SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JUNE 8, 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

1529

CA 17-01227

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

IN THE MATTER OF RITE AID CORPORATION,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

RHONDA DARLING, ASSESSOR, AND BOARD OF ASSESSMENT
REVIEW OF CITY OF CORNING, CITY OF CORNING,
RESPONDENTS-RESPONDENTS,
AND CORNING-PAINTED POST AREA SCHOOL DISTRICT,
INTERVENOR-RESPONDENT.
(PROCEEDING NOS. 1-6.)

JACOBSON LAW FIRM, P.C., PITTSFORD (ROBERT L. JACOBSON OF COUNSEL), FOR PETITIONER-APPELLANT.

BARLCAY DAMON, LLP, ROCHESTER (MICHAEL E. NICHOLSON OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Steuben County (Joseph W. Latham, A.J.), entered August 25, 2016 in proceedings pursuant to RPTL article 7. The order, among other things, granted in part the joint motion of respondent City of Corning and intervenor-respondent for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion of respondent City of Corning and intervenor-respondent in its entirety, vacating the first, and third through fifth ordering paragraphs, reinstating the petitions with respect to tax years beginning in 2009, 2010 and 2011, and reinstating the note of issue in each proceeding, and as modified the order is affirmed without costs.

Memorandum: Petitioner commenced these RPTL article 7 proceedings seeking review of the real property tax assessments for a commercial property located in respondent City of Corning (City) for the tax years 2009 through 2014. Following this Court's decisions in *Matter of Rite Aid Corp. v Haywood* (130 AD3d 1510 [4th Dept 2015], *lv denied* 26 NY3d 915 [2016], *rearg denied* 27 NY3d 976 [2016], *cert denied* — US —, 137 S Ct 174 [2016]) and *Matter of Rite Aid Corp. v Huseby* ([appeal No. 2] 130 AD3d 1518 [4th Dept 2015], *lv denied* 26 NY3d 916 [2016], *rearg denied* 27 NY3d 977 [2016], *cert denied* — US —, 137 S Ct 174 [2016]), the City and intervenor-respondent, Corning-Painted Post Area School District (respondents), jointly moved for summary judgment dismissing the petitions on the ground that *Haywood*

and *Huseby* rendered the appraisal report and opinions of petitioner's expert unreliable and invalid as a matter of law. Petitioner cross-moved pursuant to 22 NYCRR 202.59 (h) for leave to amend its appraisal report. Supreme Court granted the motion in part, dismissed the petitions with respect to the 2009-2011 tax years, denied those parts of the cross motion seeking leave to amend the appraisal report for the 2009-2011 tax years, and granted those parts of the cross motion seeking leave to amend the appraisal report for the remaining tax years. The court also struck, sua sponte, the notes of issue in all six proceedings, deemed the proceedings for the 2009-2011 tax years to be abandoned pursuant to RPTL 718 (2) (d), and ordered that the proceedings for the 2012-2014 tax years be placed on the court's trial calendar after new notes of issue were filed no later than February 28, 2017. Petitioner appeals.

Initially, we agree with petitioner that the court erred in granting those parts of the motion seeking summary judgment dismissing the petitions with respect to the 2009-2011 tax years, and we therefore modify the order accordingly. Our decisions in *Haywood* and *Huseby* were rendered in an entirely different procedural context than that presented here. In both *Haywood* and *Huseby*, we conducted weight of the evidence review of verdicts rendered after nonjury trials, i.e., we considered whether the trial court " 'failed to give conflicting evidence the relative weight which it should have' " (*People ex rel. MacCracken v Miller*, 291 NY 55, 61 [1943] [emphasis omitted]), while giving due deference to the trial court's power to resolve credibility issues by choosing among conflicting expert opinions (*see Matter of Brooks Drugs, Inc. v Board of Assessors of City of Schenectady*, 51 AD3d 1094, 1095 [3d Dept 2008], *lv denied* 11 NY3d 710 [2008]). In both decisions, we concluded that the failure of petitioner's expert to utilize a recent sale of the subject property, as well as readily available comparable sales of national chain drugstore properties in the applicable submarket, and the contract rent as evidence of value, resulted in valuation conclusions of the expert's appraisal that were unreliable with respect to the weight, if any, to be given to those conclusions. We thus concluded in both *Haywood* and *Huseby* that the trial court's determinations to credit the appraisal of petitioner's expert over that of the respondents' expert were against the weight of the evidence. Here, however, the court was presented with a motion for summary judgment, and the issue before the court was therefore whether respondents made "a prima facie showing of entitlement to judgment as a matter of law, tendering evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Thus, there is a significant and dispositive difference between this case and the procedural context in *Haywood* and *Huseby*.

We further conclude that respondents failed to establish their entitlement to judgment as a matter of law (*see generally Alvarez*, 68 NY2d at 324). We agree with petitioner that the appraisal report prepared by its expert is not deficient as a matter of law inasmuch as it sets forth substantial evidence that the property was overvalued by the taxing authority to rebut the presumption of validity of the tax assessments in each proceeding (*see generally Matter of Techniplex III*

v Town & Vil. of E. Rochester, 125 AD3d 1412, 1412-1413 [4th Dept 2015]). A primary objective of the exchange and filing of appraisal reports prior to trial is "to afford 'opposing counsel the opportunity to effectively prepare for cross-examination' " (*Matter of Board of Mgrs. of French Oaks Condominium v Town of Amherst*, 23 NY3d 168, 176 [2014]), and the appraisal of petitioner's expert serves that purpose. Moreover, "[d]eficiencies in an appraisal report may be cured by the expert's trial testimony" (*Matter of Gibson v Gleason*, 20 AD3d 623, 625 [3d Dept 2005], *lv denied* 5 NY3d 713 [2005]), and "the trial court enjoys broad discretion in that it can reject expert testimony and arrive at a determination of value that is either within the range of expert testimony or supported by other evidence and adequately explained by the court" (*ARC Machining & Plating v Dimmick*, 238 AD2d 849, 850 [3d Dept 1997]; *see Wagner v State of New York*, 25 AD2d 814, 814 [4th Dept 1966]).

In light of our determination that the court erred in granting those parts of the motion seeking summary judgment dismissing the petitions with respect to the 2009-2011 tax years, we conclude that there is no basis for striking the notes of issue in those proceedings. We further conclude that the court abused its discretion in sua sponte striking the notes of issue in the proceedings for the 2012-2014 tax years (*see* 22 NYCRR 202.21 [e]; *see generally Marks v Morrison*, 275 AD2d 1027, 1027 [4th Dept 2000]). We therefore further modify the order by reinstating the note of issue in each proceeding. As a result, we also conclude that the court erred in determining pursuant to RPTL 718 (2) (d) that the proceedings for the 2009-2011 tax years had been abandoned.

We reject petitioner's further contention that the court abused its discretion in denying its cross motion to amend its appraisal with respect to the 2009-2011 tax years pursuant to 22 NYCRR 202.59 (h).

Petitioner's remaining contentions are raised for the first time on appeal and thus are not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

Entered: June 8, 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 17-01399

PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

IN THE MATTER OF COREY KRUG,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, RESPONDENT-APPELLANT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (DAVID M. LEE OF COUNSEL), FOR RESPONDENT-APPELLANT.

CREIGHTON, JOHNSEN & GIROUX, BUFFALO (IAN HAYES OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (James H. Dillon, J.), entered April 19, 2017 in a proceeding pursuant to CPLR article 78. The judgment granted the petition in part.

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

Memorandum: Petitioner, a police officer employed by respondent, City of Buffalo, commenced this proceeding pursuant to CPLR article 78 to challenge respondent's determination denying his request that respondent defend and indemnify him in a civil action. The civil action arose from an incident in which petitioner was on patrol and allegedly attacked and assaulted a civilian complainant in violation of the complainant's constitutional rights. Petitioner was indicted in connection with that incident, and the complainant thereafter commenced the civil action. Supreme Court determined that petitioner's request for indemnification was premature, and the court granted that part of the petition seeking to annul respondent's denial of petitioner's request to be defended on the ground that the determination with respect thereto was arbitrary and capricious. Respondent appeals, and we affirm.

We reject respondent's contention that its determination was not arbitrary and capricious. Respondent has a duty to provide a defense to petitioner "if his alleged conduct occurred or allegedly occurred while he was acting within the scope of his public employment or duties" (*Matter of Riehle v County of Cattaraugus*, 17 AD3d 1029, 1029 [4th Dept 2005]; *see* Buffalo City Code §§ 35-28, 35-29), and the determination that petitioner was not acting within the scope of his public employment or duties "may be set aside only if it lacks a factual basis, and in that sense, is arbitrary and capricious" (*Matter*

of Williams v City of New York, 64 NY2d 800, 802 [1985]). Here, it is undisputed that petitioner was on duty and working as a police officer when the alleged conduct occurred (*see generally Riviello v Waldron*, 47 NY2d 297, 304-305 [1979]).

We respectfully disagree with the view of our dissenting colleagues that a 30-second-long video recording of a portion of the incident, considered in conjunction with the indictment, provides a factual basis for respondent's implicit determination that petitioner was not acting within the scope of his employment and duties as a police officer. First, it is well settled that "[a]n indictment is a mere accusation and raises no presumption of guilt" (*People v Miller*, 91 NY2d 372, 380 [1998]; *see Republic Pension Servs. v Cononico*, 278 AD2d 470, 472 [2d Dept 2000]; *see also In re Oliver*, 333 US 257, 265 [1948]). Thus, the filing of an indictment against petitioner does not provide a factual basis to support the denial of a defense to petitioner in the civil action. Second, the video recording captured only part of the encounter between petitioner and the complainant, and did not capture the beginning or the end of the encounter. As a result, the recorded images of petitioner striking the complainant in the area of his legs and feet with a baton are unaccompanied by contextual factual information that would be essential to support a determination that petitioner's actions fell outside the scope of his employment and duties as a police officer. Notably, the brief video clip shows a loud and chaotic intersection with a heavy police presence, and petitioner appeared to be dressed in police uniform and wearing a jacket with the word "POLICE" printed in bold letters. Three of the officers in the video appeared to be carrying batons, like petitioner, and one other officer appeared to have been engaged in a physical struggle with a civilian on the sidewalk. That struggle appeared to continue into the roadway before the other officer and the civilian disengaged, at which point the camera panned over to a parking lot where petitioner was already engaged with the complainant.

Although it is well settled that an employee's conduct does not fall within the scope of his or her employment where his or her actions are taken for wholly personal reasons not related to the employee's job (*see Beauchamp v City of New York*, 3 AD3d 465, 466 [2d Dept 2004]; *Schilt v New York City Tr. Auth.*, 304 AD2d 189, 194 [1st Dept 2003]), we conclude that the video recording does not establish that petitioner's actions were taken for wholly personal reasons unrelated to his job as a police officer. Absent sufficient factual support upon which to make that determination, we conclude that respondent's denial of petitioner's request for a defense in the civil action was arbitrary and capricious (*see generally Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758 [1991]; *Williams*, 64 NY2d at 802; *Matter of Taft v Village of Newark Planning Bd.*, 74 AD3d 1840, 1841 [4th Dept 2010]).

All concur except DEJOSEPH and NEMOYER, JJ., who dissent and vote to reverse in accordance with the following memorandum: We respectfully dissent and vote to reverse the judgment and grant respondent's motion to dismiss the petition.

Municipalities must defend and indemnify police officers for torts committed "within the scope of [their] employment" (General Municipal Law § 50-j [1]), which the law defines as the "immediate and actual performance of a public duty . . . for the benefit of the citizens of the community" (§ 50-j [2]). In the City of Buffalo, the Corporation Counsel determines in the first instance whether any particular tort was committed within the scope of a police officer's employment such that he or she receives a taxpayer-funded defense (*see* Buffalo City Code § 35-28; *Matter of Salino v Cimino*, 1 NY3d 166, 172 n 4 [2003]). The Corporation Counsel's determination will be upheld so long as, insofar as relevant here, it is not arbitrary and capricious (*see Salino*, 1 NY3d at 172; *Matter of Williams v City of New York*, 64 NY2d 800, 802 [1985]). Notably, the Court of Appeals has specifically rejected the notion that the Corporation Counsel's determination is controlled by the language of the civil complaint against which a taxpayer-funded defense is sought (*see Salino*, 1 NY3d at 172). Thus, the mere fact that a plaintiff accuses an officer of violating his or her rights under color of law does not, by itself, entitle the officer to a taxpayer-funded defense against those allegations.

So far, we are all in accord. We part company with the majority, however, in its application of those principles to the facts of this case. The majority holds that the Corporation Counsel acted arbitrarily and capriciously in determining that petitioner was not acting within the scope of his employment during the imbroglio that gave rise to the underlying civil lawsuit. But we say precisely the opposite. The imbroglio was captured on videotape, and it shows petitioner, armed with a baton, violently striking a prone and unarmed man for no apparent reason. As a result of this conduct, petitioner was charged criminally in federal court and sued civilly in Supreme Court. The Corporation Counsel took all three pieces of information – video, criminal indictment, and civil complaint – into account in making the challenged determination. Under these circumstances, we cannot say that the Corporation Counsel's determination to withhold a taxpayer-funded defense from petitioner was arbitrary or capricious in any sense of the term, i.e., that it was "taken without sound basis in reason or regard to the facts" (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]; *see e.g. Matter of Riehle v County of Cattaraugus*, 17 AD3d 1029, 1029-1030 [4th Dept 2005]; *Matter of Bolusi v City of New York*, 249 AD2d 134, 134 [1st Dept 1998]). In fact, we suspect that the average citizen would be surprised to learn that the sort of conduct captured on videotape here constitutes, as a matter of law, a "public duty performed . . . for the benefit of the citizens of the community" (General Municipal Law § 50-j [2]).

The majority articulates four rationales for its contrary determination, but none withstands scrutiny. First, the majority invokes the time-honored rule that "[a]n indictment is a mere accusation and raises no presumption of guilt" (*People v Miller*, 91 NY2d 372, 380 [1998] [internal quotation marks omitted]). This is of course true, and we have no quarrel with the majority's conclusion that the Corporation Counsel may not *automatically* withhold a taxpayer-funded defense in a civil suit simply because the officer was

indicted in connection with the same incident. But that is not what occurred here. Rather, the Corporation Counsel "went to the videotape" and determined for himself that petitioner was not acting within the scope of his employment during the underlying incident. This is the very determination that the Buffalo City Code commits to the sound discretion of the Corporation Counsel. Indeed, if the Corporation Counsel cannot withhold a taxpayer-funded defense when a police officer is caught red-handed assaulting a citizen, then we cannot imagine any circumstances in which he or she could validly exercise the discretion conferred by law to decline to defend a police officer at taxpayer expense – a discretion, we might add, that has been consistently vindicated by the Court of Appeals (*see Salino*, 1 NY3d at 171-172; *Williams*, 64 NY2d at 801-802).

Second, the majority claims that "the video recording captured only part of the encounter between petitioner and the complainant, and [is] . . . unaccompanied by contextual factual information that would be essential to support a determination that petitioner's actions fell outside the scope of his employment and duties as a police officer." We disagree with the majority's characterization of the video; it shows enough of the encounter to demonstrate, persuasively to our mind, that petitioner was not acting out of any immediate fear for his life or his safety or out of any need to subdue the complainant, who was lying prone on his back during the encounter. Indeed, the mind struggles to even hypothesize an off-camera event that could have justified petitioner's conduct. But ultimately, our conflicting interpretations of the videotape are beside the point, for they demonstrate – at most – that reasonable people could disagree about what is depicted thereon. And *that* is simply an insufficient predicate for striking down an administrative determination as arbitrary and capricious; quite the opposite, it is well established that administrative action "may *not* be characterized as arbitrary and capricious" so long as "[r]easonable [people] might differ as to the wisdom of such a determination" (*Matter of Sinacore v New York State Liq. Auth.*, 21 NY2d 379, 384 [1968] [emphasis added]).

Third, the majority emphasizes that "the video recording does not establish that petitioner's actions were taken for wholly personal reasons unrelated to his job as a police officer." Perhaps so, but that is merely one way that an officer can step outside the scope of his duties within the meaning of General Municipal Law § 50-j (2). Stated conversely, the fact that petitioner might not have been acting for "wholly personal reasons" does not demonstrate that he was acting within the scope of his duties for purposes of section 50-j (2); it establishes only that he was not acting outside the scope of his duties *by virtue of* wholly personal conduct. None of the cases upon which the majority relies for this point holds that an officer is necessarily acting within the scope of his duties so long as he is not acting for wholly personal reasons.

Finally, and most importantly, the majority notes that it is "undisputed that petitioner was on duty and working as a police officer when the alleged conduct occurred." As a factual matter, true enough. But as a legal matter, the majority's observation demarcates

only the beginning, not the end, of the scope-of-duty analysis. As the Second Department recently held, not every act undertaken by an on-duty officer constitutes the " 'proper' " performance of his or her duties (*Matter of Lemma v Nassau County Police Officer Indem. Bd.*, 147 AD3d 760, 762 [2d Dept 2017], *lv granted* 29 NY3d 907 [2017]). By parity of reasoning, not every act undertaken by an on-duty officer constitutes an "immediate and actual performance of a public duty . . . for the benefit of the citizens of the community" (General Municipal Law § 50-j [2]). Such is the case here – or, at the very minimum, the Corporation Counsel rationally could have so determined. We respectfully dissent.

Entered: June 8, 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 12-02145

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY J. TERBORG, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO 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 (Alex R. Renzi, J.), rendered August 16, 2012. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree and intimidating a victim or witness 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 burglary in the first degree (Penal Law § 140.30 [2]) and intimidating a victim or witness in the second degree (§ 215.16 [2]). 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 conclude that the verdict is not against the weight of the evidence with respect to the element of physical injury (*see People v Lumpkin*, 154 AD3d 966, 966-967 [2d Dept 2017], *lv denied* 30 NY3d 1117 [2018]; *People v Spratley*, 96 AD3d 1420, 1420-1421 [4th Dept 2012]; *People v Porter*, 304 AD2d 845, 845-846 [3d Dept 2003], *lv denied* 100 NY2d 565 [2003]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Contrary to defendant's contention, Supreme Court (Doyle, J.) properly disqualified the Monroe County Public Defender's Office from representing him (*see People v Terborg*, 156 AD3d 1320, 1320 [4th Dept 2017]). To the extent that defendant also challenges a subsequent ruling of the court (Renzi, J.) adhering to the initial disqualification ruling, we conclude that the subsequent ruling was not an abuse of discretion (*see People v Beauchamp*, 84 AD3d 507, 508 [1st Dept 2011], *lv denied* 17 NY3d 813 [2011]; *see generally People v Evans*, 94 NY2d 499, 506 [2000], *rearg denied* 96 NY2d 755 [2001]). Contrary to defendant's further contention, the court did not err in denying his pretrial request to remove trial counsel inasmuch as

defendant abandoned that request (*see People v Ragin*, 136 AD3d 426, 427 [1st Dept 2016], *lv denied* 27 NY3d 1074 [2016]). Contrary to defendant's further contention, the court conducted a sufficient inquiry into his presentence request to remove trial counsel (*see People v Porto*, 16 NY3d 93, 99-100 [2010]).

Contrary to defendant's contention, the court did not allow evidence of prior uncharged crimes to be introduced at trial. To the extent that defendant challenges the court's refusal to declare a mistrial following the victim's unprompted mention of a prior criminal act by defendant, we conclude that the court's curative instruction to the jury was adequate to dissipate any prejudice (*see People v Spears*, 140 AD3d 1629, 1630 [4th Dept 2016], *lv denied* 28 NY3d 974 [2016]; *People v Holton*, 225 AD2d 1021, 1021 [4th Dept 1996], *lv denied* 88 NY2d 986 [1996]).

Defendant failed to preserve for our review his contention that the Trial Justice should have recused himself, and we decline to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Pett*, 74 AD3d 1891, 1892 [4th Dept 2010]). Defendant's claim of ineffective assistance of counsel is based on matters outside the record and must therefore be raised in a motion pursuant to CPL article 440 (*see People v Atkinson*, 105 AD3d 1349, 1350 [4th Dept 2013], *lv denied* 24 NY3d 958 [2014]). The sentence is not unduly harsh or severe. We have considered defendant's remaining contentions and conclude that none warrant reversal or modification of the judgment.

Finally, we note that the uniform sentence and commitment sheet recites an incorrect sentencing date of August 13, 2012 and must be corrected to reflect the correct sentencing date of August 16, 2012 (*see generally People v Pitcher*, 126 AD3d 1471, 1473-1474 [4th Dept 2015], *lv denied* 25 NY3d 1169 [2015]).

Entered: June 8, 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 17-01658

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

AMMIE HOURIHAN AND KEVIN HOURIHAN,
PLAINTIFFS-RESPONDENTS,

V ORDER

SODEXO MANAGEMENT, INC., DEFENDANT-APPELLANT.

THE TARANTINO LAW FIRM, LLP, BUFFALO (ANN M. CAMPBELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered January 11, 2017. The order, insofar as appealed from, denied those parts of the motion of defendant seeking to strike all claims of emotional injury from the amended bill of particulars and seeking to compel disclosure of the medical records pertaining to the thyroid condition of plaintiff Ammie Hourihan.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 15 and April 27, 2018,

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

Entered: June 8, 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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CAF 16-02327

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

IN THE MATTER OF YESHUA G.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ANTHONY G., RESPONDENT-APPELLANT.

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

JAMES E. BROWN, BUFFALO, FOR PETITIONER-RESPONDENT.

DOMINIC PAUL CANDINO, WEST SENECA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered December 7, 2016 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights to the subject child on the grounds of mental illness.

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

Memorandum: Petitioner commenced this proceeding to terminate respondent father's parental rights with respect to the subject child on the ground of mental illness (*see generally* Social Services Law § 384-b [4] [c]). Family Court granted petitioner's motion for summary judgment on the petition. We now affirm.

Contrary to the father's contention, the court properly granted petitioner's motion based on collateral estoppel (*see Matter of Suffolk County Dept. of Social Servs. v James M.*, 83 NY2d 178, 182-183 [1994]; *Matter of Desiree C.*, 7 AD3d 522, 524 [2d Dept 2004]). The relevant issue in this proceeding is whether the father is "presently and for the foreseeable future unable, by reason of mental illness . . . , to provide proper and adequate care for a child" (Social Services Law § 384-b [4] [c]), and the court resolved that exact issue against him in a prior termination proceeding concerning his other children (*Matter of Neveah G. [Anthony G.]*, 156 AD3d 1342, 1342 [4th Dept 2017], *lv denied* — NY3d —, 2018 NY Slip Op 71835 [2018]; *see Matter of Neveah G. [Jahkeya A.]*, 156 AD3d 1340, 1341 [4th Dept 2017], *lv denied* — NY3d —, 2018 NY Slip Op 71836 [2018]). The father does not dispute that he was afforded a full and fair opportunity to litigate that issue in the prior proceeding (*see James M.*, 83 NY2d at 182-183; *Matter of Sarah L.*, 207 AD2d 1016, 1017 [4th Dept 1994]). Thus,

"[a]ll the requirements were satisfied for applying collateral estoppel to sustain the [instant termination] petition" (*Sarah L.*, 207 AD2d at 1017; *see Matter of Jasmine R.*, 8 Misc 3d 904, 908-912 [Fam Ct, Queens County 2005]). We reject the father's contention that petitioner was obligated to submit the expert report upon which the court's prior determination was based inasmuch as that determination was itself sufficient, standing alone, to establish petitioner's initial burden on summary judgment.

In opposition to petitioner's motion, the father failed to raise a triable issue of fact concerning the applicability of collateral estoppel. We therefore conclude that the court properly granted petitioner's motion and terminated the father's parental rights with respect to the subject child (*see Matter of Majerae T. [Crystal T.]*, 74 AD3d 1784, 1784-1786 [4th Dept 2010]; *cf. Matter of Terrence G. [Terrence M.M.—Yvonne C.G.]*, 98 AD3d 1294, 1295-1296 [4th Dept 2012]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

307

CA 17-01659

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

IN THE MATTER OF ARBITRATION BETWEEN
PROGRESSIVE CASUALTY INSURANCE COMPANY,
PROGRESSIVE ADVANCED INSURANCE COMPANY, MEMORANDUM AND ORDER
PROGRESSIVE AMERICAN INSURANCE COMPANY,
PROGRESSIVE MAX INSURANCE COMPANY, PROGRESSIVE
NORTHERN INSURANCE COMPANY, PROGRESSIVE
PREMIER INSURANCE COMPANY OF ILLINOIS,
PROGRESSIVE SOUTHEASTERN INSURANCE COMPANY AND
PROGRESSIVE SPECIALTY INSURANCE COMPANY,
PETITIONERS-APPELLANTS,

AND

ELITE MEDICAL SUPPLY OF NEW YORK, LLC,
RESPONDENT-RESPONDENT.

MURA & STORM, PLLC, BUFFALO (ROY A. MURA OF COUNSEL), FOR PETITIONERS-APPELLANTS.

NIXON PEABODY LLP, BUFFALO (SHELDON K. SMITH OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered April 20, 2017 in a proceeding pursuant to CPLR article 75. The order denied the petition.

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

Memorandum: Petitioners issued a number of personal automobile insurance policies that included a Mandatory Personal Injury Protection Endorsement. Respondent, a company that supplies durable medical equipment including a Multi-Mode Stimulator Kit (Kit), supplied the Kit to various patients insured by petitioners. After the patients assigned to respondent their rights under the policies, respondent sought reimbursement from petitioners on behalf of those patients. Petitioners sought information by an informational demand in the form of verification requests, as provided under the 120-day rule (*see* 11 NYCRR 65-3.8 [b] [3]), including respondent's acquisition costs and other pricing information for the Kit. Respondent refused to provide that information within the 120 days as required under the rule, maintaining that disclosure thereof would expose trade secrets or proprietary information. In addition, respondent took the position that, when the supplier of the equipment is also the manufacturer of

the equipment, the reimbursement is "the usual and customary price charged to the general public" and thus the information requested by petitioners was not necessary for reimbursement. Thereafter, petitioners denied respondent's claims and, at respondent's request, the parties proceeded to mandatory arbitration. The arbitrator issued 14 identical awards denying each of respondent's claims. Respondent appealed the arbitrator's awards to the master arbitrator, who vacated the arbitrator's awards and remitted the matters for new hearings.

Petitioners filed the instant CPLR article 75 proceeding seeking to vacate the master arbitration awards, alleging that the master arbitrator, among other things, exceeded his authority. Supreme Court disagreed, and denied the petition. We affirm.

The "role of the master arbitrator is to review the determination of the arbitrator to assure that the arbitrator reached his [or her] decision in a rational manner, that the decision was not arbitrary and capricious . . . , incorrect as a matter of law . . . , in excess of the policy limits . . . or in conflict with other designated no-fault arbitration proceedings" (*Matter of Petrofsky [Allstate Ins. Co.]*, 54 NY2d 207, 212 [1981]). This power "does not include the power to review, de novo, the matter originally presented to the arbitrator" (*Matter of Allstate Ins. Co. v Keegan*, 201 AD2d 724, 725 [2d Dept 1994]). Here, we agree with the court that the master arbitrator properly exercised his authority and limited his review of the arbitrator's awards to assessing whether the awards were incorrect as a matter of law (*see Matter of Smith [Firemen's Ins. Co.]*, 55 NY2d 224, 231 [1982]; *Petrofsky*, 54 NY2d at 210-211). In his awards, the master arbitrator found that the arbitrator had misapplied the 120-day rule, reasoning that, pursuant to that rule, a claimant who responds within the requisite 120-day period with a "reasonable justification" is permitted to have that objection decided by the arbitrator and, if overruled by the arbitrator, is to be afforded the opportunity to produce the requested information and allow the insurer to base its decision on such information (11 NYCRR 65-3.8 [b] [3]). Contrary to petitioners' contention, the master arbitrator did not impermissibly perform a de novo review of the evidence. Rather, the master arbitrator vacated the arbitrator's awards based on "an alleged error of a rule of substantive law" (*Matter of Acuhealth Acupuncture, P.C. v Country-Wide Ins. Co.*, 149 AD3d 828, 829 [2d Dept 2017] [internal quotation marks omitted]). Thus, we conclude that the court's decision to uphold the master arbitrator's awards in this case was rational (*cf. id.*).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

329

CA 17-01645

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

ABBOTT BROS. II STEAK OUT, INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ALEXANDROS TSOULIS, DEFENDANT-APPELLANT.

HALL AND KARZ, CANANDAIGUA (PETER ROLPH OF COUNSEL), FOR DEFENDANT-APPELLANT.

PETRALIA WEBB & O'CONNELL, P.C., ROCHESTER (ARNOLD R. PETRALIA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered December 2, 2016. The order granted plaintiff leave to reargue, and upon reargument, granted that part of the motion of plaintiff for summary judgment with respect to liability.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of the motion with respect to the first through sixth causes of action, and with respect to the seventh cause of action except insofar as it is based upon defendant's removal of a steam boiler furnace, a hot water heater, a walk-in cooler, a two-sink stainless steel unit, a single door freezer, a small refrigerator, an under work line, a two-sliding door refrigerator, three fryer units, one broiler, a Hobart brand dishwasher, a milk cooler, an iced tea machine, and various tables, chairs, bar stools, booster seats, and high chairs, and as modified the order is affirmed without costs.

Memorandum: This action arises out of a lease between plaintiff, as landlord, and defendant, as tenant, for a commercial property that was to be operated as a restaurant. The fifth paragraph of the lease provided that defendant had examined the premises, and accepted it in the condition that it was in at the time of lease commencement. The fifth paragraph further provided that defendant would "quit and surrender the premises at the end of the demised term in as good condition as on the commencement of th[e] lease, as the reasonable use thereof will permit." The thirtieth paragraph of the lease provided that "[t]he demised premises herein is a fully equipped restaurant and bar including furniture, equipment, fixtures and other personal property[,] including but not limited to those items set forth in Exhibit A attached hereto . . . Tenant agrees that all items contained

in Exhibit A are in good condition and fully operable and are accepted by Tenant in 'as is' condition. Tenant must keep, and at the end of the Term return, all of said fixtures and personal property in good order and repair, reasonable wear and tear excepted. Tenant shall be responsible for replacement of any items contained in Exhibit A which are lost, stolen, damaged or become obsolete or worn out during the lease term."

After defendant vacated and surrendered the leased premises at the end of the lease term, plaintiff commenced this action and asserted seven causes of action, including for conversion and breach of lease based on allegations that defendant improperly removed restaurant equipment and fixtures when he vacated the premises. Following discovery, plaintiff moved for summary judgment on the complaint, and Supreme Court denied the motion. Plaintiff subsequently sought leave to reargue the motion and, upon reargument, the court granted that part of the motion with respect to liability. We note that the court failed to specify in either its bench decision or written order the cause or causes of action that served as the basis for granting the motion in part.

