message to a person whom he or she knows, or reasonably should know, is operating a motor vehicle.

In the evening of December 8, 2012, plaintiff and decedent were driving their respective vehicles toward each other on Route 33 in Genesee County. It was dark and rainy. Decedent was traveling home from work and was exchanging text messages with his girlfriend, Taylor Cratsley (defendant). As the vehicles approached each other, decedent's vehicle crossed the center line. Seconds before impact, plaintiff applied her brakes and steered her vehicle onto the shoulder of the highway. The vehicles collided. Plaintiff sustained serious injuries, and decedent was killed. An accident reconstruction report, prepared by a New York State Trooper, determined that the primary cause of the accident was decedent's failure to stay to the right of the center line. There was no evidence that decedent tried to take evasive action, suggesting that he was likely distracted. "The

cellular phone activity," the Trooper opined, "may have been the source of this distraction."

Plaintiff commenced an action against defendant alleging that the collision was caused in part by her negligence in continuing to engage decedent in a text message conversation despite knowing, or having special reason to know, that he was operating a motor vehicle. That action was consolidated with a negligence action that plaintiff had previously commenced against decedent's estate and the owner of the vehicle that he was operating (*Vega v Crane*, — AD3d — [May 4, 2018] [4th Dept 2018]). We reject plaintiff's contention that Supreme Court erred in granting defendant's motion for summary judgment dismissing the complaint against her. The court properly concluded that defendant had no duty to refrain from sending text messages to decedent, and thus properly granted defendant's motion.

It is well established that a defendant may not be held liable for negligence unless he or she owes a duty to the plaintiff (*see Palsgraf v Long Is. R.R. Co.*, 248 NY 339, 342 [1928], *rearg denied* 249 NY 511 [1928]; *Wallace v M&C Hotel Interests, Inc.*, 150 AD3d 1652, 1653 [4th Dept 2017], *lv denied* 29 NY3d 917 [2017]). "The existence and scope of an alleged tortfeasor's duty is, in the first instance, a legal question for determination by the court" (*Di Ponzio v Riordan*, 89 NY2d 578, 583 [1997]). "Courts resolve legal duty questions by resort to common concepts of morality, logic and consideration of the social consequences of imposing the duty" (*Tenuto v Lederle Labs., Div. of Am. Cyanamid Co.*, 90 NY2d 606, 612 [1997]). "A defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others, even where as a practical matter defendant can exercise such control" (*D'Amico v Christie*, 71 NY2d 76, 88 [1987]; *see Oddo v Queens Vil. Comm. for Mental Health for Jamaica Community Adolescent Program, Inc.*, 28 NY3d 731, 735-736 [2017]). That said, we note that "a passenger in a car may be liable if he [or she] distracted the driver while operating the vehicle immediately prior to the accident" (*Sartori v Gregoire*, 259 AD2d 1004, 1004 [4th Dept 1999]; *see Dziedzic v Thayer*, 292 AD2d 845, 845-846 [4th Dept 2002]). By way of illustration, the Restatement of Torts explains that a passenger is negligent where he or she "suddenly and unnecessarily calls out" to the driver in heavy traffic, thus causing the driver to crash into the car of a third person (Restatement [Second] of Torts § 303, Comment *d*, Illustration 3).

There is, however, a significant distinction between the distracting passenger and the remote sender of text messages. Unlike the passenger, the remote sender is not present in the vehicle and thus "lacks the first-hand knowledge of the circumstances attendant to the driver's operation of the vehicle that a passenger possesses and has even less ability to control the actions of the driver" (*Kubert v Best*, 432 NJ Super 495, 521, 75 A3d 1214, 1230 [Super Ct, App Div 2013] [Espinosa, J., concurring]). The driver cannot prevent the passenger, who is actually present inside the vehicle, from creating a distraction by suddenly and unnecessarily calling out at an imprudent moment. The same driver, on the other hand, has complete control over

whether to allow the conduct of the remote sender to create a distraction. Although the remote sender has the ability to refrain from sending the driver a text message, he or she is powerless to compel the driver to read such a text message at an imprudent moment, and has no duty to prevent the driver from doing so.

Rather, it is the duty of the driver to see what should be seen and to exercise reasonable care in the operation of his or her vehicle to avoid a collision with another vehicle (*see Deering v Deering*, 134 AD3d 1497, 1499 [4th Dept 2015]; *Zweeres v Materi*, 94 AD3d 1111, 1111 [2d Dept 2012]). If a person were to be held liable for communicating a text message to another person whom he or she knows or reasonably should know is operating a vehicle, such a holding could logically be expanded to encompass all manner of heretofore innocuous activities. A billboard, a sign outside a church, or a child's lemonade stand could all become a potential source of liability in a negligence action. Each of the foregoing examples is a communication directed specifically at passing motorists and intended to divert their attention from the highway.

To be sure, cellular telephones and other electronic devices present unique distractions to motorists. For that reason, the legislature passed laws specifically to regulate the use of cellular telephones and other electronic devices by those operating motor vehicles (*see* Vehicle and Traffic Law §§ 1225-c, 1225-d). The legislature did not create a duty to refrain from communicating with persons known to be operating a vehicle. To the contrary, those laws place the responsibility of managing or avoiding the distractions caused by electronic devices squarely with the driver. The driver has various means available for managing or avoiding such distractions, such as a hands-free device to handle incoming calls (*see* § 1225-c [1] [e]) or a setting for temporarily disabling sounds or alerts. Or, the driver can simply pull over to the side of the highway to engage in any communications deemed too urgent to wait. The remote sender of a text message is not in a good position to know how the driver will or should handle incoming text messages.

We conclude that defendant owed no duty to plaintiff to refrain from the conduct alleged, and therefore that she cannot be held liable for such conduct. Accordingly, we conclude that the order should be affirmed.

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

457

KA 16-00954

PRESENT: SMITH, J.P., CARNI, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY T. BERNECKY, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Victoria M. Argento, J.), entered April 26, 2016. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: In this proceeding pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.), defendant appeals from an order classifying him as a level two risk. Defendant pleaded guilty to a federal sex offense arising from his possession of more than 8,000 computer files containing images of, inter alia, child pornography involving sex acts between 10- to 12-year-old boys and adults or other boys. Contrary to defendant's contentions, "children depicted in pornographic images are each separate victims for purposes of the Sex Offender Registration Act in general and risk factor 3 in particular" (*People v Graziano*, 140 AD3d 1541, 1542 [3d Dept 2016], *lv denied* 28 NY3d 909 [2016]; *see People v Gillotti*, 23 NY3d 841, 859-860 [2014]; *People v Wooten*, 136 AD3d 1305, 1306 [4th Dept 2016]), and " 'the plain terms of [risk] factor 7 authorize the assessment of points based on a child pornography offender's stranger relationship with the children featured in his or her child pornography files, and thus points can be properly assessed under that factor due to an offender's lack of prior acquaintance with the children depicted in the files' " (*People v Tutty*, 156 AD3d 1444, 1444-1445 [4th Dept 2017]; *see Gillotti*, 23 NY3d at 859-860; *People v Johnson*, 11 NY3d 416, 419-421 [2008]).

Contrary to defendant's further contention, County Court did not abuse its discretion in denying his request for a downward departure from his presumptive risk level. Although a defendant's response to

treatment, "if exceptional" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 17 [2006]), may constitute a mitigating factor to serve as the basis for a downward departure, we conclude that, here, defendant failed to prove by a preponderance of the evidence that his response to treatment was exceptional (*see People v Butler*, 129 AD3d 1534, 1534-1535 [4th Dept 2015], *lv denied* 26 NY3d 904 [2015]). Defendant otherwise "failed to establish by a preponderance of the evidence the existence of mitigating factors not adequately taken into account by the guidelines" (*People v Lewis*, 156 AD3d 1431, 1432 [4th Dept 2017]; *see People v Nilsen*, 148 AD3d 1688, 1689 [4th Dept 2017], *lv denied* 29 NY3d 912 [2017]), particularly in light of the fact that he possessed an extraordinary number of pornographic images, including depictions of sexual acts involving children, violence, and bestiality (*see generally People v Poole*, 90 AD3d 1550, 1551 [4th Dept 2011]). We therefore conclude, upon examining all of the relevant circumstances, that the court providently exercised its discretion in denying defendant's request for a downward departure (*see People v Smith*, 122 AD3d 1325, 1326 [4th Dept 2014]).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

462

KA 12-00694

PRESENT: SMITH, J.P., CARNI, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RODOLFO HINOJOSO-SOTO, DEFENDANT-APPELLANT.

J. SCOTT PORTER, SENECA FALLS, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered April 5, 2012. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, criminal possession of a weapon in the second degree and attempted criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), criminal possession of a weapon in the second degree (§ 265.03 [3]), and attempted criminal sale of a controlled substance in the third degree (§§ 110.00, 220.39 [1]). The charges arose from allegations that defendant sold to a man a substance that defendant represented was cocaine but, when the man expressed dissatisfaction with the quality of the drugs, defendant shot and killed him.

Defendant contends that Supreme Court should have suppressed his statements to the police because the People failed to establish that he, a native Spanish speaker, understood and knowingly, voluntarily and intelligently waived his *Miranda* rights. We reject that contention. It is well settled that "[a] defendant's waiver of his *Miranda* rights must be knowing, voluntary, and intelligent . . . [, and] if his English language comprehension was so deficient that he could not understand the import of his rights, his [statements] could not have been voluntary" (*People v Jin Cheng Lin*, 26 NY3d 701, 725 [2016]). To meet their initial burden when seeking to admit statements in evidence from such a defendant, "[t]he People must establish that the defendant 'grasped that he or she did not have to speak to the interrogator; that any statement might be used to the subject's disadvantage; and that an attorney's assistance would be provided upon request, at any time, and before questioning is continued' " (*id.* at 726, quoting *People v Williams*, 62 NY2d 285, 289

[1984]). Here, we conclude that the People met their initial burden by introducing evidence establishing that the officers provided *Miranda* warnings in both English and Spanish, and that defendant responded to questioning without exhibiting any difficulty in comprehending or responding (*see People v Valle*, 70 AD3d 1386, 1386-1387 [4th Dept 2010], *lv denied* 15 NY3d 758 [2010]; *see generally People v Esquerdo*, 71 AD3d 1424, 1425 [4th Dept 2010], *lv denied* 14 NY3d 887 [2010]). Thereafter, " 'the burden of persuasion' " with respect to suppression shifted to defendant (*People v Dunlap*, 24 AD3d 1318, 1319 [4th Dept 2005], *lv denied* 6 NY3d 812 [2006]; *see People v Williams*, 118 AD3d 1429, 1429 [4th Dept 2014], *lv dismissed* 24 NY3d 1222 [2015]). We further conclude that defendant failed to meet his burden, and the court therefore properly refused to suppress his statements.

Defendant further contends that suppression of his statements was required because the police did not reread the *Miranda* warnings at later times in the interrogation process. That contention is without merit. There is "no need for the police to readminister *Miranda* warnings[where, as here,] defendant remained in continuous custody, nothing occurred that would have induced defendant to believe he was no longer the focal point of the investigation, and there was no reason to believe that defendant no longer understood his constitutional rights" (*People v Dudley*, 31 AD3d 264, 265 [1st Dept 2006], *lv denied* 7 NY3d 866 [2006]; *see People v Mendez*, 77 AD3d 1312, 1312 [4th Dept 2010], *lv denied* 16 NY3d 799 [2011]; *cf. People v Guilford*, 21 NY3d 205, 209-213 [2013]; *see generally People v Glinsman*, 107 AD2d 710, 710 [2d Dept 1985], *lv denied* 64 NY2d 889 [1985], *cert denied* 472 US 1021 [1985]). Defendant's contention concerning the length of time over which the questioning took place is likewise without merit inasmuch as the evidence from the suppression hearing establishes that the police questioned defendant for approximately six hours and then stopped, that defendant slept for approximately eight hours, and that defendant then sought out a specific police investigator and asked if the questioning could continue.

We reject defendant's further contention that the court erred in its determination of the exact point at which defendant's attorney informed the police that he represented defendant. It is well settled that the "factual findings and credibility determinations of a hearing court are entitled to great deference on appeal, and [they] will not be disturbed unless clearly unsupported by the record" (*People v Collier*, 35 AD3d 628, 629 [2d Dept 2006], *lv denied* 8 NY3d 879 [2007], *reconsideration denied* 9 NY3d 841 [2007]; *see People v Rodas*, 145 AD3d 1452, 1452-1453 [4th Dept 2016]; *People v Hogan*, 136 AD3d 1399, 1400 [4th Dept 2016], *lv denied* 27 NY3d 1070 [2016]). Contrary to defendant's contention, the record supports the court's determination regarding the specific times at which defendant made the incriminating statements to the police and at which defendant's attorney informed a police officer that he represented defendant. Consequently, the court properly concluded that defendant "failed to meet his burden of establishing that his right to counsel attached" before defendant gave

the statements at issue (*People v Steiniger*, 142 AD3d 1320, 1321 [4th Dept 2016], *lv denied* 28 NY3d 1189 [2017]). We have considered defendant's further contentions concerning the suppression of his statements to the police, and we conclude that they lack merit.

Defendant contends that the court erred in denying his oral motion seeking to suppress the items seized during the execution of a search warrant at an apartment in the City of Syracuse. Defendant's contention is based on the ground that there was an insufficient connection between himself and the apartment (*see generally People v Woodring*, 48 AD3d 1273, 1275 [4th Dept 2008], *lv denied* 10 NY3d 846 [2008]). We conclude that defendant's contention is not properly before us inasmuch as defendant failed to submit a written motion challenging the search warrant as required by CPL 710.60 (1). It therefore was error for the court to consider defendant's oral motion in the absence of a waiver from the People (*see generally People v Mezon*, 80 NY2d 155, 158-159 [1992]), and we have no authority to reach defendant's contention on appeal (*see id.* at 159). We note, in any event, that there is an additional preservation problem with defendant's contention inasmuch as it is based on a ground that was not raised in the suppression court (*see generally* CPL 470.05 [2]).