As a preliminary matter, we agree with defendant that the photographs submitted by plaintiff on its original motion were not properly authenticated (*see generally People v Byrnes*, 33 NY2d 343, 347 [1974]), and that plaintiff's attempt to remedy that defect in its reply papers was improper (*see David v Bryon*, 56 AD3d 413, 414-415 [2d Dept 2008]). We note, however, that our decision herein is not based upon any photographs in the record.

We further agree with defendant that the court erred in granting the motion with respect to liability on the first through sixth causes of action, and we therefore modify the order accordingly. Even assuming, arguendo, that plaintiff met its initial burden on the motion (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), we conclude that defendant's submissions raised triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), particularly on the issue whether he left the premises in a condition that conformed to the lease provisions.

Finally, we conclude that the court erred in granting the motion with respect to liability on the seventh cause of action, for breach of lease, except to the extent that it is based on certain items that defendant admitted removing or failing to replace. Specifically, defendant admitted in his interrogatory responses that, upon vacating the premises, he removed or failed to replace the following items that were present at the premises when he took possession: a steam boiler furnace, a hot water heater, a walk-in cooler, a two-sink stainless steel unit, a single door freezer, a small refrigerator, a small freezer described in Exhibit A as an "under work line," a two-sliding door refrigerator, three fryer units, one broiler, a Hobart brand dishwasher, a milk cooler, an iced tea machine, and various tables, chairs, bar stools, booster seats, and high chairs. Defendant's admissions establish as a matter of law that he breached the fifth and thirtieth paragraphs of the lease agreement with respect to only those

items, and we therefore further modify the order accordingly.

In light of our determination, plaintiff's contention concerning spoliation is academic.

Entered: June 8, 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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CAF 17-01113

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

IN THE MATTER OF RAYMOND J. MAURO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CHEYENNE L. COSTELLO, RESPONDENT-RESPONDENT.

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

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR RESPONDENT-RESPONDENT.

SARA E. ROOK, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Steuben County (Matthew K. McCarthy, A.J.), entered January 5, 2017 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, dismissed the violation petition.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting petitioner's violation petition, and as modified the order is affirmed without costs in accordance with the following memorandum: Petitioner father appeals from an order that, inter alia, denied his petition seeking to modify a prior custody order entered on consent by awarding him sole physical custody of the parties' child and dismissed his violation petition. We reject the father's contention that Family Court erred in continuing custody with respondent mother. Initially, we conclude that the father established the requisite change in circumstances to warrant an inquiry into whether the best interests of the child would be served by a change in custody by establishing, inter alia, that the mother had been arrested (*see Matter of Jeremy J.A. v Carley A.*, 48 AD3d 1035, 1036 [4th Dept 2008]). Nevertheless, we further conclude that the court properly determined that primary physical custody with the mother is in the child's best interests (*see generally Matter of Higgins v Higgins*, 128 AD3d 1396, 1396 [4th Dept 2015]). The record establishes that the conditions of the father's parole, which have not been modified to allow for custody under these circumstances, require that the father's contact with the child be supervised. Thus, while the best interests factors favor the father in several significant respects, there is a sound and substantial basis in the record supporting the court's determination that primary physical custody with the mother is in the child's best interests inasmuch as there is a legal impediment to the relief sought by the father (*see Cunningham*

v Cunningham, 137 AD3d 1704, 1705 [4th Dept 2016]).

We agree with the father, however, that the court erred in denying his violation petition, and we therefore modify the order accordingly. " 'To sustain a finding of civil contempt based upon a violation of a court order, it is necessary to establish that a lawful court order clearly expressing an unequivocal mandate was in effect and that the person alleged to have violated that order had actual knowledge of its terms' " (*Matter of Petkovsek v Snyder* [appeal No. 2], 251 AD2d 1085, 1085 [4th Dept 1998]). "In addition, it must be established that the offending conduct 'defeated, impaired, impeded, or prejudiced' a right or remedy of the complaining party" (*id*., quoting Judiciary Law § 753 [A]; *see* Family Ct Act § 156). In this matter, the terms of the consent order were unequivocal and the mother repeatedly violated the terms, particularly with respect to communication and visitation. The father struggled to maintain telephone contact with the child, because the mother's phone number frequently changed and she failed to notify the father of those changes. Indeed, at times the mother prevented the father from speaking with the child for weeks. Moreover, the consent order mandated that the father was to have Skype contact with the child one time per week, and the mother failed to comply with that directive. Thus, the father established by clear and convincing evidence that the mother violated the consent order (*see El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]), and the mother is therefore advised to abide by both her visitation and communication obligations.

Entered: June 8, 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 16-00620

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID M. CAREY, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SHERRY A. CHASE OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAVID M. CAREY, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered March 2, 2016. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [1]). A parole warrant was issued for defendant after defendant failed to report to parole and moved out of his parole-approved residence. Defendant was arrested in the early morning hours outside an apartment leased to his girlfriend after defendant fled the residence upon hearing parole officers knocking at the door. In conducting a protective sweep of the residence, the parole officers found a box that contained what appeared to be baggies of cocaine. The parole officers found no furnishings upstairs at the residence, and they found some furniture, including a bed, downstairs. They found only men's clothing in the apartment, and they also found defendant's identification card and what appeared to be a key to the residence. Defendant's girlfriend was inside the residence when the parole officers entered, but they had observed her outside 20 to 30 minutes earlier, knocking on the door several times before being let inside, thus suggesting that she did not have a key to the apartment.

We agree with defendant in his main and pro se supplemental briefs that County Court erred in finding that he lacked standing to contest the search of the residence. "One seeking standing to assert

a violation of his Fourth Amendment rights must demonstrate a legitimate expectation of privacy. One may have an expectation of privacy in premises not one's own, e.g., an overnight guest" (*People v Ortiz*, 83 NY2d 840, 842 [1994]). Here, we conclude that defendant established his standing at least as an overnight guest, if not as something more (*see People v Telfer*, 175 AD2d 638, 639 [4th Dept 1991], *lv denied* 78 NY2d 1130 [1991]; *People v Moss*, 168 AD2d 960, 960 [4th Dept 1990]; *see generally People v Rodriguez*, 69 NY2d 159, 162-163 [1987]). We agree with the court's further determination, however, that the search of the apartment was lawful (*see People v Johnson*, 94 AD3d 1529, 1531-1532 [4th Dept 2012], *lv denied* 19 NY3d 974 [2012]). The search by the parole officers was rationally and reasonably related to the parole officers' duties "to detect and to prevent parole violations for the protection of the public from the commission of further crimes" (*People v Huntley*, 43 NY2d 175, 181 [1977]; *see Johnson*, 94 AD3d at 1531-1532).

We reject defendant's further contention in his main and pro se supplemental briefs that the court erred in granting the People's request for a missing witness charge with respect to defendant's girlfriend. Contrary to defendant's contention, the People established that the girlfriend would have provided testimony on a material issue in the case and would have testified favorably for defendant (*see People v Soto*, 297 AD2d 567, 567 [1st Dept 2002], *lv denied* 99 NY2d 564 [2002]). Defendant's further contention that the missing witness instruction constituted improper burden-shifting is without merit. "Although a court may not ordinarily comment on a defendant's failure to testify or otherwise come forward with evidence at trial, . . . once a defendant does so, the customary standards for giving a missing witness charge apply" (*People v Macana*, 84 NY2d 173, 177 [1994]).

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 reject defendant's further contention in his main brief that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Russaw*, 114 AD3d 1261, 1261-1262 [4th Dept 2014], *lv denied* 22 NY3d 1202 [2014]). Also contrary to defendant's contention in his main brief, the sentence is not unduly harsh or severe.

We reject defendant's contention in his pro se supplemental brief that he was denied effective assistance of counsel because counsel failed to make a CPL 30.30 speedy trial motion. The record before us does not support defendant's contention that there was a speedy trial violation (*see People v Cooper*, 134 AD3d 1583, 1585-1586 [4th Dept 2015]), and it is well settled that "[t]here can be no denial of effective assistance of trial counsel from counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005]; *see People v Jackson*, 132 AD3d 1304, 1305 [4th Dept 2015], *lv denied* 27 NY3d 999 [2016]). To the extent that defendant's contention involves matters outside the record on appeal, it must be raised by way of a motion pursuant to CPL

440.10 (*see Cooper*, 134 AD3d at 1586). Defendant's contention that the People failed to establish a sufficient chain of custody for the cocaine is unpreserved for our review (*see People v Alexander*, 48 AD3d 1225, 1226 [4th Dept 2008], *lv denied* 10 NY3d 859 [2008]), and we decline to exercise our power to address it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We have examined defendant's remaining contentions in his pro se supplemental brief and conclude that they are without merit.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

379

CA 17-01244

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

STANLEY PARKER, FAIRMAN SUTTON, DAVID BAIN, ELLEN PECK, DOUGLAS WILLIAMS, AND ALCID BEAUDIN, PLAINTIFFS-APPELLANTS,

V OPINION AND ORDER

TOWN OF ALEXANDRIA, DEFENDANT-RESPONDENT.

CAMPANY, MCARDLE & RANDALL, PLLC, LOWVILLE (KEVIN M. MCARDLE OF COUNSEL), AND YOUNG LAW OFFICE, PLLC, FOR PLAINTIFFS-APPELLANTS.

SLYE LAW OFFICES, P.C., WATERTOWN (ROBERT J. SLYE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Jefferson County (James P. McClusky, J.), entered April 6, 2017. The order and judgment, among other things, granted the motion of defendant for summary judgment on its first through sixth counterclaims.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying the motion in part with respect to the sixth counterclaim and vacating the fourth decretal paragraph, and by vacating the first decretal paragraph to the extent that it grants the relief sought in the first counterclaim and vacating the third decretal paragraph in its entirety, and as modified the order and judgment is affirmed without costs.

Opinion by TROUTMAN, J.: In 2001, the Town Board of defendant, Town of Alexandria (Town), adopted a policy (2001 Policy) to provide qualified former employees with continued health benefits after retirement. The Town Board later sought to modify that policy by passing Local Law No. 2 of 2009 (2009 Law). That law, which changed the eligibility requirements for receiving benefits, included a modification clause that stated, in relevant part: "This Local Law may be amended, revoked or rescinded by a vote of not less than a majority plus one (1) of the Town Board." The 2009 Law was not enacted by referendum. The Town Board sought "to clarify" the 2009 Law by passing a resolution in 2011 (2011 Resolution), which purported to incorporate additional paragraphs into the 2009 Law concerning the qualification for continuation of retirement benefits. The Town Board then passed Local Law No. 2 of 2014 (2014 Law), which replaced the health insurance benefits of retired employees with cash grants to help offset the cost of private health insurance. The 2014 Law

contained a modification clause similar to the modification clause in the 2009 Law, and it also was not enacted by referendum.

Plaintiffs, former Town employees who retired between 2001 and 2014, commenced this action as a hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, a declaration that the 2014 Law is invalid. In its answer, the Town asserted a counterclaim seeking, inter alia, declarations that the 2009 Law, the 2011 Resolution, and the 2014 Law are invalid. We previously concluded that the action is properly only a declaratory judgment action and thus that Supreme Court erred in using a summary procedure applicable only to CPLR article 78 proceedings to dispose of the action and to declare those enactments invalid (*Parker v Town of Alexandria*, 138 AD3d 1467, 1467-1468 [4th Dept 2016]).

After we issued our decision, plaintiffs filed an amended complaint again seeking a declaration that the 2014 Law is invalid and seeking an order directing that the Town continue payment of plaintiffs' health insurance premiums in accordance with the 2009 Law. The Town interposed several counterclaims in its answer and thereafter moved for summary judgment on the first through sixth counterclaims. The first counterclaim seeks a declaration that the 2009 Law is invalid under Municipal Home Rule Law § 20 (1) because its modification clause requires a supermajority vote of the Town Board to enact a local law. The second counterclaim seeks a declaration that the 2009 Law is invalid because its modification clause curtails the power of elected members of the Town Board and thus was subject under section 23 (2) (f) to a mandatory referendum, which did not occur. The third counterclaim seeks a declaration that the 2011 Resolution is invalid because a resolution cannot modify a local law. The fourth and fifth counterclaims seek declarations that the 2014 Law is invalid on the same grounds as those identified in the first and second counterclaims. The sixth counterclaim seeks a declaration that the 2001 Policy is "the only validly adopted policy of the Town of Alexandria in connection with retiree health insurance."

The court granted defendant's motion and declared (1) the 2009 Law invalid on the grounds asserted in the first and second counterclaims; (2) the 2014 Law invalid on the grounds asserted in the fourth and fifth counterclaims; (3) the 2011 Resolution invalid on the ground asserted in the third counterclaim; and (4) the 2001 Policy "valid and in effect from the time of its adoption until otherwise validly amended, revoked or superseded as claimed in [the] Sixth Counterclaim."

Plaintiffs correctly acknowledge that the modification clauses in the 2009 Law and the 2014 Law run afoul of Municipal Home Rule Law § 23 (2) (f) because those laws were not enacted by referendum. "[A] local law shall be subject to mandatory referendum if it . . . [a]bolishes, transfers or curtails any power of an elective officer" (*id.*). Therefore, a local legislative body lacks the power to enact legislation curtailing the voting powers of its own members; such legislation cannot be enacted except by referendum. Here, the modification clauses in the 2009 Law and the 2014 Law curtailed the

voting powers of the elected members of the Town Board by requiring a supermajority vote to enact certain kinds of legislation. The 2009 Law and 2014 Law are thus invalid inasmuch as they were not enacted by referendum.

Nevertheless, plaintiffs contend that the modification clauses should be severed from the substantive provisions of the 2009 Law and 2014 Law, and the substantive provisions upheld (*see generally Matter of Westinghouse Elec. Corp. v Tully*, 63 NY2d 191, 196-199 [1984]). Initially, we note that plaintiffs are not aggrieved by that part of the order and judgment invalidating the 2014 Law inasmuch as they sought that relief in their amended complaint, and thus their contention on appeal requesting enforcement of the substantive provisions of that law is not properly before us (*see* CPLR 5511; *Armata v Abbott Laboratories*, 284 AD2d 911, 911 [4th Dept 2011]). Furthermore, we reject plaintiffs' contention with respect to the 2009 Law. Where, as here, a local law is subject to a mandatory referendum, the failure to enact it by referendum renders the entire law invalid (*see Gizzo v Town of Mamaroneck*, 36 AD3d 162, 166 [2d Dept 2006], *lv denied* 8 NY3d 806 [2007]; *Matter of Sacco v Maruca*, 175 AD2d 578, 579 [4th Dept 1991], *lv denied* 78 NY2d 862 [1991]; *cf. Mayor of City of N.Y. v Council of City of N.Y.*, 235 AD2d 230, 231 [1st Dept 1997], *lv denied* 89 NY2d 815 [1997]). In the cases upon which plaintiffs rely, courts applied severability to uphold valid provisions contained in properly enacted local laws (*see e.g. CWM Chem. Servs., L.L.C. v Roth*, 6 NY3d 410, 423-425 [2006]; *Matter of Catanzaro v City of Buffalo*, 163 AD2d 822, 823 [4th Dept 1990], *lv denied* 76 NY2d 712 [1990]). Here, in contrast, we have no occasion to apply severability because there is no properly enacted local law from which to sever the modification clause.

We thus conclude that the court properly granted the motion with respect to the second counterclaim. In light of that determination, the Town's additional challenges to the 2009 Law and 2011 Resolution are moot, and any discussion of the first and third counterclaims is therefore purely academic.

We agree with plaintiffs, however, that the court erred in granting the motion with respect to the sixth counterclaim and declaring that the 2001 Policy is "valid and in effect from the time of its adoption until otherwise validly amended, revoked or superseded." The moving party on a motion for summary judgment has the burden of establishing its entitlement to judgment as a matter of law by submitting evidence sufficient to eliminate any questions of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The Town failed to submit evidence that the 2001 Policy was valid at the time of its adoption, and that it was not amended, revoked or superseded by subsequent legislation other than the above subject enactments.

Accordingly, the order and judgment should be modified by vacating the first decretal paragraph to the extent that it grants the relief sought in the first counterclaim and by vacating the third

decretal paragraph, which grants the relief sought in the third counterclaim, in its entirety. Furthermore, the order and judgment should be modified by denying the motion in part with respect to the sixth counterclaim and vacating the fourth decretal paragraph.

Entered: June 8, 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 17-01663

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

HENRI PONTES, DEFENDANT-RESPONDENT.

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

MICHAEL T. ANSALDI, ROCHESTER, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Monroe County Court (Douglas A. Randall, J.), entered February 10, 2017. The order granted that part of defendant's omnibus motion seeking to dismiss the indictment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, that part of the omnibus motion seeking to dismiss the indictment is denied, the indictment is reinstated, and the matter is remitted to Monroe County Court for further proceedings on the indictment.

Memorandum: The People appeal from an order granting that part of defendant's omnibus motion seeking to dismiss an indictment charging her with identity theft in the first degree (Penal Law § 190.80 [3]) and second degree (§ 190.79 [2]). We now reverse the order, deny that part of the motion, and reinstate the indictment. We agree with the People that County Court erred in granting that part of the motion inasmuch as the evidence before the grand jury is legally sufficient to sustain the indictment (*see People v Roberts*, — NY3d —, —, 2018 NY Slip Op 03172 at *4-7 [2018]; *People v Yuson*, 133 AD3d 1221, 1221-1222 [4th Dept 2015], *lv denied* 27 NY3d 1157 [2016]; *see generally People v Bello*, 92 NY2d 523, 525-526 [1998]).

Entered: June 8, 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 17-01833

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

IN THE MATTER OF ARBITRATION BETWEEN
THE PROFESSIONAL, CLERICAL, TECHNICAL EMPLOYEES
ASSOCIATION, PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

BOARD OF EDUCATION FOR BUFFALO CITY SCHOOL
DISTRICT, RESPONDENT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (BETHANY A. CENTRONE OF COUNSEL), FOR RESPONDENT-APPELLANT.

BARTLO, HETTLER, WEISS & TRIPI, KENMORE (PAUL D. WEISS OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered July 6, 2017 in a proceeding pursuant to CPLR article 75. The order granted the petition to confirm an arbitration award and denied the cross petition to vacate that arbitration award.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is denied, the cross petition is granted, the award is vacated, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: In this CPLR article 75 proceeding, respondent appeals from an order granting the petition to confirm the arbitration award, denying respondent's cross petition to vacate the award, and confirming the award. The arbitration proceeding arose from respondent's plan to transfer certain employees previously assigned to work at a single location to new positions requiring them to alternate between two different work locations. The arbitrator's opinion and award, among other things, found that respondent involuntarily transferred the grievants in violation of the collective bargaining agreement between the parties, and directed respondent to compensate the grievants "for work performed at more than one location from November 30, 2013 until the end of the 2016 Budget Year."

We agree with respondent that Supreme Court erred in granting the petition and in denying the cross petition. An arbitration award "shall be vacated" where the arbitrator "so imperfectly executed [the award] that a final and definite award upon the subject matter submitted was not made" (CPLR 7511 [b] [1] [iii]). "An award is indefinite or nonfinal within the meaning of the statute 'only if it

leaves the parties unable to determine their rights and obligations, if it does not resolve the controversy submitted or if it creates a new controversy' " (*Yoonessi v Givens*, 78 AD3d 1622, 1622-1623 [4th Dept 2010], *lv denied* 17 NY3d 718 [2011], quoting *Matter of Meisels v Uhr*, 79 NY2d 526, 536 [1992]). Vacatur is appropriate where the award failed to set forth the manner of computing monetary damages (*see Matter of Teamsters Local Union 693 [Coverall Serv. & Supply Co.]*, 84 AD2d 609, 610 [3d Dept 1981]; *Matter of Biscardi [Maryland Cas. Co.]*, 40 AD2d 610, 610-611 [2d Dept 1972]).

In an affidavit in support of the cross petition, respondent's Chief of Staff averred that none of the affected employees was terminated or had his or her compensation reduced as a result of the allegedly wrongful transfers. The award does not explain the basis for the compensation allegedly owed to the grievants, nor does it detail how that compensation should be calculated. It appears that the arbitrator merely copied verbatim the remedy requested by petitioner rather than making findings of his own. We therefore reverse the order, deny the petition, grant the cross petition, vacate the award, and remit the matter to Supreme Court, which shall remit the matter to the arbitrator to determine whether any compensation is owed to the grievants, and, if so, to determine the amount of such compensation or how it can be calculated with reasonable precision (*see generally Matter of Westchester County Corr. Officers Benevolent Assn., Inc. v Cheverko*, 112 AD3d 842, 842 [2d Dept 2013], *lv dismissed* 22 NY3d 1174 [2014]).

Entered: June 8, 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 17-01585

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

MICHAEL EDWARDS AND KAREN ROTHENBERGH,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

FRANCINE M. GORMAN, RURAL/METRO OF ROCHESTER, INC., RURAL/METRO MEDICAL SERVICES, RURAL/METRO OF NEW YORK, INC., R/M MANAGEMENT CO., INC. (ALSO KNOWN AS RURAL/METRO MANAGEMENT), AND RURAL/METRO CORPORATION, DEFENDANTS-RESPONDENTS.

FARACI LANGE, LLP, ROCHESTER (CAROL A. MCKENNA OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GOLDBERG SEGALLA LLP, ROCHESTER (PATRICK B. NAYLON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Renee Forgensi Minarik, A.J.), entered November 16, 2016. The order, insofar as appealed from, denied plaintiffs' motion for summary judgment on the issue of liability.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and plaintiffs' motion is granted in accordance with the following memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Michael Edwards (plaintiff) when he was struck by an ambulance driven by defendant Francine M. Gorman. At the time of the collision, plaintiff, a parking attendant, was tasked with instructing vehicles traveling in a two-lane, one-way "pass-through" road of the entrance loop of Strong Memorial Hospital on how to reach an alternate entrance for a nearby parking garage. Plaintiff was standing in the center of the pass-through road between the two lanes of travel, and Gorman struck him as she was slowing down for a stop sign at the end of the pass-through road. Plaintiffs moved for partial summary judgment on the issue of liability, and defendants cross-moved for partial summary judgment on the issue of plaintiff's comparative fault. Supreme Court denied the motion and cross motion, and plaintiffs appeal. We agree with plaintiffs that the court erred in denying their motion.

We note at the outset that the issue of serious injury was previously decided in plaintiffs' favor, and no appeal was taken from that order. Thus, in seeking partial summary judgment on liability,

plaintiffs were required to establish only that Gorman was negligent and that her negligence was a proximate cause of the accident. We conclude that plaintiffs met that burden by providing photographs, video footage and Gorman's deposition testimony in which she admitted that she executed a wide turn through multiple lanes of the pass-through road, which constitutes a violation of Vehicle and Traffic Law § 1128 (a) (*see Gabriel v Great Lakes Concrete Prods. LLC*, 151 AD3d 1855, 1855-1856 [4th Dept 2017]). In opposition, defendants failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Although defendants successfully raised triable issues of fact with respect to plaintiff's negligence, that is of no moment in the context of plaintiffs' appeal. "To be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault" (*Rodriguez v City of New York*, — NY3d —, —, 2018 NY Slip Op 02287, *6 [2018]).

To the extent that plaintiffs contend that Gorman's negligence was the sole proximate cause of the accident, we conclude that their contention is not properly before us inasmuch as it was raised for the first time in their reply papers in Supreme Court (*see Mikulski v Battaglia*, 112 AD3d 1355, 1356 [4th Dept 2013]). In any event, as noted herein, defendants raised triable issues of fact concerning plaintiff's comparative fault.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

405

CA 17-01560

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

ROBERT SMILEY AND KIMBERLY SMILEY,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ALLGAIER CONSTRUCTION CORP.,
DEFENDANT-APPELLANT.

SCHNITTER CICCARELLI MILLS, PLLC, WILLIAMSVILLE (RYAN J. MILLS OF COUNSEL), FOR DEFENDANT-APPELLANT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (WILLIAM QUINLAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered May 4, 2017. The order, among other things, granted plaintiffs' motion for partial summary judgment on the issue of liability under Labor Law § 240 (1), and denied those parts of defendant's cross motion seeking summary judgment dismissing the Labor Law §§ 240 (1) and 241 (6) claims.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying plaintiffs' motion and granting that part of defendant's cross motion with respect to the Labor Law § 241 (6) claim and dismissing that claim and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this common-law negligence and Labor Law action to recover damages for injuries allegedly sustained by Robert Smiley (plaintiff) while he and a coworker were performing work on a mechanical door. According to plaintiff's deposition testimony, he and the coworker were lifting a heavy motor approximately four feet onto the deck of a scissor lift, and they had positioned themselves on each side of the motor and lifted it off the floor. Plaintiff initially gripped the motor from underneath and lifted it two to three feet in the air but had to change his grip and reposition his hands to get the motor above his chest. The motor was at an angle with its weight bearing down on plaintiff because he was one foot shorter than his coworker. While plaintiff was changing his grip, he lost control of the left side of the motor and it dropped, forcing him to catch it from underneath to prevent it from falling to the floor. When plaintiff did so, he felt pain in his left arm. He could not put the motor down at that time because it would have fallen down on him. The two men completed the task and lifted the motor onto

the scissor lift, at which time plaintiff felt a pop in his left shoulder.

Plaintiffs moved for partial summary judgment on the issue of liability under Labor Law § 240 (1), and defendant cross-moved for summary judgment dismissing the complaint. Supreme Court granted plaintiffs' motion and granted defendant's cross motion only in part, dismissing the common-law negligence and Labor Law § 200 claims. Defendant contends on appeal that the court erred in granting plaintiffs' motion and in denying those parts of defendant's cross motion with respect to the claims pursuant to Labor Law §§ 240 (1) and 241 (6). We agree with defendant that the court erred in granting plaintiffs' motion and in denying that part of its cross motion with respect to Labor Law § 241 (6). We therefore modify the order accordingly.

In support of the motion, plaintiffs submitted the deposition testimony of plaintiff set forth above, as well as that of his coworker and a foreman. Plaintiff's coworker testified that he had performed work on 30 or 40 such doors and had manually lifted the motor onto a scissor lift every time. Conversely, the foreman, who was not on location on the date of the injury, testified that he had performed work on "over a thousand" such doors and had "never lifted a motor manually onto a scissor lift." The foreman found it "hard to believe" that hoists, blocks, pulleys, ropes, or other safety devices were not available on site.

We conclude that plaintiffs failed to meet their initial burden on their motion inasmuch as their evidentiary submissions created issues of fact whether plaintiff's "injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see Finocchi v Live Nation Inc.*, 141 AD3d 1092, 1094 [4th Dept 2016]; *cf. Carr v McHugh Painting Co., Inc.*, 126 AD3d 1440, 1442-1443 [4th Dept 2015]). Based on those issues of fact, we likewise conclude that the court properly denied that part of defendant's cross motion with respect to the Labor Law § 240 (1) claim (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

We further agree with defendant that the court erred in denying that part of its cross motion with respect to the Labor Law § 241 (6) claim, which is premised on the alleged violation of 12 NYCRR 23-1.7 (f). That regulation applies to stairways, ramps or runways, and the undisputed evidence establishes that the accident "did not involve [plaintiff] ascending or descending to a different level" (*Trombley v DLC Elec., LLC*, 134 AD3d 1343, 1344 [3d Dept 2015]; *see Miranda v NYC Partnership Hous. Dev. Fund Co., Inc.*, 122 AD3d 445, 446 [1st Dept 2014]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

413

KA 15-00653

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TALIB ALSAIFULLAH, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

TALIB ALSAIFULLAH, DEFENDANT-APPELLANT PRO SE.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered February 24, 2015. The judgment convicted defendant, upon his plea of guilty, of promoting prison contraband in the first degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him, upon his *Alford* plea entered during deliberations following a jury trial, of promoting prison contraband in the first degree (Penal Law § 205.25 [2]). In appeal No. 2, defendant appeals from an order denying his motion pursuant to CPL 440.30 (1-a) for DNA testing on evidence including the weapon he was charged with possessing. In appeal No. 3, defendant appeals from an order denying his motion pursuant to CPL 440.10 to vacate the judgment. We affirm in each appeal.

Addressing first defendant's contentions in his main brief with respect to the judgment in appeal No. 1, we conclude that he "knowingly, intelligently, and voluntarily waived his right to appeal as a condition of the plea" (*People v Bizardi*, 130 AD3d 1492, 1492 [4th Dept 2015], *lv denied* 27 NY3d 992 [2016]; *see generally People v Sanders*, 25 NY3d 337, 340-342 [2015]). Contrary to defendant's contention, County Court "engage[d] [him] in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice . . . , and the record establishes that defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*Bizardi*,

130 AD3d at 1492 [internal quotation marks omitted]; *see Sanders*, 25 NY3d at 341). Contrary to defendant's further contentions, we conclude that "the waiver of the right to appeal was not rendered invalid based on the court's failure to require defendant to articulate the waiver in his own words" (*People v Dozier*, 59 AD3d 987, 987 [4th Dept 2009], *lv denied* 12 NY3d 815 [2009]), the court's failure " 'to specify during the colloquy which specific claims survive the waiver' " (*Bizardi*, 130 AD3d at 1492), or the fact that the waiver "was not reduced to writing" (*People v Bryan*, 78 AD3d 1692, 1692 [4th Dept 2010], *lv denied* 16 NY3d 829 [2011]; *see People v Nicholson*, 6 NY3d 248, 257 [2006]).

Defendant contends that the court erred in denying his motion to dismiss the indictment on the ground that he was shackled and handcuffed while appearing before the grand jury. Even assuming, arguendo, that defendant's contention survives the valid waiver of the right to appeal (*see People v Lopez*, 6 NY3d 248, 255 [2006]; *People v Gilmore*, 12 AD3d 1155, 1155-1156 [4th Dept 2004]; *People v Robertson*, 279 AD2d 711, 712 [3d Dept 2001], *lv denied* 96 NY2d 805 [2001]), we conclude that it lacks merit. "Although 'a criminal defendant may not be physically restrained in the presence of a [grand] jury unless there is a rational basis, articulated on the record, for the restraint' . . . , reversal is not required here inasmuch as 'the prosecutor . . . gave cautionary instructions to the [g]rand [j]ury, which dispelled any prejudice that may have resulted' " (*People v Brooks*, 140 AD3d 1780, 1781 [4th Dept 2016]). Moreover, "the overwhelming nature of the evidence adduced before the grand jury eliminated the possibility that defendant was prejudiced as a result of the improper shackling" (*id.*).