To the extent that defendant contends that his attorney was ineffective in failing to make a written motion covering the suppression ground defendant now advances on appeal, we conclude that defendant failed to meet his burden of demonstrating "the absence of strategic or other legitimate explanations for counsel's failure to pursue" that suppression ground by a written motion (*People v Garcia*, 75 NY2d 973, 974 [1990]). Indeed, defense counsel may have chosen as a matter of strategy to avoid asserting that ground to prevent the People from challenging defendant's standing to contest the search warrant (*see generally People v Ramirez-Portoreal*, 88 NY2d 99, 108 [1996]).

Defendant further contends that he was deprived of a fair trial when the court closed the courtroom to the public. It is well settled that "preservation of public trial claims is still required. Bringing a public trial violation to a judge's attention in the first instance will ensure the timely opportunity to correct such errors" (*People v Alvarez*, 20 NY3d 75, 81 [2012], *cert denied* 569 US 947 [2013]; *see People v Everson*, 158 AD3d 1119, 1123 [4th Dept 2018]). Here, the alleged violation of defendant's right to a public trial was not brought to the court's attention at a time when the court could have taken remedial action, and thus defendant's contention is not preserved for our review (*see Alvarez*, 20 NY3d at 81). Insofar as defendant contends that his attorney was ineffective in failing to bring the matter to the court's attention, we conclude that the record is insufficient to establish that the courtroom was closed, and thus the proper vehicle to raise that contention is a motion pursuant to CPL article 440.

Defendant failed to preserve for our review his challenge to the sufficiency of the evidence with respect to the crime of attempted criminal sale of a controlled substance "inasmuch as his motion for a

trial order of dismissal was not specifically directed at the alleged error asserted on appeal" (*People v Smith*, 60 AD3d 1367, 1367 [4th Dept 2009], *lv denied* 12 NY3d 921 [2009] [internal quotation marks omitted]; *see People v Gray*, 86 NY2d 10, 19 [1995]). In any event, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient with respect to that crime (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We reject defendant's contention that he was deprived of a fair trial by the admission of certain evidence. First, defendant asserts that he was deprived of a fair trial by the admission of evidence that he possessed cocaine several days after the crimes at issue herein. We conclude, however, that the evidence of the uncharged crime of drug possession was properly admitted to demonstrate the mental state necessary for defendant's attempted criminal sale of a controlled substance and his belief that the substance that he sold was in fact a controlled substance. Thus, the evidence was admissible pursuant to the intent and knowledge exceptions of the *Molineux* rule (*see generally People v Alvino*, 71 NY2d 233, 241-242 [1987]). Defendant also asserts that the court erred in permitting the People to introduce a prior consistent statement of a witness, but defendant failed to preserve that issue for our review (*see* CPL 470.05 [2]). In any event, we conclude that the issue lacks merit. Defendant's cross-examination of that witness could have left the jury with the impression that, when the witness testified at the grand jury, he was unable to identify defendant as the perpetrator of the crimes, and thus the evidence introduced by the People was "appropriate [because it was] introduced to remedy [the] misapprehension created by the defense upon cross-examination" (*People v Jackson*, 240 AD2d 680, 680 [2d Dept 1997], *lv denied* 90 NY2d 1012 [1997]; *see generally People v Lindsay*, 42 NY2d 9, 12 [1977]).

Defendant further contends that he was deprived of a fair trial because the jury was permitted to take certain objects that had not been admitted in evidence into the jury room during deliberations. Defendant failed to object or to move for a mistrial, and thus failed to preserve his contention for our review (*see* CPL 470.05 [2]; *cf. People v Smith*, 97 NY2d 324, 329-330 [2002]). In any event, the court promptly "gave a curative instruction, which the jury is presumed to have followed . . . Thus, . . . we conclude that any prejudice was alleviated" (*People v Flowers*, 151 AD3d 1843, 1844 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018]).

Contrary to defendant's contention, the prosecutor did not commit misconduct during the People's opening statement. Rather, "the prosecutor's opening statement was properly framed in terms of what the [witnesses] would testify to and did not distort the evidence or otherwise prejudice defendant" (*People v Castro*, 281 AD2d 935, 935-936 [4th Dept 2001], *lv denied* 96 NY2d 860 [2001]). Defendant failed to preserve for our review his contention that the prosecutor committed misconduct during summation (*see People v Crosby*, 158 AD3d 1300, 1302 [4th Dept 2018]; *see also People v Stanley*, 155 AD3d 1684, 1685 [4th

Dept 2017], *lv denied* 30 NY3d 1120 [2018]; *People v Santos*, 151 AD3d 1620, 1621-1622 [4th Dept 2017], *lv denied* 29 NY3d 1133 [2017]). In any event, that contention is without merit (*see generally People v Halm*, 81 NY2d 819, 821 [1993]).

Defendant failed to preserve for our review his contention that the court erred in its handling of a jury note. "[D]efendant does not dispute that his trial counsel was 'apprised of the specific, substantive contents of the note[],' inasmuch as the court read the precise contents of the note[] into the record in the presence of counsel and the jury before responding to" it (*People v Nealon*, 26 NY3d 152, 157 [2015]), and thus defendant was required to preserve for our review his challenge to the court's handling of the note (*see id.* at 158). In any event, we reject defendant's contention that the court erred in failing to provide sua sponte additional supplemental instructions beyond the jury's request for reinstruction (*see generally People v Almodovar*, 62 NY2d 126, 131-132 [1984]; *People v Balance-Soler*, 298 AD2d 927, 928 [4th Dept 2002], *lv denied* 99 NY2d 555 [2002]). Defendant's claim of ineffective assistance of counsel with respect to the note lacks merit.

With respect to defendant's remaining claims of ineffective assistance of counsel, we conclude that the evidence, the law, and the circumstances of this case, viewed in totality and as of the time of the representation, establish that defense counsel provided defendant with meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant contends that the court erred in ordering him to pay restitution to the New York State Office of Victim Services (OVS). We reject that contention. It is well settled that a court may order restitution to be paid to the OVS to the extent that the OVS contributed to "the victim's funeral expenses" (*People v Burkett*, 101 AD3d 1468, 1473 [3d Dept 2012], *lv denied* 20 NY3d 1096 [2013]; *see* Penal Law § 60.27 [4] [b]). Finally, the sentence is not unduly harsh or severe.

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

479

KA 16-00892

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDWARD BISHOP, DEFENDANT-APPELLANT.

DAVID J. PAJAK, ALDEN, FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered April 4, 2016. The judgment convicted defendant, upon a nonjury verdict, of animal fighting.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by adding the phrase "other than farm animals" following the reference to "any animal" in the first ordering paragraph of the order dated April 4, 2016 and striking the second sentence of the first ordering paragraph therein and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a nonjury verdict, of animal fighting (Agriculture and Markets Law § 351 [2] [d]). We reject defendant's contention that all of the property seized, i.e., the dog fighting paraphernalia aside from the dogs, should have been suppressed. Here, a search warrant authorized police to search the subject premises for "fighting dogs" and "for any personal papers or documents which tend to identify the owner, lessee or whomever has custody or control over the premises . . . searched or the items seized, and seize said property." "[L]aw enforcement officers may properly seize an item in 'plain view' without a warrant if (i) they are lawfully in a position to observe the item; (ii) they have lawful access to the item itself when they seize it; and (iii) the incriminating character of the item is immediately apparent" (*People v Brown*, 96 NY2d 80, 89 [2001]). In our view, there is no basis to disturb County Court's determination that the police discovered the dog fighting paraphernalia in plain view inasmuch as the hearing evidence demonstrated that one of the police officers involved in the search was in a lawful position to observe the items, had lawful access to the items and their incriminating character was immediately apparent to her, based on her personal experience in dog fighting cases (*see id.* at 89-90; *People v Woods*, 93 AD3d 1287, 1288-1289 [4th Dept 2012], *lv denied* 19 NY3d 969 [2012]).

Defendant failed to preserve for our review his related contention that the statement in the warrant that "there is probable cause to believe . . . that certain property has been used, or is possessed for the purpose of being used to commit a crime or offense" is overbroad as a matter of law and should be severed from the rest of the warrant. In any event, defendant's contention lacks merit. That language is a subpart to only the section of the warrant that stated that probable cause existed, not to the section of the warrant that instructed and authorized where and for what to search. There is thus no basis to sever that clause inasmuch as it is merely used as an introduction to the property to be seized and is not, as defendant contends, an independent provision authorizing an unconstitutional general search (*cf. Brown*, 96 NY2d at 88).

As the People correctly concede, the court's directive in the order dated April 4, 2016 that, "[t]o ensure compliance of this part of the [c]ourt's sentence, the defendant must submit to inspections of any premises which he owns or resides at by a duly licensed law enforcement agency or humane society" is not authorized by any applicable legislation and must be stricken. In addition, the court's directive under Agriculture and Markets Law § 374 (8) (c) in that order must specifically exempt farm animals, in accordance with the language of the statute. We therefore modify the judgment accordingly.

Finally, although not dispositive to the issues raised on appeal, we must voice our condemnation of the testimony of the drafter of the subject warrant that he was deliberately vague in drawing the warrant. That is an unacceptable practice and should be discontinued immediately because it is in direct contravention of the principles of the Fourth Amendment.

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

484

KA 16-00447

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GUADALUPE HERNANDEZ, II, ALSO KNOWN AS GUADALUPE HERNANDEZ, III, 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 (Michael F. Pietruszka, A.J.), rendered March 15, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence of incarceration imposed to a definite sentence of one year and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), defendant contends that County Court erred in imposing an enhanced sentence without specifically warning him of that possibility if he failed to appear for sentencing. "[D]efendant did not preserve that contention for our review inasmuch as 'he failed to object to the alleged enhanced sentence and did not move to withdraw his plea or to vacate the judgment of conviction on that ground' . . . , and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c])" (*People v Dumbleton*, 150 AD3d 1688, 1688-1689 [4th Dept 2017], *lv denied* 29 NY3d 1091 [2017]).

We agree with defendant, however, that the sentence is unduly harsh and severe. "[H]aving regard to the nature and circumstances of the crime and to the history and character of the defendant, [we are] of the opinion that a sentence of imprisonment [was] necessary but that it [was] unduly harsh to impose an indeterminate sentence" (Penal Law § 70.00 [former (4)]). Thus, as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]), we modify the judgment by reducing the sentence to a definite sentence of imprisonment of one

year (*see* Penal Law § 70.00 [former (4)]).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

487

CA 17-01174

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

ESTHER CASSATT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ZIMMER, INC. AND ZIMMER UPSTATE NEW YORK, INC.,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

LAW OFFICE OF MARK H. CANTOR, LLC, BUFFALO (DAVID WOLFF OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FAEGRE BAKER DANIELS LLP, FORT WAYNE, INDIANA (PETER A. MEYER, OF THE INDIANA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND GOLDBERG SEGALLA LLP, BUFFALO, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Mark Montour, J.), entered October 13, 2016. The order granted the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action asserting causes of action for strict products liability and breach of implied warranty and seeking damages for injuries that she sustained following knee replacement surgery. Plaintiff alleged that a manufacturing defect in a component of the knee replacement system required two subsequent revision surgeries after certain components dissociated from each other. In appeal No. 1, plaintiff appeals from an order granting defendants' motion for summary judgment dismissing the complaint. In appeal No. 2, plaintiff appeals from an order denying her motion for leave to reargue and renew her opposition to the relief granted in the order in appeal No. 1.

Contrary to plaintiff's contention in appeal No. 1, we conclude that Supreme Court properly granted defendants' motion for summary judgment dismissing the complaint. Initially, we note that plaintiff does not raise any contentions in her brief with respect to her cause of action for breach of implied warranty, and therefore has abandoned any issues concerning the dismissal of that cause of action (*see Kiersznowski v Gregory B. Shankman, M.D., P.C.*, 67 AD3d 1366, 1367 [4th Dept 2009]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). With respect to the cause of action for strict products liability, we conclude that defendants met their initial burden by presenting competent evidence that the components of the knee

replacement system were not defective (*see Ramos v Howard Indus., Inc.*, 10 NY3d 218, 223-224 [2008]; *Rachlin v Volvo Cars of N. Am.*, 289 AD2d 981, 982 [4th Dept 2001]). The components of the knee replacement system removed during the second revision surgery were lost by the hospital where the surgery was performed and were therefore not available for inspection by defendants. Nonetheless, the deposition testimony of defendants' director of quality assurance and the expert affidavit of a product development engineer established that the components of the knee replacement system "were designed and manufactured under state of the art conditions according to [defendants'] specifications and that [their] manufacturing process complied with applicable industry standards" (*Ramos*, 10 NY3d at 223). Those submissions further established that, in light of such testing and inspection, the components placed in plaintiff conformed with the specified dimensional, surface, material and visual requirements, and there was no evidence that the dissociations of the components in plaintiff's knee were caused by a manufacturing defect in the knee replacement system (*see id.* at 223-224). Defendants also submitted evidence attributing plaintiff's dissociations to her history of falls, preexisting knee instability caused by ligament laxity, and high posterior tibial slope (*see id.* at 224).

Plaintiff failed to raise a triable issue of fact in opposition by either direct or circumstantial evidence. Although plaintiff's surgeon broadly averred in an affidavit that there was a defect in the tibial component of the knee replacement system, his subsequent deposition testimony established that he did not detect any abnormalities in that component during the first revision surgery and that, during the second revision surgery, he similarly could not identify the location of any defect and did not observe any defects in the components even after removing the knee replacement system. Plaintiff offered only the surgeon's anecdotal observation that, during his career, he had never seen a knee dissociation occur twice in the same person. Plaintiff, however, cannot rely solely upon those occurrences to raise a triable issue of fact regarding the existence of a defect in the tibial component, and she failed to submit "some direct evidence that [such] a defect existed" (*Brown v Borruso*, 238 AD2d 884, 885 [4th Dept 1997]; *see Blazynski v A. Gareleck & Sons, Inc.*, 48 AD3d 1168, 1169 [4th Dept 2008], *lv denied* 11 NY3d 825 [2008]; *Rachlin*, 289 AD2d at 982). We further conclude that "[p]laintiff failed to present evidence excluding all other causes for the [dissociations] not attributable to defendant[s] such that a reasonable jury could find that the [tibial component of the knee replacement system] was defective in the absence of evidence of a specific defect" (*Ramos*, 10 NY3d at 224). Plaintiff relied upon the surgeon's deposition testimony, which failed to exclude the possible causes of plaintiff's falls or knee instability, and plaintiff failed to submit any evidence to exclude plaintiff's high posterior tibial slope as a possible cause not attributable to defendants (*see id.*; *Blazynski*, 48 AD3d at 1169).

Insofar as the order in appeal No. 2 denied that part of plaintiff's motion for leave to reargue, it is not appealable, and we therefore dismiss the appeal to that extent on that ground (*see Gaiter*

v City of Buffalo Bd. of Educ., 142 AD3d 1349, 1350 [4th Dept 2016]). We otherwise affirm the order in appeal No. 2 inasmuch as the court did not abuse its discretion in denying that part of plaintiff's motion that sought leave to renew (*see* CPLR 2221 [e] [2], [3]; *Chiappone v William Penn Life Ins. Co. of N.Y.*, 96 AD3d 1627, 1627-1628 [4th Dept 2012]).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

488

CA 17-01175

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

ESTHER CASSATT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ZIMMER, INC. AND ZIMMER UPSTATE NEW YORK, INC.,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

LAW OFFICE OF MARK H. CANTOR, LLC, BUFFALO (DAVID WOLFF OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FAEGRE BAKER DANIELS LLP, FORT WAYNE, INDIANA (PETER A. MEYER, OF THE INDIANA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND GOLDBERG SEGALLA LLP, BUFFALO, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Mark Montour, J.), entered February 23, 2017. The order denied the motion of plaintiff for leave to reargue and renew her opposition to defendants' prior motion.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed and the order is affirmed without costs.

Same memorandum as in *Cassatt v Zimmer, Inc.* ([appeal No. 1] — AD3d — [May 4, 2018] [4th Dept 2018]).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

489

CA 17-01296

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

ARIANA WHITE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MAURICE MAYFIELD, JULIE ROBERTSON, DEFENDANTS,
AND BUFFALO AUTO RENTAL, INC., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LAW OFFICES OF KEVIN A. LANE, PLLC, BUFFALO (KEVIN A. LANE OF COUNSEL), FOR DEFENDANT-APPELLANT.

BROWN CHIARI LLP, BUFFALO (ERIC M. SHELTON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered November 1, 2016. The order, insofar as appealed from, denied the motion of defendant Buffalo Auto Rental, Inc. 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 *White v Mayfield* ([appeal No. 2] — AD3d — [May 4, 2018] [4th Dept 2018]).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

490

CA 17-01746

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

ARIANA WHITE, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

MAURICE MAYFIELD, JULIE ROBERTSON, DEFENDANTS,
AND BUFFALO AUTO RENTAL, INC.,
DEFENDANT-APPELLANT-RESPONDENT.
(APPEAL NO. 2.)

LAW OFFICES OF KEVIN A. LANE, PLLC, BUFFALO (KEVIN A. LANE OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

BROWN CHIARI LLP, BUFFALO (ERIC M. SHELTON OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered June 23, 2017. The order, among other things, denied in part plaintiff's motion for partial summary judgment against defendant Buffalo Auto Rental, Inc. and denied the cross motion of defendant Buffalo Auto Rental, Inc. for summary judgment dismissing the complaint against it.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when a vehicle driven by defendant Maurice Mayfield, in which plaintiff was a passenger, collided with another vehicle. Shortly before the accident, Mayfield's mother, defendant Julie Robertson, obtained insurance coverage for the vehicle and executed a bill of sale indicating that she had purchased the vehicle from defendant Buffalo Auto Rental, Inc. (BAR). On the day of the accident, however, the vehicle was still registered to and insured by BAR, and BAR's license plates remained on the vehicle. In her complaint, plaintiff alleged that both Robertson and BAR were the owners of the vehicle and were liable for Mayfield's reckless and negligent operation of the vehicle.

BAR moved for summary judgment dismissing the complaint against it, contending that it was not the legal owner of the vehicle and was not estopped from denying ownership. In the order in appeal No. 1, Supreme Court, inter alia, denied that motion, and BAR appeals from that part of the order that denied its motion. Thereafter, plaintiff moved for summary judgment against BAR "on the issues of negligence and serious injury" and contended, inter alia, that BAR is estopped

from denying ownership of the vehicle. BAR cross-moved for summary judgment dismissing the complaint against it on the grounds that Mayfield was not a permissive user of the vehicle, BAR could not be liable for Mayfield's intentional acts and plaintiff was precluded from recovering for her injuries due to her voluntary participation in illegal or wantonly reckless conduct. In the order in appeal No. 2, the court granted plaintiff's motion to the extent that it concluded that BAR was estopped from denying ownership of the vehicle. The court otherwise denied plaintiff's motion on the issues of negligence and serious injury, as well as BAR's cross motion. BAR appeals from that order, and plaintiff cross-appeals from only that part of the order that denied her motion for summary judgment on the issue of negligence. We now affirm.

Contrary to BAR's contention in both appeals, the court properly determined that BAR was estopped from denying ownership of the vehicle as a matter of law. Even assuming, arguendo, that it was the intention of BAR and Robertson that Robertson was to be the legal owner of the vehicle after she executed the bill of sale and took physical possession of the vehicle (*see Godfrey v G.E. Capital Auto Lease, Inc.*, 89 AD3d 471, 477 [1st Dept 2011], *lv dismissed* 18 NY3d 951 [2012], *lv denied* 19 NY3d 816 [2012]), we conclude that the issue of legal ownership is not determinative. "Whether or not [BAR] was still the owner of the motor vehicle at the time of the accident need not be determined; [BAR], having left [its] registration plates on the motor vehicle, is estopped to deny [its] ownership" as against plaintiff (*Nelson v Alonge*, 286 App Div 921, 921 [4th Dept 1955]; *see Dairylea Coop. v Rossal*, 64 NY2d 1, 10 [1984]; *Madafferi v Herring*, 104 AD3d 1293, 1294 [4th Dept 2013]; *cf. Godfrey*, 89 AD3d at 477). Contrary to BAR's contention, the fact that Robertson had obtained insurance for the vehicle does not mandate a different result inasmuch as the public policy reasons for the estoppel doctrine are not limited to issues of insurance coverage (*see Phoenix Ins. Co. v Guthiel*, 2 NY2d 584, 587-588 [1957]; *Switzer v Aldrich*, 307 NY 56, 59 [1954]; *see also* Vehicle and Traffic Law §§ 420 [1]; 2113).

Plaintiff contends, in appeal No. 2, that the court erred in denying that part of her motion for summary judgment on the issue of negligence. We reject that contention. Plaintiff failed to establish as a matter of law that Mayfield was negligent in his operation of the vehicle. Although plaintiff submitted evidence that Mayfield was operating the vehicle in excess of 100 miles per hour at the time of the accident, plaintiff also submitted deposition testimony from Mayfield in which he stated that, at the time of the accident, another vehicle "was chasing" his vehicle; that the driver of that other vehicle was acting "aggressive[ly]"; and that Mayfield "felt like [he had to] get out of there." "[W]hen an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context" (*Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327 [1991], *rearg denied* 77 NY2d 990 [1991]). In our view, plaintiff's

own evidence raises triable issues of fact whether Mayfield was faced with an emergency situation and, as a result, the burden never shifted to BAR to raise a triable issue of fact (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Relying on evidence that Mayfield may have been drag racing with a friend at the time of the accident, BAR contends in appeal No. 2 that it was entitled to summary judgment dismissing the complaint against it because "[a] vehicle owner cannot be held vicariously liable for personal injuries caused by a permissive user's intentional acts" (*Gomez v Singh*, 309 AD2d 620, 621 [1st Dept 2003]). We reject that contention as well. As noted above, there are triable issues of fact whether Mayfield was drag racing with another vehicle and, even assuming that he was, we conclude that "the term 'negligence' in [Vehicle and Traffic Law §] 388 is sufficiently broad to include gross negligence and reckless acts" such as drag racing (*Lynch-Fina v Paredes*, 164 Misc 2d 963, 964 [Sup Ct, Queens County 1995]; *see Keller v Kruger*, 39 Misc 3d 720, 725 [Sup Ct, Kings County 2013]). This is not a situation in which the operator used the vehicle to strike another person (*cf. Gomez*, 309 AD2d at 620-621; *Beddingfield v LaBarbera*, 276 AD2d 575, 575 [2d Dept 2000]; *Marchetti v Avis Rent-A-Car Sys.*, 249 AD2d 518, 518 [2d Dept 1998]).

BAR further contends in appeal No. 2 that it was entitled to summary judgment dismissing the complaint against it on the ground that plaintiff is precluded from recovering for her injuries because she encouraged or participated in "grossly reckless conduct that created a grave risk to the public" (*Hathaway v Eastman*, 122 AD3d 964, 966 [3d Dept 2014], *lv denied* 25 NY3d 904 [2015]; *see generally Manning v Brown*, 91 NY2d 116, 122 [1997]; *Barker v Kallash*, 63 NY2d 19, 25-26 [1984]). Contrary to BAR's contention, it failed to establish as a matter of law that plaintiff encouraged or participated in the alleged drag racing inasmuch as BAR submitted portions of plaintiff's deposition testimony in which she contended that she and the other passengers repeatedly asked Mayfield to slow down (*cf. Hathaway*, 122 AD3d at 966-967).

Finally, BAR contends in appeal No. 2 that, even if it is deemed an owner of the vehicle, it was entitled to summary judgment dismissing the complaint against it because Mayfield did not have BAR's permission to use the vehicle. That contention lacks merit. Where, as here, "the owner of a vehicle places it under the unrestricted control of a second person, the owner's consent to use of the vehicle may reasonably be found to extend to a third person whom the second person permits to drive it" (*Bernard v Mumuni*, 22 AD3d 186, 188 [1st Dept 2005], *affd* 6 NY3d 881 [2006]). BAR's own submissions established that it gave Robertson unrestricted control of the vehicle and that Mayfield operated the vehicle with Robertson's permission.

We thus conclude that the court properly determined that BAR was estopped from denying ownership of the vehicle and properly denied the remainder of plaintiff's motion in appeal No. 2, and denied BAR's

motion and cross motion in appeal Nos. 1 and 2.

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

497

CA 17-00801

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

DANNY P. DUNN, SR. AND ANITA L. DUNN, PLAINTIFFS,

V MEMORANDUM AND ORDER

COUNTY OF NIAGARA, DEFENDANT-APPELLANT,
RUSSELL JACKMAN, FOURTH DISTRICT NIAGARA COUNTY
CORONER, AND RUSSELL JACKMAN, INDIVIDUALLY,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

WEBSTER SZANYI LLP, BUFFALO (KEVIN COPE OF COUNSEL), FOR DEFENDANT-APPELLANT.

LEWIS & LEWIS, P.C., BUFFALO (MICHAEL T. COUTU OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Mark Montour, J.), entered January 10, 2017. The order, insofar as appealed from, granted in part the motion of defendant Russell Jackman for summary judgment by determining that defendant County of Niagara is obligated to provide him with a defense.

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

Memorandum: On April 13, 2012, Russell Jackman (defendant), then a coroner employed by defendant County of Niagara (County), responded to the fatal accident of plaintiffs' son (decedent) and absconded with decedent's brain matter, without plaintiffs' consent. Defendant gave the brain matter to defendant Vincent Salerno, the Fire Chief of defendant Cambria Volunteer Fire Company, Inc., for use in training cadaver dogs. Defendant thereafter pleaded guilty to obstructing governmental administration in the second degree, and resigned. Plaintiffs commenced this action sounding in negligent infliction of emotional distress against, inter alia, defendant, in his capacity as County coroner and individually, as well as the County. In his answer, defendant asserted a cross claim against the County for indemnification and/or contribution from the County, and the County likewise interposed a cross claim against defendant for contribution and/or indemnification. Defendant thereafter moved for summary judgment dismissing the County's cross claim against him and seeking a determination that, inter alia, the County is obligated to defend and indemnify him pursuant to Public Officers Law § 18. Supreme Court

granted the motion in part, determining that the County must provide defendant with a defense by an attorney of his choosing and must reimburse defendant for his legal costs incurred to the date of the order. We agree with the County that the court should have denied defendant's motion in its entirety.

Initially, we note that the County contends for the first time on appeal that defendant's motion should have been addressed pursuant to the standard provided under CPLR article 78 and we therefore do not address that contention (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

We agree with the County, however, that defendant's summary judgment motion should have been denied in its entirety. A county's duty to defend an employee "turns on whether [the employee was] acting within the scope of [his or her] employment," and whether the obligation to defend the employee "was formally adopted by a local governing body" (*Grasso v Schenectady County Pub. Lib.*, 30 AD3d 814, 818 [3d Dept 2006]; *see* Public Officers Law § 18 [1] [a], [b]; [2] [a]; [3] [a]; *Matter of Coker v City of Schenectady*, 200 AD2d 250, 252-253 [3d Dept 1994], *appeal dismissed* 84 NY2d 1027 [1995]). In order to establish its prima facie entitlement to judgment as a matter of law under Public Officers Law § 18, it was incumbent on defendant to establish the applicability of that section (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Here, the court erred in granting summary judgment to defendant while still finding that there are issues of fact that bear on the applicability of Public Officers Law § 18 to defendant's claims (*see generally* CPLR 3212 [b]; *Zuckerman v New York*, 49 NY2d 557, 562 [1980]). We note that defendant's contention that the County had adopted Public Officers Law § 18 was raised for the first time in his reply papers and was not properly before the court (*see generally Mikulski v Battaglia*, 112 AD3d 1355, 1356 [4th Dept 2013]).