Defendant's further contention that his plea was "not voluntarily entered because [he] provided only monosyllabic responses to [the court's] questions is actually a challenge to the factual sufficiency of the plea allocution" (*People v Hendrix*, 62 AD3d 1261, 1262 [4th Dept 2009], *lv denied* 12 NY3d 925 [2009]), which is encompassed by the valid waiver of the right to appeal (*see People v Smith*, 26 AD3d 746, 747 [4th Dept 2006], *lv denied* 7 NY3d 763 [2006]; *People v Biaselli*, 12 AD3d 1133, 1133 [4th Dept 2004]). Defendant's related contention that the court erred in accepting his *Alford* plea because the record lacked the requisite strong evidence of actual guilt to support his plea "survives his waiver of the right to appeal to the extent that it implicates the voluntariness of the plea" (*People v Elliott*, 107 AD3d 1466, 1466 [4th Dept 2013], *lv denied* 22 NY3d 996 [2013]). "By failing to move to withdraw the plea or vacate the judgment of conviction on the ground that the record lacked the requisite 'strong evidence of actual guilt,' however, defendant failed to preserve his contention for our review . . . , and this case does not fall within the narrow exception to the preservation requirement" (*id.*; *see People v Lopez*, 71 NY2d 662, 666 [1988]). In any event, we conclude that "the record establishes that defendant's *Alford* plea was the product of a voluntary and rational choice, and the record . . . contains strong evidence of actual guilt" (*Elliott*, 107 AD3d at 1466 [internal quotation marks omitted]).

Defendant contends that he was denied effective assistance of counsel because, according to defendant, defense counsel did not properly challenge the jury panel (*see generally* CPL 270.10). That contention does not survive his plea or the valid waiver of the right to appeal inasmuch as defendant failed to demonstrate that the plea bargaining process was infected by the allegedly ineffective assistance or that he entered the plea because of defense counsel's allegedly poor performance (*see People v Brinson*, 151 AD3d 1726, 1726 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017]; *see generally People v Petgen*, 55 NY2d 529, 534-535 [1982], *rearg denied* 57 NY2d 674 [1982]).

The contentions in defendant's main and pro se supplemental briefs that he was denied due process based upon preindictment and other prosecutorial misconduct are forfeited as a result of his guilty plea (*see People v Escalera*, 121 AD3d 1519, 1520-1521 [4th Dept 2014], *lv denied* 24 NY3d 1083 [2014]; *People v Anderson*, 90 AD3d 1475, 1477 [4th Dept 2011], *lv denied* 18 NY3d 991 [2012]), and are encompassed by his waiver of the right to appeal (*see People v Thomas*, 56 AD3d 1240, 1240 [4th Dept 2008], *lv denied* 12 NY3d 763 [2009]).

We conclude that defendant's claim of actual innocence in his pro se supplemental brief is not properly before us on defendant's direct appeal following his *Alford* plea. "A claim of actual innocence 'must be based upon reliable evidence which was not presented at the [time of the plea]' . . . , and thus must be raised by a motion pursuant to CPL article 440" (*People v Brockway*, 148 AD3d 1815, 1815 [4th Dept 2017]). Defendant failed to preserve his claim of actual innocence for our review inasmuch as he "failed to move to withdraw the plea, and his postjudgment motion pursuant to CPL 440.10 did not seek vacatur on that ground" (*People v Grimes*, 53 AD3d 1055, 1056 [4th Dept 2008], *lv denied* 11 NY3d 789 [2008]; *see People v Jenkins*, 84 AD3d 1403, 1409 [2d Dept 2011], *lv denied* 19 NY3d 1026 [2012]). Moreover, a plea of guilty "should not be permitted to be used as a device for a defendant to avoid a [verdict following a] trial while maintaining a claim of factual innocence" (*People v Plunkett*, 19 NY3d 400, 406 [2012]), and "the same is true of an *Alford* plea" (*Brockway*, 148 AD3d at 1815; *see generally Matter of Silmon v Travis*, 95 NY2d 470, 475 [2000]).

In appeal No. 2, defendant contends in his main brief that the court erred in summarily denying his motion pursuant to CPL 440.30 (1-a) for DNA testing on evidence that included the weapon he was charged with possessing. We reject that contention. The sole offense for which defendant was indicted and convicted, i.e., promoting prison contraband in the first degree, a class D nonviolent felony (Penal Law § 205.25 [2]), does not qualify as an offense for which the statute authorizes a motion for DNA testing of evidence following a plea of guilty and entry of a judgment thereon (*see* CPL 440.30 [1-a] [a] [2]).

Contrary to defendant's contention in appeal No. 3 in his main brief, the court properly denied his CPL 440.10 motion without a hearing on the ground that the judgment was "pending on appeal, and sufficient facts appear on the record with respect to the . . .

issue[s] raised upon the motion to permit adequate review thereof upon such an appeal" (CPL 440.10 [2] [b]; *see People v Satterfield*, 66 NY2d 796, 799 [1985]). To the extent that defendant raises those additional issues on his direct appeal in appeal No. 1, we conclude that they lack merit.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

414

KA 15-01069

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TALIB ALSAIFULLAH, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

TALIB ALSAIFULLAH, DEFENDANT-APPELLANT PRO SE.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Cayuga County Court (Mark H. Fandrich, A.J.), entered May 5, 2015. The order denied the motion of defendant pursuant to CPL 440.30 (1-a) for DNA testing.

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

Same memorandum as in *People v Alsaifullah* ([appeal No. 1] — AD3d — [June 8, 2018] [4th Dept 2018]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

415

KA 15-01012

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TALIB ALSAIFULLAH, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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

TALIB ALSAIFULLAH, DEFENDANT-APPELLANT PRO SE.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judical Department, from an order of the Cayuga County Court (Mark H. Fandrich, A.J.), entered May 20, 2015. The order, inter alia, denied the motion of defendant pursuant to CPL 440.10 to vacate a judgment of conviction.

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

Same memorandum as in *People v Alsaifullah* ([appeal No. 1] — AD3d — [June 8, 2018] [4th Dept 2018]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

416

KA 14-00587

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY S. PERRI, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (JOSEPH PLUKAS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered December 5, 2013. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree (three counts) and endangering the welfare of a child (three counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, that part of the omnibus motion seeking to suppress defendant's videotaped statement is granted in its entirety, the motion to preclude the use of defendant's grand jury testimony at trial is granted, and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of three counts each of sexual abuse in the first degree (Penal Law § 130.65 [3]) and endangering the welfare of a child (§ 260.10 [1]). We reject defendant's contention that the conviction is not supported by legally sufficient evidence. There is a valid line of reasoning and permissible inferences that could lead a rational person to conclude that defendant committed the crimes in question (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Contrary to defendant's further contention, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant contends that County Court erred in refusing to suppress evidence of the viewing by victims of video surveillance footage, because the sole purpose of the viewing was the identification of defendant and the procedure used for viewing the video recording was unduly suggestive. We reject defendant's contention. " '[T]here is nothing inherently suggestive' in showing a witness a surveillance video depicting the defendant and other

individuals, provided that the 'defendant was not singled-out, portrayed unfavorably, or in any other manner prejudiced by police conduct or comment or by the setting in which [the defendant] was taped' " (*People v Davis*, 115 AD3d 1167, 1169 [4th Dept 2014], *lv denied* 23 NY3d 1019 [2014], quoting *People v Edmonson*, 75 NY2d 672, 676-677 [1990], *rearg denied* 76 NY2d 846 [1990], *cert denied* 498 US 1001 [1990]), and we conclude that the procedure used here did not suffer from those infirmities.

We agree with defendant, however, that the court erred in suppressing only a portion of his videotaped statement to police investigators inasmuch as the portion of the statement that the court refused to suppress was also obtained prior to the administration of *Miranda* warnings. Although the court properly determined that defendant was in custody from the outset of the interview, we conclude that the court erred in determining that *Miranda* warnings were not required before defendant admitted to having a foot fetish inasmuch as "the facts indicated that an interrogational environment existed" from the outset of the interview (*People v Tavares-Nunez*, 87 AD3d 1171, 1173 [2d Dept 2011], *lv denied* 19 NY3d 1105 [2012]; *see People v Bungo*, 60 AD3d 1449, 1449 [4th Dept 2009]; *People v Kollar*, 305 AD2d 295, 299 [1st Dept 2003], *appeal dismissed* 1 NY3d 591 [2004]).

We also agree with defendant that the court erred in denying his motion to preclude the People's use of his grand jury testimony at trial on the ground that he was mentally incompetent at the time of such testimony. Although a defendant is presumed to be competent to testify before the grand jury (*see People v Gelikkaya*, 84 NY2d 456, 459 [1994]; *People v Bones*, 309 AD2d 1238, 1239 [4th Dept 2003], *lv denied* 1 NY3d 568 [2003]), here, we conclude that defendant rebutted that presumption. Indeed, defendant's grand jury testimony, a rambling, delusional and bizarre narrative of government conspiracy, prompted one grand juror to inquire of defendant whether he had any psychiatric diagnoses. Within days of his testimony at the grand jury, the arraigning court referred defendant for a CPL article 730 psychiatric examination based upon what the court described as "confused, or bizarre behavior" and the inability "to understand charges or court processes." Shortly thereafter, two psychiatric examiners found that defendant lacked capacity to understand the proceedings against him or to assist in his defense based upon a diagnosis of Delusional Disorder, Paranoid Type. As a result, defendant was involuntarily committed to a psychiatric facility under the auspices of the Office of Mental Health. We thus conclude that defendant rebutted the presumption of competence, and that the court abused its discretion in denying the motion to preclude the grand jury testimony (*cf. Gelikkaya*, 84 NY2d at 460-461).

We therefore reverse the judgment, grant that part of the omnibus motion seeking to suppress defendant's videotaped statement in its entirety as well as defendant's motion to preclude the People from using his grand jury testimony at trial, and we grant a new trial. In light of our determination, we do not review defendant's remaining

contentions.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

421

CA 17-01504

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

JAMES CORLE AND COLIN CORLE, INDIVIDUALLY AND AS ASSIGNEES OF JEOFFREY LEE BAUTER TEETER AND JEFFREY S. TEETER, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ALLSTATE INSURANCE COMPANY, DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JESSICA L. FOSCOLO 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 March 30, 2017. The order denied the motion of defendant for summary judgment.

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

Memorandum: This action arises out of an incident in which plaintiff Colin Corle (Colin) was accidently shot by Jeoffrey Lee Bauter Teeter, who was insured under a policy issued by defendant. Plaintiff James Corle (James), individually and on behalf of his then-infant son, Colin, commenced a personal injury action against Teeter and his father, Jeffrey S. Teeter. Defendant disclaimed coverage, asserting that the accidental shooting was not a covered loss under the policy. James ultimately obtained a judgment in the personal injury action against the Teeters in excess of $350,000.

James then brought a direct action against defendant, individually and on behalf of his then-infant son, as an injured person/judgment creditor under Insurance Law § 3420 (a) (2) and (b) (1). In that action, Supreme Court granted the motion of James for summary judgment, holding that the accidental shooting was a covered loss under the insurance policy and awarding him the $50,000 policy limits of the Teeters' liability policy.

Thereafter, the Teeters assigned all of their rights and claims against defendant to James and Colin who, individually and as the Teeters' assignees, commenced this action alleging that defendant disclaimed coverage in bad faith. Defendant moved to dismiss the action pursuant to CPLR 3211 (a) (5) and (7). The court converted

defendant's motion to dismiss into a motion for summary judgment, without first providing notice to the parties, and denied the motion.

Initially, we agree with defendant that the court erred in converting the motion to dismiss to a CPLR 3212 motion for summary judgment. Although the court was authorized to treat the motion as one for summary judgment upon "adequate notice to the parties" (CPLR 3211 [c]), no such notice was given. Further, recognized exceptions to the notice requirement are inapplicable here inasmuch as neither party made a specific request for summary judgment, and the record does not establish that they deliberately charted a summary judgment course (*see Mihlovan v Grozavu*, 72 NY2d 506, 508 [1988]; *Carcone v D'Angelo Ins. Agency*, 302 AD2d 963, 963-964 [4th Dept 2003]).

Nevertheless, we conclude that defendant was not entitled to dismissal of the complaint under CPLR 3211 (a) (5) based on res judicata. Contrary to defendant's contention, we conclude that the failure of James to litigate the bad faith claim in the earlier Insurance Law § 3420 (a) (2) action does not bar litigation of that claim in the instant action. "Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation . . . Additionally, under New York's transactional analysis approach to res judicata, 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy' " (*Matter of Hunter*, 4 NY3d 260, 269 [2005]; *see O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]).

Insurance Law § 3420 (b) (1) provides that, "[s]ubject to the limitations and conditions of paragraph two of subsection (a) of this section, . . . any person who . . . has obtained a judgment against the insured or the insured's personal representative[] for damages for injury sustained . . . during the life of the policy or contract" may maintain an action against the insurer "to recover the amount of a judgment against the insured or his personal representative." Such an action may be "maintained against the insurer under the terms of the policy or contract for the amount of such judgment not exceeding the amount of the applicable limit of coverage under such policy or contract" (§ 3420 [a] [2]).

We conclude that, under Insurance Law § 3420 (a) (2) and (b) (1), an injured party's standing to bring an action against an insurer is limited to recovering only the policy limits of the insured's insurance policy. Contrary to defendant's contention, we conclude that, if an injured party/judgment creditor seeks to recover from the insurer an amount above the insured's policy limits on a theory of liability beyond that created by Insurance Law § 3420 (a) (2), the statute does not confer standing to do so. However, if the insured assigns his or her rights under the insurance contract to the injured party/judgment creditor, then the injured party/judgment creditor may

simultaneously bring a direct action against the insurer pursuant to Insurance Law § 3420 (a) (2) along with any other appropriate claim, including a bad faith claim, seeking a judgment in a total amount beyond the insured's policy limits.

Here, when James commenced the prior action pursuant to Insurance Law § 3420 (a) (2) individually and on behalf of Colin, the Teeters had not yet assigned their rights under the insurance contract to James and Colin. As a result, James did not have standing to bring a bad faith claim against defendant (*cf. Bennion v Allstate Ins. Co.*, 284 AD2d 924, 924-926 [4th Dept 2001]). Thus, because James lacked standing to bring a bad faith claim against defendant at the time he brought the Insurance Law § 3420 (a) (2) action, we conclude that the doctrine of res judicata does not bar this action (*see generally Hunter*, 4 NY3d at 269; *Summer v Marine Midland Bank*, 227 AD2d 932, 934 [4th Dept 1996]), and defendant's motion insofar as it sought to dismiss the complaint pursuant to CPLR 3211 (a) (5) was properly denied.

We recognize that the First Department held otherwise on similar facts in *Cirone v Tower Ins. Co. of N.Y.* (76 AD3d 883 [1st Dept 2010], *lv denied* 16 NY3d 708 [2011]). To the extent that the First Department in *Cirone* concluded that an injured person/judgment creditor who commenced an action against the insurer pursuant to Insurance Law § 3420 (a) (2) had standing to assert a bad faith settlement practices claim in that action in the absence of an assignment from the insured, we disagree with that conclusion and decline to follow *Cirone*.

We reject defendant's further contention that the court erred in denying its motion insofar as it sought to dismiss the complaint under CPLR 3211 (a) (7), for failure to state a cause of action. Viewing the facts as alleged by plaintiffs in the light most favorable to them and affording plaintiffs all favorable inferences (*see generally Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012]), we conclude that plaintiffs sufficiently stated a cause of action for bad faith against defendant.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

422

CA 17-01231

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

DENZEL COSTON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, CITY OF BUFFALO POLICE DEPARTMENT AND ADAM M. WIGDORSKI, DEFENDANTS-APPELLANTS.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (DAVID M. LEE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered April 17, 2017. The order denied defendants' motion 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 seeking damages for injuries he sustained when the vehicle he was operating collided with a police vehicle operated by defendant Adam M. Wigdorski, a police officer employed by defendant City of Buffalo. Defendants moved for summary judgment dismissing the complaint on various grounds and, in denying the motion, Supreme Court determined, inter alia, that there is an issue of fact whether the reckless disregard standard of care as opposed to ordinary negligence is applicable to this case. As limited by their brief on appeal, defendants contend that the court should have granted their motion on the ground that Wigdorski did not act with reckless disregard for the safety of others.

Initially, we agree with defendants that the reckless disregard standard of care is applicable to this case and thus that the court erred in finding that there was an issue of fact with respect to the applicable standard of care. At the time of the accident, Wigdorski was responding to a dispatch call in an authorized emergency vehicle. We agree with defendants that Wigdorski was involved in an emergency operation and that his vehicle therefore was exempt from the requirement that the vehicle's emergency lights or siren must be activated (*see Perkins v City of Buffalo*, 151 AD3d 1941, 1942 [4th Dept 2017]). We also agree with defendants that any evidence that Wigdorski did not slow down prior to running a stop sign and colliding

with plaintiff's vehicle does not render Wigdorski's conduct " 'unprivileged as a matter of law' " (*id.*; *cf. LoGrasso v City of Tonawanda*, 87 AD3d 1390, 1391 [4th Dept 2011]). Thus, we conclude that the standard of care pursuant to Vehicle and Traffic Law § 1104 (e), i.e., reckless disregard for the safety of others, applies to Wigdorski's conduct rather than that of ordinary negligence (*see Connelly v City of Syracuse*, 103 AD3d 1242, 1242 [4th Dept 2013]).

Contrary to defendants' further contention, however, the court properly denied the motion inasmuch as there are triable issues of fact whether Wigdorski acted with reckless disregard for the safety of others by "intentionally [performing an] act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and [doing] so with conscious indifference to the outcome" (*Perkins*, 151 AD3d at 1942 [internal quotation marks omitted]). Specifically, there are conflicting versions of the accident, including whether Wigdorski slowed his vehicle before passing through the stop sign (*see Rice v City of Buffalo*, 145 AD3d 1503, 1505 [4th Dept 2016]; *Connelly*, 103 AD3d at 1242-1243).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

423

CA 17-01772

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

BARBARA A. DELAUS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MONROE COUNTY, COUNTY OF MONROE INDUSTRIAL DEVELOPMENT AGENCY, MONROE NEWPOWER CORPORATION, TOWN OF BRIGHTON, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

THE ZOGHLIN GROUP, PLLC, ROCHESTER (JACOB H. ZOGHLIN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MICHAEL E. DAVIS, COUNTY ATTORNEY, ROCHESTER (MATTHEW D. BROWN OF COUNSEL), FOR DEFENDANT-RESPONDENT MONROE COUNTY.

HARRIS BEACH PLLC, PITTSFORD (NICHOLAS C. ROBERTS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS COUNTY OF MONROE INDUSTRIAL DEVELOPMENT AGENCY AND MONROE NEWPOWER CORPORATION.

GORDON & SCHAAL, LLP, ROCHESTER (KENNETH W. GORDON OF COUNSEL), FOR DEFENDANT-RESPONDENT TOWN OF BRIGHTON.

Appeal from an order of the Supreme Court, Monroe County (Debra A. Martin, A.J.), entered December 19, 2016. The order granted the respective motions of defendants-respondents to dismiss the amended complaint against them.

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

424

CA 17-00215

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

ANGELA M. MURRAY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TODD A. MURRAY, DEFENDANT-APPELLANT.

RANDY S. MARGULIS, WILLIAMSVILLE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), entered April 1, 2016 in a divorce action. The judgment, among other things, ordered defendant to pay plaintiff child support and maintenance.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by striking from the third decretal paragraph the phrase "the Plaintiff shall pay to the Defendant child support in the amount of $69 per week for Kyle with the net effect with Defendant to pay Plaintiff $104 per week with such payments to be retroactive to October 4, 2013" and substituting therefor the phrase "the Plaintiff shall pay to the Defendant child support in the amount of $116 per week for Kyle with the net effect being that Defendant shall pay Plaintiff $57 per week with such payments to be retroactive to November 2013, provided that, upon termination of Defendant's spousal maintenance obligation, Defendant's child support obligation shall be adjusted to $151 per week without prejudice to either party's right to seek a modification," and as modified the judgment is affirmed without costs.

Memorandum: On appeal from a judgment of divorce, defendant contends, among other things, that Supreme Court erred in calculating and setting the retroactive date of his net child support obligation to plaintiff with respect to the parties' children. One of the children resides with defendant, and the other resides with plaintiff. Pursuant to the amendment to Domestic Relations Law § 240, which was effective prior to entry of the judgment (*see* L 2015, ch 387, §§ 3, 4; *see generally Matter of Panossian v Panossian*, 201 AD2d 983, 983 [4th Dept 1994]; *Butler v Butler*, 171 AD2d 985, 986 [3d Dept 1991]), we conclude that including in plaintiff's income the amount of spousal maintenance to be paid to her for purposes of calculating child support (*see* § 240 [1-b] [b] [5] [iii] [I]) results in a net child support obligation payable from defendant to plaintiff of $57 per week. We further conclude that, upon termination of defendant's

spousal maintenance obligation, his child support obligation must be adjusted to $151 per week (*see id.*; § 240 [1-b] [b] [5] [vii] [C]). We therefore modify the judgment accordingly. We also conclude that the court erred in ordering child support retroactive to the date that plaintiff filed her summons with notice requesting such relief inasmuch as the parties' daughter did not live with plaintiff at that time (*see Matter of Kalapodas v Kalapodas*, 305 AD2d 1047, 1048 [4th Dept 2003]). Instead, plaintiff is entitled to child support retroactive to November 2013 when the daughter began living with her (*see id.*). We therefore further modify the judgment accordingly. We have considered defendant's remaining contentions and conclude that none warrants reversal or further modification of the judgment.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

443

CA 17-02091

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

IN THE MATTER OF ROCHESTER GENESEE REGIONAL TRANSPORTATION AUTHORITY, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN R. STENSRUD, MARIA B. STENSRUD, RESPONDENTS-APPELLANTS, AND CANANDAIGUA NATIONAL BANK AND TRUST COMPANY, AS MORTGAGEE, RESPONDENT.

LACY KATZEN LLP, ROCHESTER (JOHN T. REFERMAT OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (KATHLEEN M. BENNETT OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered August 1, 2017. The order denied the motion of respondents John R. Stensrud and Maria B. Stensrud seeking leave to renew and reargue.

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

Memorandum: John R. Stensrud and Maria B. Stensrud (respondents) appeal from an order denying their motion seeking leave to reargue and renew with respect to a prior order that granted petitioner's motion in limine and denied respondents' cross motion in limine. No appeal lies from an order denying a motion seeking leave to reargue, and thus that part of respondents' appeal must be dismissed (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]). Supreme Court properly denied that part of respondents' motion seeking leave to renew inasmuch as respondents failed to provide a reasonable justification for their failure to submit the new evidence in opposition to the prior motion and in support of the prior cross motion (*see Heltz v Barratt*, 115 AD3d 1298, 1299-1300 [4th Dept 2014], *affd* 24 NY3d 1185 [2014]; *Wright v State of New York*, 156 AD3d 1413, 1414-1415 [4th Dept 2017], *appeal dismissed* 31 NY3d 1001 [2018]). "[A] motion for leave to renew 'is not a second chance freely given to parties who have not exercised due diligence in making their first

factual presentation' " (*Heltz*, 115 AD3d at 1300).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

444

CA 17-01982

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

BROADWAY WAREHOUSE CO., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BUFFALO BARN BOARD, LLC, ET AL., DEFENDANTS,
AND DAVID R. PFALZGRAF, JR., DEFENDANT-RESPONDENT.

BLAIR & ROACH, LLP, TONAWANDA (J. MICHAEL LENNON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BOND, SCHOENECK & KING, PLLC, BUFFALO (RIANE F. LAFFERTY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered August 14, 2017. The order granted the motion of defendant David R. Pfalzgraf, Jr., to dismiss the complaint against him.

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

Memorandum: Plaintiff commenced this action seeking to recover amounts due under a written agreement pursuant to which plaintiff leased its warehouse to defendant Buffalo Barn Board, LLC (BBB). Brooks Anderson, BBB's principal, personally guaranteed the lease, and David R. Pfalzgraf, Jr. (defendant) was the attorney who represented BBB. After BBB defaulted on its rental payments, defendant requested that plaintiff defer legal action. Plaintiff agreed, on the condition that defendant keep plaintiff informed about "the status of the restructuring/ refinancing, and anything that is happening or has happened (not in the ordinary course of business) that has or might impair [plaintiff's] security interest."

Insofar as relevant to this appeal, plaintiff alleged that defendant breached his agreement with plaintiff by failing to notify plaintiff of actions jeopardizing plaintiff's security interest. Plaintiff further alleged that defendant engaged in fraud and misrepresentation, which induced plaintiff to defer its legal action against BBB and thereby rendered plaintiff unable to recover the amounts due under the lease agreement. In a prior appeal, we determined that Supreme Court (Walker, A.J.) erred in granting that part of plaintiff's motion seeking partial summary judgment on the breach of contract cause of action against defendant on the ground that "[p]laintiff failed to meet its initial burden of establishing by

'clear and explicit evidence' that [defendant] intended 'to substitute or superadd his personal liability for, or to, that of his principal' " (*Broadway Warehouse Co. v Buffalo Barn Bd., LLC*, 143 AD3d 1238, 1242 [4th Dept 2016], quoting *Salzman Sign Co. v Beck*, 10 NY2d 63, 67 [1961] [internal quotation marks from *Salzman Sign Co.* omitted]). Defendant thereafter moved pursuant to CPLR 3211 (a) (7) to dismiss the complaint against him, and Supreme Court (Chimes, J.) granted that motion.

While this appeal was pending, Anderson, pursuant to his personal guaranty, paid plaintiff the amount due under the lease agreement plus interest. We agree with defendant that this appeal is now moot and that the exception to the mootness doctrine does not apply (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]; *see also Matter of Sarbro IX v McGowan*, 271 AD2d 829, 830 [3d Dept 2000]). Contrary to plaintiff's contention, it is not entitled to an award of attorney's fees as against defendant. Such fees "may not be awarded in the absence of a statute expressly authorizing their recovery, or an agreement or stipulation to that effect by the parties" (*Feeney v Licari*, 131 AD2d 539, 539 [2d Dept 1987]). Here, such an award was not authorized by any statute, and there was no stipulation or agreement between plaintiff and defendant that would permit such an award.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

465

CAF 17-00472

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

IN THE MATTER OF CAIDEN G.

ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

WALTER G., RESPONDENT-APPELLANT,
AND MONIQUE (W.)G., RESPONDENT.

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

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (CATHERINE Z. GILMORE OF COUNSEL), FOR PETITIONER-RESPONDENT.

SARA E. LOWENGARD, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered February 10, 2017 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent neglected the subject child.

It is hereby ORDERED that said appeal insofar as it concerns the finding of neglect is unanimously dismissed and the order is affirmed without costs.

Memorandum: Petitioner, Onondaga County Department of Children and Family Services (DCFS), commenced this neglect proceeding pursuant to Family Court Act article 10 alleging, inter alia, that respondent father neglected the subject child by failing to protect the child after the child disclosed that he had been sexually abused by the paternal grandfather. DCFS alleged in the amended petition that the father failed to bring the child to two scheduled appointments at a child advocacy center to be interviewed; that, despite having been directed by police detectives and DCFS staff to ensure that the child had no contact with the grandfather while the investigation was pending, the father allowed the child to stay at the grandfather's house for two days; and that the child was found sleeping in the grandfather's bed. DCFS also alleged that the father had engaged in acts of domestic violence in the presence of the child. The father consented to the temporary removal of the child to the custody of DCFS, which placed the child in foster care, and subsequently entered an admission of neglect. Family Court conducted a dispositional and permanency hearing, and determined, inter alia, that the placement of the child in the custody of DCFS and foster care should continue until

the next permanency hearing, approximately six months later.

Initially, we note that the father's challenge to the underlying finding of neglect is not reviewable on appeal because it was premised on his admission of neglect and thereby made in an order entered on the consent of the father (*see Matter of Martha S. [Linda M.S.],* 126 AD3d 1496, 1497 [4th Dept 2015], *lv dismissed in part and denied in part* 26 NY3d 941 [2015]). The father never moved to vacate the finding of neglect or to withdraw his consent to the order, and thus his challenge to the factual sufficiency of his admission is not properly before us (*see id.*; *see also* Family Ct Act § 1051 [f]). We therefore dismiss the appeal to that extent. We note, in any event, that the father waived his right to appeal with respect to fact-finding.

We reject the father's further contention that the court erred in continuing the child's placement when the child "could have been returned home safely with an [o]rder of [p]rotection." The determination whether to terminate or to continue a placement rests within the discretion of the court and should not be disturbed absent an improvident exercise of discretion (*see generally* Family Ct Act § 1065 [a]; *Matter of Latisha C. [Wanda C.]*, 101 AD3d 1113, 1115 [2d Dept 2012]). Although the evidence at the hearing establishes that the father received sexual abuse education and counseling, and that he completed domestic violence classes, it further establishes that he has made little progress in "overcom[ing] the specific problems which led to the removal of the child" (*Matter of Carson W. [Jamie G.]*, 128 AD3d 1501, 1501 [4th Dept 2015], *lv dismissed* 26 NY3d 976 [2015] [internal quotation marks omitted]). We therefore conclude that the court's determination is supported by the record, and we see no need to disturb it (*see Matter of Lylly M.G. [Theodore T.]*, 121 AD3d 1586, 1587-1588 [4th Dept 2014], *lv denied* 24 NY3d 913 [2015] [internal quotation marks omitted]).

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

473

CA 17-02106

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

STEVEN CALOCERINOS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

C&S WORLDWIDE HOLDINGS, INC.,
DEFENDANT-RESPONDENT.

MENTER, RUDIN & TRIVELPIECE, P.C., SYRACUSE (MICHAEL J. BALESTRA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (JONATHAN B. FELLOWS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered March 13, 2017. The judgment, among other things, declared that defendant is entitled to reduce the repurchase price of plaintiff's shares by 30%.

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

Memorandum: Plaintiff was formerly employed by a subsidiary of defendant as an engineer. The Second Amended and Restated Shareholder Agreement (agreement) between the parties provides, inter alia, that defendant would repurchase plaintiff's shares of defendant's stock when plaintiff left defendant's employ. The agreement further provides that, if plaintiff engaged in conduct that was in conflict or competition with defendant's business, within two years after leaving defendant's employ, defendant would reduce the repurchase price for plaintiff's shares by 30%. The agreement lists illustrative examples of the types of conduct that would result in a reduction in the repurchase price, but it clearly states that the conflicting or competitive conduct is not limited to those examples.

After plaintiff left defendant's employ, defendant concluded that plaintiff was engaged in conduct in competition with defendant's business and reduced the repurchase price for plaintiff's shares accordingly. Plaintiff thereafter commenced this action asserting two causes of action, one for breach of contract and another seeking a declaration that defendant had violated the terms of the agreement. Plaintiff moved for summary judgment on the complaint, and defendant cross-moved for summary judgment dismissing the complaint. Supreme Court denied the motion, in effect granted the cross motion, and declared that defendant is entitled to reduce the repurchase price for

plaintiff's shares by 30%. We affirm.