Moreover, we agree with the County that the court should have applied County Law § 501 in determining whether the County was obligated to defend defendant (*see generally Hennessy v Robinson*, 985 F Supp 283, 286-287 [ND NY 1997]). Pursuant to that statute, because the complaint created an inherent conflict between defendant and the County over whether defendant's actions occurred in the scope of his employment, the County was absolved of its responsibility to defend defendant and defendant's retention of outside counsel was "at his own expense unless the provisions of [Public Officers Law § 18] are applicable" (§ 501 [2]), which as discussed herein cannot be determined in the context of defendant's motion for summary judgment.

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

502

KA 16-00920

PRESENT: CENTRA, J.P., DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES DIMON, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB 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 (James H. Cecile, A.J.), rendered January 6, 2015. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence imposed to an indeterminate term of imprisonment of 1 to 3 years and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of burglary in the third degree (Penal Law § 140.20). Preliminarily, we agree with defendant that he did not validly waive his right to appeal (*see People v Elioff*, 152 AD3d 1158, 1159 [4th Dept 2017], *lv denied* 29 NY3d 1126 [2017]; *People v Homer*, 151 AD3d 1949, 1949 [4th Dept 2017], *lv denied* 30 NY3d 950 [2017]). We further agree with defendant that the 2-to-6-year term of imprisonment imposed by County Court is unduly harsh and severe, and we therefore modify the judgment as a matter of discretion in the interest of justice by reducing the sentence to a term of imprisonment of 1 to 3 years (*see generally People v Meacham*, 151 AD3d 1666, 1670 [4th Dept 2017], *lv denied* 30 NY3d 981 [2017]).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

512

CAF 17-00252

PRESENT: CENTRA, J.P., DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

IN THE MATTER OF AMOLLYAH B., BRINNLEY B., BROOKLYN B., AND VANESSAH B.

JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

TIFFANY R., RESPONDENT-APPELLANT.

MEMORANDUM AND ORDER

THE SAGE LAW FIRM GROUP, PLLC, BUFFALO (KATHRYN FRIEDMAN OF COUNSEL), FOR RESPONDENT-APPELLANT.

DAVID J. PAULSEN, COUNTY ATTORNEY, WATERTOWN (ARTHUR C. STEVER, IV, OF COUNSEL), FOR PETITIONER-RESPONDENT.

CARRIE M. MASON, ADAMS, ATTORNEY FOR THE CHILDREN.

MELISSA L. KOFFS, CHAUMONT, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Jefferson County (Eugene J. Langone, Jr., J.), entered January 4, 2017 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, modified the permanency goal for the subject children to placement for adoption or placement with a relative.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order in which Family Court modified the permanency goals with respect to the mother's four children from reunification to adoption or placement with a relative.

We conclude that the mother's appeal must be dismissed. Initially, we note that the mother did not appeal from the order of fact-finding and disposition in which the court made a finding of neglect. Consequently, because the mother failed to appeal from that order, her contentions with respect to the finding of neglect are not properly before us in this appeal from a permanency order (*see generally Matter of Arkadian S. [Crystal S.]*, 130 AD3d 1457, 1458 [4th Dept 2015], *lv dismissed* 26 NY3d 995 [2015]; *Matter of Breeyanna S.*, 52 AD3d 342, 342-343 [1st Dept 2008], *lv denied* 11 NY3d 711 [2008]; *Matter of James H.*, 281 AD2d 920, 920-921 [4th Dept 2001], *appeal dismissed* 96 NY2d 896 [2001], *cert denied* 534 US 1090 [2002]). Furthermore, the mother's challenge to the permanency order must be

dismissed as moot inasmuch as superseding permanency orders have since been entered (*see Matter of Anthony L. [Lisa P.]*, 144 AD3d 1690, 1691 [4th Dept 2016], *lv denied* 28 NY3d 914 [2017]; *Matter of Alexander M. [Michael M.]*, 83 AD3d 1400, 1401 [4th Dept 2011], *lv denied* 17 NY3d 704 [2011]; *Breeyanna S.*, 52 AD3d at 342).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

516

CA 17-01874

PRESENT: CENTRA, J.P., DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

WILMINGTON SAVINGS FUND SOCIETY, FSB, DOING BUSINESS AS CHRISTIANA TRUST, NOT IN ITS INDIVIDUAL CAPACITY BUT SOLELY AS LEGAL TITLE TRUSTEE FOR BRONZE CREEK TITLE TRUST 2013-NPL1, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

UNKNOWN HEIRS AT LAW OF DANNY HIGDON, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

KNUCKLES, KOMOSINSKI & MANFRO, LLP, ELMSFORD (JORDAN J. MANFRO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SCOTT BIELICKI, SHERRILL, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered December 27, 2016. The order granted the motion of defendants-respondents to dismiss the supplemental complaint.

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

Memorandum: Plaintiff commenced this foreclosure action in February 2015, alleging that the mortgage given by Danny Higdon (decedent) and subsequently assigned to plaintiff went into default on September 1, 2008. Timely payments continued to be made on the loan secured by the mortgage for more than a year after decedent's death in January 2007. Plaintiff appeals from an order that granted the motion of defendants-respondents (defendants) to dismiss the supplemental complaint on the ground that the action is time-barred by the six-year statute of limitations (*see* CPLR 213 [4]; 3211 [a] [5]). We reverse.

We agree with plaintiff that Supreme Court erred in granting the motion inasmuch as defendants failed to meet their initial burden of establishing that the action is time-barred. Where, as here, a loan secured by a mortgage is payable in installments, separate causes of action accrue for each unpaid installment, and the statute of limitations begins to run on the date that each installment becomes due (*see Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 754 [2d Dept 2010]; *United States of Am. v Quaintance*, 244 AD2d 915, 915-916 [4th

Dept 1997], *lv dismissed* 91 NY2d 957 [1998]). Thus, unless the entire debt had been accelerated by the mortgage holder, on the date of a default the statute of limitations begins to run only for the installment payment that became due on that date (*see Business Loan Ctr., Inc. v Wagner*, 31 AD3d 1122, 1123 [4th Dept 2006]; *EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2d Dept 2001]).

Here, defendants' own submissions in support of the motion establish that the mortgage is an installment mortgage, the installment payments are due monthly until January 1, 2035, and defendants defaulted on the payment that was due September 1, 2008. Further, defendants failed to establish that plaintiff accelerated the debt by demanding payment of the entire loan or by commencing a prior foreclosure action. Thus, the action was timely commenced inasmuch as the statute of limitations did not begin to run on the entire debt until the instant action was commenced on February 20, 2015.

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

517

CA 17-02018

PRESENT: CENTRA, J.P., DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

CORTNEY WOJTALEWSKI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CENTRAL SQUARE CENTRAL SCHOOL DISTRICT AND
ROBERT WILLS, DEFENDANTS-RESPONDENTS.

FOLEY & FOLEY, PALMYRA (MICHAEL STEINBERG OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PETRONE & PETRONE, P.C., UTICA (MARK J. HALPIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered July 3, 2017. The judgment, insofar as appealed from, awarded defendants fees, costs and disbursements upon a jury verdict in defendants' favor, after Supreme Court denied plaintiff's pretrial cross motion for leave to amend the complaint.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, the award of fees, costs and disbursements is vacated, the cross motion is granted upon condition that plaintiff shall serve the proposed amended complaint with two causes of action, for battery and respondeat superior, within 20 days of service of a copy of the order of this Court with notice of entry, and a new trial is granted in accordance with the following memorandum: Plaintiff, a high school student, commenced this negligence action seeking damages for injuries she allegedly sustained when a teacher, defendant Robert Wills, struck her in the back of the head. Plaintiff alleged that the incident occurred on a certain date and time while she was sitting in an auditorium at Paul V. Moore High School for a school assembly. Supreme Court denied plaintiff's cross motion seeking leave to amend her complaint to add a cause of action against Wills for battery and a cause of action against defendant Central Square Central School District based on the doctrine of respondeat superior. The case proceeded to trial, and the jury returned a verdict in favor of defendants after finding that Wills was not negligent. Plaintiff, as limited by her brief, appeals from the ensuing judgment, contending that the court erred in denying her cross motion for leave to amend her complaint. She does not contend that the judgment should be reversed insofar as the jury found that Wills was not negligent.

We agree with plaintiff that the court abused its discretion in

denying the cross motion (*see Holst v Liberatore*, 105 AD3d 1374, 1374 [4th Dept 2013]; *Boxhorn v Alliance Imaging, Inc.*, 74 AD3d 1735, 1735 [4th Dept 2010]). It is well settled that, "[i]n the absence of prejudice or surprise, leave to amend a pleading should be freely granted" (*Boxhorn*, 74 AD3d at 1735; *see* CPLR 3025 [b]; *Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014]). Plaintiff established that the relation-back doctrine applied for statute of limitations purposes with respect to the battery cause of action, which was based on the same facts and occurrence as the negligence cause of action and thus related back to the original complaint (*see* CPLR 203 [f]; *Taylor v Deubell*, 153 AD3d 1662, 1662 [4th Dept 2017]; *Boxhorn*, 74 AD3d at 1735; *Bilhorn v Farlow*, 60 AD2d 755, 755 [4th Dept 1977]). In opposition to the cross motion, defendants failed to establish that they would be prejudiced by plaintiff's delay in seeking leave to amend the complaint (*see Holst*, 105 AD3d at 1374; *Boxhorn*, 74 AD3d at 1736; *see generally Kimso Apts., LLC*, 24 NY3d at 411), inasmuch as the new causes of action were based upon the same facts as the negligence cause of action in the original complaint (*see Ciminello v Sullivan*, 120 AD3d 1176, 1177 [2d Dept 2014]; *Maloney Carpentry, Inc. v Budnik*, 37 AD3d 558, 558-559 [2d Dept 2007]; *Bilhorn*, 60 AD2d at 755).

Defendants argued in opposition to the cross motion that plaintiff failed to proffer any excuse for her delay in seeking leave to amend the complaint, but " '[m]ere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side' " (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]; *see Putrelo Constr. Co. v Town of Marcy*, 137 AD3d 1591, 1593 [4th Dept 2016]; *Ciminello*, 120 AD3d at 1177). Therefore, although plaintiff provided no excuse for her delay in seeking leave to amend, that is of no moment because, as noted above, defendants have not shown that they were prejudiced by the delay (*see Putrelo Constr. Co.*, 137 AD3d at 1593). We further reject defendants' contention that the proposed amendment was patently insufficient on its face (*see id.*; *Holst*, 105 AD3d at 1374-1375). To the extent that defendants raise on appeal an alternative ground for affirmance (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]), we conclude that it lacks merit.

We therefore reverse the judgment insofar as appealed from, vacate the award of fees, costs and disbursements, grant the cross motion upon condition that plaintiff shall serve the proposed amended complaint with two causes of action, for battery and respondeat superior, within 20 days of service of a copy of the order of this Court with notice of entry, and grant a trial only on the new causes of action in the amended complaint after defendants are afforded the opportunity for motion practice with respect thereto.

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

526

KA 16-01317

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAWN HERRINGTON, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. LOWRY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered July 19, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [2]). As the People correctly concede, defendant's waiver of the right to appeal does not encompass his challenge to the severity of the sentence because "no mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal his conviction that he was also waiving his right to appeal any issue concerning the harshness of his sentence" (*People v Tomeno*, 141 AD3d 1120, 1120-1121 [4th Dept 2016], *lv denied* 28 NY3d 974 [2016] [internal quotation marks omitted]; *see People v Maracle*, 19 NY3d 925, 928 [2012]). We nevertheless conclude that the sentence is not unduly harsh or severe. Indeed, we note that Supreme Court imposed the minimum permissible sentence.

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

532

KA 16-00921

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TARELL SMITH, ALSO KNOWN AS SHELLITO DONMORE,
DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (JULIE BENDER FISKE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered March 9, 2016. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to defendant's contention, County Court properly refused to suppress the weapon that was secured by the police from the street where defendant threw it following the stop of the vehicle in which he was a passenger at a traffic safety checkpoint. We conclude that, although the court properly determined that the stop was unlawful, it further properly determined that suppression of the weapon was not warranted inasmuch as defendant's act of pulling a weapon from his waistband and pointing it at another individual " 'was an independent act, not the direct result of, and therefore not tainted by, the illegal [stop]' " (*People v Fussello*, 265 AD2d 838, 838 [4th Dept 1999], *lv denied* 94 NY2d 823 [1999]; *see People v Mercado*, 229 AD2d 550, 551 [2d Dept 1996], *lv denied* 88 NY2d 1070 [1996]).

Contrary to the assertion of the People on appeal, we conclude that defendant preserved for our review his contentions with respect to the legal insufficiency of the evidence by making an appropriate motion for a trial order of dismissal (*see People v Gray*, 86 NY2d 10, 19 [1995]). We nevertheless reject defendant's contentions on the merits. The fact that no prosecution witness testified that the weapon thrown from the vehicle was the same weapon secured by the

police does not render the evidence legally insufficient. "The only reasonable inference that could be drawn from the chain of evidence in this . . . incident was that the loaded, operable pistol recovered by the police immediately after the crime was the same weapon that was used by [defendant]" (*People v Torres*, 32 AD3d 796, 796 [1st Dept 2006], *lv denied* 8 NY3d 850 [2007]). Similarly, we conclude that minor variations in how prosecution witnesses described the weapon and a clerical error in the date on a laboratory form do not render the evidence legally insufficient (*see People v Grant*, 194 AD2d 348, 351 [1st Dept 1993], *lv denied* 82 NY2d 754 [1993]; *see also People v Daniels*, 147 AD3d 1392, 1393 [4th Dept 2017], *lv denied* 29 NY3d 1077 [2017]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Finally, viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

534

KA 16-00005

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARNELL CREDELL, DEFENDANT-APPELLANT.

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

DARNELL CREDELL, DEFENDANT-APPELLANT PRO SE.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (HARMONY A. HEALY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered November 30, 2015. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). At trial, a confidential informant identified defendant as the man who sold him drugs. This testimony was corroborated by an audio recording of the transaction, as well as by the undisputed fact that the informant entered the subject apartment with buy money and exited it with crack cocaine. Morever, while testifying in his own defense, defendant essentially admitted to being the informant's drug dealer. There is no basis to disturb the jury's credibility determinations. Thus, contrary to defendant's contention, we conclude that, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), the verdict is not against the weight of the evidence on the element of identity (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). In fact, a different verdict would have been unreasonable (*see generally id.*).

Contrary to defendant's further contention, County Court properly admitted evidence of his prior uncharged drug sales to prove his intent to sell in connection with the crimes charged, as well as to complete the narrative of events leading up thereto (*see People v*

Whitfield, 115 AD3d 1181, 1182 [4th Dept 2014], *lv denied* 23 NY3d 1044 [2014]; *People v Ray*, 63 AD3d 1705, 1706 [4th Dept 2009], *lv denied* 13 NY3d 838 [2009]; *People v Tabora*, 139 AD2d 540, 541 [2d Dept 1988], *lv denied* 72 NY2d 925 [1988]). We reject defendant's related contention that the prejudicial effect of such evidence outweighed its probative value (*see People v Lee*, 129 AD3d 1295, 1298 [3d Dept 2015], *lv denied* 27 NY3d 1001 [2016]; *Whitfield*, 115 AD3d at 1182). In any event, any error in admitting the disputed evidence is harmless (*see People v Graham*, 117 AD3d 1584, 1585 [4th Dept 2014], *lv denied* 23 NY3d 1037 [2014]).

Defendant next contends that the court erred in refusing to suppress a scale recovered pursuant to a search warrant. Even assuming, arguendo, that the scale should have been suppressed, we conclude that any error is harmless (*see People v Burdine*, 147 AD3d 1471, 1472 [4th Dept 2017], *amended on rearg* 149 AD3d 1626 [4th Dept 2017], *lv denied* 29 NY3d 1076 [2017]). The sentence is not unduly harsh or severe. We have considered defendant's remaining contentions, including those raised in his pro se supplemental brief, and we conclude that none warrants relief.

Finally, we note that the uniform sentence and commitment form must be corrected to reflect that defendant was convicted of criminal possession of a controlled substance in the third degree under count two of the indictment and not under count one, as it currently states.

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

540

CA 17-01948

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

MICHAEL C. TENNANT, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF ISABELLA SARA TENNANT, A DECEASED INFANT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SHARON R. LASCELLE AND HENRY C. LASCELLE, DEFENDANTS-RESPONDENTS.

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

LAW OFFICE OF VICTOR M. WRIGHT, ORCHARD PARK (RACHEL A. EMMINGER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Daniel Furlong, J.), entered February 10, 2017. The order granted defendants' motion for summary judgment dismissing plaintiff's complaint.

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

Memorandum: On the night of August 26, 2015, plaintiff's five-year-old daughter, Isabella Sara Tennant, was entrusted to the care of her great-grandmother, Sharon R. Lascelle (defendant). Around 10:00 p.m., defendant went to bed and allowed Isabella to color with nonparty John Freeman, Jr., a 16-year-old neighbor of defendant and the boyfriend of defendant's granddaughter. Shortly thereafter, while defendant was asleep, Freeman murdered Isabella and stuffed her body in an exterior garbage bin. Freeman confessed the crime to the police, but he could not explain why he spontaneously murdered Isabella.

Plaintiff subsequently commenced the instant action and alleged, inter alia, that his daughter's murder was caused by defendants' negligent supervision on the night in question. Following discovery, Supreme Court granted defendants' motion for summary judgment dismissing the complaint. We now affirm and note, as a preliminary matter, that plaintiff has effectively abandoned on appeal any claim against defendant Henry C. Lascelle (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

It is well established that " 'an intervening intentional or criminal act will generally sever the liability of the original

tort-feasor' " (*Turturro v City of New York*, 28 NY3d 469, 484 [2016], quoting *Kush v City of Buffalo*, 59 NY2d 26, 33 [1983]). "The test to be applied is whether under all the circumstances the chain of events that followed [an allegedly] negligent act or omission was a normal or foreseeable consequence of the situation created by the [alleged] negligence" (*Mirand v City of New York*, 84 NY2d 44, 50 [1994]). Thus, an intervening criminal act by a third party that is " 'extraordinary under the circumstances' " or " 'not foreseeable in the normal course of events' " breaks the causal chain and exonerates the original tortfeasor of liability (*Maheshwari v City of New York*, 2 NY3d 288, 295 [2004]).

Here, even assuming, arguendo, that defendant was negligent to some extent in supervising Isabella on the night in question, we nevertheless conclude, as a matter of law, that Freeman's intentional murder of Isabella severed the chain of causation and eliminated any liability on defendant's part (*see id.*). The record contains numerous undisputed facts supporting that conclusion. Freeman had previously watched Isabella on more than 10 occasions, all without incident, and they had even colored together before. Freeman and Isabella got along well for years before the murder, and defendant never observed any "red flags" or troubling indicia about Freeman generally, or his interactions with Isabella in particular. Defendant was unaware of any mental problems with Freeman. Indeed, there is no suggestion that Freeman had ever exhibited any questionable behavior or tendencies in the past, whether or not known to defendant.

In sum, there is nothing in the record to indicate that a reasonable person could have foreseen the extraordinary, inexplicable, and spontaneous homicidal violence that Freeman unleashed upon Isabella. "While it is true that these issues generally present questions of fact, there must be some foundation upon which the question of foreseeability of harm may be predicated, i.e., at least a minimal showing as to the existence of actual or constructive notice" (*Schrader v Board of Educ. of Taconic Hills Cent. Sch. Dist.*, 249 AD2d 741, 743 [3d Dept 1998], *lv denied* 92 NY2d 806 [1998]). There was no such minimal showing in this case. Summary judgment to the supervisor—defendant—is therefore appropriate on this record (*see Brandy B. v Eden Cent. Sch. Dist.*, 15 NY3d 297, 302 [2010]; *Lillian C. v Administration for Children's Servs.*, 48 AD3d 316, 317 [1st Dept 2008]; *Lisa P. v Attica Cent. Sch. Dist.*, 27 AD3d 1080, 1080-1082 [4th Dept 2006]; *Schrader*, 249 AD2d at 742-744; *Belinda L.G. v Fresh Air Fund*, 183 AD2d 430, 430-431 [1st Dept 1992]; *Adolph E. v Linda M.*, 170 AD2d 1011, 1011-1012 [4th Dept 1991], *lv denied* 77 NY2d 809 [1991]; *but see Mary A. ZZ. v Blasen*, 284 AD2d 773, 775 [3d Dept 2001]).

Plaintiff's contrary contentions are unavailing. First, plaintiff's reliance on *Phelps v Boy Scouts of Am.* (305 AD2d 335 [1st Dept 2003]) is misplaced; in that case, the plaintiffs submitted evidence indicating that the defendant supervisor had notice that older campers were sexually and physically attacking younger campers. Second, defendant never conceded that the murder was a reasonably foreseeable consequence of allowing Freeman to watch Isabella on the

night in question; to the contrary, defendant consistently maintained during motion practice that the "foreseeable harm [under the circumstances presented here] does not include the arbitrary, cold-blooded murder by a trusted friend in one's own home." Third, the fact that Isabella's mother had previously voiced vague expressions of disapproval about the occasional presence of neighborhood teenagers in defendant's home does not constitute a basis to foresee later violent conduct by one such teenager (*see Brandy B.*, 15 NY3d at 302-303; *Doe v Rohan*, 17 AD3d 509, 511-512 [2d Dept 2005], *lv denied* 6 NY3d 701 [2005]). Fourth, the fact that Freeman might have been "bickering" with his girlfriend in the hours before Isabella arrived at defendant's home does not create a triable issue of fact regarding the foreseeability of Freeman's later homicidal violence against Isabella, who had nothing to do with the "bickering." Fifth and finally, plaintiff's bald assertion that it is inherently foreseeable that a 16-year-old male might injure or kill an unrelated five-year-old female in his care is nothing more than invidious gender stereotyping, which we cannot countenance (*see generally People v King*, 27 NY3d 147, 170 [2016] [Rivera, J., dissenting]).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

552

KA 16-01445

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HAKIM OWENS, DEFENDANT-APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered September 23, 2015. The judgment convicted defendant, upon a jury verdict, of kidnapping in the second degree and attempted kidnapping in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of kidnapping in the second degree (Penal Law § 135.20) and attempted kidnapping in the second degree (§§ 110.00, 135.20). The conviction arises from separate incidents on the same night involving defendant, his codefendant and two female victims (*see People v Manning*, 151 AD3d 1936 [4th Dept 2017], *lv denied* 30 NY3d 951 [2017]). The People presented evidence at trial that defendant, dressed as an FBI agent, left a costume party with the codefendant in an SUV. They encountered a woman (first victim) walking, identified themselves as FBI agents, and tried unsuccessfully to pull her into the SUV. Defendant and the codefendant left the scene in the SUV and shortly thereafter encountered another woman (second victim) walking. They again identified themselves as FBI agents, one of them placed the second victim in handcuffs, and the codefendant lifted her into the back seat of the SUV. While two police officers were interviewing the first victim, they noticed the SUV driving past them and pursued it in their patrol car. Defendant stopped the SUV and fled on foot, and another police officer stopped and arrested defendant after pursuing him on foot.

As we previously determined on the appeal of codefendant, having viewed the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see Manning*, 151 AD3d at 1938).

We reject defendant's contention that he was deprived of a fair trial when the prosecutor pointed at the defense table as he questioned the first victim concerning her previous identification of defendant at a showup procedure. Even assuming, arguendo, that the prosecutor's conduct was improper, we conclude that it was not so egregious that it deprived defendant of a fair trial (*see generally People v Terborg*, 156 AD3d 1320, 1321 [4th Dept 2017]).

County Court properly denied defendant's motion to suppress the first victim's identification testimony on the ground that the showup procedure was unduly suggestive. The People established that the showup procedure was conducted in "geographic and temporal proximity to the crime" (*People v Ortiz*, 90 NY2d 533, 537 [1997]; *see People v Dangerfield*, 140 AD3d 1626, 1627 [4th Dept 2016], *lv denied* 28 NY3d 928 [2016]), and the fact that the first victim viewed defendant after he got out of a patrol car did not render the procedure unduly suggestive (*see People v Wilson*, 104 AD3d 1231, 1232 [4th Dept 2013], *lv denied* 21 NY3d 1011 [2013], *reconsideration denied* 21 NY3d 1078 [2013]).

Defendant did not challenge the legality of his pursuit, detention or arrest by the police officers in his omnibus motion or at the suppression hearing. Thus, his contentions that his pursuit, detention and arrest were illegal, and that the showup identification was the fruit of an illegal arrest, are not preserved for our review (*see People v Hudson*, 158 AD3d 1087, 1087 [4th Dept 2018]).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

553

KA 17-01877

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SABRINA T. LIVERMORE, DEFENDANT-APPELLANT.

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

VALERIE G. GARDNER, DISTRICT ATTORNEY, PENN YAN (MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (W. Patrick Falvey, J.), rendered March 1, 2016. The judgment convicted defendant, upon her plea of guilty, of aggravated vehicular homicide and driving while intoxicated.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of aggravated vehicular homicide (Penal Law § 125.14 [5]) and driving while intoxicated (Vehicle and Traffic Law § 1192 [2]). Contrary to defendant's contention, we conclude that the record establishes that County Court "conducted an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Davis*, 129 AD3d 1613, 1613 [4th Dept 2015], *lv denied* 26 NY3d 966 [2015] [internal quotation marks omitted]), and that "[t]he plea colloquy, together with the written waiver of the right to appeal, adequately apprised defendant that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Williams*, 132 AD3d 1291, 1291 [4th Dept 2015], *lv denied* 26 NY3d 1151 [2016] [internal quotation marks omitted]; *see People v Lopez*, 6 NY3d 248, 256 [2006]). Contrary to defendant's further contention, the court "was not required to specify during the colloquy which specific claims survive the waiver of the right to appeal" (*People v Rodriguez*, 93 AD3d 1334, 1335 [4th Dept 2012], *lv denied* 19 NY3d 966 [2012]; *see People v Kosty*, 122 AD3d 1408, 1408 [4th Dept 2014], *lv denied* 24 NY3d 1220 [2015]).

Defendant's contention that her plea was not knowing, intelligent, and voluntary because she simply replied "yes" and "no" to many of the court's questions is actually a challenge to the

factual sufficiency of the plea allocution, which is encompassed by the valid waiver of the right to appeal (*see People v Simcoe*, 74 AD3d 1858, 1859 [4th Dept 2010], *lv denied* 15 NY3d 778 [2010]). Defendant's further contention that a certain response made by her during the plea colloquy implied that she did not operate the vehicle recklessly is also a challenge to the factual sufficiency of the plea allocution, and that challenge is also encompassed by her valid waiver of the right to appeal (*see Kosty*, 122 AD3d at 1408). In any event, defendant failed to preserve her contentions for our review because she did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Darling*, 125 AD3d 1279, 1279 [4th Dept 2015], *lv denied* 25 NY3d 1071 [2015]), and this case does not fall within the narrow exception to the preservation rule (*see People v Lopez*, 71 NY2d 662, 666 [1988]).