We reject plaintiff's contention that the court erred in interpreting the agreement. "As a general rule, courts must enforce shareholder agreements according to their terms" (*Matter of Penepent Corp.*, 96 NY2d 186, 192 [2001]), and they must "examin[e] the terms of the agreement as a whole and giv[e] a practical interpretation to the language employed" (*Matter of El-Roh Realty Corp.*, 48 AD3d 1190, 1192 [4th Dept 2008]). Here, the agreement plainly provides for a reduction of the repurchase price for an employee's shares if the employee, within two years of leaving defendant's employ, "engage[s] in any other business or activity that might conflict or compete with the business or activity of [defendant], and/or of [defendant's] clients or customers, without the express prior written approval of [defendant's] Board of Directors." Plaintiff admitted in an affidavit in support of his motion that he was formerly employed by defendant in Syracuse as "a licensed professional engineer," and that, approximately 27 days after leaving defendant's employ, he "opened an office in Liverpool, New York[,] for the purpose of providing engineering services in the Central New York area." Inasmuch as plaintiff was engaging in a business that conflicted or competed with defendant's business and he did not have the express prior written approval of defendant's Board of Directors, we conclude that the court did not err in declaring that defendant was entitled to reduce the repurchase price for plaintiff's shares as provided in the agreement.

We reject plaintiff's contention that the illustrative examples of certain types of competitive conduct listed in the agreement were the only types of conduct that could result in a reduction of the repurchase price of his shares. Just after the provision in the agreement stating that an employee, plaintiff in this case, may not "directly or indirectly, engage in . . . any other business or activity that might conflict or compete with the business or activity of" defendant, the agreement further provides that, "[i]n elaboration of the foregoing and not in limitation thereof," certain conduct is specifically prohibited. Plaintiff's proposed interpretation of the agreement gives no effect to the language immediately preceding the illustrative list of prohibited conduct and thus violates the well-settled rule that "a court should not read a contract so as to render any term, phrase, or provision meaningless or superfluous" (*Givati v Air Techniques, Inc.*, 104 AD3d 644, 645 [2d Dept 2013]; *see Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]).

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

506

KA 16-00133

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SIR RAVEN RODGERS, DEFENDANT-APPELLANT.

KATHRYN B. FRIEDMAN, BUFFALO, 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 (Christopher J. Burns, J.), rendered December 22, 2015. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of robbery in the second degree (Penal Law § 160.10 [3]). At the outset, we conclude that defendant knowingly, voluntarily and intelligently waived his right to appeal, and that waiver, which specifically included a waiver of the right to challenge defendant's "conviction" and the "sentence," encompasses his contention that the sentence imposed is unduly harsh and severe (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]; *People v Butler*, 151 AD3d 1959, 1959 [4th Dept 2017], *lv denied* 30 NY3d 948 [2017]). Although defendant's further contention that the sentence is illegal survives his valid waiver of the right to appeal (*see People v Seaberg*, 74 NY2d 1, 10 [1989]; *People v Bussom*, 125 AD3d 1331, 1331 [4th Dept 2015]), we conclude that the sentence imposed by Supreme Court, i.e., eight years of incarceration with five years of postrelease supervision, is legal (*see* §§ 70.00 [6]; 70.02 [2] [a]; [3] [b]; 70.45 [2] [f]).

Defendant further contends that the court erred in refusing to preclude and/or suppress an in-court identification of him. Defendant forfeited any preclusion argument based upon an allegedly defective CPL 710.30 notice by moving to suppress the identification (*see People v Graham*, 107 AD3d 1421, 1422 [4th Dept 2013], *affd* 25 NY3d 994 [2015]; *People v Kirkland*, 89 NY2d 903, 904-905 [1996]), and by pleading guilty (*see People v La Bar*, 16 AD3d 1084, 1084 [4th Dept 2005], *lv denied* 5 NY3d 764 [2005]). Moreover, because defendant pleaded guilty before the court issued a suppression ruling with

respect to the in-court identification, he forfeited the right to raise the suppression issue on appeal (*see People v Fernandez*, 67 NY2d 686, 688 [1986]; *People v Russell*, 128 AD3d 1383, 1384 [4th Dept 2015], *lv denied* 25 NY3d 1207 [2015]; *People v Scaccia*, 6 AD3d 1105, 1105 [4th Dept 2004], *lv denied* 3 NY3d 681 [2004]).

Although defendant's contention that his guilty plea was not voluntarily, knowingly and intelligently entered survives the waiver of the right to appeal (*see People v McKay*, 5 AD3d 1040, 1041 [4th Dept 2004], *lv denied* 2 NY3d 803 [2004]), that contention is unpreserved for our review because defendant failed to move to withdraw his guilty plea or to vacate the judgment of conviction (*see People v Rojas*, 147 AD3d 1535, 1536 [4th Dept 2017], *lv denied* 29 NY3d 1036 [2017]; *People v Brown*, 115 AD3d 1204, 1205 [4th Dept 2014], *lv denied* 23 NY3d 1060 [2014]). In any event, defendant's contention lacks merit, inasmuch as his assertion that he "did not have sufficient time to consider the plea offer . . . [is] belied by his statements during the plea colloquy" (*People v McNew*, 117 AD3d 1491, 1492 [4th Dept 2014], *lv denied* 24 NY3d 1003 [2014]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

508

CAF 17-02050

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

IN THE MATTER OF JASON M. GRATTON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KATHERINE C. GRATTON, RESPONDENT-RESPONDENT.

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

UNDERBERG & KESSLER LLP, ROCHESTER (LEAH T. CINTINEO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Wayne County (Richard M. Healy, J.), dated March 24, 2017 in a proceeding pursuant to Family Court Act article 4. The order affirmed the determination of the Support Magistrate.

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

Memorandum: In this child support modification proceeding pursuant to Family Court Act article 4, petitioner father appeals from an order denying his objection to an order of the Support Magistrate that dismissed his petition with prejudice. The father sought a downward modification of his child support obligation as set forth in the parties' April 2016 settlement agreement that was incorporated but not merged into the August 2016 judgment of divorce. The Support Magistrate dismissed the father's petition on the ground that he failed to establish a substantial change in circumstances since the entry of the judgment on August 30, 2016. In addition, although the Support Magistrate implicitly found that the father's income had decreased by more than 15%, the Support Magistrate determined that the father's reduction in income was due to a self-created hardship and thus was not "involuntary" (Family Ct Act § 451 [3] [b] [ii]). We conclude that Family Court properly denied the father's objection to the Support Magistrate's order.

We reject the father's contention that the Support Magistrate and the court both failed to apply Family Court Act § 451 (3) (b) (ii), and we conclude that he was not entitled to relief under that statute. "[S]ection 451 of the Family Court Act allows a court to modify an order of child support, without requiring a party to allege or demonstrate a substantial change in circumstances" (*Matter of Harrison*

v Harrison, 148 AD3d 1630, 1632 [4th Dept 2017] [internal quotation marks omitted]), where, inter alia, "there has been a change in either party's gross income by fifteen percent or more since the order was entered, last modified, or adjusted" (§ 451 [3] [b] [ii]). Although the father's income decreased by more than 15% after he was laid off from his job as a nuclear power plant contractor in May 2016, we nevertheless conclude that he failed to establish his entitlement to relief under the statute because the change did not occur since the time that the judgment was entered in August 2016. In any event, the father also failed to establish that his reduced income was involuntary. The record demonstrates that the father had no intention of returning to his occupation and made minimal efforts "to secure employment commensurate with his . . . education, ability, and experience" as required under Family Court Act § 451 (3) (b) (ii). Instead, the father intended to work on the family farm, despite the fact that it was not profitable for him to do so.

Similarly, to support a request for a downward modification under the nonstatutory change in circumstances standard, which must be " 'substantial, unanticipated and unreasonable,' " the change in circumstances must have occurred in "the period between the issuance of the [relevant] order and the filing of the [modification] petition" (*Matter of Brink v Brink*, 147 AD3d 1443, 1444 [4th Dept 2017]; *see Matter of Boden v Boden*, 42 NY2d 210, 213 [1977]). Here, the change in circumstances, i.e., the father's layoff, occurred in May 2016 but, as noted, the judgment of divorce was not entered until August 2016. Thus, the change that formed the basis for the father's request for a downward modification occurred prior to the entry of the relevant order. We further note in any event that the nature of the father's contract work was intermittent, and the change was not unanticipated inasmuch as he testified that he worked during outages, which occurred every spring or fall depending on the refueling cycle of the nuclear plant. We therefore conclude that the father also failed to establish his entitlement to a downward modification of child support under the nonstatutory change in circumstances standard (*see Matter of Gray v Gray*, 52 AD3d 1287, 1288 [4th Dept 2008], *lv denied* 11 NY3d 706 [2008]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

518

CA 17-02034

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

THOMAS TORNATORE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JEAN COHEN, D.C., DEFENDANT-APPELLANT.

MARKS, O'NEILL, O'BRIEN, DOHERTY & KELLY, P.C., NEW YORK CITY (MARCI D. MITKOFF OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County (Anthony J. Paris, J.), dated January 30, 2017. The judgment awarded plaintiff money damages upon a jury verdict.

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

Memorandum: Plaintiff commenced this medical malpractice action seeking to recover damages for injuries he sustained as a result of defendant's chiropractic treatment. Defendant appeals from a judgment entered upon a jury verdict finding that defendant was negligent and awarding plaintiff damages for, among other things, future medical and life care expenses. We affirm.

We reject defendant's contention that Supreme Court erred in precluding her from impeaching plaintiff with evidence of his criminal history. Contrary to defendant's contention, while a civil litigant is granted broad authority to use the criminal convictions of a witness to impeach the credibility of that witness, the nature and extent of cross-examination, including with respect to criminal convictions, remains firmly within the discretion of the trial court (*see* CPLR 4513; *Davis v McCullough*, 37 AD3d 1121, 1122 [4th Dept 2007]; *Morgan v National City Bank*, 32 AD3d 1264, 1265 [4th Dept 2006]; *see generally Siemucha v Garrison*, 111 AD3d 1398, 1399-1400 [4th Dept 2013]; *Bodensteiner v Vannais*, 167 AD2d 954, 954 [4th Dept 1990]). Here, even assuming, arguendo, that the disposition of plaintiff's out-of-state criminal offense constituted a conviction (*see generally Matter of Kasckarow v Board of Examiners of Sex Offenders of State of N.Y.*, 25 NY3d 1039, 1042 [2015]), we conclude that the court did not abuse its discretion in precluding defendant from impeaching plaintiff with that conviction (*see Davis*, 37 AD3d at 1122; *see generally Bodensteiner*, 167 AD2d at 954).

By failing to move to preclude the testimony of plaintiff's life care planning expert on the ground that plaintiff did not timely disclose the substance of the facts and opinions contained in the expert's updated report (*see* CPLR 3101 [d] [1]), defendant failed to preserve for our review her contention that the expert's testimony should have been precluded on that ground (*see* CPLR 4017, 5501 [a] [3]; *McClain v Lockport Mem. Hosp.*, 236 AD2d 864, 865 [4th Dept 1997], *lv denied* 89 NY2d 817 [1997]).

We reject defendant's further contention that the court erred in denying her motion to strike the testimony of the life care planning expert on the ground that her opinion was principally based upon inadmissable hearsay statements of plaintiff's treating physician. It is well settled that " 'opinion evidence must be based on facts in the record or personally known to the witness' " (*Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 725 [1984]). It is equally well settled, however, that an expert is permitted to offer opinion testimony based upon facts not in evidence where the material is " 'of a kind accepted in the profession as reliable in forming a professional opinion' " (*id.* at 726; *see Wagman v Bradshaw*, 292 AD2d 84, 86-87 [2d Dept 2002]). "The professional reliability exception to the hearsay rule 'enables an expert witness to provide opinion evidence based on otherwise inadmissible hearsay, provided it is demonstrated to be the type of material commonly relied on in the profession' " (*Matter of State of New York v Motzer*, 79 AD3d 1687, 1688 [4th Dept 2010], quoting *Hinlicky v Dreyfuss*, 6 NY3d 636, 648 [2006]; *see Caleb v Sevenson Envtl. Servs., Inc.*, 117 AD3d 1421, 1422 [4th Dept 2014], *lv denied* 23 NY3d 909 [2014]), and "provided that it does not constitute the sole or principal basis for the expert's opinion" (*Matter of State of New York v Fox*, 79 AD3d 1782, 1783 [4th Dept 2010]; *see Kendall v Amica Mut. Ins. Co.*, 135 AD3d 1202, 1205-1206 [3d Dept 2016]; *Borden v Brady*, 92 AD2d 983, 984 [3d Dept 1983]; *see generally People v Sugden*, 35 NY2d 453, 460-461 [1974]).

Here, the expert explained the professional methodology by which a person's life care plan is developed, which included reviewing medical records, understanding the recommendations made by the person's treatment providers, interviewing the person, conducting research and analysis of costs, and preparing a report. In preparing the life care plan for plaintiff, the expert reviewed legal documents and various medical records of plaintiff's treatment providers; she interviewed plaintiff about his background, work history, injuries, and treatments, the recommendations of his treatment providers, and his level of independence in light of his injuries; and she discussed and reviewed the elements of the life care plan with plaintiff's treating physician. The expert testified that the information upon which she relied was of the type commonly relied on in her profession (*see Mroz v 3M Co.* [appeal No. 2], 151 AD3d 1606, 1607 [4th Dept 2017]). Although the expert's discussions with the treating physician provided a basis for several components of plaintiff's future medical needs and the expert acknowledged the extent of her reliance upon those hearsay statements, we conclude that the record establishes that the expert "had a sufficient basis for [her] opinion of which the

[hearsay statements of the treating physician were] but 'a link in the chain of data upon which [she] relied' " (*Anderson v Dainack*, 39 AD3d 1065, 1067 [3d Dept 2007]; *see Kendall*, 135 AD3d at 1205). Indeed, the expert included the components in the life care plan and determined the costs thereof based upon a combination of the treating physician's recommendations, material in evidence including medical records, professionally accepted outside sources such as a medical costs database, and her own knowledge and expertise (*see Anderson*, 39 AD3d at 1067; *Madden v Dake*, 30 AD3d 932, 937 [3d Dept 2006]). Contrary to defendant's related assertion, to the extent that the expert projected that plaintiff would require greater treatment with respect to certain components of the life care plan than he had previously received, we conclude that such testimony goes to the weight of the expert's opinion rather than its admissibility (*see generally Fox*, 79 AD3d at 1784).

Defendant also contends that the court erred in denying her motion to strike the testimony of the life care planning expert because the underlying opinion of plaintiff's treating physician was unreliable and certain medical topics discussed by the life care planning expert were outside the scope of her expertise and that of the treating physician. That contention is not preserved for our review inasmuch as defendant did not move to strike the expert's testimony on those grounds (*see* CPLR 4017, 5501 [a] [3]; *Nary v Jonientz*, 110 AD3d 1448, 1448 [4th Dept 2013]; *see generally Matter of State of New York v Pierce*, 79 AD3d 1779, 1780 [4th Dept 2010], *lv denied* 16 NY3d 712 [2011]).

Contrary to defendant's further contention, we conclude that the court properly denied her posttrial motion to set aside the verdict as against the weight of the evidence with respect to damages for future medical and life care expenses inasmuch as it cannot be said that the evidence so preponderated in favor of defendant that the verdict could not have been reached upon any fair interpretation of the evidence (*see generally Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]). We also reject defendant's contention that the jury's award of damages for future medical and life care expenses "deviates materially from what would be reasonable compensation" (CPLR 5501 [c]).

Finally, we reject defendant's contention that she was deprived of a fair trial by the court's question to one of plaintiff's witnesses and its comments during trial. The court has broad discretion " 'to control the courtroom, rule on the admission of evidence, elicit and clarify testimony, expedite the proceedings and . . . admonish counsel and witnesses when necessary' " (*Messinger v Mount Sinai Med. Ctr.*, 15 AD3d 189, 189 [1st Dept 2005], *lv dismissed* 5 NY3d 820 [2005]), and here the court's conduct did not deprive defendant of a fair trial.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

523

KA 14-00336

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT W. HENDERSON, JR., DEFENDANT-APPELLANT.

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

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (AMY L. HALLENBECK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Donald E. Todd, J.), rendered August 12, 2013. The appeal was held by this Court by order entered June 17, 2016, decision was reserved, and the matter was remitted to Oswego County Court for further proceedings (140 AD3d 1761). The proceedings were held and completed.

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

Memorandum: We previously held this case, reserved decision and remitted the matter to County Court to conduct a reconstruction hearing with respect to the portions of the plea proceeding that were not transcribed because of the inaudibility of the digital recording (*People v Henderson*, 140 AD3d 1761, 1761 [4th Dept 2016]). During the reconstruction hearing, the former prosecuting attorney and defendant's former attorney testified with respect to their recollections of defendant's answers to questions, stating that defendant had responded affirmatively to all of the court's questions. In its decision following the reconstruction hearing, the court, which had presided over the original plea proceeding, found that, during portions of the plea proceeding that were transcribed as either "inaudible" or "no verbal response," defendant had actually responded affirmatively to the court's questions, indicating that he understood the court's questions specifically and the proceedings generally. Based on the record of the reconstruction hearing and the original plea proceeding, we now affirm.

Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived his right to appeal and that he had "a full appreciation of the consequences" of that waiver (*People v Seaberg*, 74 NY2d 1, 11 [1989]; *see generally People v Lopez*, 6 NY3d 248, 256 [2006]). In addition, "defendant's history of

mental illness did not invalidate the waiver of the right to appeal inasmuch as there was no showing that defendant was uninformed, confused or incompetent when he waived his right to appeal" (*People v Brand*, 112 AD3d 1320, 1321 [4th Dept 2013], *lv denied* 23 NY3d 961 [2014] [internal quotation marks omitted]). The valid waiver of the right to appeal forecloses defendant's challenge to the severity of the sentence inasmuch as "there [was] a specific sentence promise at the time of the waiver" (*People v Brown*, 115 AD3d 1204, 1206 [4th Dept 2014], *lv denied* 23 NY3d 1060 [2014] [internal quotation marks omitted]; *see generally Lopez*, 6 NY3d at 255).

Defendant further contends that the court erred in failing to order a competency hearing sua sponte and that defense counsel was ineffective in failing to request such a hearing. Although those contentions survive the plea and the valid waiver of the right to appeal to the extent that they implicate the voluntariness of the plea (*see People v Stoddard*, 67 AD3d 1055, 1055 [3d Dept 2009], *lv denied* 14 NY3d 806 [2010]; *People v Jermain*, 56 AD3d 1165, 1165 [4th Dept 2008], *lv denied* 11 NY3d 926 [2009]), and they need not be preserved for our review (*see People v Winebrenner*, 96 AD3d 1615, 1615-1616 [4th Dept 2012], *lv denied* 19 NY3d 1029 [2012]; *but see People v Chavis*, 117 AD3d 1193, 1194 [3d Dept 2014]), we nevertheless conclude that the contentions lack merit. Generally, "[a] defendant is presumed competent . . . , and the court is under no obligation to issue an order of examination . . . unless it has 'reasonable ground . . . to believe that the defendant was an incapacitated person' " (*People v Morgan*, 87 NY2d 878, 880 [1995]). Moreover, "a 'history of psychiatric illness does not in itself call into question defendant's competence' to proceed" (*People v Carpenter*, 13 AD3d 1193, 1194 [4th Dept 2004], *lv denied* 4 NY3d 797 [2005], quoting *People v Tortorici*, 92 NY2d 757, 765 [1999], *cert denied* 528 US 834 [1999]).

We conclude, on the record of the reconstruction hearing and the original plea proceeding, that nothing in the plea proceeding established that defendant's mental illness or alleged failure to take medication related thereto "so stripped [defendant] of orientation or cognition that he lacked the capacity to plead guilty" (*People v Alexander*, 97 NY2d 482, 486 [2002]). He "responded appropriately to questioning by the court . . . and was 'unequivocal in assuring the court that he understood the meaning of the plea proceeding, and the implications of his decision to accept the plea agreement' " (*People v Yoho*, 24 AD3d 1247, 1248 [4th Dept 2005]; *see People v Hibbard*, 148 AD3d 1538, 1539 [4th Dept 2017]). In addition, the court noted in its decision following the reconstruction hearing that it had held "an extensive dialog[ue] with [defendant] regarding his mental health status," after which the court was assured that defendant understood the proceedings. Thus, the court did not err in failing sua sponte to conduct a competency hearing, and defense counsel was not ineffective in failing to request a competency hearing (*see People v Jorge N.T.*, 70 AD3d 1456, 1457 [4th Dept 2010], *lv denied* 14 NY3d 889 [2010]).

Although defendant's contention that the waiver of indictment was jurisdictionally defective because it was not voluntarily,

intelligently or knowingly entered and the written waiver was not signed in open court is not precluded by the valid waiver of the right to appeal and does not require preservation (*see People v Waid*, 26 AD3d 734, 734-735 [4th Dept 2006], *lv denied* 6 NY3d 839 [2006]), we nevertheless conclude that the contention lacks merit. The record establishes that defendant "entered a valid waiver of indictment, and freely and voluntarily consented to be prosecuted by way of a superior court information" (*People v Lugg*, 108 AD3d 1074, 1074 [4th Dept 2013]; *see* CPL 195.10), and following the reconstruction hearing the court " 'expressly found that defendant had executed the waiver in open court,' " as required by CPL 195.20 (*People v Myers*, 145 AD3d 1596, 1597 [4th Dept 2016], *lv granted* 29 NY3d 1093 [2017]).

Finally, defendant contends that his plea was not knowingly, voluntarily or intelligently entered due to his history of mental illness. Although that contention survives the valid waiver of the right to appeal (*see People v Watkins*, 77 AD3d 1403, 1403 [4th Dept 2010], *lv denied* 15 NY3d 956 [2010]), that contention is not preserved for our review (*see People v Williams*, 124 AD3d 1285, 1285 [4th Dept 2015], *lv denied* 25 NY3d 1078 [2015]; *Carpenter*, 13 AD3d at 1194), and this case does not fall within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666 [1988]). In any event, the record of the reconstruction hearing and the original plea proceeding establishes that the plea was knowingly, voluntarily and intelligently entered (*see People v Finch*, 96 AD3d 1485, 1486 [4th Dept 2012]; *Watkins*, 77 AD3d at 1403-1404).

Mark W. Bennett

Entered: June 8, 2018

Clerk of the Court

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

524

KA 16-01490

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PHILIP R. AYALA, ALSO KNOWN AS PHILIP A. AYALA, ALSO KNOWN AS PHILIP AYALA, DEFENDANT-APPELLANT.

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (MELISSA L. CIANFRINI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Michael F. Pietruszka, A.J.), rendered July 8, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

542

CA 17-02133

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

ACCADIA SITE CONTRACTING, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LIPSITZ GREEN SCIME CAMBRIA LLP, AND
JOSEPH J. MANNA, INDIVIDUALLY AND AS
A PARTNER OF LIPSITZ GREEN SCIME
CAMBRIA LLP, DEFENDANTS-RESPONDENTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (PHILLIP A. OSWALD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CONNORS LLP, BUFFALO (CHRISTOPHER J. LARRABEE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered February 23, 2017. The order denied plaintiff's motion for partial summary judgment and granted defendants' cross motion for summary judgment dismissing the 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 counterclaim and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action for legal malpractice alleging that defendants acted negligently while representing it in an action involving a construction dispute. We previously affirmed the order and judgment granting the motion of the defendant in the underlying action for summary judgment dismissing the complaint (*Accadia Site Contr., Inc. v Erie County Water Auth.*, 115 AD3d 1351, 1351-1353 [4th Dept 2014]). Contrary to plaintiff's contentions, we conclude that Supreme Court properly granted defendants' cross motion for summary judgment seeking dismissal of the complaint herein. Defendants established that they did not fail to exercise the appropriate degree of care, skill, and diligence in representing plaintiff, and that any breach of their duty could not have been a proximate cause of plaintiff's damages, and plaintiff failed to raise a triable issue of fact to defeat the cross motion (*see Chamberlain, D'Amanda, Oppenheimer & Greenfield, LLP v Wilson*, 136 AD3d 1326, 1327-1328 [4th Dept 2016], *lv dismissed* 28 NY3d 942 [2016]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562

[1980]). Defendants concede in their brief that, prior to the issuance of the order on appeal, the parties settled their dispute over the attorneys' fees that were the subject of defendants' counterclaim. We therefore modify the order by granting that part of plaintiff's motion pursuant to CPLR 3211 seeking dismissal of the counterclaim.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

543

CA 17-01915

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

JACOB STILLMAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MOBILE MOUNTAIN, INC., DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

OSBORN, REED & BURKE, LLP, ROCHESTER (JEFFREY P. DIPALMA OF COUNSEL), FOR DEFENDANT-APPELLANT.

CONNORS LLP, BUFFALO (LAWLOR F. QUINLAN, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered March 28, 2017. The order, insofar as appealed from, denied that part of the motion of defendant Mobile Mountain, Inc., seeking 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 he sustained when he fell from an artificial rock climbing wall amusement attraction owned and operated by Mobile Mountain, Inc. (defendant) at the Eden Corn Festival. Insofar as relevant to this appeal, defendant moved for summary judgment dismissing the complaint against it on the grounds that the action is barred by the doctrine of assumption of the risk and, in the alternative, that it lacked constructive notice of any alleged defective condition causing the accident and injuries. Supreme Court denied that part of the motion, and we affirm.

The climbing wall amusement attraction included a safety harness worn by the patron and a belay cable system that attached to the harness by use of a carabiner. There is no dispute that the carabiner detached from the safety harness worn by plaintiff, and that plaintiff fell approximately 18 feet to the ground below.

The doctrine of assumption of the risk operates "as a defense to tort recovery in cases involving certain types of athletic or recreational activities" (*Custodi v Town of Amherst*, 20 NY3d 83, 87 [2012]). A person who engages in such an activity "consents to those commonly appreciated risks which are inherent in and arise out of the

nature of the sport generally and flow from such participation" (*Morgan v State of New York*, 90 NY2d 471, 484 [1997]). However, "participants are not deemed to have assumed risks resulting from the reckless or intentional conduct of others, or risks that are concealed or unreasonably enhanced" (*Custodi*, 20 NY3d at 88). Here, we conclude that the court properly denied that part of defendant's motion based on assumption of the risk inasmuch as it failed to meet its initial burden of establishing that the risk of falling from the climbing wall is a risk inherent in the use and enjoyment thereof (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Defendant further contends that the court erred in denying that part of its motion based on lack of constructive notice of any alleged defective condition in the carabiner or the climbing wall. We reject that contention. Defendant casts the alleged defective condition as a dangerous condition on the property giving rise to premises liability (*see generally Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]), and it thereafter attempts to establish its lack of liability based upon its lack of constructive notice of that condition (*see generally Depczynski v Mermigas*, 149 AD3d 1511, 1511-1512 [4th Dept 2017]). Even assuming, arguendo, that the alleged defective condition constitutes a "dangerous condition on property" (*Clifford v Woodlawn Volunteer Fire Co., Inc.*, 31 AD3d 1102, 1103 [4th Dept 2006] [internal quotation marks omitted]), we conclude that defendant failed to establish either its own level of legal interest in the premises or its rights and obligations associated therewith. Indeed, the record is devoid of evidence regarding who owned the real property where the festival was held. Further, although defendant's president testified at his deposition that defendant had a "contract" to operate the climbing wall at the festival, defendant failed to submit a copy of that contract or to otherwise establish the terms of or the identity of any other party to the alleged contract. We therefore conclude that defendant failed to meet its burden on that part of its motion based on premises liability (*see generally Alvarez*, 68 NY2d at 324).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

545

CA 17-01940

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

NORTH GEDDES STREET PROPERTIES, LLC,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

IGLESIA MISIONERA MONTE DESION,
DEFENDANT-APPELLANT.

GARY H. COLLISON, LIVERPOOL, FOR DEFENDANT-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (NICOLE MARLOW-JONES OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered February 14, 2017. The order, among other things, granted plaintiff's motion for partial summary judgment.

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

Memorandum: Plaintiff contracted to purchase a building in the City of Syracuse from defendant, a not-for-profit religious corporation. Defendant then filed the requisite petition for permission to sell the building (*see* Not-for-Profit Corporation Law § 511; Religious Corporations Law § 12). Defendant subsequently refused to close the transaction, and plaintiff commenced this action for, inter alia, specific performance of the contract. Supreme Court thereafter issued a single order which, inter alia, granted plaintiff's motion for partial summary judgment on its cause of action for specific performance, denied defendant's cross motion for partial summary judgment dismissing that cause of action, and granted defendant's petition for permission to sell (hereafter, first order).

Defendant then appealed from the first order and moved in Supreme Court to stay the closing pending the disposition of the appeal (*see generally* CPLR 5519 [a] [6]). The court granted defendant's motion to stay the closing pending appeal, conditioned on the posting of a bond (hereafter, second order). Defendant did not post the bond, however, and the stay lapsed accordingly. After the stay lapsed, the transaction closed and title passed to plaintiff. We note that defendant did not appeal from the second order and challenge the bond requirement or the amount thereof.

Given the above described circumstances, we dismiss defendant's

appeal from the first order. Plaintiff's cause of action for specific performance is now moot because the transaction has closed and defendant failed either to post the required bond or to appeal from the second order (*see Currier v First Transcapital Corp.*, 190 AD2d 507, 507-508 [1st Dept 1993]; *see generally Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d 165, 171-174 [2002]). In addition, although defendant purports to challenge the granting of its petition for permission to sell, we note that defendant is not aggrieved thereby (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 544 [1983]; *see generally* CPLR 5511).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

564

CA 17-01819

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

R&D ELECTRONICS, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NYP MANAGEMENT, CO., INC., DEFENDANT.

CATTARAUGUS COUNTY BANK,
INTERPLEADER PLAINTIFF-RESPONDENT,

V

NYP AG SERVICES CO., INC.,
INTERPLEADER DEFENDANT-APPELLANT.

KEENAN LAW CENTRE, P.C., HAMBURG (JOHN J. KEENAN OF COUNSEL), FOR INTERPLEADER DEFENDANT-APPELLANT.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (MARK C. DAVIS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

CONGDON, PERREAULT, DOHL & RICKERT, SALAMANCA (THOMAS W. RICKERT OF COUNSEL), FOR INTERPLEADER PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), entered December 29, 2016. The order and judgment, among other things, granted in part the motion of plaintiff R&D Electronics, Inc. for partial summary judgment.