To the extent that defendant's contention that she was denied effective assistance of counsel survives her plea and her valid waiver of the right to appeal (*see People v Cotton*, 119 AD3d 1452, 1452-1453 [4th Dept 2014]) and is reviewable upon this record, we conclude that it is without merit (*see People v Long*, 151 AD3d 1886, 1886 [4th Dept 2017]; *see generally People v Ford*, 86 NY2d 397, 404 [1995]). To the extent that defendant's contention regarding ineffective assistance of counsel is based upon matters outside the record, it is not properly before us and must be raised by way of a motion pursuant to CPL article 440 (*see People v Mulcahy*, 155 AD3d 1594, 1594-1595 [4th Dept 2017], *lv denied* 30 NY3d 1107 [2018]; *People v Jones*, 147 AD3d 1521, 1521-1522 [4th Dept 2017], *lv denied* 29 NY3d 1033 [2017]).

Finally, defendant's valid waiver of the right to appeal encompasses her challenge to the severity of the sentence (*see Davis*, 129 AD3d at 1615; *see generally Lopez*, 6 NY3d at 255).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

555

KA 15-00941

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT MCFADDEN, ALSO KNOWN AS JOHN DOE,
DEFENDANT-APPELLANT.

JEFFREY WICKS, PLLC, ROCHESTER (CHARLES STEINMAN 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 (John L. DeMarco, J.), rendered December 2, 2014. The judgment convicted defendant, upon a jury verdict, of manslaughter in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of manslaughter in the second degree (Penal Law § 125.15 [1]), defendant contends that he was deprived of effective assistance of counsel because his trial attorney failed to request criminally negligent homicide (§ 125.10) as a lesser included offense of intentional murder and failed to ask County Court to instruct the jury on the justification defense. We reject that contention. Although there was a reasonable view of the evidence that defendant negligently shot the victim, whom defendant claimed grabbed the barrel of defendant's loaded handgun and tried to steal it, "it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations" for defense counsel's allegedly deficient conduct (*People v Rivera*, 71 NY2d 705, 709 [1988]; *see People v Benevento*, 91 NY2d 708, 712 [1998]), and defendant failed to meet that burden (*see People v Hicks*, 110 AD3d 1488, 1489 [4th Dept 2013], *lv denied* 22 NY3d 1156 [2014]).

Indeed, it would have been a reasonable strategy for defense counsel to decide not to request criminally negligent homicide as a lesser included offense because, without that charge, the chances of defendant being acquitted outright were increased (*see generally People v Lane*, 60 NY2d 748, 750 [1983]). That is to say, if the jury believed defendant's claim that the gun went off accidently when the victim tried to steal it from him, the jury would have acquitted

defendant because it did not have the option of finding him guilty of criminally negligent homicide. If criminally negligent homicide had been charged, and the jury believed defendant's accidental shooting claim, he would have been convicted of criminally negligent homicide, a class E felony, and sentenced to prison as a second felony offender.

Defendant acknowledges, as he must, that it is reasonable for a defense attorney to adopt an " 'all-or-nothing' " strategy at trial (*id.*; *see People v Clarke*, 55 AD3d 370, 370 [1st Dept 2008], *lv denied* 11 NY3d 923 [2009]; *People v Guarino*, 298 AD2d 937, 938 [4th Dept 2002], *lv denied* 98 NY2d 768 [2002]), and that defense counsel would therefore not have been ineffective if he failed to request any lesser included offenses. Defendant nevertheless contends that, because defense counsel requested manslaughter in the first and second degrees as lesser included offenses, there was no legitimate reason not to request criminally negligent homicide as a lesser as well. Defendant cites no authority for the proposition that anything other than a complete "all-or-nothing" strategy with respect to lesser included offenses is unreasonable, and we fail to see the logic in it.

In any event, even assuming, arguendo, that defense counsel should have requested criminally negligent homicide as a lesser included offense, we note that it is well settled that the failure to request a particular lesser included offense "is not the type of 'clear cut and completely dispositive' error that rises to the level of ineffective assistance of counsel" (*People v Harris*, 97 AD3d 1111, 1112 [4th Dept 2012], *lv denied* 19 NY3d 1026 [2012], quoting *People v Turner*, 5 NY3d 476, 481 [2005]).

Defendant's contention that defense counsel was ineffective in failing to ask the court to instruct the jury on justification is similarly without merit. Defendant admitted to the police that he shot and killed the victim but claimed that he did so accidently when the victim unexpectedly grabbed the barrel of the gun. Because a person cannot accidently act in self-defense, defense counsel would have had to present inconsistent defenses to the jury had he requested the justification charge and the court granted that request. "The 'hazardous' nature of pursuing inconsistent defenses is well established, 'for it not only risks confusing the jury as to the nature of the defense but also may well taint a defendant's credibility in the eyes of the jury' " (*People v Nauheimer*, 142 AD3d 760, 761 [4th Dept 2016], *lv denied* 28 NY3d 1074 [2016], quoting *People v DeGina*, 72 NY2d 768, 777 [1988]). Here, "[c]ounsel's failure to request a [justification charge] may have been based on a reasonable strategic determination that such a charge would be counterproductive and difficult to reconcile with the accidental [shooting] claim" (*People v Poston*, 95 AD3d 729, 730-731 [1st Dept 2012], *lv denied* 19 NY3d 1104 [2012]; *see Nauheimer*, 142 AD3d at 761).

Based on our review of the record, we conclude that defense counsel afforded meaningful representation to defendant, obtaining an acquittal on the two murder counts (both intentional and felony murder, despite defendant's admission that he took the victim's cell phone after shooting him), and an acquittal on manslaughter in the

first degree. We note that several prosecution witnesses testified that they saw the shooting, and none of them observed the victim grabbing the gun, as defendant claimed to the police. Also, it would seem unlikely that the victim would try to steal a gun while it was being held by defendant with his finger on the trigger, as claimed by defendant. Yet, despite that evidence, defense counsel persuaded the jury that defendant did not intentionally shoot the victim. We also note that defendant, who was sentenced to 7½ to 15 years in prison, appeared pleased with the result at sentencing, stating that he would gladly have accepted a sentence of 20 years in prison on a plea if such an offer had been made to him. Under the circumstances, we cannot agree with defendant that he was deprived of effective assistance of counsel.

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

557

CAF 17-01742

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

IN THE MATTER OF MARK G. LOVELAND,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ERIKA N. BARNES, RESPONDENT-RESPONDENT.

IN THE MATTER OF ERIKA N. BARNES,
PETITIONER-RESPONDENT,

V

MARK G. LOVELAND, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

MULDOON, GETZ & RESTON, ROCHESTER (GARY MULDOON OF COUNSEL), FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

ERIKA N. BARNES, RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT PRO SE.

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

Appeal from an order of the Family Court, Wayne County (Dennis M. Kehoe, J.), dated December 28, 2016 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded sole custody of the subject child to Erika N. Barnes.

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

Memorandum: In appeal No. 1, petitioner-respondent father appeals from an order that, inter alia, denied his petition seeking modification of a prior custody order by awarding him sole custody of the parties' child, and granted the cross petition of respondent-petitioner mother seeking modification of the prior order of custody by awarding her sole custody of the child. In appeal No. 2, the father appeals from an order awarding attorney's fees to the mother.

We conclude in appeal No. 1 that the record supports the determination of Family Court that joint custody was no longer appropriate in light of the parties' acrimonious relationship (*see Williams v Williams*, 100 AD3d 1347, 1348 [4th Dept 2012]). We further conclude that there is a sound and substantial basis in the record to support the court's determination that it was in the child's best

interests to award sole legal custody to the mother (*see Matter of Lawson v Lawson*, 111 AD3d 1393, 1393 [4th Dept 2013]). A sound and substantial basis in the record also supports the court's determination "that the father failed to establish a change in circumstances reflecting a real need for change in the primary residence of the child[] to ensure that [his] best interests were served" (*Matter of Betro v Carbone*, 50 AD3d 1583, 1584 [4th Dept 2008]).

Contrary to the father's contention in appeal No. 2, we conclude that the court did not award attorney's fees to the mother pursuant to 22 NYCRR part 130, inasmuch as the court explicitly found that the modification proceeding initiated by the father was not frivolous. We further conclude that the court properly awarded such fees to the mother, not as a sanction against the father, but rather based upon "the equities of the case and the financial circumstances of the parties" (*Popelaski v Popelaski*, 22 AD3d 735, 738 [2d Dept 2005]; *see Griffin v Griffin*, 104 AD3d 1270, 1272 [4th Dept 2013]).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

558

CAF 17-01743

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

IN THE MATTER OF MARK G. LOVELAND,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ERIKA N. BARNES, RESPONDENT-RESPONDENT.

IN THE MATTER OF ERIKA N. BARNES,
PETITIONER-RESPONDENT,

V

MARK G. LOVELAND, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

MULDOON, GETZ & RESTON, ROCHESTER (GARY MULDOON OF COUNSEL), FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

ERIKA N. BARNES, RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT PRO SE.

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

Appeal from an order of the Family Court, Wayne County (Dennis M. Kehoe, J.), entered December 29, 2016 in a proceeding pursuant to Family Court Act article 6. The order directed Mark G. Loveland to pay $9,500 to Erika N. Barnes as and for attorney's fees.

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

Same memorandum as in *Matter of Loveland v Barnes* ([appeal No. 1] — AD3d — [May 4, 2018] [4th Dept 2018]).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

560

CAF 16-02183

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

IN THE MATTER OF TAKODA G., EMMA T., HANNAH T., AVA T., AND MIA T.

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

ONTARIO COUNTY DEPARTMENT OF SOCIAL SERVICES CHILD PROTECTIVE UNIT, PETITIONER-RESPONDENT;

JUAN T., RESPONDENT-APPELLANT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR RESPONDENT-APPELLANT.

GARY L. CURTISS, COUNTY ATTORNEY, CANANDAIGUA (SANDRA J. PACKARD OF COUNSEL), FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Ontario County (William F. Kocher, J.), entered November 25, 2016 in a proceeding pursuant to Family Court Act article 10. The order determined that respondent had neglected the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father appeals from an order granting the motion of petitioner for summary judgment on the petition, which sought a determination that the father neglected the subject children. The contentions in the father's brief in opposition to the motion are raised for the first time on appeal and therefore are not properly before us (*see Matter of Paige K. [Jay J.B.]*, 81 AD3d 1284, 1284 [4th Dept 2011]). In any event, those contentions lack merit. Petitioner moved for summary judgment following the father's conviction, upon a jury verdict, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and five counts of endangering the welfare of a child (§ 260.10 [1]) stemming from a physical altercation between the father and the children's mother during which a loaded firearm was fired inside an apartment with the children present. The father does not dispute that he had a full and fair opportunity to litigate the issue of his criminal conduct during the criminal trial, and petitioner's submissions establish that "the allegations of neglect and [the father's] subsequent criminal conviction[] 'arose out of the same incident' " (*Matter of Tavianna CC. [Maceo CC.]*, 99 AD3d 1132, 1134 [3d Dept 2012], *lv denied* 20 NY3d 856 [2013]). Contrary to the

father's contention, although he was acquitted of other criminal charges, petitioner presented sufficient evidence of the facts underlying the conviction of five counts of endangering the welfare of a child, which established that the children were in actual or imminent danger of physical, emotional or mental impairment as a result of the father's failure to exercise a minimum degree of care (*see* Family Ct Act § 1012 [f] [i] [B]; *Matter of Blima M. [Samuel M.]*, 150 AD3d 1006, 1008 [2d Dept 2017]; *Tavianna CC.*, 99 AD3d at 1134; *cf. Matter of Kaliia F. [Jason F.]*, 148 AD3d 805, 807 [2d Dept 2017]). Inasmuch as the father did not submit any opposition to petitioner's prima facie showing and therefore failed to raise a triable issue of fact, the court properly granted the motion (*see Matter of Suffolk County Dept. of Social Servs. v James M.*, 83 NY2d 178, 183 [1994]).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

561

CA 17-01946

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

CHRISTOPHER COSGROVE AND WENDY COSGROVE,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

RIVER OAKS RESTAURANTS, LLC, DOING BUSINESS AS
WENDYS, DEFENDANT-APPELLANT.

LEVENE GOULDIN & THOMPSON, LLP, VESTAL (ELIZABETH A. SOPINSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

WELCH, DONLON & CZARPLES, PLLC, CORNING (MICHAEL A. DONLON OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Steuben County (Joseph W. Latham, A.J.), entered May 24, 2017. The order, insofar as appealed from, denied defendant's motion for summary judgment dismissing plaintiffs' amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the amended complaint to the extent that it alleges that defendant had actual notice of the allegedly dangerous condition and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Christopher Cosgrove (plaintiff) when he allegedly slipped and fell on a patch of ice that was covered by a dusting of snow in defendant's parking lot. Defendant moved for summary judgment dismissing the amended complaint on the grounds that it did not have actual or constructive notice of the allegedly dangerous condition or create the condition. We conclude that Supreme Court erred in denying the motion with respect to the allegation that defendant had actual notice of the allegedly dangerous condition but otherwise properly denied the motion. We therefore modify the order accordingly.

Defendant met its initial burden with respect to actual notice by submitting evidence that it "did not receive any complaints concerning the area where plaintiff fell and [was] unaware of any [ice] in that location prior to plaintiff's accident" (*Navetta v Onondaga Galleries LLC*, 106 AD3d 1468, 1469 [4th Dept 2013]; *see Quinn v Holiday Health & Fitness Ctrs. of N.Y., Inc.*, 15 AD3d 857, 857 [4th Dept 2005]). Although defendant also submitted evidence that one of its employees slipped in a different area of the parking lot earlier that morning,

such evidence does not raise a triable issue of fact because a " '[g]eneral awareness that snow or ice may be present is legally insufficient to constitute notice of the particular condition that caused' a plaintiff to fall" (*Krieger v McDonald's Rest. of N.Y., Inc.*, 79 AD3d 1827, 1829 [4th Dept 2010], *lv dismissed* 17 NY3d 734 [2011]; *see Stoddard v G.E. Plastics Corp.*, 11 AD3d 862, 863 [3d Dept 2004]). Defendant submitted additional evidence that the employee who had previously slipped in the parking lot noticed an icy condition in the area of plaintiff's fall as he was helping plaintiff after the incident. That evidence, however, does not raise a triable issue of fact whether defendant had actual notice of the condition *before* plaintiff's fall. In opposition to the motion, plaintiffs failed to raise a triable issue of fact on actual notice (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Contrary to defendant's contention, the court properly denied that part of its motion seeking summary judgment on the issue of constructive notice. "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *see Keene v Marketplace*, 114 AD3d 1313, 1314 [4th Dept 2014]). Although "an owner's 'general awareness' that a dangerous condition may exist is insufficient to support a finding that the owner had constructive notice of the *specific condition* that caused the plaintiff to slip and fall" (*Winecki v West Seneca Post 8113*, 227 AD2d 978, 979 [4th Dept 1996] [emphasis added]), evidence that another person had fallen in the "same general vicinity" a few hours before the plaintiff's fall raises triable issues of fact whether the condition existed for a sufficient length of time to discover and remedy it (*Walters v Costco Wholesale Corp.*, 51 AD3d 785, 786 [2d Dept 2008]; *cf. Gilbert v Evangelical Lutheran Church in Am.*, 43 AD3d 1287, 1288-1289 [4th Dept 2007], *lv denied* 9 NY3d 815 [2007]). Inasmuch as defendant submitted evidence that its employee slipped in the same parking lot as plaintiff several hours before plaintiff's fall and thereafter observed the icy condition as he rendered aid to plaintiff, there are triable issues of fact "whether the icy 'condition was visible and apparent and existed for a sufficient period of time prior to the accident to permit defendant[] to discover it and take corrective action' " (*Nicoterra v Clifford*, 11 AD3d 942, 943 [4th Dept 2004]).

We agree with defendant that it met its initial burden of establishing as a matter of law that it did not create the dangerous condition by submitting evidence that plaintiff did not fall in an area of the parking lot that had been repaired in such a way that it caused the pooling of water. We nevertheless conclude that plaintiffs raised a triable issue of fact by submitting deposition testimony from one of defendant's employees identifying the area of plaintiff's fall as being within the repaired area of the parking lot. That evidence raises a triable issue of fact whether defendant created the allegedly dangerous condition that caused plaintiff to slip and fall (*see Benty v First Methodist Church of Oakfield*, 24 AD3d 1189, 1190 [4th Dept

2005]).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

563

CA 17-01938

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

IN THE MATTER OF THE ESTATE OF NINA SCOLLAN,
DECEASED.

THERESA MILLUS, PETITIONER-APPELLANT, MEMORANDUM AND ORDER

V

SERGEY SCOLLAN, RESPONDENT-RESPONDENT.

COMARDO LAW FIRM, P.C., AUBURN (BENJAMIN M. KOPP OF COUNSEL), FOR PETITIONER-APPELLANT.

BOYLE & ANDERSON, P.C., AUBURN (DAVID G. TEHAN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Surrogate's Court, Cayuga County (Mark H. Fandrich, S.), dated January 17, 2017. The order granted respondent's motion for summary judgment dismissing the amended petition for probate.

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

Memorandum: Petitioner commenced this proceeding seeking, inter alia, admission to probate of a photocopy of the will of Nina Scollan (decedent) dated March 2008. In her affidavit supporting the amended petition, petitioner asserted that she was seeking the admission of the photocopy of the will inasmuch as "the original has been lost or destroyed." Petitioner further asserted that she was decedent's primary caregiver during the last 7 to 10 years of decedent's life, decedent spoke disparagingly of respondent, decedent's son, and decedent told petitioner that she "would be receiving everything" upon decedent's death.

Surrogate's Court properly granted respondent's motion for summary judgment dismissing the amended petition. "A lost or destroyed will may be admitted to probate only if . . . [i]t is established that the will has not been revoked" (SCPA 1407 [1]). " 'When a will previously executed cannot be found after the death of the testator, there is a strong presumption that it was revoked by destruction by the testator' " (*Matter of Fox*, 9 NY2d 400, 407 [1961]). That "strong presumption of revocation by the testator . . . stands in the place of positive proof when a will previously executed cannot be found after a testator's death" (*Matter of Philbrook*, 185 AD2d 550, 552 [3d Dept 1992]; *see Matter of Staiger*, 243 NY 468, 472

[1926]). Respondent was thus entitled to rely on the presumption to meet his burden on the motion (*see Matter of Winters*, 84 AD3d 1388, 1389 [2d Dept 2011]; *Matter of Evans*, 264 AD2d 482, 482 [2d Dept 1999]; *Matter of Passuello*, 169 AD2d 1007, 1008 [3d Dept 1991]). In addition, petitioner's own submissions established that decedent asked to retain the original will in her possession, and the attorney who drafted the will had the original delivered to decedent shortly after its execution (*cf. Matter of Castiglione*, 40 AD3d 1227, 1229 [3d Dept 2007], *lv denied* 9 NY3d 806 [2007]).

In opposition to the motion, petitioner failed to present evidence sufficient to raise a question of fact whether the presumption of revocation may be overcome (*see Winters*, 84 AD3d 1389; *Evans*, 264 AD2d at 482; *Passuello*, 169 AD2d at 1008). The presumption is unaffected by evidence that decedent's attorney retained a copy of the will at his office and that decedent never advised him that she intended to revoke the will (*see Matter of Robinson*, 257 App Div 405, 407 [4th Dept 1939]). Nor may the presumption be overcome with hearsay accounts of decedent's statements concerning her testamentary intentions (*see Fox*, 9 NY2d at 406; *Matter of Kraus*, 17 AD2d 653, 653 [2d Dept 1962]). Finally, while the presumption of revocation may be overcome with circumstantial evidence (*see Matter of Mittelstaedt*, 278 App Div 231, 233 [1st Dept 1951]), "[p]etitioner[] cannot succeed on mere speculation and suspicion" (*Philbrook*, 185 AD2d at 552). Rather, petitioner must present "facts and circumstances which show that the will was fraudulently destroyed during the testator's lifetime" (*Evans*, 264 AD2d at 482; *see Collyer v Collyer*, 110 NY 481, 486 [1888]). Here, petitioner offered nothing more than speculation and suspicion to support her theory that respondent or someone acting on his behalf fraudulently destroyed the will. In sum, therefore, "petitioner failed to raise an issue of fact as to whether she can overcome the presumption that the testator destroyed the will with the intention to revoke it" (*Evans*, 264 AD2d at 482).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

574

KA 16-00448

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRELL B. MILLER, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (DEBORAH K. JESSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

TERRELL B. MILLER, DEFENDANT-APPELLANT PRO SE.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered March 16, 2016. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the first degree (Penal Law § 140.30 [4]). To the extent that defendant contends in his main brief that his waiver of the right to appeal is invalid, we reject that contention. The record establishes that County Court "engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice . . . , and informed him that the waiver was a condition of the plea agreement" (*People v Krouth*, 115 AD3d 1354, 1354-1355 [4th Dept 2014], *lv denied* 23 NY3d 1064 [2014] [internal quotation marks omitted]). Contrary to defendant's assertion, the record further establishes that defendant read and understood the contents of the written waiver that he executed during the proceeding (*cf. People v Bradshaw*, 18 NY3d 257, 265 [2011]). We thus conclude that "[t]he plea colloquy, together with the written waiver of the right to appeal executed by defendant, establishes that defendant's waiver of the right to appeal was knowingly, intelligently, and voluntarily entered" (*People v Fontaine*, 144 AD3d 1658, 1658 [4th Dept 2016], *lv denied* 29 NY3d 997 [2017]; *see People v Lopez*, 6 NY3d 248, 256 [2006]). The valid waiver of the right to appeal encompasses defendant's challenges in his main and pro se supplemental briefs to the court's suppression ruling (*see People v Sanders*, 25 NY3d 337, 342 [2015]; *People v Kemp*, 94 NY2d 831, 833 [1999]), and his challenge in his main brief to the severity of the

sentence (*see Lopez*, 6 NY3d at 255).

Defendant's further contention in his main brief that he was denied effective assistance of counsel because defense counsel should not have raised the issue of the waiver of the right to appeal during the plea proceeding survives his plea and valid waiver "only insofar as he demonstrates that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [his] attorney['s] allegedly poor performance" (*People v Rausch*, 126 AD3d 1535, 1535 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016] [internal quotation marks omitted]). "That contention, however, is belied by the statements of defendant [made following the initial discussion of the waiver] that he was satisfied with the representation provided by defense counsel" (*People v Kapp*, 59 AD3d 974, 975 [4th Dept 2009], *lv denied* 12 NY3d 818 [2009]). Moreover, defendant failed to demonstrate the absence of a strategic or other legitimate explanation for defense counsel's discussion of the waiver inasmuch as the record establishes that the prosecutor had already prepared a written waiver prior to the proceeding and that defendant benefitted from the waiver insofar as it secured the court's sentencing commitment to a range far lower than the maximum sentence (*see People v Turck*, 305 AD2d 1072, 1073 [4th Dept 2003], *lv denied* 100 NY2d 566 [2003]).

Defendant further contends in his main brief that defense counsel took a position adverse to him at sentencing and that he was therefore deprived of effective assistance of counsel. We reject that contention inasmuch as the record establishes that defense counsel's comments at sentencing were not adverse to defendant's position (*see People v Collins*, 85 AD3d 1678, 1679 [4th Dept 2011], *lv denied* 18 NY3d 993 [2012]; *see also People v Washington*, 25 NY3d 1091, 1095 [2015]; *People v Fifield*, 24 AD3d 1221, 1222 [4th Dept 2005], *lv denied* 6 NY3d 775 [2006]).

To the extent that defendant's contention in his pro se supplemental brief that he was denied effective assistance of counsel survives his guilty plea and valid waiver of the right to appeal (*see Rausch*, 126 AD3d at 1535), we reject that contention. The record establishes that defendant "receive[d] an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404 [1995]; *see People v Parson*, 27 NY3d 1107, 1108 [2016]; *People v Barnes*, 41 AD3d 1309, 1310 [4th Dept 2007], *lv denied* 9 NY3d 920 [2007]). Further, to the extent that defendant's contention in his pro se supplemental brief is based upon matters outside the record, his contention must be raised by way of a motion pursuant to CPL 440.10 (*see People v Smith*, 122 AD3d 1300, 1301 [4th Dept 2014], *lv denied* 25 NY3d 1172 [2015]).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

585

CA 17-01991

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

IN THE MATTER OF SHARON SCHWERTFAGER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS, NEW YORK STATE, STATE UNIVERSITY OF NEW YORK AND STATE UNIVERSITY COLLEGE AT FREDONIA,
RESPONDENTS-RESPONDENTS.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JOSEPH M. SPADOLA OF COUNSEL), FOR RESPONDENTS-RESPONDENTS NEW YORK STATE, STATE UNIVERSITY OF NEW YORK AND STATE UNIVERSITY COLLEGE AT FREDONIA.

Appeal from an order and judgment (one paper) of the Supreme Court, Chautauqua County (Frank A. Sedita, III, J.), entered January 18, 2017 in a proceeding pursuant to Executive Law § 298. The order and judgment dismissed the petition.

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

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

Initially, we note that petitioner did not address her discrimination claims in her memorandum of law or at oral argument in the motion court, nor did she address them in her brief on appeal. Consequently, any issues with respect to those claims have been abandoned (*see Haher v Pelusio*, 156 AD3d 1381, 1382 [4th Dept 2017]; *Cleere v Frost Ridge Campground, LLC*, 155 AD3d 1645, 1646-1647 [4th Dept 2017]).

Contrary to petitioner's contention, the determination of SDHR is supported by a rational basis and is not arbitrary and capricious (*see Matter of Witkowich v New York State Div. of Human Rights*, 56 AD3d

1170, 1170 [4th Dept 2008], *lv denied* 12 NY3d 702 [2009]; *cf. Matter of Mambretti v New York State Div. of Human Rights*, 129 AD3d 1696, 1696-1697 [4th Dept 2015], *lv denied* 26 NY3d 909 [2015]). Contrary to petitioner's further contention, upon our review of the record, we conclude that SDHR " 'properly investigated petitioner's complaint . . . and provided petitioner with a full and fair opportunity to present evidence on [her] behalf and to rebut the evidence presented by [respondent]' " (*Witkowich*, 56 AD3d at 1170).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

592

TP 17-01958

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

IN THE MATTER OF OCCUPATIONAL SAFETY & ENVIRONMENTAL ASSOCIATES, INC., PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF ECONOMIC DEVELOPMENT, DIVISION OF MINORITY AND WOMEN'S BUSINESS DEVELOPMENT, AND EMPIRE STATE DEVELOPMENT CORPORATION, RESPONDENTS.

DUKE, HOLZMAN, PHOTIADIS & GRESENS, LLP, BUFFALO (PATRICIA GILLEN OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court, Erie County [John F. O'Donnell, J.], entered November 6, 2017) to annul a determination denying petitioner's application for recertification as a women-owned business enterprise.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul a determination that denied its application for recertification as a women-owned business enterprise ([WBE]; *see* Executive Law § 310 [15]; 5 NYCRR 144.2). Petitioner is a business that provides safety, environmental, and industrial hygiene consulting and training. In 1993, Gina L. Coniglio (Gina) became the majority owner of petitioner and, in 1995, petitioner was certified as a WBE by respondent New York State Department of Economic Development, Division of Minority and Women's Business Development (Division) and was granted recertification periodically thereafter. In 2013, petitioner submitted an application for recertification but it was denied by the Division based on petitioner's failure to meet three separate eligibility criteria related to women's ownership, operation, and control of petitioner. Petitioner filed an administrative appeal. After receiving written submissions, the Administrative Law Judge recommended that the determination be affirmed, and the Executive Director of the Division accepted that recommendation.

We initially note that, inasmuch as no administrative hearing was held, this proceeding does not raise a substantial evidence issue, and Supreme Court therefore should not have transferred the proceeding to this Court (*see* CPLR 7803 [4]; 7804 [g]; *Matter of Scherz v New York State Dept. of Health*, 93 AD3d 1302, 1303 [4th Dept 2012]). We nevertheless address the merits of petitioner's contentions in the interest of judicial economy (*see Scherz*, 93 AD3d at 1303).