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

Memorandum: Interpleader plaintiff, Cattaraugus County Bank (Bank), commenced this interpleader action to determine whether funds deposited into the bank account of interpleader defendant, NYP Ag Services Co., Inc. (NYP Ag), should be used to satisfy a judgment obtained by plaintiff, R&D Electronics, Inc. (R&D), against defendant, NYP Management, Co., Inc. (NYP Management). R&D loaned money to NYP Management, an animal feed business, in August 2010. In January 2013, R&D filed a summons and notice of motion for summary judgment in lieu of complaint against NYP Management. NYP Management failed to appear, the motion was granted, and a judgment in the amount of approximately

$290,000 was entered in favor of R&D against NYP Management in May 2013. R&D served a "restraining notice with information subpoena" on the Bank. On June 6, 2013, Dwayne Gier, the operations manager of NYP Management, started a new company, NYP Ag. Gier, the President and sole shareholder of NYP Ag, continued the animal feed business that NYP Management had run, but there was never any asset purchase agreement between the two corporations. Gier opened an account at the Bank in the name of NYP Ag and made various deposits. In early September 2014, the Bank reviewed NYP Ag's account and determined that many checks made payable to NYP Management were deposited into NYP Ag's account. The Bank placed a hold on the account, which had a balance of $63,000.18, and commenced this interpleader action against NYP Ag. We note that, although the Bank named only one claimant instead of the required two (*see* CPLR 1006 [a]), judgment creditor R&D, the unnamed claimant, filed an answer to the interpleader complaint and sought judgment against the Bank and NYP Ag.

R&D moved for summary judgment in the interpleader action requesting that Supreme Court apply the money at issue in partial satisfaction of R&D's judgment and seeking a determination that, pursuant to the de facto merger doctrine, any and all assets of NYP Ag should be used to satisfy the judgment against NYP Management. NYP Ag cross-moved to compel the deposition of R&D's President or, in the alternative, for summary judgment determining that the money at issue belonged to NYP Ag. The court granted the motion in part by ordering the Bank to pay the money at issue to R&D, denied the remainder of the motion, and denied the cross motion. NYP Ag now appeals.

Initially, NYP Ag does not challenge the court's denial of that part of its cross motion to compel the deposition of R&D's President, and thus it has abandoned any contention with respect to that part of its cross motion (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). We agree with NYP Ag that the court erred in granting the motion in part, and we therefore modify the order and judgment accordingly. "In general, a corporation that acquires another corporation's assets is not liable for its predecessor's contract liabilities" (*Eastern Concrete Materials, Inc./NYC Concrete Materials v DeRosa Tennis Contrs., Inc.*, 139 AD3d 510, 512 [1st Dept 2016]; *see Schumacher v Richards Shear Co.*, 59 NY2d 239, 244-245 [1983]; *Hamilton Equity Group, LLC v Juan E. Irene, PLLC*, 101 AD3d 1703, 1704-1705 [4th Dept 2012]). There are four exceptions to this general rule. A corporation may be held liable if: "(1) it expressly or impliedly assumed the predecessor's [contract] liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations" (*Schumacher*, 59 NY2d at 245; *see Meadows v Amsted Indus.*, 305 AD2d 1053, 1054 [4th Dept 2003]). The second and third exceptions are "based on the concept that a successor that effectively takes over a company in its entirety should carry the predecessor's liabilities as a concomitant to the benefits it derives from the good will purchased" (*Grant-Howard Assoc. v General Housewares Corp.*, 63 NY2d 291, 296 [1984]; *see Simpson v Ithaca Gun Co. LLC*, 50 AD3d 1475, 1476 [4th Dept 2008], *lv denied* 11 NY3d 709

[2008]).

In moving for summary judgment, R&D relied on the second exception, i.e., the de facto merger doctrine. "Traditionally, courts have considered several factors in determining whether a de facto merger has occurred: (1) continuity of ownership; (2) a cessation of ordinary business and dissolution of the predecessor as soon as practically and legally possible; (3) assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the predecessor; and (4) a continuity of management, personnel, physical location, assets, and general business operation" (*Sweatland v Park Corp.*, 181 AD2d 243, 245-246 [4th Dept 1992]; *see Ivory Dev., LLC v Roe*, 135 AD3d 1216, 1223 [3d Dept 2016]; *Washington Mut. Bank, F.A. v SIB Mtge. Corp.*, 21 AD3d 953, 954 [2d Dept 2005]).

In support of its motion, R&D submitted the deposition testimony of Gier, who testified that he withdrew the balance (approximately $90,000) in NYP Management's accounts at the Bank in early June 2013. He testified that NYP Ag assumed approximately $400,000 in liabilities that NYP Management owed to vendors and satisfied those liabilities. Gier explained that NYP Ag assumed those liabilities so that the vendors would supply product to NYP Ag, and NYP Ag in turn could deliver product to its customers. Gier testified that any accounts receivable of NYP Management that were collected by NYP Ag were used to satisfy the vendor liabilities. Gier's deposition testimony also established that the management and employees were the same for both corporations; NYP Ag operated out of the same locations that NYP Management had operated; NYP Ag used the same vehicles that NYP Management had used; NYP Ag used the same post office box, cell phone service, internet service, and electric service that NYP Management had used; and the vendors and customers of both corporations were the same. R&D, however, failed to establish that there was continuity of ownership between the two corporations. In fact, in opposition to the motion, NYP Ag established that there was no continuity of ownership. NYP Ag submitted the affidavit of Gier, who averred that NYP Management was owned by Susan Coppings, whereas NYP Ag is owned by Gier. The two corporations do not share the same officers, directors, or shareholders. Gier was a long-term employee of NYP Management who appeared essentially to run the business, but he did not have any ownership interest therein.

In *Sweatland*, we explained that "[p]ublic policy considerations dictate that, *at least in the context of tort liability*, courts have flexibility in determining whether a transaction constitutes a de facto merger. While factors such as shareholder and management continuity will be evidence that a de facto merger has occurred . . . , those factors alone should not be determinative" (*Sweatland*, 181 AD2d at 246 [emphasis added]; *see Lippens v Winkler Backereitechnik GmbH* [appeal No. 2], 138 AD3d 1507, 1509-1510 [4th Dept 2016]). However, courts have held that, "in *non-tort actions*, 'continuity of ownership is the essence of a merger' " (*Washington Mut. Bank, F.A.*, 21 AD3d at 954 [emphasis added]), and is a necessary predicate to finding a de facto merger (*see Ambac Assur. Corp. v Countrywide Home*

Loans, Inc., 150 AD3d 490, 490-491 [1st Dept 2017]; *Matter of TBA Global, LLC v Fidus Partners, LLC*, 132 AD3d 195, 209 [1st Dept 2015]). Here, inasmuch as R&D failed to establish continuity of ownership, it failed to establish that there was a de facto merger between the two corporations (*see Eastern Concrete Materials, Inc./NYC Concrete Materials*, 139 AD3d at 513).

We reject the contention of NYP Ag that the court erred in denying that part of its cross motion seeking summary judgment. In support of its cross motion, NYP Ag failed to establish as a matter of law that the third exception, i.e., the mere continuation of the selling corporation, did not apply and that NYP Ag is therefore not liable for R&D's judgment against NYP Management (*see generally Schumacher*, 59 NY2d at 245; *Wass v County of Nassau*, 153 AD3d 887, 888 [2d Dept 2017]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

580

CAF 17-01425

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

IN THE MATTER OF SHELLI A. WHEELER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL S. WHEELER, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

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

BARNEY & AFFRONTI, LLP, ROCHESTER (FRANCIS C. AFFRONTI OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Joan S. Kohout, J.), entered October 19, 2016 in a proceeding pursuant to Family Court Act article 4. The order, among other things, granted in part the objections of respondent to an order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of respondent's third objection contained in the second bullet point, reinstating the violation petition filed on November 25, 2015, and reinstating the order of disposition of the Support Magistrate entered August 23, 2016 insofar as it determined that respondent violated his obligation to contribute to the daughter's college expenses, and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Monroe County, for further proceedings in accordance with the following memorandum: These appeals arise from litigation concerning several violation petitions that petitioner mother filed alleging that respondent father violated certain terms of the parties' separation agreement, which was incorporated but not merged into their judgment of divorce. That agreement provided, inter alia, that the parties would contribute to their children's college education and would consult each other and their children concerning the college selection process. The mother filed a prior petition seeking to modify the judgment of divorce with respect to the father's contribution to the college expenses of the parties' daughter. In a prior order, the Support Magistrate granted that petition and ordered, inter alia, that the father pay 47% of his daughter's college expenses. The prior order, however, did not specify a maximum dollar amount for those expenses because the parties failed to establish the amount of tuition at SUNY Geneseo, which they had set as the cap for the amount of tuition expenses. After the father filed objections to the prior

order, Family Court, in an order from which no appeal was taken, granted the objections in part but denied the objection to that part of the prior order directing him to contribute to his daughter's college expenses.

While those proceedings were pending, the mother filed a violation petition alleging that the father violated the separation agreement by failing to contribute to their daughter's college expenses. In an order of disposition entered August 23, 2016 (2016 order), the Support Magistrate concluded, inter alia, that the father violated the separation agreement by failing to make those contributions and both parties filed objections to that order. In appeal No. 1, the mother appeals from an order that, insofar as relevant here, denied her objections, granted the father's objections in part, vacated the 2016 order, and dismissed the mother's violation petition. Specifically, the court sustained the second bullet point of the father's third objection, wherein he asserted that his obligation to contribute to his daughter's college expenses was not triggered because the mother violated the separation agreement by failing to consult with him regarding the college selection process. The court therefore denied the mother's objections to the 2016 order as moot. In appeal No. 2, the mother appeals from an order settling the record in appeal No. 1.

Initially, we reject the mother's contention in appeal No. 2 that the court erred in excluding certain documents from the record in appeal No. 1, including the mother's modification petition and the transcript from the hearing on that petition. "The court properly excluded the disputed items from the original record on appeal [in appeal No. 1] because those items either related to a [prior] order not appealed by [either party] . . . or were not considered by the court in rendering judgment" (*Balch v Balch* [appeal No. 2], 193 AD2d 1080, 1080 [4th Dept 1993]; *see generally Paul v Cooper* [appeal No. 2], 100 AD3d 1550, 1551 [4th Dept 2012], *lv denied* 21 NY3d 855 [2013]). We therefore affirm the order in appeal No. 2.

We agree, however, with the mother in appeal No. 1 that the court erred in sustaining the father's objection to the determination in the 2016 order that he violated the separation agreement by failing to contribute to his daughter's educational costs. The father's "specific commitment to pay for . . . tuition expenses during the four years following graduation from high school . . . controls over the more general list of termination events, which" includes the parties' agreement to consult with each other and the children with respect to the daughter's choice of college (*Hejna v Reilly*, 88 AD3d 1119, 1121 [3d Dept 2011]; *see generally Warshof v Rochester Community Sav. Bank* [appeal No. 2], 286 AD2d 920, 921-922 [4th Dept 2001]).

Furthermore, although "[p]ursuant to Family Court Act § 439 (e), Family Court may make its own findings, and here there was . . . [a] record upon which the court could make its own findings of fact . . . , i.e., the transcript of the hearing conducted by the Support Magistrate" (*Matter of Baker v Rose*, 23 AD3d 1112, 1113 [4th Dept 2005] [internal quotation marks omitted]), we agree with the mother

that the evidence in the record does not support the court's conclusion that the father's agreement to contribute to his daughter's college expenses was conditioned on him being consulted regarding her choice of college. To the contrary, the parties' separation agreement did not require that they agree upon a choice of college (*cf. Dierna v Dierna*, 11 AD3d 426, 426 [2d Dept 2004]), nor did it condition either party's duty to contribute to college expenses upon such consultation. In addition, the Support Magistrate noted during argument concerning the 2016 order that the court had previously determined that the father was "obligated to pay a percentage of college expenses." In response, the father's attorney conceded that issue, stating "we agree with that, that he does have that obligation." Thus, the court's determination to the contrary is not supported by the record. We therefore modify the order by denying that part of the father's third objection contained in the second bullet point, reinstating the violation petition, and reinstating the 2016 order insofar as it determined that the father violated his obligation to contribute to the daughter's college expenses, and we remit the matter to Family Court for consideration of the parties' objections to the calculation and amount of those expenses, which the court did not consider.

We have considered the mother's remaining contentions in appeal No. 1 and conclude that they lack merit.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

581

CAF 17-01774

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

IN THE MATTER OF SHELLI A. WHEELER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL S. WHEELER, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

BARNEY & AFFRONTI, LLP, ROCHESTER (FRANCIS C. AFFRONTI OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Joan S. Kohout, J.), entered August 7, 2017 in a proceeding pursuant to Family Court Act article 4. The order settled the record for an appeal from an order entered October 19, 2016.

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

Same memorandum as in *Matter of Wheeler v Wheeler* ([appeal No. 1] — AD3d — [June 8, 2018] [4th Dept 2018]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

582

CAF 16-01132

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

IN THE MATTER OF SEAN P.

ONONDAGA COUNTY DEPARTMENT OF CHILDREN
AND FAMILY SERVICES, PETITIONER-RESPONDENT; MEMORANDUM AND ORDER

BRANDY P., RESPONDENT,
AND SEAN P., RESPONDENT-APPELLANT.

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

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (MAGGIE SEIKALY OF COUNSEL), FOR PETITIONER-RESPONDENT.

LAURA ESTELA CARDONA, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered June 7, 2016 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent Sean P. had neglected the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father appeals from an order determining that he derivatively neglected his newborn son. Family Court's determination was based on, inter alia, the father's sexual abuse of a child, which resulted in an abuse adjudication. On a prior appeal, we affirmed the order determining that respondent mother neglected the subject child herein (*Matter of Sean P. [Brandy P.]*, 156 AD3d 1339 [4th Dept 2017]).

Contrary to the father's contention, the finding of derivative neglect is supported by a preponderance of the evidence in the record (*see* Family Ct Act § 1046 [b] [i]; *Nicholson v Scoppetta*, 3 NY3d 357, 368, 371 [2004]; *Matter of Makayla L.P. [David S.]*, 92 AD3d 1248, 1249-1250 [4th Dept 2012], *lv dismissed* 19 NY3d 886 [2012]). Although evidence of abuse or neglect of one child does not, standing alone, establish a prima facie case of derivative neglect against a parent, "[a] finding of derivative neglect may be made where the evidence with respect to the child found to be abused or neglected 'demonstrates such an impaired level of parental judgment as to create a substantial

risk of harm for any child in [the parent's] care' " (*Matter of Jovon J.*, 51 AD3d 1395, 1396 [4th Dept 2008]; *see* § 1046 [a] [i]). "In order '[t]o sustain a finding of derivative neglect, the prior finding must be so proximate in time to the derivative proceeding so as to enable the factfinder to reasonably conclude that the condition still exists' " (*Matter of Dana T. [Anna D.]*, 71 AD3d 1376, 1376 [4th Dept 2010]); however, " 'there is no bright-line, temporal rule beyond which we will not consider older child protective determinations' " (*Matter of Ilonni I. [Benjamin K.]*, 119 AD3d 997, 998 [3d Dept 2014], *lv denied* 24 NY3d 914 [2015]). In the instant case, "there is no reason to believe that the father's proclivity for sexually abus[e] . . . has changed, nor is there any indication the father has addressed the issues that led to the prior adjudication of . . . his sexual abuse of [the] child[ ]" (*Matter of Ahmad H.*, 46 AD3d 1357, 1357-1358 [4th Dept 2007], *lv denied* 12 NY3d 715 [2009]). We therefore see no reason to disturb the court's finding of neglect (*see Makayla L.P.*, 92 AD3d at 1249). Inasmuch as petitioner made out a prima facie case of derivative neglect, we reject the father's further contention that the court erred in denying his motion to dismiss at the close of petitioner's case (*see Matter of Mary R.F. [Angela I.]*, 144 AD3d 1493, 1493 [4th Dept 2016], *lv denied* 28 NY3d 915 [2017]).

Finally, we reject the father's contention that he was denied effective assistance of counsel. "The record, viewed in its totality, establishes that the father received meaningful representation" (*Matter of Heffner v Jaskowiak*, 132 AD3d 1418, 1418 [4th Dept 2015]; *see Matter of Deon M. [Vernon B.]*, 155 AD3d 1586, 1586-1587 [4th Dept 2017], *lv denied* 30 NY3d 910 [2018]; *cf. Matter of Martin v Martin*, 46 AD3d 1243, 1246-1247 [3d Dept 2007]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

589

CA 17-01587

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

LYNN PAIGE, PLAINTIFF-RESPONDENT,

V ORDER

ROBERT PAIGE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LAW OFFICE OF MAURICE J. VERRILLO, P.C., ROCHESTER (MAURICE J. VERRILLO OF COUNSEL), FOR DEFENDANT-APPELLANT.

DUKE LAW FIRM, P.C., LAKEVILLE (SUSAN K. DUKE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Kristin F. Splain, R.), entered November 15, 2016. The order, inter alia, equitably distributed the marital assets of the parties.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1st Dept 1978]; *see also* CPLR 5501 [a] [1]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

590

CA 17-01588

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

LYNN PAIGE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT PAIGE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LAW OFFICE OF MAURICE J. VERRILLO, P.C., ROCHESTER (MAURICE J. VERRILLO OF COUNSEL), FOR DEFENDANT-APPELLANT.

DUKE LAW FIRM, P.C., LAKEVILLE (SUSAN K. DUKE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Steuben County (Marianne Furfure, A.J.), entered January 19, 2017. The judgment, inter alia, distributed the marital assets of the parties.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the value of the life insurance policy that defendant is required to obtain with plaintiff as the sole beneficiary from $600,000 to $25,000 and directing defendant to maintain that policy until plaintiff has received her share of defendant's deferred compensation benefits without penalty and as modified the judgment is affirmed without costs.

Memorandum: In appeal No. 2, defendant appeals from a judgment of divorce that, inter alia, distributed marital property and directed defendant to purchase life insurance in the amount of $600,000 with plaintiff as the sole beneficiary. In appeal No. 3, defendant appeals from an order awarding plaintiff attorney's fees.

In appeal No. 2, we reject defendant's contention that Supreme Court erred in distributing the marital property. "It is well settled that [e]quitable distribution presents issues of fact to be resolved by the trial court, and its judgment should be upheld absent an abuse of discretion" (*Wagner v Wagner*, 136 AD3d 1335, 1336 [4th Dept 2016] [internal quotation marks omitted]; *see McPheeters v McPheeters*, 284 AD2d 968, 969 [4th Dept 2001]). Here, the court did not abuse its discretion by failing to credit defendant's trial testimony with respect to equitable distribution of marital property inasmuch as defendant admitted that he hid significant assets during his prior divorce and bankruptcy proceedings, and that he violated the automatic order in effect during the pendency of the instant action by taking distributions from his deferred compensation plan, purchasing

property, and removing plaintiff from his health insurance plan after the commencement of the divorce. With respect to defendant's contention that certain funds were separate property, we conclude that he "failed to trace the source of the funds . . . with sufficient particularity to rebut the presumption that they were marital property" (*Scully v Scully*, 104 AD3d 1137, 1138 [4th Dept 2013] [internal quotation marks omitted]).

We agree with defendant, however, that the court abused its discretion in ordering him to purchase a life insurance policy in the amount of $600,000 with plaintiff as the sole beneficiary. Inasmuch as the purpose of ordering a party to obtain life insurance is "to ensure that the spouse or children will receive the economic support for payments that would have been due had the payor spouse survived" (*Mayer v Mayer*, 142 AD3d 691, 696 [2d Dept 2016], *lv dismissed* 28 NY3d 1100 [2016], *lv denied* 29 NY3d 918 [2017]), we conclude that the amount of insurance that was ordered is excessive. We therefore modify the judgment in appeal No. 2 by reducing the value of the life insurance policy that defendant is required to obtain with plaintiff as the sole beneficiary from $600,000 to $25,000, and by directing that defendant maintain that policy until plaintiff has received her share of defendant's deferred compensation benefits without penalty (*see generally* Domestic Relations Law § 236 [B] [8] [a]).

Finally, in appeal No. 3, we reject defendant's challenge to the award of attorney's fees to plaintiff. Inasmuch as defendant's violations of the automatic order that was in effect during the pendency of the action "resulted in protracted litigation" (*McPheeters*, 284 AD2d at 968), we conclude that the court did not abuse its discretion in awarding plaintiff attorney's fees for expenses incurred as a result of defendant's violations of that order.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

591

CA 17-01589

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

LYNN PAIGE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT PAIGE, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

LAW OFFICE OF MAURICE J. VERRILLO, P.C., ROCHESTER (MAURICE J. VERRILLO OF COUNSEL), FOR DEFENDANT-APPELLANT.

DUKE LAW FIRM, P.C., LAKEVILLE (SUSAN K. DUKE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Marianne Furfure, A.J.), entered February 15, 2017. The order directed defendant to pay $4,664.00 to plaintiff 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 *Paige v Paige* ([appeal No. 2] — AD3d — [June 8, 2018] [4th Dept 2018]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

596

KA 15-00932

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAUL D. STANDSBLACK, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered April 13, 2015. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]). Defendant was sentenced by County Court as a persistent violent felony offender (§ 70.08 [3] [b]). In appeal No. 2, defendant appeals from a subsequent order that summarily denied his motion pursuant to CPL 440.10 seeking to vacate a judgment convicting him upon his plea of guilty of sexual abuse in the first degree (§ 130.65 [1]). That judgment was considered by the court in establishing defendant's status as a persistent violent felony offender.

In the early morning hours of October 13, 2013, defendant entered the apartment that the complainant shared with her boyfriend and awakened her by touching her vagina. Earlier that evening, defendant had been drinking at a party in the backyard outside the apartment, where he engaged the complainant in a sexually charged conversation. When the party dissipated, defendant accompanied the boyfriend and others to a bar in a neighboring town, where they continued drinking. At some point, defendant left the bar by himself and walked back to the apartment, where the complainant was sleeping alone. After defendant touched her vagina, the complainant expressed her disapproval, fled from the apartment, and attempted to contact her boyfriend's cell phone while standing outside in the cold. Meanwhile, defendant fell asleep on the couch. The boyfriend eventually returned

from the bar, awakened defendant, and called the police. Defendant apologized and fled before the police arrived. Thereafter, he was indicted on, and convicted of, one count of burglary in the second degree, resulting in the judgment in appeal No. 1.

Defendant contends in appeal No. 1 that the court's *Sandoval* compromise was an abuse of discretion. The court limited cross-examination with respect to defendant's prior conviction of sexual abuse in the first degree to the fact of conviction only, but it permitted cross-examination about the facts and circumstances of, inter alia, his prior conviction of manslaughter in the first degree. Contrary to the People's assertion, defendant preserved his contention for our review in part. Before trial, he requested that the court limit cross-examination with respect to the manslaughter conviction to the fact of conviction only on the grounds that it was more than 20 years old and that the underlying facts were unduly prejudicial to him. The court rejected that argument in making its ultimate *Sandoval* ruling, and defendant objected to that ruling, thus preserving that part of his contention for our review (*cf. People v Taylor*, 148 AD3d 1607, 1608 [4th Dept 2017]; *People v Kelly*, 134 AD3d 1571, 1572 [4th Dept 2015], *lv denied* 27 NY3d 1070 [2016]). Defendant otherwise failed to preserve his contention for our review (*see* CPL 470.05 [2]; *see generally People v Jackson*, 29 NY3d 18, 23 [2017]). In any event, the contention lacks merit. "[T]he court's *Sandoval* compromise, in which it limited questioning on defendant's prior conviction[] for [sexual abuse] to whether [he] had been convicted of a felony . . . , 'reflects a proper exercise of the court's discretion' " (*People v Stevens*, 109 AD3d 1204, 1205 [4th Dept 2013], *lv denied* 23 NY3d 1043 [2014]; *see People v Butler*, 140 AD3d 1610, 1613 [4th Dept 2016], *lv denied* 28 NY3d 969 [2016]). Additionally, the court did not abuse its discretion in "permitting specific questioning as to defendant's [manslaughter] conviction[], even though [it was] remote in time" (*Stevens*, 109 AD3d at 1205).

Defendant further contends that the conviction is not based on legally sufficient evidence. More particularly, he contends that the evidence is legally insufficient to establish that he knowingly entered or remained unlawfully in the apartment and, further, to establish that he entered the apartment with the intent to commit the crime of sexual abuse in the third degree (Penal Law § 130.55), i.e., the crime underlying the burglary charge. As a preliminary matter, with respect to his knowledge of the lawfulness of the entry, defendant failed to preserve his contention for our review inasmuch as his motion for a trial order of dismissal was not " 'specifically directed' " at the alleged error (*People v Gray*, 86 NY2d 10, 19 [1995]; *see People v Womack*, 151 AD3d 1852, 1853 [4th Dept 2017], *lv denied* 29 NY3d 1135 [2017]). In any event, we conclude that it lacks merit. With respect to intent, we note that the jury may infer a defendant's intent to commit a crime from the circumstances of the entry and the defendant's actions when confronted (*see People v Pendarvis*, 143 AD3d 1275, 1275 [4th Dept 2016], *lv denied* 28 NY3d 1149 [2017]; *People v Sterina*, 108 AD3d 1088, 1090 [4th Dept 2013]). Here, the jury could infer from the circumstances of the entry that

defendant unlawfully entered the apartment with the intent to commit the crime of sexual abuse in the third degree. Viewing the evidence in the light most favorable to the People, " 'there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt' " (*People v Danielson*, 9 NY3d 342, 349 [2007]). Viewing the evidence in light of the elements of the crime of burglary in the second degree as charged to the jury (*see id.*), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant contends that he was denied effective assistance of counsel because his attorney failed to request that the court charge the jury as to the lesser included offense of criminal trespass in the second degree (Penal Law § 140.15 [1]). We reject that contention. " '[I]t is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712 [1998]), and we conclude that defendant has not met that burden here. "[T]he decision to request or consent to the submission of a lesser included offense is often based on strategic considerations, taking into account a myriad of factors, including the strength of the People's case" (*People v McGee*, 20 NY3d 513, 519 [2013]). "[W]here the proof against a defendant is relatively weak and the charges very serious, a defendant may elect not to request a lesser included offense so that the jury is forced to choose between conviction of a serious crime or an acquittal, with the hope that the jury will be sympathetic to defendant and uncomfortable convicting on scant evidence" (*id.* at 520). Here, the proof against defendant consisted of the conflicting testimony of eyewitnesses and, if he obtained an acquittal, he would have avoided a significant period of incarceration. Under those circumstances, defense counsel may have made a strategic decision not to request the charge down. Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Contrary to defendant's further contention, the court properly refused to suppress his pre-*Miranda* statements to the police. The testimony at the *Huntley* hearing established that defendant was walking home from the apartment along a public road when he was approached from opposite directions by two Sheriff's deputies in patrol vehicles. The deputies stopped their vehicles and approached defendant on foot. One of the deputies, who had recently spoken to the complainant and her boyfriend, asked defendant for his name, and defendant gave a false name in response. The deputy, who was familiar with defendant, indicated that he knew defendant's real name, whereupon defendant acknowledged his true identity. Based upon that testimony, we conclude that "a reasonable person in defendant's position, innocent of any crime, would not have believed that he or she was in custody, and thus *Miranda* warnings were not required" (*People v Lunderman*, 19 AD3d 1067, 1068 [2005], *lv denied* 5 NY3d 830 [2005]; *see People v Leta*, 151 AD3d 1761, 1762 [4th Dept 2017], *lv*

denied 30 NY3d 981 [2017]). Additionally, we conclude that the deputy's question was "investigatory rather than accusatory" (*Leta*, 151 AD3d at 1762).

Defendant failed to preserve for our review his contention that certain alleged instances of prosecutorial misconduct deprived him of a fair trial inasmuch as he failed to object to any of them (*see People v Jemes*, 132 AD3d 1361, 1363 [4th Dept 2015], *lv denied* 26 NY3d 1110 [2016]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant failed to preserve for our review his challenge to evidentiary rulings concerning the evidence of his consciousness of guilt and with respect to the elicitation of certain testimony regarding his post-*Miranda* statements (*see* CPL 470.05 [2]). Defendant also failed to preserve for our review his contention that the court should have issued a limiting instruction to the jury that certain testimony could be considered only as evidence of consciousness of guilt inasmuch as he failed to request such a limiting instruction (*see People v Case*, 113 AD3d 872, 873 [2d Dept 2014], *lv denied* 23 NY3d 961 [2014]; *People v Leitzsey*, 173 AD2d 488, 489 [2d Dept 1991], *lv denied* 78 NY2d 969 [1991]). We decline to exercise our power to review those unpreserved contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

With respect to appeal No. 2, defendant contends that the Judge erred in refusing to recuse himself from deciding the CPL 440.10 motion based on the fact that he presided over the underlying plea proceeding and prosecuted defendant on the prior charge of manslaughter. We reject that contention. A Judge is disqualified from deciding a motion in a proceeding in which he had previously been an attorney (*see* Judiciary Law § 14), but the mere fact that a Judge previously prosecuted a defendant on an unrelated predicate felony does not require recusal (*see People v Forshey*, 298 AD2d 962, 963 [4th Dept 2002], *lv denied* 99 NY2d 558 [2002], *reconsideration denied* 100 NY3d 561 [2003]). "Absent a legal disqualification under Judiciary Law § 14, a Trial Judge is the sole arbiter of recusal" (*People v Moreno*, 70 NY2d 403, 405 [1987]; *see People v Terborg*, 156 AD3d 1320, 1321 [4th Dept 2017]). Here, there was no basis for legal disqualification, and defendant failed to demonstrate that any alleged bias or prejudice affected the court's determination of the motion (*see Terborg*, 156 AD3d at 1321; *People v Hazzard*, 129 AD3d 1598, 1598 [4th Dept 2015], *lv denied* 26 NY3d 968 [2015]).

Defendant further contends that the court erred in summarily denying the CPL 440.10 motion. In particular, defendant contends that the judgment convicting him of sexual abuse in the first degree must be vacated because the court lacked jurisdiction to accept a guilty plea to a crime that is not a lesser included offense of those that were charged in the subject indictment, i.e., rape in the first degree (Penal Law § 130.35 [1]) and rape in the second degree (§ 130.30 [1]). Even assuming, arguendo, that the court lacked jurisdiction, we conclude that defendant is barred from raising that contention by way

of a CPL 440.10 motion. Where, as here, " 'sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review' of the defendant's contentions, the court must deny a motion to vacate the judgment" (*People v Brown*, 59 AD3d 1058, 1059 [4th Dept 2009], *lv denied* 12 NY3d 851 [2009], quoting CPL 440.10 [2] [c]). Furthermore, defendant contends that he was entitled to a hearing on his allegations that his attorney failed to investigate the case and coerced him to plead guilty. We conclude, however, that the court was permitted to deny the motion summarily because the material allegations were refuted by defendant's plea colloquy and were supported only by defendant's self-serving affidavit (*see* CPL 440.30 [4] [d] [i]; *People v Witkop*, 114 AD3d 1242, 1243 [4th Dept 2014], *lv denied* 23 NY3d 1069 [2014]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

597

KA 15-00826

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAUL D. STANDSBLACK, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (SHIRLEY A. GORMAN 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 Genesee County Court (Robert C. Noonan, J.), entered April 22, 2015. The order denied defendant's motion pursuant to CPL 440.10 to vacate a judgment convicting him, upon his plea of guilty, of sexual abuse in the first degree.