" 'In reviewing an administrative agency determination, [courts] must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious' " (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]; *see generally* CPLR 7803 [3]). Here, contrary to petitioner's contention, we conclude that the Division's determination is supported by a rational basis and is not arbitrary and capricious.

First, it was rational for the Division to determine that the contribution of the women owners was not proportionate to their equity interest in the business enterprise (*see* 5 NYCRR 144.2 [a] [1]). Gina and her sister had a combined 54.3% ownership interest in petitioner, while Gina's husband, John P. Coniglio (John), had a 45.7% ownership interest. The figures submitted by petitioner in its application, however, showed that the two women contributed less than 51% to the corporation in terms of money and expertise (*see id.*). Petitioner contends that those figures were from the 1995 application, and that the Division failed to account for the fact that Gina has gained significantly more experience, involvement, and control over the operations of the corporation since 1995. We reject that contention inasmuch as it is clear from the Division's determination that it relied on information after that time and concluded that petitioner had not shown the requisite ownership of the business.

Second, it was rational for the Division to determine that decisions pertaining to the operations of the business enterprise were not made by the women claiming ownership of the business (*see* 5 NYCRR 144.2 [b] [1]). The Division properly considered the factors set forth in 5 NYCRR 144.2 (b) (1) (i)-(iii) and determined that Gina did not have the working knowledge and expertise to have independent operational control of the business's enterprise, i.e., consulting and training work. Rather, it was John who had the education and expertise in occupational safety and health management and safety engineering, and who was the principal consultant for the business. Thus, at most, Gina and John operated petitioner as a family-owned business (*see Matter of C.W. Brown, Inc. v Canton*, 216 AD2d 841, 842 [3d Dept 1995]; *Matter of Northeastern Stud Welding Corp. v Webster*, 211 AD2d 889, 891 [3d Dept 1995]).

Inasmuch as we conclude that the Division's determination has a rational basis on those two grounds, it is not necessary for us to address the third and final basis for the Division's determination

(*see C.W. Brown, Inc.*, 216 AD2d at 843).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

603

KA 15-00702

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

IRA T. WILLIS, ALSO KNOWN AS PEE WEE,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered July 3, 2012. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). We agree with defendant that the waiver of the right to appeal is invalid. Supreme Court did not elicit the waiver until after defendant had pleaded guilty and, in any event, "the record fails to establish that [the court] engaged him in an adequate colloquy to ensure that the waiver was a knowing and voluntary choice" (*People v Blackwell*, 129 AD3d 1690, 1690 [4th Dept 2015], *lv denied* 26 NY3d 926 [2015]). Furthermore, "neither the written waiver of the right to appeal in the record nor the court's brief mention of that waiver during the plea proceeding distinguished the waiver of the right to appeal from those rights automatically forfeited upon a plea of guilty" (*People v Norton*, 96 AD3d 1651, 1652 [4th Dept 2012], *lv denied* 19 NY3d 999 [2012]; *see People v Lopez*, 6 NY3d 248, 256 [2006]; *People v Alston*, 101 AD3d 1672, 1672 [4th Dept 2012]).

We further agree with defendant that the court erred in failing to determine whether he should be afforded youthful offender status (*see People v Rudolph*, 21 NY3d 497, 501 [2013]; *People v Quinones*, 129 AD3d 1699, 1700 [4th Dept 2015]). As the People correctly concede, defendant is an eligible youth, and the sentencing court must make "a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it" (*Rudolph*, 21

NY3d at 501; *see People v Lester*, 155 AD3d 1579, 1579 [4th Dept 2017]). We therefore hold the case, reserve decision, and remit the matter to Supreme Court to make and state for the record a determination whether defendant should be afforded youthful offender status (*see Rudolph*, 21 NY3d at 503; *Lester*, 155 AD3d at 1579).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

609

CA 17-01604

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

PATTI M. DECHOW, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TERRY DECHOW, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

HOGAN WILLIG, PLLC, AMHERST (STEVEN G. WISEMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Cattaraugus County (Jeremiah J. Moriarty, III, J.), entered April 11, 2017. The judgment, among other things, distributed the marital property.

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

Memorandum: In appeal No. 1, plaintiff appeals from a judgment of divorce that, among other things, distributed the marital property between the parties. In appeal No. 2, plaintiff appeals from an order that awarded counsel fees to defendant.

We reject plaintiff's contention in appeal No. 1 that Supreme Court erred in awarding to defendant 50% of the marital portion of her 401K account and pension plan and 50% of the equity in the marital residence. Upon considering the requisite statutory factors set forth in Domestic Relations Law § 236 (B) (5) (d) (*see generally Arvantides v Arvantides*, 64 NY2d 1033, 1034 [1985]; *Majauskas v Majauskas*, 61 NY2d 481, 492-493 [1984]; *Alaimo v Alaimo*, 199 AD2d 1039, 1039-1040 [4th Dept 1993]), we conclude that the court properly exercised its broad discretion in making an equitable distribution of the marital property (*see Krolikowski v Krolikowski*, 110 AD3d 1449, 1450 [4th Dept 2013]; *Bossard v Bossard*, 199 AD2d 971, 971 [4th Dept 1993]). We further conclude that, contrary to plaintiff's contention, the court did not err in the manner in which it credited her for payments that she made on the mortgage and taxes associated with the marital residence before and after commencement of this action (*see generally Louzoun v Montalto*, 70 AD3d 652, 653-654 [2d Dept 2010], *lv dismissed* 15 NY3d 838 [2010]; *Martusewicz v Martusewicz*, 217 AD2d 926, 928 [4th Dept 1995], *lv denied* 88 NY2d 801 [1996]).

We reject plaintiff's contention in appeal No. 2 that the court

abused its discretion in awarding counsel fees to defendant. "An award of an attorney's fee pursuant to Domestic Relations Law § 237 (a) is a matter within the sound discretion of the trial court, and the issue is controlled by the equities and circumstances of each particular case" (*Grant v Grant*, 71 AD3d 634, 634-635 [2d Dept 2010] [internal quotation marks omitted]; *see Gelia v Gelia*, 114 AD3d 1263, 1264 [4th Dept 2014]). Here, the court properly considered the circumstances of the case, including the parties' relative financial circumstances and the merits of their positions during trial, and we conclude that the award is reasonable and does not constitute an abuse or improvident exercise of the court's discretion (*see Matter of Viscuso v Viscuso*, 129 AD3d 1679, 1683 [4th Dept 2015]; *Gelia*, 114 AD3d at 1264).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

610

CA 17-01605

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

PATTI DECHOW, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TERRY DECHOW, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

HOGAN WILLIG, PLLC, AMHERST (STEVEN G. WISEMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Cattaraugus County (Jeremiah J. Moriarty, III, J.), dated April 5, 2017. The order, among other things, awarded defendant attorney fees in the amount of $3,142.75.

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

Same memorandum as in *Dechow v Dechow* ([appeal No. 1] — AD3d — [May 4, 2018] [4th Dept 2018]).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

612

CA 17-01661

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

ALYSON GRAHAM AND BEN GRAHAM,
CLAIMANTS-APPELLANTS,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 122092.)

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

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

Appeal from a judgment of the Court of Claims (Catherine C. Schaewe, J.), entered December 15, 2016. The judgment dismissed the claim after a trial on the issue of liability.

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

Memorandum: Claimants commenced this action against defendant, the State of New York, seeking damages for injuries allegedly sustained by Alyson Graham (claimant) when, while jogging on the Centerway Bridge in Corning, New York, she tripped on a steel plate that was elevated from the concrete sidewalk. After a trial on the issue of liability, the Court of Claims dismissed the claim. Contrary to claimants' contention, the court properly determined, after considering all the facts and circumstances of the case, that they failed to establish the existence of a dangerous or defective condition on the sidewalk at the time of the accident, and that the defect in the sidewalk was, in fact, trivial (*see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 78-79 [2015]; *Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]). The evidence at trial established that the incident occurred on a clear, sunny day, that claimant saw the readily apparent steel plate, and that the height differential between the steel plate and the sidewalk was small. The determination of the court is "supported by a fair interpretation of the evidence," and we therefore will not disturb it (*Guastella v State of New York*, 135 AD3d 819, 819 [2d Dept 2005]; *see generally Black v State of New York* [appeal No. 2], 125 AD3d 1523, 1524 [4th Dept

2015]).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

617

KA 14-02100

PRESENT: WHALEN, P.J., SMITH, CARNI, LINDLEY, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER WILMET, DEFENDANT-APPELLANT.

CATHERINE H. JOSH, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered November 18, 2014. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the third degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]), defendant contends that County Court erred in refusing to suppress a pair of metal knuckles. We reject that contention. The police responded to a 911 call of a domestic dispute at an apartment that defendant shared with his girlfriend. While inside the apartment, a police officer observed a marihuana pipe in plain view, and defendant claimed ownership of it. Based on defendant's admission, the police arrested defendant for unlawful possession of marihuana and, during the search incident to arrest, the police found the metal knuckles in defendant's pants pocket, leading to his arrest for criminal possession of a weapon in the third degree.

Defendant contends that the police officer's testimony that he observed the marihuana pipe in plain view was not credible, and that police officers conducted an unlawful warrantless search of the apartment when they rummaged through his bedroom looking for contraband without consent. It is well settled, however, "that great deference should be given to the determination of the suppression court, which had the opportunity to observe the demeanor of the witnesses and to assess their credibility, and its factual findings should not be disturbed unless clearly erroneous" (*People v Layou*, 134 AD3d 1510, 1511 [4th Dept 2015], *lv denied* 27 NY3d 1070 [2016], *reconsideration denied* 28 NY3d 932 [2016]; *see People v Prochilo*, 41 NY2d 759, 761 [1977]).

Here, the court's determination that the police officer observed the pipe in plain view "was based solely upon the credibility of the witnesses at the suppression hearing" (*People v Esquerdo*, 71 AD3d 1424, 1424 [4th Dept 2010], *lv denied* 14 NY3d 887 [2010]), and the officer's testimony in that regard "was not so inherently incredible or improbable as to warrant disturbing the . . . court's determination of credibility" (*People v Walters*, 52 AD3d 1273, 1274 [4th Dept 2008], *lv denied* 11 NY3d 795 [2008] [internal quotation marks omitted]).

Finally, contrary to defendant's remaining contention, the court's *Sandoval* ruling did not constitute an abuse of discretion (*see People v Taylor*, 140 AD3d 1738, 1739 [4th Dept 2016]).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

619

KA 15-01509

PRESENT: WHALEN, P.J., SMITH, CARNI, LINDLEY, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KELLEE L. LEWIS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered August 3, 2015. The judgment convicted defendant, upon her plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting her upon her plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and, in appeal No. 2, she appeals from a judgment convicting her upon her plea of guilty of criminal sale of a controlled substance in the third degree (§ 220.39 [1]). The two pleas were entered in a single plea proceeding. In each appeal, defendant contends that her waiver of the right to appeal is not valid, and she challenges the severity of the sentence. Although we agree with defendant that the waiver of the right to appeal is invalid because the perfunctory inquiry made by County Court was "insufficient to establish that the court 'engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Brown*, 296 AD2d 860, 860 [4th Dept 2002], *lv denied* 98 NY2d 767 [2002]; *see People v Hamilton*, 49 AD3d 1163, 1164 [4th Dept 2008]), we nevertheless conclude that the sentence in each appeal is not unduly harsh or severe.

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

620

KA 15-01510

PRESENT: WHALEN, P.J., SMITH, CARNI, LINDLEY, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KELLEE L. LEWIS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered August 3, 2015. The judgment convicted defendant, upon her plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Same memorandum as in *People v Lewis* ([appeal No. 1] — AD3d — [May 4, 2018] [4th Dept 2018]).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court

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

627

CA 17-00173

PRESENT: WHALEN, P.J., SMITH, CARNI, LINDLEY, AND WINSLOW, JJ.

IN THE MATTER OF THE APPLICATION OF STATE OF NEW YORK, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

EDWARD T., AN INMATE IN THE CUSTODY OF NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, FOR CIVIL MANAGEMENT PURSUANT TO MENTAL HYGIENE LAW ARTICLE 10, RESPONDENT-APPELLANT.

KEVIN D. WILSON, DEPUTY DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, ROCHESTER (MICHAEL F. HIGGINS OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Steuben County (Joseph W. Latham, A.J.), entered November 3, 2016 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, committed respondent to a secure treatment facility.

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

Memorandum: Respondent appeals from an order revoking his regimen of strict and intensive supervision and treatment, determining that he is a dangerous sex offender requiring confinement, and committing him to a secure treatment facility (*see* Mental Hygiene Law § 10.01 *et seq.*). Contrary to respondent's contention, viewing the evidence in the light most favorable to petitioner (*see Matter of State of New York v John S.*, 23 NY3d 326, 348 [2014], *rearg denied* 24 NY3d 933 [2014]), we conclude that there is sufficient evidence to support the finding of Supreme Court that respondent is a dangerous sex offender requiring confinement, i.e., that he has "a strong predisposition to commit sex offenses, and such an inability to control behavior, that [he] is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (§ 10.03 [e]; *cf. Matter of State of New York v Michael M.*, 24 NY3d 649, 658-660 [2014]).

We further conclude that the determination that respondent is a dangerous sex offender requiring confinement is not against the weight of the evidence. The court was in the best position to evaluate the

weight and credibility of the uncontradicted testimony of petitioner's expert, and we see no reason to disturb the court's determination (*see Matter of State of New York v Peters*, 144 AD3d 1654, 1656 [4th Dept 2016]). Respondent's contention that petitioner's expert psychiatric examiner misapplied certain assessment tests is raised for the first time on appeal and thus is not properly before us (*see Matter of State of New York v Breeden*, 140 AD3d 1649, 1650 [4th Dept 2016]).

Entered: May 4, 2018

Mark W. Bennett
Clerk of the Court