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

Same memorandum as in *People v Standsblack* ([appeal No. 1] — AD3d — [June 8, 2018] [4th Dept 2018]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

606

CA 17-02111

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

GREGORY P. ROHR, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES DEWALD, DEFENDANT,
AND PUMPCRETE CORPORATION, DEFENDANT-APPELLANT.

CULLEY MARKS TANENBAUM & PEZZULO LLP, ROCHESTER (GLENN E. PEZZULO OF COUNSEL), FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., BUFFALO (PATRICK A. LITTLE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered June 5, 2017. The order, inter alia, denied that part of the cross motion of defendant Pumpcrete Corporation for partial summary judgment with respect to the Labor Law § 241 (6) cause of action against it.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the cross motion in its entirety and dismissing the Labor Law § 241 (6) cause of action against defendant Pumpcrete Corporation, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that he sustained during a construction accident on property owned by defendant James Dewald. Plaintiff was injured while guiding a concrete pump hose that was attached to a truck owned and operated by defendant Pumpcrete Corporation (Pumpcrete). An obstruction formed in the pump hose, causing wet concrete to suddenly be ejected from the hose and knocking plaintiff off of the scaffolding upon which he was standing. At the time of the accident, plaintiff was working for the general contractor, which had hired Pumpcrete to supply the concrete pumping equipment.

In his complaint, plaintiff asserted causes of action for common-law negligence and violations of Labor Law §§ 240 (1) and 241 (6). Plaintiff moved for partial summary judgment on liability with respect to the common-law negligence cause of action against Pumpcrete, and Pumpcrete cross-moved for partial summary judgment dismissing the section 240 (1) and 241 (6) causes of action against it. Plaintiff thereafter stipulated to the dismissal of the section 240 (1) cause of

action against Pumpcrete, and Supreme Court denied the motion and cross motion. Pumpcrete appeals.

With respect to the Labor Law § 241 (6) cause of action against Pumpcrete, we note that, "while under that statute owners and general contractors are generally absolutely liable for statutory violations . . . , other parties may be liable under th[at] statute[ ] only if they are acting as the agents of the owner or general contractor by virtue of the fact that they had been given the authority to supervise and control the work being performed at the time of the injury" (*Knab v Robertson,* 155 AD3d 1565, 1565-1566 [4th Dept 2017] [internal quotation marks omitted]; *see Trombley v DLC Elec., LLC*, 134 AD3d 1343, 1343 [3d Dept 2015]; *Van Blerkom v American Painting, LLC*, 120 AD3d 660, 661 [2d Dept 2014]; *Krajnik v Forbes Homes, Inc.*, 120 AD3d 902, 904 [4th Dept 2014]; *Johnson v Ebidenergy, Inc.*, 60 AD3d 1419, 1421 [4th Dept 2009]). Pumpcrete satisfied its initial burden of establishing as a matter of law that it was not an agent of the owner or general contractor by submitting deposition testimony from plaintiff and the Pumpcrete pump operator that Pumpcrete lacked authority to supervise or control plaintiff's work, and plaintiff failed to raise a triable issue of fact in response (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). We therefore conclude that the court erred in denying that part of Pumpcrete's cross motion with respect to the Labor Law § 241 (6) cause of action, and we modify the order accordingly.

We reject Pumpcrete's contention, however, that it is entitled to summary judgment dismissing the common-law negligence cause of action against it. Although Pumpcrete did not seek that relief in its cross motion, "we may search the record notwithstanding that failure because th[e] [negligence] cause of action was the subject of plaintiff's motion, which placed the issue before the motion court" (*Charter Sch. for Applied Tech. v Board of Educ. for City Sch. Dist. of City of Buffalo*, 105 AD3d 1460, 1462 [4th Dept 2013]; *see generally Mercedes-Benz Credit Corp. v Dintino*, 198 AD2d 901, 902 [4th Dept 1993]; *Bosun's Locker v Fireman's Fund Ins. Cos.*, 147 AD2d 907, 908 [4th Dept 1989]). Nevertheless, upon searching the record, we conclude that Pumpcrete is not entitled to summary judgment dismissing the negligence cause of action against it because the conflicting expert opinions with respect to that cause of action create triable issues of fact (*see Cook v Peterson*, 137 AD3d 1594, 1596 [4th Dept 2016]; *Corbett v County of Onondaga*, 291 AD2d 886, 887 [4th Dept 2002]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

613.1

TP 17-01824

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

IN THE MATTER OF FREDERICK L. WILLIAMS,
PETITIONER,

V MEMORANDUM AND ORDER

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

FREDERICK L. WILLIAMS, PETITIONER PRO SE.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Russell P. Buscaglia, A.J.], entered September 15, 2017) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated various inmate rules. Petitioner contends that substantial evidence does not support the determination that he violated inmate rules 107.11 (7 NYCRR 270.2 [B] [8] [ii] [harassment]), 101.10 (7 NYCRR 270.2 [B] [2] [i] [sex offense]) or 101.20 (7 NYCRR 270.2 [B] [2] [iii] [lewd conduct]). We reject that contention.

The testimony of the correction officers at the hearing and the misbehavior report constitute substantial evidence that petitioner was guilty of violating the subject inmate rules (*see Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]; *People ex rel. Vega v Smith*, 66 NY2d 130, 140 [1985]). Petitioner's testimony in support of his claims, i.e., that the reporting correction officer was sexually harassing him and wrote the misbehavior report because she was afraid petitioner would "tell on" her and because she sought to retaliate against him for past grievances, merely presented an issue of credibility for resolution by the Hearing Officer (*see Foster*, 76 NY2d at 966).

Contrary to petitioner's contention, the record does not support the conclusion that the Hearing Officer was biased or that the determination flowed from the alleged bias (*see Matter of Colon v Fischer*, 83 AD3d 1500, 1501-1502 [4th Dept 2011]; *Matter of Rodriguez v Herbert*, 270 AD2d 889, 890 [4th Dept 2000]). The mere fact that the Hearing Officer ruled against petitioner is insufficient to establish bias (*see Matter of Edwards v Fischer*, 87 AD3d 1328, 1329 [4th Dept 2011]; *Matter of Wade v Coombe*, 241 AD2d 977, 977 [4th Dept 1997]).

Contrary to petitioner's further contention, we conclude that the Hearing Officer properly denied his request to call the Hall Captain to testify. Inasmuch as the Hall Captain did not witness the incident, the Hearing Officer properly determined that his testimony would be irrelevant (*see Matter of Cunningham v Annucci*, 153 AD3d 1491, 1492 [3d Dept 2017]). The Hearing Officer likewise properly denied petitioner's request for a video depicting a conversation he had with a correction officer in which the officer allegedly informed petitioner that the reporting officer did not report the incident to him. The content of the alleged conversation was not relevant to the issue whether petitioner violated the subject inmate rules. We further conclude, contrary to petitioner's additional contentions, that the Hearing Officer properly limited witness testimony to relevant questions concerning what happened on the date of the incident and properly excused a witness after petitioner became argumentative (*see Matter of Townes v Goord*, 14 AD3d 754, 755 [3d Dept 2005]).

Lastly, we reject petitioner's contention that the misbehavior report was fatally defective because it was written a day after the incident. The applicable regulation does not require that it be written the same day as the incident but, rather, it must be written "as soon as practicable" (7 NYCRR 251-3.1 [a]; *see Matter of Hamilton v Selsky*, 13 AD3d 844, 846 [3d Dept 2004], *lv denied* 5 NY3d 704 [2005], *rearg denied* 5 NY3d 850 [2005]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

616

KA 16-00777

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES WHITEHEAD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered October 8, 2015. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), arising from his possession of a gun. We reject defendant's contention that County Court erred in refusing to suppress the gun as the fruit of an illegal stop without probable cause. The suppression hearing testimony established that the officers were on regular patrol when they observed a group of individuals, including defendant, congregated on the lawn of an abandoned house, drinking alcoholic beverages. The officers pulled over with the intention of issuing citations to the group for violating the city's open container law but, before they exited their vehicles, two of the officers observed defendant toss a handgun over his shoulder into a vacant lot. At that point, the officers detained defendant and recovered the weapon, which was determined to be a loaded handgun. We conclude that, when the officers observed defendant throw the firearm, they acquired probable cause, justifying the stop, forcible detention, and arrest of defendant (*see People v Robinson*, 134 AD3d 1538, 1539 [4th Dept 2015]; *see generally People v McRay*, 51 NY2d 594, 602 [1980]; *People v De Bour*, 40 NY2d 210, 223 [1976]).

Defendant failed to preserve for our review his contention that the court's supplemental instructions to the jury on the charges of temporary lawful possession and knowing possession were misleading

inasmuch as he failed to object to those instructions (*see People v Lewis*, 150 AD3d 1264, 1265 [2d Dept 2017], *lv denied* 30 NY3d 951 [2017]; *People v Whitfield*, 72 AD3d 1610, 1610 [4th Dept 2010], *lv denied* 15 NY3d 811 [2010]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's contention that the evidence is legally insufficient to establish that he possessed a loaded firearm outside of his home or place of business (*see* Penal Law § 265.03 [3]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The evidence presented at trial established that defendant was arrested on the front lawn of a home that was known to be abandoned and, contrary to defendant's contention, there is no evidence to support the inference that it was his home (*see People v Phillips*, 109 AD3d 1124, 1124-1125 [4th Dept 2013], *lv denied* 22 NY3d 1090 [2014]).

We reject defendant's further contention that the verdict is against the weight of the evidence because he had only temporary innocent possession of the weapon. Even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude that defendant's conduct in throwing the weapon over his head, rather than turning it over to the police who were right in front of him, was "utterly at odds with [his] claim of innocent possession . . . temporarily and incidentally [resulting] from" another individual having just handed him the weapon (*People v Hicks*, 110 AD3d 1488, 1488 [4th Dept 2013], *lv denied* 22 NY3d 1156 [2014] [internal quotation marks omitted]; *see People v DeJesus*, 118 AD3d 1340, 1341 [4th Dept 2014], *lv denied* 23 NY3d 1061 [2014]). Thus, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

618

KA 14-00239

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SEDRICK D. COUNCIL, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (JOSEPH PLUKAS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered October 10, 2013. The judgment convicted defendant, upon a jury verdict, of assault in the first degree, criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by directing that all of the sentences shall run concurrently and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of assault in the first degree (Penal Law § 120.10 [1]), criminal possession of a weapon in the second degree (§ 265.03 [3]), and criminal possession of a weapon in the third degree (§ 265.02 [1]), defendant contends that the evidence is legally insufficient to establish his identity as the perpetrator of the assault or his possession of the firearm. By failing to make a motion to dismiss that was " 'specifically directed' " at those alleged deficiencies in the proof (*People v Gray*, 86 NY2d 10, 19 [1995]), defendant failed to preserve for our review his challenges to the legal sufficiency of the evidence (*see People v Bausano*, 122 AD3d 1341, 1341-1342 [4th Dept 2014], *lv denied* 25 NY3d 1069 [2015]).

We conclude that, when viewed 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 (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The victim testified that he saw defendant's face under the light of a nearby street light when defendant shot him, and that defendant was someone who he knew from the neighborhood. Further, during the execution of a search warrant at defendant's residence about two weeks after the

victim was shot, the police found a loaded .22 caliber sawed-off rifle under a mattress with mail that was addressed to defendant. Thereafter, the victim identified the recovered rifle as the same firearm that defendant used to shoot him. The jury had an opportunity to see and hear the victim's testimony, and " '[g]reat deference is accorded to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor' " (*People v Mateo*, 2 NY3d 383, 410 [2004], *cert denied* 542 US 946 [2004]; *see People v Gay*, 105 AD3d 1427, 1428 [4th Dept 2013]).

We reject defendant's further contention that County Court erred in denying his motion to sever the assault count from the weapons possession counts. "Two offenses, even though based on different criminal transactions, may be joined in the same indictment when '[s]uch offenses, or the criminal transactions underlying them, are of such nature that either proof of the first offense would be material and admissible as evidence[-]in[-]chief upon a trial of the second, or proof of the second would be material and admissible as evidence in chief upon a trial of the first' " (*People v Gadsen*, 139 AD2d 925, 925 [4th Dept 1988], quoting CPL 200.20 [2] [b]). Inasmuch as the assault count and the weapons counts charged in the indictment are joinable under CPL 200.20 (2) (b), the court lacked discretion to sever them (*see* CPL 200.20 [3]; *People v Lee*, 275 AD2d 995, 997 [4th Dept 2000], *lv denied* 95 NY2d 966 [2000]). Thus, the court properly denied defendant's pretrial motion for severance and his posttrial motion to set aside the verdict pursuant to CPL 330.30 (1) based on the denial of the prior motion for severance.

Finally, we agree with defendant that the sentence imposed is unduly harsh and severe. We therefore modify the judgment as a matter of discretion in the interest of justice by directing that all of the sentences shall run concurrently.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

621

KA 16-01176

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDWARD LUNDY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (NATHANIEL V. RILEY 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 April 28, 2015. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by directing that the sentence shall run concurrently with the sentences imposed under superior court information Nos. I-13-0480-1 and I-14-0579-1 and as modified the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him, upon his plea of guilty, of grand larceny in the fourth degree (Penal Law § 155.30 [1]). In appeal Nos. 2 and 3, he appeals from judgments convicting him, upon his pleas of guilty, of burglary in the third degree (§ 140.20). Preliminarily, in each appeal we agree with defendant that he did not validly waive his right to appeal. His written waivers of the right to appeal were not accompanied by a colloquy sufficient to establish that the waivers were knowingly, voluntarily, and intelligently made (*see People v Bradshaw*, 18 NY3d 257, 264-265 [2011]; *People v Hibbard*, 148 AD3d 1538, 1539 [4th Dept 2017]).

Defendant did not preserve for our review his contention in each appeal that County Court abused its discretion in failing to discharge him from a drug treatment program after 18 months of participation in that program (*see generally* CPL 470.05 [2]). His further contention that the court abused its discretion by terminating him from that program and imposing a prison sentence is without merit. Trial courts have “broad discretion when supervising a defendant subject to [a drug treatment program], and deciding whether the conditions of a [drug

treatment program] plea agreement have been met" (*People v Fiammegta*, 14 NY3d 90, 96 [2010]; *see generally* CPL 216.05 [9] [c]). The record establishes that, although defendant made progress during his first year in treatment, he then failed a drug test, lied to both the court and his treatment provider about his job search, and was subsequently arrested and charged with felony driving while intoxicated. Under these circumstances, we cannot conclude that the court abused its discretion in terminating his participation in the drug treatment program (*see generally People v Peck*, 100 AD3d 1520, 1521 [4th Dept 2012], *lv denied* 20 NY3d 1102 [2013]).

We agree with defendant in each appeal, however, that the imposition of consecutive indeterminate sentences of imprisonment, with an aggregate sentence of 6 to 18 years, is unduly harsh and severe under the circumstances. This Court's " 'sentence-review power may be exercised, if the interest of justice warrants, without deference to the sentencing court' " (*People v Meacham*, 151 AD3d 1666, 1670 [4th Dept 2017], *lv denied* 30 NY3d 981 [2017], quoting *People v Delgado*, 80 NY2d 780, 783 [1992]). Here, as a matter of discretion in the interest of justice, we modify the judgments by directing that the terms of imprisonment imposed in all three appeals shall run concurrently with each other (*see generally* CPL 470.20 [6]; *People v Prather*, 249 AD2d 954, 955 [4th Dept 1998], *lv denied* 92 NY2d 859 [1998]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

622

KA 16-01175

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDWARD LUNDY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (NATHANIEL V. RILEY 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 April 28, 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 directing that the sentence shall run concurrently with the sentences imposed under superior court information Nos. I-13-0479-1 and I-14-0579-1 and as modified the judgment is affirmed.

Same memorandum as in *People v Lundy* ([appeal No. 1] — AD3d — [June 8, 2018] [4th Dept 2018]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

623

KA 16-01174

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDWARD LUNDY, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (NATHANIEL V. RILEY 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 April 28, 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 directing that the sentence shall run concurrently with the sentences imposed under superior court information Nos. I-13-0479-1 and I-13-0480-1, and as modified the judgment is affirmed.

Same memorandum as in *People v Lundy* ([appeal No. 1] — AD3d — [June 8, 2018] [4th Dept 2018]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

624

KA 16-00555

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN FITZRANDOLPH, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KRISTIN M. PREVE 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 (Michael F. Pietruszka, J.), rendered December 22, 2015. The judgment convicted defendant, upon a nonjury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of murder in the second degree (Penal Law § 125.25 [1]). Defendant contends that the People failed to establish his guilt by legally sufficient evidence because his intoxication rendered him incapable of forming the requisite criminal intent (*see* § 15.25), and the verdict is against the weight of the evidence with respect to the element of intent. We reject that contention. Although there was evidence at trial that defendant consumed alcohol, marihuana, and LSD prior to the commission of the crime, " '[a]n intoxicated person can form the requisite criminal intent to commit a crime, and it is for the trier of fact to decide if the extent of the intoxication acted to negate the element of intent' " (*People v Madore*, 145 AD3d 1440, 1440 [4th Dept 2016], *lv denied* 29 NY3d 1034 [2017]). Here, defendant's own expert psychiatrist testified that defendant intended to kill the victim, and the nature and extent of the stab wound was sufficient by itself to establish intent (*see People v Tigner*, 51 AD3d 1045, 1045 [2d Dept 2008], *lv denied* 13 NY3d 863 [2009], *reconsideration denied* 14 NY3d 806 [2010]). Thus, viewing the evidence in the light most favorable to the People, we conclude that it is legally sufficient to establish defendant's criminal intent and, viewing the evidence in light of the elements of murder in the second degree, we conclude that the verdict is not against the weight of the evidence with respect to the element of intent (*see generally People v Danielson*, 9 NY3d 342, 349 [2007]; *People v Bleakley*, 69 NY2d 490, 495 [1987]).

We reject defendant's further contentions that County Court erred in concluding that the insanity defense did not apply (*see* Penal Law § 40.15), and that the verdict is against the weight of the evidence because the testimony of the People's expert was "deeply flawed." The statute provides that a defendant lacks criminal responsibility for a crime by reason of mental disease or defect when, "as a result of mental disease or defect, he [or she] lacked substantial capacity to know or appreciate either: . . . [t]he nature and consequences of such conduct; or . . . [t]hat such conduct was wrong." It is axiomatic that, for the affirmative defense to apply, a defendant's conduct must be the result of his or her mental disease or defect; the defense is not applicable simply because a defendant is afflicted with a mental illness. Here, the People's expert opined that defendant's conduct was principally caused by his drug use rather than his mental illness, while defendant presented the testimony of an expert psychiatrist that defendant's mental illness prevented him from appreciating the wrongfulness of his conduct. Therefore, it was within the province of the court to conclude that the affirmative defense of mental disease or defect did not apply in this instance (*see People v Hadfield*, 119 AD3d 1217, 1222-1223 [3d Dept 2014], *lv denied* 25 NY3d 989 [2015]; *People v Gillis*, 281 AD2d 698, 699 [3d Dept 2001], *lv denied* 96 NY2d 918 [2001]; *People v Bergamini*, 223 AD2d 548, 549 [2d Dept 1996], *lv denied* 88 NY2d 933 [1996]). "Where, as here, there was conflicting expert evidence concerning criminal responsibility, the [court] was free to accept or reject in whole or in part the opinion of any expert . . . , at least in the absence of a serious flaw in the expert's testimony" (*People v Hershey*, 85 AD3d 1661, 1662 [4th Dept 2011], *lv denied* 18 NY3d 883 [2012], *cert denied* 566 US 1022 [2012] [internal quotation marks omitted]; *see People v Stoffel*, 17 AD3d 992, 993 [4th Dept 2005], *lv denied* 5 NY3d 795 [2005]). Inasmuch "[a]s we discern no 'serious flaw' in the opinion offered by the People's expert, we are unable to conclude that [the court], in crediting such testimony, failed to give the evidence the weight it should be accorded" (*Hadfield*, 119 AD3d at 1223 [internal quotation marks omitted]; *see Gillis*, 281 AD2d at 699; *People v Moss*, 179 AD2d 271, 272-273 [4th Dept 1992], *lv dismissed* 80 NY2d 932 [1992]).

Finally, defendant's sentence, which is only three years longer than the minimum sentence required by law (*see* Penal Law § 70.00 [3] [a] [i]), is not unduly harsh or severe.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

625

CAF 16-01341

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

IN THE MATTER OF CAIDENCE M., BIANCA M.,
AND FRANCIS M.
---------- MEMORANDUM AND ORDER
SENECA COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

FRANCIS W.M., RESPONDENT-APPELLANT.

MARY M. WHITESIDE, NORTH HOLLYWOOD, CALIFORNIA (DAVID M. ABBATOY, JR., OF COUNSEL), FOR RESPONDENT-APPELLANT.

FRANK R. FISHER, COUNTY ATTORNEY, WATERLOO (DAVID K. ETTMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

SARA E. ROOK, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Seneca County (Dennis F. Bender, J.), entered July 21, 2016 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent.

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

Memorandum: Respondent father appeals from an order terminating his parental rights on the ground of permanent neglect and transferring guardianship and custody of his three children to petitioner. We reject the father's contention that petitioner failed to establish that it had exercised diligent efforts to encourage and strengthen the parent-child relationship during his incarceration as required by Social Services Law § 384-b (7) (a). "Diligent efforts include reasonable attempts at providing counseling, scheduling regular visitation with the child, providing services to the parents to overcome problems that prevent the discharge of the child into their care, and informing the parents of their child's progress" (*Matter of Jessica Lynn W.*, 244 AD2d 900, 900-901 [4th Dept 1997]; *see* § 384-b [7] [f]; *Matter of Mya B. [William B.]*, 84 AD3d 1727, 1727 [4th Dept 2011], *lv denied* 17 NY3d 707 [2011]).

Social Services Law § 384-b (7) (f) (3) provides that an agency need not provide "services and other assistance to . . . incarcerated parents" (*see Matter of Jaylysia S.-W.*, 28 AD3d 1228, 1229 [4th Dept 2006]). While an agency's obligation to exercise diligent efforts is not obviated by a parent's incarceration (*see* § 384-b [7] [f]), it

does "create[] some impediments, both to the agency and to the parent," leading courts to conclude that diligent efforts in such circumstances may be established by the agency "apprising the incarcerated parent of the child's well-being, developing an appropriate service plan, investigating possible placement of the child with relatives suggested by the parent, responding to the parent's inquiries and facilitating telephone contact between the parent and child" (*Matter of James J. [James K.]*, 97 AD3d 936, 937 [3d Dept 2012]; *see Matter of Hailey ZZ. [Ricky ZZ.]*, 19 NY3d 422, 430 [2012]).

Here, petitioner established by clear and convincing evidence that it fulfilled its duty in that regard (*see Mya B.*, 84 AD3d at 1728). During the nearly four-month period after petitioner removed the children from the father's home to the time the father was incarcerated, petitioner offered the father drug treatment and parent counseling services, transportation assistance, and information about available apartments when the father stated that he was going to be evicted from his apartment. The father refused drug treatment and parent counseling and tested positive for cocaine, and he was arrested for armed robbery and criminal possession of a controlled substance in the third degree, leading to his incarceration. While the father was incarcerated, petitioner arranged visits between the father and the children, made special arrangements to have the visits take place during the week, kept the father apprised of the children's well-being, and investigated the children's possible placement with relatives.

The evidence at the hearing established that the father failed to plan for the future of the children (*see Matter of Christian C.-B. [Christopher V.B.]*, 148 AD3d 1775, 1776-1777 [4th Dept 2017], *lv denied* 29 NY3d 917 [2017]). Although the father wanted the children to live with the paternal grandmother until he was released from prison, petitioner determined that the grandmother was not a viable candidate (*see Matter of Amanda C.*, 281 AD2d 714, 716-717 [3d Dept 2001], *lv denied* 96 NY2d 714 [2001]). Petitioner also investigated the paternal uncle, who lived out of state, but likewise determined that he was not a viable candidate. In any event, the uncle offered to take custody of only one child. Finally, the father's alternative suggestion, i.e., that the children remain in foster care until he was released from prison, was "not in the child[ren']s best interests and [was] antithetical to [their] need for permanency" (*Matter of Kaiden AA. [John BB.]*, 81 AD3d 1209, 1211 [3d Dept 2011]; *see Matter of Skye N. [Carl N.]*, 148 AD3d 1542, 1544 [4th Dept 2017]; *Matter of Gena S. [Karen M.]*, 101 AD3d 1593, 1594 [4th Dept 2012], *lv dismissed* 21 NY3d 975 [2013]).

The father further contends that the oldest child was denied effective assistance of counsel inasmuch as one attorney represented all three children and there was an alleged conflict of interest between the eldest child and the two younger children. That contention is not preserved for our review inasmuch as the father failed to request the removal of the Attorney for the Children (AFC) (*see Matter of Aaliyah H. [Mary H.]*, 134 AD3d 1574, 1575 [4th Dept

2015], *lv denied* 27 NY3d 906 [2016]; *see also Matter of Shonyo v Shonyo*, 151 AD3d 1595, 1596 [4th Dept 2017], *lv denied* 30 NY3d 901 [2017]). For the same reason, the father's contention that the AFC was biased against him is unpreserved for our review (*see Matter of Elniski v Junker*, 142 AD3d 1392, 1393 [4th Dept 2016]; *Matter of Nicole VV.*, 296 AD2d 608, 613 [3d Dept 2002], *lv denied* 98 NY2d 616 [2002]), as are the father's assertions that the AFC improperly substituted her judgment for that of the younger siblings and otherwise did not provide the oldest child with effective representation (*see Matter of Emmanuel J. [Maximus L.]*, 149 AD3d 1292, 1297 [3d Dept 2017]).

Finally, we conclude that there is a sound and substantial basis in the record for Family Court's order terminating the father's parental rights and freeing the children for adoption (*see Matter of Jyashia RR. [John VV.]*, 92 AD3d 982, 985 [3d Dept 2012]; *see generally Matter of Martha S. [Linda M.S.]*, 126 AD3d 1496, 1497 [4th Dept 2015], *lv dismissed in part and denied in part* 26 NY3d 941 [2015]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

626

CA 17-01939

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

BELLA ROSS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

AVI LANDAU, DEFENDANT-RESPONDENT.

MICHAEL J. CROSBY, HONEOYE FALLS, FOR PLAINTIFF-APPELLANT.

Appeal from an order of the Monroe County Court (Victoria M. Argento, J.), entered December 7, 2015. The order affirmed a judgment of the Rochester City Court dated May 14, 2015 that dismissed plaintiff's claim for damages in an action involving personal tort.

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

Memorandum: Plaintiff commenced this small claims action in Rochester City Court (hereafter, trial court), seeking $5,000 in damages from defendant, her neighbor. At trial, plaintiff testified that, approximately two years before she filed the claim, defendant approached her one night while she was shoveling snow and pushed her down without provocation. According to plaintiff, defendant then took her shovel and struck her storm door with it, causing property damage. Plaintiff explained that she did not call the police until two years later because she was afraid of defendant and did not trust the police. Defendant also testified, and denied having any altercation with plaintiff and causing any damage to her property. A woman who lives with defendant corroborated his testimony, adding that plaintiff's storm door had been broken for more than 10 years.

The trial court dismissed the claim, crediting the testimony of defendant and his witness and determining that "this incident as alleged never occurred and that the Defendant never assaulted or harassed the Plaintiff [on the date in question] or damaged any of her property." The trial court further concluded that plaintiff in any event had failed to provide sufficient proof of her damages. On plaintiff's appeal of the trial court's judgment, County Court affirmed, writing that this case "primarily involves a credibility issue and this Court is in no position to overturn the determination made by the trial court[,] which had the advantage of having seen and heard the witnesses." County Court concluded that, based on its review of the record, "it cannot be said that the judgment was 'so shocking as not to be substantial justice,' " citing *Coppola v Kandey Co.* (236 AD2d 871, 872 [4th Dept 1997]). Plaintiff appealed as of

right once again (*see* CPLR 5703 [b]), and we now affirm.

Contrary to plaintiff's contention, County Court did not apply the incorrect standard of appellate review. "Appellate review of small claims is limited to determining whether 'substantial justice has not been done between the parties according to the rules and principles of substantive law' " (*Rowe v Silver & Gold Expressions*, 107 AD3d 1090, 1091 [3d Dept 2013], quoting UCCA 1807). "Thus, judgment rendered in a small claims action will be overturned only if it is 'so shocking as to not be substantial justice' " (*Coppola*, 236 AD2d at 872; *see Curto v Erie County* [appeal No. 1], 154 AD3d 1319, 1319 [4th Dept 2017]; *Mead Home Improvement, Inc. v Goldstein*, 56 AD3d 1179, 1179 [4th Dept 2008]; *Davis v Monroe Muffler/Brake & Serv., Inc.*, 50 AD3d 1544, 1544-1545 [4th Dept 2008]). As noted, that is the precise standard applied by County Court.

In any event, regardless of the standard of review, this case turned on credibility issues that the trial court resolved in defendant's favor, and, like County Court, we conclude that there is no basis in the record for us to disturb the trial court's credibility determinations.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

628

CA 17-02041

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

KAREN A. WHITAKER, AS PLENARY GUARDIAN OF
JOSEPH L. MARTIN, JR., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KENNEDY/TOWN OF POLAND, TOWN OF POLAND HIGHWAY
DEPARTMENT, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

SUGARMAN LAW FIRM, LLP, SYRACUSE (ZACHARY M. MATTISON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an amended order of the Supreme Court, Chautauqua County (Eugene F. Pigott, Jr., J.), entered September 20, 2017. The amended order denied the motion of defendants Kennedy/Town of Poland and Town of Poland Highway Department for summary judgment dismissing the complaint.

It is hereby ORDERED that the amended order so appealed from is unanimously modified on the law by granting in part the motion of defendants Kennedy/Town of Poland and Town of Poland Highway Department and dismissing the complaint against them except to the extent that the complaint, as amplified by the bill of particulars, alleges that they were negligent in failing to install guiderails at the relevant intersection, and as modified the amended order is affirmed without costs.

Memorandum: Plaintiff commenced this action as plenary guardian of Joseph L. Martin, Jr., an incapacitated person, seeking damages for injuries sustained by Martin in a single-vehicle accident at the intersection of Hartman Road and Stone Road in the Town of Poland. Martin was a passenger in the vehicle, which failed to stop at the intersection, continued across the street, went down an embankment, struck a tree, and came to rest in a creek.

Supreme Court properly denied that part of the motion of Kennedy/Town of Poland and Town of Poland Highway Department (defendants) for summary judgment dismissing the complaint against them insofar as the complaint, as amplified by the bill of particulars, alleged that defendants were negligent in failing to install guiderails at the intersection. “A municipality has a duty to

maintain its roads in a reasonably safe condition 'in order to guard against contemplated and foreseeable risks to motorists,' including risks related to a driver's negligence or misconduct" (*Stiggins v Town of N. Dansville*, 155 AD3d 1617, 1618 [4th Dept 2017]). Defendants submitted evidence in support of their motion tending to establish that they had notice of prior similar accidents at the intersection, which created an issue of fact whether they were negligent in failing to provide adequate protection against a known dangerous condition by installing guiderails (*see Gillooly v County of Onondaga*, 168 AD2d 921, 922 [4th Dept 1990]; *Posman v State of New York*, 117 AD2d 915, 917 [3d Dept 1986]; *see also Popolizio v County of Schenectady*, 62 AD3d 1181, 1182-1183 [3d Dept 2009]).

We agree with defendants, however, that the court erred in denying that part of their motion for summary judgment dismissing the complaint to the extent that the complaint, as amplified by the bill of particulars, alleges other theories of defendants' negligence. Defendants met their initial burden with respect to those other theories, and plaintiff either did not oppose those portions of the motion, thus implicitly conceding defendants' entitlement to summary judgment on those grounds (*see Hagenbuch v Victoria Woods HOA, Inc.*, 125 AD3d 1520, 1521 [4th Dept 2015]), or failed to raise an issue of fact precluding summary judgment (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). We therefore modify the amended order accordingly.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

636

TP 18-00196

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF LEONARDO VALDEZ-CRUZ, PETITIONER,

V ORDER

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

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

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered January 31, 2018) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated an inmate rule.

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

637

KAH 16-01802

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
ALEX NANCE, PETITIONER-APPELLANT,

V ORDER

DALE ARTUS, SUPERINTENDENT, ATTICA CORRECTIONAL
FACILITY, RESPONDENT-RESPONDENT.

KATHRYN FRIEDMAN, BUFFALO, FOR PETITIONER-APPELLANT.

ALEX NANCE, PETITIONER-APPELLANT PRO SE.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (John L. Michalski, A.J.), entered July 13, 2016 in a habeas corpus proceeding. The judgment, insofar as appealed from, denied the petition.

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

640

KA 15-01258

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREA L. WILLIAMS, DEFENDANT-APPELLANT.

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

ANDREA L. WILLIAMS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered February 4, 2015. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree (two counts) and criminal possession of a controlled substance in the seventh degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the indictment is dismissed and the matter is remitted to Oneida County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1], [12]) and one count of criminal possession of a controlled substance in the seventh degree (§ 220.03). In her main and pro se supplemental briefs, defendant contends that the evidence is legally insufficient to establish that she constructively possessed heroin that was recovered from the apartment where she was arrested. We agree, and we therefore reverse the judgment and dismiss the indictment.

Where, as here, there is no evidence that the defendant actually possessed the controlled substance, the People are required to establish that the defendant "exercised 'dominion or control' over the property by a sufficient level of control over the area in which the contraband is found or over the person from whom the contraband is seized" (*People v Manini*, 79 NY2d 561, 573 [1992]; *see* Penal Law § 10.00 [8]; *People v Russaw*, 114 AD3d 1261, 1261-1262 [4th Dept 2014], *lv denied* 22 NY3d 1202 [2014]). The People may establish constructive possession by circumstantial evidence (*see People v Torres*, 68 NY2d 677, 678-679 [1986]; *People v Boyd*, 145 AD3d 1481,

1481-1482 [4th Dept 2016], *lv denied* 29 NY3d 947 [2017]). It is well established, however, that a defendant's mere presence in the area where drugs are discovered is insufficient to establish constructive possession (*see Boyd*, 145 AD3d at 1482; *People v Knightner*, 11 AD3d 1002, 1004 [4th Dept 2004], *lv denied* 4 NY3d 745 [2004]).

The evidence in this case, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally insufficient to establish the possession element of the crimes charged. Although defendant was present in the apartment at the time when the police executed the search warrant, "no evidence was presented to establish that defendant was an occupant of the apartment or that [she] regularly frequented it" (*People v Swain*, 241 AD2d 695, 696 [3d Dept 1997]). The People relied primarily on the trial testimony of a police investigator, who testified that defendant was listed in the records management system of the Utica Police Department (UPD) as living at the apartment. The investigator acknowledged on cross-examination, however, that he did not know how the UPD obtained that information and that the information in the records management system is not always current or even accurate. The investigator also testified that he surveilled the building in which the apartment was located "hundreds" of times over the course of a three-week investigation, and that he observed defendant "at that location" only twice. Although the investigator testified that "typical women's clothing" was found in the apartment, he failed to offer specifics except for three pairs of footwear, which he believed might fit defendant. By contrast, he testified in detail about men's underwear and men's deodorant found in a dresser drawer, men's work boots piled near the dresser, and men's sweatshirts hanging over a couch. Photographs of the clothing were received in evidence, and those photographs did not depict any "typical women's clothing," with the possible exception of one or two pairs of footwear. Inasmuch as there was no evidence, other than her presence, that specifically connected defendant to the apartment where the contraband was found, "the People failed to prove that [she] exercised dominion and control over the contraband, and therefore failed to prove the possession element of the counts as charged" (*People v Brown*, 133 AD3d 772, 773 [2d Dept 2015], *lv denied* 26 NY3d 1143 [2016]; *see generally People v Gautreaux-Perez*, 31 AD3d 1209, 1210 [4th Dept 2006]).

In light of our determination, we need not consider the additional contentions in defendant's main and pro se supplemental briefs.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

643

KA 15-01665

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VINCENT PEPE, DEFENDANT-APPELLANT.

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

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (STEVEN G. COX 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 Oneida County Court (John S. Balzano, A.J.), dated July 21, 2015. The order denied the motion of defendant pursuant to CPL 440.10 seeking to vacate a judgment of conviction.

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

Memorandum: Defendant appeals from an order denying his motion pursuant to CPL 440.10 seeking to vacate the judgment convicting him upon a jury verdict of, inter alia, four counts of murder in the second degree (Penal Law § 125.25 [1], [3]). In his motion, defendant relied upon the testimony of certain witnesses at a hearing that was held upon his federal habeas corpus petition. Defendant contends that County Court erred in denying that part of his motion seeking to vacate the judgment on the ground that the prosecutor failed to notify the court and defense counsel of a conflict of interest of defendant's former attorneys that violated his constitutional right to a fair trial by being represented by conflict-free counsel. We reject that contention. On defendant's direct appeal from the judgment of conviction, we rejected his contention that he was denied effective assistance of counsel based on that same conflict of interest (*People v Pepe*, 259 AD2d 949, 950 [4th Dept 1999], *lv denied* 93 NY2d 1024 [1999]). We wrote that, "[e]ven assuming, arguendo, that the same attorneys represented defendant and some prosecution witnesses during the [g]rand [j]ury investigation, we conclude that, because defendant was represented by different counsel at his arraignment and through the completion of the trial, he failed to establish that the continued representation of those prosecution witnesses by his former attorneys bore a substantial relation to the conduct of his defense" (*id.*). At the hearing held upon the federal habeas corpus petition, the prosecutor at the time of the grand jury proceeding testified that he

was aware that defendant's former attorneys represented two prosecution witnesses at the grand jury proceeding, but he was informed that defendant was represented by new counsel. For the same reasons we rejected defendant's ineffective assistance of counsel claim on his direct appeal, we conclude that the prosecutor's failure to notify the court or defense counsel that he was aware that defendant's former attorneys represented prosecution witnesses does not warrant vacatur of the judgment of conviction.

We reject defendant's further contention that the court erred in denying without a hearing that part of his motion seeking to vacate the judgment on the ground of ineffective assistance of counsel. Defendant, again relying upon testimony at the federal hearing, argued that his counsel failed to inform him of a plea offer made by the prosecutor. We reject that contention. The testimony of the prosecutor and an associate of defendant's attorney established that, although there were plea discussions, a plea offer was never made by the prosecutor. Defendant also failed to show that a hearing was required on this issue (*see generally People v Satterfield*, 66 NY2d 796, 799 [1985]). Defendant's remaining contention regarding ineffective assistance of counsel is raised for the first time on appeal and thus is not properly before us (*see People v Annis*, 134 AD3d 1433, 1434 [4th Dept 2015]; *People v Glover*, 117 AD3d 1477, 1478 [4th Dept 2014], *lv denied* 23 NY3d 1036 [2014], *reconsideration denied* 24 NY3d 961 [2014]).

In light of our determination, we reject defendant's final contention that the judgment should be vacated based on cumulative error.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

645

CA 17-02156

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, TROUTMAN, AND WINSLOW, JJ.

TIMOTHY MEYERS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THE ESTATE OF CRAIG A. FREER, DECEASED,
ET AL., DEFENDANTS,
AND FRANCINE BUSSMAN, DEFENDANT-APPELLANT.

LAW OFFICE OF VICTOR M. WRIGHT, ORCHARD PARK (VICTOR M. WRIGHT OF COUNSEL), FOR DEFENDANT-APPELLANT.

COLUCCI & GALLAHER, P.C., BUFFALO (ARI GOLDBERG OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Sara Sheldon, A.J.), entered July 5, 2017. The order, insofar as appealed from, denied the motion of defendant Francine Bussman for summary judgment.

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

Memorandum: Plaintiff commenced this action against various defendants seeking damages for injuries that he allegedly sustained in a physical altercation on premises owned by Craig A. Freer (decedent). Francine Bussman (defendant), who lived with decedent, moved for summary judgment dismissing the complaint against her. Supreme Court properly denied the motion.

" 'Liability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of [the] premises . . . The existence of one or more of these elements is sufficient to give rise to a duty of care' " (*Weierheiser v McCann's Inc.*, 126 AD3d 1482, 1482 [4th Dept 2015]; *see Puzhayeva v City of New York*, 151 AD3d 988, 989 [2d Dept 2017]). Contrary to defendant's contention, we conclude that she failed to establish that none of those elements was present (*see Weierheiser*, 126 AD3d at 1482-1483; *cf. Clifford v Woodlawn Volunteer Fire Co., Inc.*, 31 AD3d 1102, 1103 [4th Dept 2006]). The deposition testimony submitted in support of the motion established that defendant stayed at the cabin regularly, kept clothes, toiletries, and kitchen items there, invested money in it, and decorated it to her own tastes. Significantly, during her own deposition testimony, defendant referred to the cabin as "our home."

Defendant's further contention that she could not have reasonably foreseen the altercation is raised for the first time on appeal and thus is not properly before us (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

648

CA 15-00493

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

JACEK WOLOSZUK, INDIVIDUALLY AND AS EXECUTOR
OF THE ESTATE OF ELLEN WOLOSZUK, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WENDE LOGAN-YOUNG, M.D., DOING BUSINESS AS
ELIZABETH WENDE BREAST CLINIC, WENDE
LOGAN-YOUNG, M.D., PHILIP MURPHY, M.D.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

UNDERBERG & KESSLER LLP, ROCHESTER (MARGARET E. SOMERSET OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PAUL WILLIAM BELTZ, P.C., BUFFALO (ANNE B. RIMMLER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (William P. Polito, J.), entered May 27, 2014. The order denied the motion of defendants Wende Logan-Young, M.D., doing business as Elizabeth Wende Breast Clinic, Wende Logan-Young, M.D., and Philip Murphy, M.D., for leave to amend their answers.

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

Memorandum: Ellen Woloszuk (decedent) and Jacek Woloszuk (plaintiff) commenced this action seeking damages for defendants' alleged medical malpractice in failing to make a timely diagnosis of decedent's breast cancer. Wende Logan-Young, M.D., doing business as Elizabeth Wende Breast Clinic (Clinic), Wende Logan-Young, M.D., and Philip Murphy, M.D. (defendants) now appeal from five orders. We note at the outset that, although the Clinic was not named in the notice of appeal from the order in appeal No. 2, we deem the notice of appeal as amended to add the name of the Clinic in the absence of any indication that plaintiff was misled or prejudiced by the omission (*see Texido v Waters of Orchard Park*, 300 AD2d 1150, 1150 [4th Dept 2002]). We dismiss the appeal from the amended order in appeal No. 5 inasmuch as it "did not effect a 'material or substantial change' " to the order in appeal No. 4 (*Reading v Fabiano* [appeal No. 2], 126 AD3d 1523, 1524 [4th Dept 2015]).

With respect to appeal No. 1, we reject defendants' contention that Supreme Court abused its discretion in denying their motion seeking leave to amend their answers to add the statute of limitations as an affirmative defense. It is well settled that, "[i]n the absence of prejudice or surprise, leave to amend a pleading should be freely granted" (*Boxhorn v Alliance Imaging, Inc.*, 74 AD3d 1735, 1735 [4th Dept 2010]; *see* CPLR 3025 [b]; *Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014]; *Holst v Liberatore*, 105 AD3d 1374, 1374 [4th Dept 2013]). Here, plaintiff established in opposition to the motion that he would be prejudiced by the late amendment of the answer (*see Oakes v Patel*, 20 NY3d 633, 646 [2013]; *Civil Serv. Empls. Assn. v County of Nassau*, 144 AD3d 1077, 1078-1079 [2d Dept 2016]; *cf. Putrelo Constr. Co. v Town of Marcy*, 137 AD3d 1591, 1592-1593 [4th Dept 2016]).

Addressing next the orders in appeal Nos. 3 and 4, we agree with defendants that the court abused its discretion in striking the answer of the Clinic based on a discovery violation. Decedent had mammograms done at the Clinic in 2006 and 2007. The Clinic uses a Computer Aided Detection (CAD) software program when it conducts mammograms. The CAD program assists radiologists reading the mammograms by using algorithms to identify calcifications and masses and then superimposing markers upon the mammogram image. Plaintiff's September 2009 notice to produce sought "CAD findings/CAD printouts/CAD pictures or diagrams," and also sought "[a]ll algorithms regarding breast mass/breast exam/breast cancer screening." Defendants responded to the demand by producing a single-page image report showing CAD markers from decedent's 2006 mammogram, which was the only image report in decedent's file. In September 2012, plaintiff demanded that defendants produce the CAD program "report and/or CAD interpretation" for decedent's 2007 mammogram. Although no CAD report had been printed from the 2007 mammogram and placed in decedent's file, defendants went back to the digital file and printed the screen shot that showed the CAD markers on the mammogram. In 2011, an unrelated action against the Clinic proceeded to trial, and the Clinic became aware that CAD "structured" reports could be generated from a patient's digital mammogram file. Using a specific computer program, a multiple-page CAD structured report containing additional data about the CAD process could be generated. The plaintiff's expert in the unrelated action was able to generate such a report.

On March 3, 2014, just prior to the scheduled date for trial, plaintiff issued a subpoena duces tecum on defendants requesting CAD structured reports. Defendants objected to the subpoena and, on March 12, 2014, plaintiff moved to strike defendants' answers or for other sanctions for defendants' discovery violation. In response, defendants were eventually able to generate the CAD structured reports and provided them to plaintiff.

Defendants' contention that plaintiff's motion to strike was untimely and procedurely defective is raised for the first time on appeal and is therefore not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). On the merits of the motion, although we agree with the court that plaintiff established that a discovery violation occurred, we conclude that the sanction of

striking the answer of the Clinic was too severe under the circumstances of this case (*see Koehler v Midtown Athletic Club, LLP*, 55 AD3d 1444, 1445 [4th Dept 2008]). This case is not similar to a spoliation case because the CAD structured reports were never destroyed but, rather, were not generated and produced in a timely manner (*see Allstate Ins. Co. v Buziashvili*, 71 AD3d 571, 572-573 [1st Dept 2010]). We conclude that the Clinic should be sanctioned by imposing costs upon it for any additional expenses plaintiff incurred as a result of the delay in disclosure (*see Friedman, Harfenist, Langer & Kraut v Rosenthal*, 79 AD3d 798, 801 [2d Dept 2010]). We therefore modify the order in appeal No. 3 by vacating that part of the first ordering paragraph striking the answer of the Clinic, and we modify the order in appeal No. 4 by vacating the third ordering paragraph and substituting therefor a provision directing the Clinic to reimburse plaintiff for expenses incurred as a result of the delayed disclosure of the CAD structured reports.

With respect to appeal No. 2, we reject defendants' contention that the court abused its discretion in denying their motion to the extent that they sought leave to renew their opposition to plaintiff's motion to strike. Even assuming, arguendo, that defendants had a reasonable justification for failing to present the new evidence in opposition to plaintiff's motion (*see* CPLR 2221 [e] [3]), we conclude that the new evidence would not change the court's prior determination (*see* CPLR 2221 [e] [2]).

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

649

CA 15-00494

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

JACEK WOLOSZUK, INDIVIDUALLY AND AS EXECUTOR
OF THE ESTATE OF ELLEN WOLOSZUK, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WENDE LOGAN-YOUNG, M.D., DOING BUSINESS AS
ELIZABETH WENDE BREAST CLINIC, WENDE
LOGAN-YOUNG, M.D., AND PHILIP MURPHY, M.D.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

UNDERBERG & KESSLER LLP, ROCHESTER (MARGARET E. SOMERSET OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PAUL WILLIAM BELTZ, P.C., BUFFALO (ANNE B. RIMMLER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (William P. Polito, J.), entered July 7, 2014. The order, among other things, denied the motion of defendants Wende Logan-Young, M.D., doing business as Elizabeth Wende Breast Clinic, Wende Logan-Young, M.D., and Philip Murphy, M.D., to strike as abandoned the motion of plaintiff for sanctions or for leave to renew their opposition to sanctions.

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

Same memorandum as in *Woloszuk v Wende Logan-Young, M.D., doing business as Elizabeth Wende Breast Clinic* ([appeal No. 1] — AD3d — [June 8, 2018] [4th Dept 2018]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

650

CA 15-00495

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

JACEK WOLOSZUK, INDIVIDUALLY AND AS EXECUTOR
OF THE ESTATE OF ELLEN WOLOSZUK, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WENDE LOGAN-YOUNG, M.D., DOING BUSINESS AS
ELIZABETH WENDE BREAST CLINIC, WENDE
LOGAN-YOUNG, M.D., PHILIP MURPHY, M.D.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 3.)

UNDERBERG & KESSLER LLP, ROCHESTER (MARGARET E. SOMERSET OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PAUL WILLIAM BELTZ, P.C., BUFFALO (ANNE B. RIMMLER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered December 23, 2014. The order, inter alia, struck the answer of defendant "Elizabeth Wende Breast Clinic, LLC."

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating that part of the first ordering paragraph striking the answer of defendant "Elizabeth Wende Breast Clinic, LLC" and as modified the order is affirmed without costs.

Same memorandum as in *Woloszuk v Wende Logan-Young, M.D., doing business as Elizabeth Wende Breast Clinic* ([appeal No. 1] — AD3d — [June 8, 2018] [4th Dept 2018]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

651

CA 15-00496

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

JACEK WOLOSZUK, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF ELLEN WOLOSZUK, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WENDE LOGAN-YOUNG, M.D., DOING BUSINESS AS ELIZABETH WENDE BREAST CLINIC, WENDE LOGAN-YOUNG, M.D., PHILIP MURPHY, M.D., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS. (APPEAL NO. 4.)

UNDERBERG & KESSLER LLP, ROCHESTER (MARGARET E. SOMERSET OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PAUL WILLIAM BELTZ, P.C., BUFFALO (ANNE B. RIMMLER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered December 23, 2014. The order, among other things, granted the motion of plaintiff to amend the caption and directed that the previously imposed sanction of striking the answer shall apply to defendant Wende Logan-Young, M.D., doing business as Elizabeth Wende Breast Clinic.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the third ordering paragraph and substituting therefor a provision directing defendant Wende Logan-Young, M.D., doing business as Elizabeth Wende Breast Clinic, to reimburse plaintiff for expenses incurred as a result of the delayed disclosure, and as modified the order is affirmed without costs.

Same memorandum as in *Woloszuk v Wende Logan-Young, M.D., doing business as Elizabeth Wende Breast Clinic* ([appeal No. 1] — AD3d — [June 8, 2018] [4th Dept 2018]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

652

CA 15-01165

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

JACEK WOLOSZUK, INDIVIDUALLY AND AS EXECUTOR
OF THE ESTATE OF ELLEN WOLOSZUK, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WENDE LOGAN-YOUNG, M.D., DOING BUSINESS AS
ELIZABETH WENDE BREAST CLINIC, WENDE
LOGAN-YOUNG, M.D., PHILIP MURPHY, M.D.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 5.)

UNDERBERG & KESSLER LLP, ROCHESTER (MARGARET E. SOMERSET OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PAUL WILLIAM BELTZ, P.C., BUFFALO (ANNE B. RIMMLER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered March 20, 2015. The amended order, among other things, granted the motion of plaintiff to amend the caption and directed that the previously imposed sanction of striking the answer shall apply to defendant Wende Logan-Young, M.D., doing business as Elizabeth Wende Breast Clinic.

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

Same memorandum as in *Woloszuk v Wende Logan-Young, M.D., doing business as Elizabeth Wende Breast Clinic* ([appeal No. 1] — AD3d — [June 8, 2018] [4th Dept 2018]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

654

TP 17-02198

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF BRETT D. BERSANI, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES,
RESPONDENT.

HOGANWILLIG, PLLC, AMHERST (REBECCA M. KUJAWA OF COUNSEL), FOR PETITIONER.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court, Erie County [Joseph R. Glownia, J.], entered December 20, 2017) to review a determination of respondent. The determination revoked petitioner's driver's license.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking to annul the determination revoking his driver's license based on his refusal to submit to a chemical test following his arrest for driving while intoxicated (DWI). We confirm the determination. Contrary to petitioner's contention, the determination is supported by substantial evidence. The hearing testimony of the arresting officer, along with his refusal report, which was entered in evidence, established that petitioner refused to submit to the chemical test after he was arrested for DWI (*see* Vehicle and Traffic Law § 1194 [2] [a] [1]; *see generally Matter of Huttenlocker v New York State Dept. of Motor Vehs. Appeals Bd.*, 156 AD3d 1464, 1464 [4th Dept 2017]). The Administrative Law Judge was entitled to discredit any testimony to the contrary (*see Huttenlocker*, 156 AD3d at 1464; *Matter of Mastrodonato v New York State Dept. of Motor Vehicles*, 27 AD3d 1121, 1122 [4th Dept 2006]). Petitioner's remaining contentions are raised for the first time in this proceeding pursuant to CPLR article 78, and he therefore failed to exhaust his administrative remedies with respect to those contentions (*see Mastrodonato*, 27 AD3d at 1122).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

655

CA 18-00006

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, TROUTMAN, AND WINSLOW, JJ.

BURRSTONE ENERGY CENTER, LLC,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

FAXTON-ST. LUKE'S HEALTHCARE,
DEFENDANT-RESPONDENT-APPELLANT.

HINCKLEY, ALLEN & SNYDER LLP, ALBANY (JAMES J. BARRIERE OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

BOND, SCHOENECK & KING, PLLC, ALBANY (STUART F. KLEIN OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered August 15, 2017. The order denied plaintiff's motion for partial summary judgment on its fifth cause of action and denied defendant's cross motion for partial summary judgment on that cause of action.

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

Memorandum: The parties entered into an "Energy Services Agreement" (Agreement) pursuant to which plaintiff would finance and construct a combined heat and power facility (CHPF) on defendant's property in exchange for defendant's promise to purchase all of its thermal energy requirements from plaintiff unless, "when operating at full capacity, the CHPF [did] not produce sufficient Thermal Energy to meet all [of defendant's energy] requirements." In the event that the CHPF did not produce sufficient Thermal Energy, defendant would be permitted to use its own boilers "to supplement the production and delivery of Thermal Energy so as to meet the one hundred percent (100%) Thermal Energy requirement." Several years after the CHPF began operating, plaintiff commenced the instant action for breach of contract and judgment declaring that defendant is obligated under the Agreement to purchase 100% of its thermal energy requirements from plaintiff. Plaintiff moved for partial summary judgment on its fifth cause of action, seeking a declaration, and defendant cross-moved for partial summary judgment on that cause of action. Supreme Court denied the motion and cross motion, and we affirm.

Initially, we agree with plaintiff that the court erred in determining that it was precluded from issuing a declaration. The

mere existence of another adequate remedy does not preclude a court from issuing a declaration (*see Matter of Morgenthau v Erlbaum*, 59 NY2d 143, 148 [1983], *cert denied* 464 US 993 [1983]; *County of Monroe v Clough Harbour & Assoc., LLP*, 154 AD3d 1281, 1282 [4th Dept 2017]; *see generally* CPLR 3001). Where, as here, the parties have differing interpretations of their obligations under a contract and the contract does not "delineate[] the agreed procedure to be followed for resolving disputes arising [between the parties]" (*Kalisch-Jarcho, Inc. v City of New York*, 72 NY2d 727, 732 [1988]), a cause of action for declaratory relief "may be an appropriate vehicle for settling justiciable disputes as to contract rights and obligations" (*id.* at 731).

We nonetheless conclude that the court properly denied the motion and cross motion because the parties' Agreement is not clear and unambiguous (*see generally MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d 640, 645 [2009]; *Colella v Colella*, 129 AD3d 1650, 1651 [4th Dept 2015]). The Agreement provides that "[t]he Parties acknowledge and understand that when operating at full capacity, the CHPF may nevertheless not produce sufficient Thermal Energy to meet all requirements." That provision may be interpreted, as plaintiff contends, as requiring defendant to purchase all of the thermal energy produced by the CHPF, regardless of whether defendant can distribute that energy. The provision also may be interpreted, as defendant contends, as permitting defendant to use its own boilers when the CHPF is incapable of meeting 100% of its thermal energy requirements, which is often because defendant's thermal energy distribution system cannot accommodate all forms of thermal energy produced by the CHPF. Inasmuch as it is not clear whether the parties were aware of the limitations of defendant's hot water thermal energy distribution capabilities when they entered the Agreement "for the sale [from plaintiff] to [defendant] of all the [hospital's] . . . Thermal Energy requirements," both the motion and cross motion were properly denied.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

656

CA 18-00123

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF RANDOLPH L.S., II, FOR
LEAVE TO CHANGE A MINOR'S NAME TO SIENNA R.S.,
PETITIONER-APPELLANT;

ORDER

EMILY R.K., RESPONDENT-RESPONDENT.

COHEN & LOMBARDO, P.C., BUFFALO (KATE SULLIVAN NOWADLY OF COUNSEL), FOR PETITIONER-APPELLANT.

DIMATTEO & ROACH, WARSAW (MEAGHAN L. MCGINNIS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

JASON C. HENSKEE, LACKAWANNA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered March 28, 2017. The order denied the petition for leave to change the name of the subject child.

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

657

CA 17-00858

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, TROUTMAN, AND WINSLOW, JJ.

STEVEN MCGREGOR, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PERMCLIP PRODUCTS CORP., DEFENDANT-APPELLANT.

HOGANWILLIG, PLLC, AMHERST (COREY J. HOGAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHIACCHIA & FLEMING, LLP, HAMBURG (ANDREW P. FLEMING OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered March 3, 2017. The judgment, inter alia, dismissed defendant's counterclaims.

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

Memorandum: Plaintiff commenced this action seeking damages for, inter alia, breach of an employment agreement. The case proceeded to trial, and the jury found in favor of plaintiff and awarded him damages in the amount of $400,000. We reject defendant's contention that Supreme Court erred in denying its posttrial motion to set aside the verdict as against the weight of the evidence. It is well settled that a verdict may be set aside as against the weight of the evidence only if "the evidence so preponderate[d] in favor of the [defendant] that [the verdict] could not have been reached on any fair interpretation of the evidence" (*Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995] [internal quotation marks omitted]), and that is not the case here.

We reject defendant's further contention that the court erred in its evidentiary rulings. The court acted within its discretion in determining that certain evidence would be cumulative to other evidence or would confuse the jury (*see generally Feldsberg v Nitschke*, 49 NY2d 636, 643 [1980]). We also reject defendant's contention that the court erred in dismissing its counterclaims. With respect to the fraud counterclaim in particular, such a claim has a scienter element (*see Barrett v Grenda*, 154 AD3d 1275, 1277 [4th Dept 2017]). In its verified answer to the second amended complaint, defendant alleged that, at the time of the fraudulent acts, plaintiff knew that defendant's sole shareholder was incompetent. The court properly dismissed that counterclaim on the ground that defendant

failed to prove at trial that plaintiff knew that the person was incompetent.

Contrary to defendant's contention, the damages award is supported by the evidence (*see Romano v Basicnet, Inc.*, 238 AD2d 910, 911 [4th Dept 1997]). Defendant's contention that it was denied a fair trial by the summation of plaintiff's counsel is largely unpreserved for our review (*see Short v Daloia*, 70 AD3d 1384, 1384-1385 [4th Dept 2010]). To the extent that it is preserved for our review, we conclude that, even assuming, arguendo, that counsel's reference to the dismissal of the counterclaims was improper, it was not so prejudicial as to deprive defendant of a fair trial (*see Guthrie v Overmyer*, 19 AD3d 1169, 1171 [4th Dept 2005]). We have examined defendant's remaining contentions and conclude that they are without merit.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

659

CA 18-00187

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, TROUTMAN, AND WINSLOW, JJ.

CLEARVIEW FARMS LLC, PLAINTIFF-APPELLANT,

V ORDER

JAYNE WOWKOWYCH, LINDSAY WOWKOWYCH AND BRADLEY BARGERSTOCK, DEFENDANTS-RESPONDENTS.

ANDREW J. DICK, ROCHESTER, FOR PLAINTIFF-APPELLANT.

JAYNE WOWKOWYCH, DEFENDANT-RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Monroe County (Debra A. Martin, A.J.), entered August 22, 2017. The order, among other things, granted summary judgment to defendants and dismissed the amended complaint.

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

660

CA 17-01544

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF FULGENCIO RODRIGUEZ,
PETITIONER-APPELLANT,

V ORDER

NEW YORK STATE DIVISION OF PAROLE CHAIRPERSON
TINA M. STANFORD, RESPONDENT-RESPONDENT.

FULGENCIO RODRIGUEZ, PETITIONER-APPELLANT PRO SE.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Jefferson County (James P. McClusky, J.), entered July 12, 2017 in a CPLR article 78 proceeding. The judgment denied and dismissed the petition.

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

661

TP 18-00195

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

IN THE MATTER OF FRANCISCO SANTOS, PETITIONER,

V ORDER

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

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

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (JULIE M. SHERIDAN OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered January 31, 2018) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated an inmate rule.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed (*see Matter of Liner v Fisher*, 96 AD3d 1416, 1417 [4th Dept 2012]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

662

KA 16-02367

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

BRIAN ASHWORTH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (James H. Cecile, A.J.), rendered August 16, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

663

KA 16-00162

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MUHAMMED BAQIR, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (NATHANIEL V. RILEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered October 26, 2015. The judgment convicted defendant, upon his plea of guilty, of aggravated vehicular homicide and aggravated vehicular assault (four counts).

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

664

KA 16-00884

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CARDELL SINGLETARY, JR., DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (ROBERT TUCKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (JEFFREY L. TAYLOR OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered May 13, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the second degree and attempted burglary in the second degree.

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

665

KA 15-01413

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

FREDDIE GLOVER, DEFENDANT-APPELLANT.

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

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Monroe County Court (Vincent M. Dinolfo, J.), entered July 7, 2015. The order denied defendant's motion to set aside his sentence pursuant to CPL 440.20.

It is hereby ORDERED that said appeal is unanimously dismissed (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985 [4th Dept 1990]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

666

KA 17-00993

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

RAMEL BELL-SCOTT, DEFENDANT-RESPONDENT.

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

Appeal from an order of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), dated September 20, 2016. The order granted that part of defendant's omnibus motion seeking to suppress oral statements made to Syracuse Police detectives.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, that part of the omnibus motion seeking to suppress defendant's statements is denied, and the matter is remitted to Supreme Court, Onondaga County, for further proceedings on the indictment.

Memorandum: The People appeal from an order granting that part of defendant's omnibus motion seeking to suppress oral statements that he made to Syracuse Police detectives. We agree with the People that Supreme Court erred in suppressing those statements, and we therefore reverse the order, deny that part of the omnibus motion seeking suppression of defendant's statements and remit the matter to Supreme Court for further proceedings on the indictment.

Contrary to the court's conclusion, the evidence at the *Huntley* hearing establishes that defendant was not in custody when he made the statements, and thus *Miranda* warnings were not required (*see generally Miranda v Arizona*, 384 US 436, 467 [1966]). "In determining whether a defendant was in custody for *Miranda* purposes, '[t]he test is not what the defendant thought, but rather what a reasonable [person], innocent of any crime, would have thought had he [or she] been in the defendant's position' " (*People v Kelley*, 91 AD3d 1318, 1318 [4th Dept 2012], *lv denied* 19 NY3d 963 [2012], quoting *People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]). We reject defendant's contention that the People failed to meet their "burden of showing that [he] voluntarily went to the [detectives' office] where he allegedly made the inculpatory statements" (*People v Gonzalez*, 80 NY2d 883, 884 [1992]). Indeed, the People "properly demonstrated by unchallenged hearsay testimony" that defendant voluntarily accompanied the officers to the detectives' office for questioning and, inasmuch

as defendant did not dispute that fact in either his motion papers or his arguments on the motion, that testimony was sufficient to sustain the People's burden (*People v Rodriguez*, 188 AD2d 564, 564 [2d Dept 1992], *lv denied* 81 NY2d 892 [1993]; *see generally People v Norman*, 304 AD2d 405, 405 [1st Dept 2003], *lv denied* 100 NY2d 623 [2003]). We further conclude that defendant was not in custody when he made the statements because he was informed that he was not under arrest and that he would be going home that day, he was not handcuffed, he was permitted to leave the interview room several times, he never asked to leave the office nor was he told that he could not leave, and he was not arrested that day (*see People v Weakfall*, 108 AD3d 1115, 1115-1116 [4th Dept 2013], *lv denied* 21 NY3d 1078 [2013]; *see also People v Wilbert*, 192 AD2d 1109, 1109-1110 [4th Dept 1993], *lv denied* 81 NY2d 1082 [1993]; *People v Anderson*, 145 AD2d 939, 939-940 [4th Dept 1988], *lv denied* 73 NY2d 974 [1989]).

The People's further contention that the court erred in denying their request to reopen the hearing is academic in light of our determination.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

668

CAF 17-01729

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

IN THE MATTER OF CINDY A. KRIEGAR,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TIMOTHY MCCARTHY, RESPONDENT-RESPONDENT.

ROBERT A. DINIERI, CLYDE, FOR PETITIONER-APPELLANT.

LORENZO NAPOLITANO, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Wayne County (Richard M. Healy, J.), entered August 18, 2017 in a proceeding pursuant to Family Court Act article 6. The order granted respondent's motion to dismiss the petition for modification of a custody order.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, and the petition is reinstated, and the matter is remitted to Family Court, Wayne County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner mother filed a petition to, inter alia, modify a prior order of joint legal custody by awarding her sole legal custody. Respondent father moved to dismiss the petition, and Family Court granted the motion. We agree with the mother that the court erred in granting the motion and summarily dismissing her petition.

It is well settled that " '[a] hearing is not automatically required whenever a parent seeks modification of a custody order' " (*Matter of Di Fiore v Scott*, 2 AD3d 1417, 1417 [4th Dept 2003]). In order to survive a motion to dismiss and warrant a hearing, " 'a petition seeking to modify a prior order of custody and visitation must contain factual allegations of a change in circumstances warranting modification to ensure the best interests of the child' " (*Matter of Gelling v McNabb*, 126 AD3d 1487, 1487 [4th Dept 2015]; *see Di Fiore*, 2 AD3d at 1417-1418). When faced with such a motion, "the court must give the pleading a liberal construction, accept the facts alleged therein as true, accord the nonmoving party the benefit of every favorable inference, and determine only whether the facts fit within a cognizable legal theory" (*Matter of Machado v Tanoury*, 142 AD3d 1322, 1323 [4th Dept 2016]). Here, we conclude that the mother adequately alleged a change in circumstances warranting a modification of the prior order, i.e., that the father has repeatedly and consistently neglected to exercise his right to full visitation and

has endangered the children by exposing them to individuals who engaged in drug use (*see generally Matter of Kelley v Fifield*, 159 AD3d 1612, 1613-1614 [4th Dept 2018]; *Matter of Farner v Farner*, 152 AD3d 1212, 1214 [4th Dept 2017]; *Machado*, 142 AD3d at 1323). We therefore reverse the order, deny the motion, reinstate the petition and remit the matter to Family Court for a hearing thereon.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

669

CAF 17-01448

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

IN THE MATTER OF RENE MONTES, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TERINA JOHNSON, RESPONDENT-APPELLANT.

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

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR PETITIONER-RESPONDENT.

TANYA CONLEY, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an amended order of the Family Court, Monroe County (Thomas W. Polito, R.), entered July 10, 2017 in a proceeding pursuant to Family Court Act article 6. The amended order, inter alia, granted primary physical custody of the subject child to petitioner.

It is hereby ORDERED that the amended order so appealed from is unanimously modified on the law by striking from the first ordering paragraph the words "and subject to periods of visitation with the Mother and the Father shall encourage [the child] to visit with her Mother," and as modified the amended order is affirmed without costs, and the matter is remitted to Family Court, Monroe County, for further proceedings in accordance with the following memorandum: Respondent mother appeals from an amended order that, inter alia, granted petitioner father's petition to modify a prior custody order by awarding him primary physical custody of their daughter. We agree with the mother that Family Court erred in failing to set a specific and definitive visitation schedule (*see Matter of Shonyo v Shonyo*, 151 AD3d 1595, 1597-1598 [4th Dept 2017], *lv denied* 30 NY3d 901 [2017]; *Gillis v Gillis*, 113 AD3d 816, 817 [2d Dept 2014]; *Matter of Murray v Parisella*, 41 AD3d 902, 904 [3d Dept 2007]). We therefore modify the amended order by striking from the first ordering paragraph the words "and subject to periods of visitation with the Mother and the Father shall encourage [the child] to visit with her Mother," and we remit the matter to Family Court to fashion a specific and definitive schedule for visitation between the mother and daughter. We have considered and rejected the mother's remaining contentions.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

670

CAF 17-01332

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

IN THE MATTER OF MICHAEL J. BUCKLEY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JACQUELYN KLEINAHANS, RESPONDENT-RESPONDENT.

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (COURTNEY S. RADICK OF COUNSEL), FOR PETITIONER-APPELLANT.

DAVIS LAW OFFICE PLLC, OSWEGO (STEPHANIE N. DAVIS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

SAMUEL J. SUGAR, FULTON, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Oswego County (Thomas Benedetto, R.), entered July 14, 2017 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded respondent sole legal and physical custody of the subject children.

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

Memorandum: Petitioner father appeals from an order that, inter alia, awarded respondent mother sole legal and physical custody of the parties' two children. We reject the father's contention that Family Court's determination is not supported by a sound and substantial basis in the record. In making an initial custody determination, the court is "required to consider the best interests of the child by reviewing such factors as 'maintaining stability for the child, . . . the home environment with each parent, each parent's past performance, relative fitness, ability to guide and provide for the child's overall well-being, and the willingness of each parent to foster a relationship with the other parent' " (*Kaczor v Kaczor*, 12 AD3d 956, 958 [3d Dept 2004]; *see Matter of Chilbert v Soler*, 77 AD3d 1405, 1406 [4th Dept 2010], *lv denied* 16 NY3d 701 [2011]). We agree with the court that those factors weigh in the mother's favor, especially with respect to the last factor, and thus the court's determination that it is in the children's best interests to award sole custody to the mother has a sound and substantial basis in the record (*see Matter of Shaw v Antes*, 274 AD2d 679, 680-681 [3d Dept 2000]).

The father failed to preserve for our review his contention that the court was biased against him because he failed to make a motion

asking the court to recuse itself (*see Matter of Shonyo v Shonyo*, 151 AD3d 1595, 1596 [4th Dept 2017], *lv denied* 30 NY3d 901 [2017]). The father also failed to preserve for our review his contention that the Attorney for the Children (AFC) was biased against him because he failed to make a motion seeking the AFC's removal (*see Matter of Elniski v Junker*, 142 AD3d 1392, 1393 [4th Dept 2016]).

We reject the father's contention that he was denied effective assistance of counsel at the hearing on the ground that counsel failed to renew his request for an adjournment. " 'There is no denial of effective assistance of counsel . . . arising from a failure to make a motion or argument that has little or no chance of success' " (*Matter of Lundyn S. [Al-Rahim S.]*, 144 AD3d 1511, 1512 [4th Dept 2016], *lv denied* 29 NY3d 901 [2017]). We further reject the father's contention with respect to the remaining instances of alleged ineffective assistance of counsel inasmuch as he did not " 'demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712 [1998]; *see Matter of Elijah D. [Allison D.]*, 74 AD3d 1846, 1847 [4th Dept 2010]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

673

CA 17-02187

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

WILLIAM LANDAHL AND KIMBERLY LANDAHL,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

DANIEL B. STEIN AND TRUDY STEIN,
DEFENDANTS-APPELLANTS.

LAW OFFICES OF ROBERT L. HARTFORD, GETZVILLE (JENNIFER V. SCHIFFMACHER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered March 29, 2017. The order denied the motion of defendants for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by plaintiff William Landahl when a stair tread on the stairs of an outdoor deck located on defendants' property broke, causing him to fall. We agree with defendants that Supreme Court erred in denying their motion for summary judgment dismissing the complaint. Defendants met their initial burden of establishing that they neither created nor had actual or constructive notice of the allegedly dangerous or defective condition of the stair tread, and plaintiffs failed to raise a triable issue of fact in opposition (*see generally King v Sam's E., Inc.*, 81 AD3d 1414, 1414-1415 [4th Dept 2011]). Contrary to plaintiffs' contention, "[t]he photographs of the accident site, which did not [clearly] depict [the stairs], and the affidavit of the plaintiff[s'] expert, who never inspected the staircase, were insufficient to raise a triable issue of fact" (*Hoffman v Brown*, 109 AD3d 791, 792 [2d Dept 2013]).

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

674

CAF 17-01216

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

IN THE MATTER OF TIMOTHY MCCARTHY,
PETITIONER-RESPONDENT-RESPONDENT,

V MEMORANDUM AND ORDER

CINDY A. KRIEGAR,
RESPONDENT-PETITIONER-APPELLANT.

ROBERT A. DINIERI, CLYDE, FOR RESPONDENT-PETITIONER-APPELLANT.

LORENZO NAPOLITANO, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Wayne County (Daniel G. Barrett, J.), entered February 17, 2017 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, continued joint legal custody of the subject children.

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

Memorandum: Respondent-petitioner mother appeals from an order that, inter alia, denied her petition to modify the prior order of custody and directed that the parties continue to share joint legal custody of their children. We affirm.

"It is well established that alteration of an established custody arrangement will be ordered only upon a showing of a change in circumstances [that] reflects a real need for change to ensure the best interest[s] of the child[ren]" (*Matter of Carey v Windover*, 85 AD3d 1574, 1574 [4th Dept 2011], *lv denied* 17 NY3d 710 [2011] [internal quotation marks omitted]). Contrary to the mother's contention, we conclude that there is a sound and substantial basis in the record for Family Court's determination that the mother failed to establish a change in circumstances (*see Matter of Avola v Horning*, 101 AD3d 1740, 1740-1741 [4th Dept 2012]). Although the record establishes that the parties have difficulty communicating with each other, the mother failed to demonstrate that those communication problems have changed since the prior custody order was entered (*see id.* at 1741). Contrary to the mother's further contention, "a court's determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record" (*Matter of Saunders v Stull*, 133 AD3d 1383, 1383 [4th Dept 2015] [internal

quotation marks omitted]). Here, there is no basis in the record to give less weight to the court's determination on the ground that the trial judge recused himself after issuing the order on appeal.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

675

CA 17-02157

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

J. MICHAEL SIMONI AND CAROL SIMONI,
PLAINTIFFS-RESPONDENTS,

V ORDER

EASTMAN KODAK COMPANY AND JOHNSON CONTROLS, INC.,
DEFENDANTS-APPELLANTS-RESPONDENTS.

THE LAW FIRM OF JANICE M. IATI, P.C., PITTSFORD (JANICE M. IATI OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT EASTMAN KODAK COMPANY.

RUPP BAASE PFALZGRAF & CUNNINGHAM LLC, ROCHESTER (AMY L. DIFRANCO OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT JOHNSON CONTROLS, INC.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (ADAM P. DEISINGER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Monroe County (Renee Forgensi Minarik, A.J.), entered November 13, 2017. The order denied the motion of defendant Johnson Controls, Inc. for summary judgment dismissing the second amended complaint and all cross claims against it and denied the motion of defendant Eastman Kodak Company for summary judgment dismissing the second amended complaint against it and for summary judgment on its cross claim against defendant Johnson Controls, Inc., for contractual indemnification.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 15 and 16, 2018,

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

677

CA 17-01885

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

SUSAN D. MONGIELO, PLAINTIFF-RESPONDENT,

V ORDER

DAVID J. MONGIELO, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

JAMES OSTROWSKI, BUFFALO, FOR DEFENDANT-APPELLANT.

HOGANWILLIG, PLLC, AMHERST (DIANE R. TIVERON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Mark Montour, J.), dated December 23, 2016. The order, among other things, granted plaintiff's quantum meruit application for counsel fees.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985 [4th Dept 1990]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

678

CA 17-01886

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

SUSAN D. MONGIELO, PLAINTIFF-RESPONDENT,

V ORDER

DAVID J. MONGIELO, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

JAMES OSTROWSKI, BUFFALO, FOR DEFENDANT-APPELLANT.

HOGANWILLIG, PLLC, AMHERST (DIANE R. TIVERON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Daniel Furlong, J.), entered July 31, 2017. The order awarded a money judgment to HoganWillig, PLLC, in the amount of $31,852.64.

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

679

CA 17-01887

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

SUSAN D. MONGIELO, PLAINTIFF-RESPONDENT,

V ORDER

DAVID J. MONGIELO, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

JAMES OSTROWSKI, BUFFALO, FOR DEFENDANT-APPELLANT.

HOGANWILLIG, PLLC, AMHERST (DIANE R. TIVERON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Daniel Furlong, J.), dated October 19, 2017. The order granted that part of defendant's motion seeking leave to reargue, and denied those parts of defendant's motion seeking to stay and/or vacate an order of the court dated December 23, 2016.

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

683

CA 18-00108

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

NICHOLAS SPARKS, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF HUNTER SPARKS, AN INFANT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FOCUS 1 LLC, DEFENDANT-APPELLANT, SANDRA CHIAPPONE, MARTIN CHIAPPONE, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

GOERGEN, MANSON & MCCARTHY, BUFFALO (KELLY J. PHILIPS OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAMPBELL & ASSOCIATES, EDEN (R. COLIN CAMPBELL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

BARCLAY DAMON LLP, BUFFALO (THOMAS A. DIGATI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Daniel Furlong, J.), entered April 11, 2017. The order denied the motion of defendant Focus 1 LLC for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries sustained by his infant son (child) when the child fell from a wooden platform located in a tree. At the time of the incident, the child lived with plaintiff in a mobile home park owned by defendant Focus 1 LLC (Focus). Focus maintained a playground on the northern portion of its property, next to which were trails and a wooded area that began on Focus's property and continued onto the adjacent property owned by defendants Sandra Chiappone and Martin Chiappone. Thus, portions of the trails and wooded area were located on both Focus's property and the Chiappones's property.

Before depositions were conducted, Focus moved for summary judgment dismissing the complaint and all cross claims against it on the grounds that it did not own the land where the elevated platform was located and did not create or contribute to the condition that caused the child's accident. Supreme Court denied the motion without prejudice to renew, and we affirm.

We agree with plaintiff that the motion is premature because discovery has not been completed and thus "information necessary to oppose the motion[, particularly with respect to whether Focus created or contributed to the dangerous condition,] remained within [Focus's] exclusive knowledge" (*Buffamante Whipple Buttafaro, Certified Public Accountants, P.C. v Dawson*, 118 AD3d 1283, 1284 [4th Dept 2014]; *see* CPLR 3212 [f]; *see generally Singh v Avis Rent A Car Sys., Inc.*, 119 AD3d 768, 770 [2d Dept 2014]). Moreover, we note that Focus failed to meet its initial burden of establishing that it did not own the property where the accident occurred inasmuch as Focus did not submit an affidavit from anyone with personal knowledge whether the site of the accident was actually located on Focus's property (*see generally* CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562-563 [1980]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

685

TP 18-00049

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

IN THE MATTER OF MACKPASSION HUITT, PETITIONER,

V ORDER

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

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

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (JULIE M. SHERIDAN OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered January 8, 2018) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated an inmate rule.

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

687

KA 15-01432

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TOMMY JACKSON, 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 (Anthony F. Aloi, J.), rendered June 24, 2015. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to defendant's contention, upon viewing the evidence in the light most favorable to the People, we conclude that the evidence is legally sufficient to establish that he possessed a loaded firearm outside of his home or place of business (*see generally People v Danielson*, 9 NY3d 342, 349 [2007]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). A police officer and a civilian ride-along passenger testified that they observed defendant walk away and turn his body upon seeing the police vehicle in which they were riding, and they subsequently observed defendant reach toward his waistband area and make a throwing motion with his right arm. Moments later, the police officer retrieved a handgun from the area where any object thrown by defendant would have landed (*see People v Recore*, 56 AD3d 1233, 1234 [4th Dept 2008], *lv denied* 12 NY3d 761 [2009]; *People v Reed*, 45 AD3d 1333, 1333-1334 [4th Dept 2007], *lv denied* 10 NY3d 843 [2008]). "Despite the lack of forensic evidence, the People supplied the necessary proof through circumstantial evidence, i.e., eyewitness testimony and surrounding circumstances" (*People v Butler*, 148 AD3d 1540, 1540 [4th Dept 2017], *lv denied* 29 NY3d 1090 [2017] [internal quotation marks omitted]). We reject defendant's further contention that the verdict is against the weight of the evidence. Even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude that, viewing the evidence in light of the

elements of the crime as charged to the jury (*see Danielson*, 9 NY3d at 349), it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495).

Defendant failed to preserve for our review his contention that, in determining the sentence to be imposed, the court penalized him for exercising his right to a jury trial, inasmuch as defendant did not raise that contention at sentencing (*see People v Stubinger*, 87 AD3d 1316, 1317 [4th Dept 2011], *lv denied* 18 NY3d 862 [2011]). In any event, that contention is without merit. "[T]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting his right to trial . . . , and there is no indication in the record before us that the sentencing court acted in a vindictive manner based on defendant's exercise of the right to a trial" (*id.* [internal quotation marks omitted]). Finally, the sentence is not unduly harsh or severe.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

688

KA 17-00749

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES BROWN, DEFENDANT-APPELLANT.

JAMES S. KERNAN, PUBLIC DEFENDER, LYONS (KIMBERLY J. CZAPRANSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS (BRUCE A. ROSEKRANS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (John B. Nesbitt, J.), rendered March 2, 2017. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree, criminal possession of a weapon in the third degree, reckless endangerment in the second degree and criminal possession of a weapon in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, assault in the second degree (Penal Law § 120.05 [2]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). Defendant failed to move to withdraw his plea or to vacate the judgment of conviction and thus failed to preserve for our review his contention that his plea was not knowing and voluntary because, inter alia, County Court did not inform him of the trial rights that he was giving up until after he pleaded guilty (*see People v Scott*, 151 AD3d 1702, 1702 [4th Dept 2017], *lv denied* 29 NY3d 1133 [2017]; *see generally People v Rojas*, 147 AD3d 1535, 1536 [4th Dept 2017], *lv denied* 29 NY3d 1036 [2017]; *People v Brown*, 115 AD3d 1204, 1205 [4th Dept 2014], *lv denied* 23 NY3d 1060 [2014]). In any event, we reject defendant's contention. "It is axiomatic that the court 'need not engage in any particular litany' in order to ensure that a defendant makes a 'knowing, voluntary and intelligent choice among alternative courses of action' . . . and, here, the record establishes that defendant's plea was a knowing, voluntary and intelligent choice" (*Scott*, 151 AD3d at 1702). The record belies defendant's further contention that his plea was not voluntary or intelligent because the court failed to notify defendant in advance of his plea that one of the charges would constitute a violent felony offense. Indeed, the record is clear that the assault charge

constituted the violent felony offense and, contrary to defendant's contention, the charge of criminal possession of a weapon in the third degree was not upgraded to a violent felony offense. Finally, the record also belies defendant's contention that the plea was not voluntary or intelligent because there was confusion regarding the appropriate sentence, inasmuch as "the record reflects that defendant was aware of the sentence to be imposed" (*People v Dickerson*, 61 AD3d 1220, 1221 [3d Dept 2009], *lv denied* 12 NY3d 924 [2009]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

689

KA 17-01201

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

OTIS B. TILFORD, DEFENDANT-APPELLANT.

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

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered June 12, 2017. The judgment convicted defendant, upon his plea of guilty, of attempted arson in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted arson in the second degree (Penal Law §§ 110.00, 150.15), defendant contends that his waiver of the right to appeal is invalid. We reject that contention. Supreme Court " 'did not improperly conflate the waiver of the right to appeal with those rights automatically forfeited by a guilty plea' " (*People v Mills*, 151 AD3d 1744, 1745 [4th Dept 2017], *lv denied* 29 NY3d 1131 [2017]; *see People v Tabb*, 81 AD3d 1322, 1322 [4th Dept 2011], *lv denied* 16 NY3d 900 [2011]). Defendant's valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see Mills*, 151 AD3d at 1745).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

693

CAF 17-01419

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

IN THE MATTER OF ANGELA TUBILEWICZ,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID STYLES, RESPONDENT-APPELLANT.

KOSLOSKY & KOSLOSKY, UTICA (WILLIAM L. KOSLOSKY OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered July 24, 2017 in a proceeding pursuant to Family Court Act article 8. The order, inter alia, committed respondent to the Oneida County Jail for two consecutive six-month jail terms for violations of a court order.

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

Memorandum: On appeal from an order in which Family Court, inter alia, found that respondent violated a temporary order of protection, respondent's sole contention is that the court exceeded its authority in imposing two consecutive six-month jail terms based on the violations. The appeal from the order "is academic . . . [because respondent] has served the period of incarceration, and there is no ameliorative action for this Court to take" (*Matter of Trentacoste v Trentacoste*, 211 AD2d 724, 726 [2d Dept 1995], *lv denied* 86 NY2d 707 [1995]; *see Matter of Geritano v Geritano*, 212 AD2d 788, 788 [2d Dept 1995]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

694

CAF 17-01612

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

IN THE MATTER OF SHAWN S.

OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT.

COURTNEY S. RADICK, ESQ., ATTORNEY FOR THE CHILD, APPELLANT.

OPINION AND ORDER

COURTNEY S. RADICK, OSWEGO, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

NELSON LAW FIRM, MEXICO (ALLISON J. NELSON OF COUNSEL), FOR PETITIONER-RESPONDENT.

SHIRIM NOTHENBERG, NEW YORK CITY, FOR LAWYERS FOR CHILDREN, INC., AMICUS CURIAE.

Appeal from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered July 11, 2017 in a proceeding pursuant to Family Court Act article 10. The order, insofar as appealed from, directed the subject child to be present for any permanency hearing.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and those paragraphs ordering the child to be present at the permanency hearing are vacated.

Opinion by TROUTMAN, J.:

The issue before us is whether Family Court has the authority to compel a child to participate in a permanency hearing when that child has waived his or her right to participate following consultation with his or her attorney (*see* Family Ct Act § 1090-a [a] [2]). We hold that the court does not have such authority. We therefore conclude that the court erred in ordering the subject child to be present at the permanency hearing.

The child was freed for adoption in 2014. A permanency hearing was scheduled for March 30, 2017, and notice of the hearing was provided to the child, who was then 14 years old. One week before the scheduled hearing date, the Attorney for the Child (AFC) filed a form indicating that the child, after consultation with the AFC, waived his right to participate in the hearing. The AFC appeared at the hearing on the child's behalf and reiterated that the child had waived his right to participate in the hearing. The court stated, however, that

it was "required by law to have some communication" with the child, and that the child would therefore be required to appear at the next scheduled hearing date. The AFC objected to the child's compelled participation. The court overruled the objection, scheduled the hearing to continue on April 12, 2017, and, in the order that was ultimately entered, directed the child to "be present, either in person or electronically," on that date. After two adjournments, the permanency hearing resumed on May 11, 2017, and the child appeared by telephone. The hearing concluded on that date.

In a written decision, the court noted that, "[i]n 2007, Family Court Act § 1089 (d) was amended to require judges to engage in age-appropriate consultation with a child who is the subject of a permanency hearing" (*Matter of Shawn S.*, 59 Misc 3d 277, 280 [Fam Ct, Oswego County 2017]). Although the court reasoned that more recent amendments to the Family Court Act "would appear to clearly" allow a child to waive his or her right to participate, the statute "should not be read to give children the final say" (*id.* at 284-285). The court concluded, without citing to any authority, that a court "should be allowed to consider the totality of the circumstances" to determine whether a child's unequivocal waiver of the right to participate should be respected (*id.* at 286).

We note at the outset that this appeal is moot inasmuch as the permanency hearing has concluded (*see Matter of Jonathan S. [Ismelda S.]*, 79 AD3d 539, 539 [1st Dept 2010]; *see also Matter of Herald Co. v Weisenberg*, 59 NY2d 378, 381 [1983]). Nevertheless, we conclude that the exception to the mootness doctrine applies because "the issue is likely to recur, typically evades review and raises a significant question not previously determined" (*Matter of Latanya H. [Halvorsen]*, 89 AD3d 1528, 1529 [4th Dept 2011], citing *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

We agree with the AFC that the court lacked the authority to compel the child to be present at the permanency hearing. The question is one of statutory interpretation. "When interpreting a statute, 'our primary consideration is to discern and give effect to the [l]egislature's intention' " (*Matter of Avella v City of New York*, 29 NY3d 425, 434 [2017]; *see Makinen v City of New York*, 30 NY3d 81, 85 [2017]). To discern the intent of the legislature, we first look to the language employed in the statute and, where the disputed language is unambiguous, we are bound "to give effect to its plain meaning" (*Makinen*, 30 NY3d at 85 [internal quotation marks omitted]). In doing so, we must consider " 'the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning' " (*Majewski v Broadalbin-Perth Cent. Sch. Dist.*, 91 NY2d 577, 583 [1998], quoting *Tompkins v Hunter*, 149 NY 117, 122-123 [1896]).

Here, the statutory language is clear and unambiguous. Although the permanency hearing must include "an age appropriate consultation with the child" (Family Ct Act § 1090-a [a] [1]), that requirement may not "be construed to compel a child who does not wish to participate

in his or her permanency hearing to do so" (§ 1090-a [g]). The choice belongs to the child. Indeed, "[a] child age fourteen and older shall be permitted to participate in person in all or any portion of his or her permanency hearing in which he or she chooses to participate" (§ 1090-a [b] [1]). Moreover, "a child who has chosen to participate in his or her permanency hearing shall choose the manner in which he or she shall participate, which may include participation in person, by telephone or available electronic means, or the issuance of a written statement to the court" (§ 1090-a [c]). Although the court may limit the participation of a child under the age of 14 based on the best interests of the child (*see* § 1090-a [a] [3]; [b] [2]), the court lacks the authority to compel the participation of a child who has waived his or her right to participate in a permanency hearing after consultation with his or her attorney (*see* § 1090-a [a] [2]; [g]).

The court erred in its interpretation. It is not for the court to consider whether valid legislation is wise, or to allow its own policy assessment, no matter how seriously considered, to supplant the judgment of the legislature (*see Chicago, B. & Q. R. Co. v McGuire*, 219 US 549, 569 [1911]; *Matter of County of Chemung v Shah*, 28 NY3d 244, 263 [2016]). Accordingly, we conclude that the order insofar as appealed from should be reversed and those paragraphs ordering the child to be present at the permanency hearing should be vacated.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

695

CAF 17-00626

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

IN THE MATTER OF JOSEPH N. CAPOBIANCO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MICHELLE A. CAPOBIANCO, RESPONDENT-RESPONDENT.

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

NORMAN P. DEEP, CLINTON, FOR RESPONDENT-RESPONDENT.

ANDREW S. GREENBERG, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Karen Stanislaus, R.), entered February 28, 2017 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded respondent sole custody of the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner father appeals from an order that modified a prior joint custody order by awarding respondent mother sole legal custody of the subject child, with visitation to the father. Although both the father and the mother petitioned for sole custody of the child, the father now contends for the first time on appeal that Family Court erred in failing to continue joint custody. That contention therefore is not properly before us (*see Matter of Voorhees v Talerico*, 128 AD3d 1466, 1467 [4th Dept 2015], *lv denied* 25 NY3d 915 [2015]). We nevertheless conclude that " 'the evidence at the hearing established that the parties have an acrimonious relationship and are not able to communicate effectively with respect to the needs and activities of their child[ ], and it is well settled that joint custody is not feasible under those circumstances' " (*Matter of Ladd v Krupp*, 136 AD3d 1391, 1392 [4th Dept 2016]). We note that the father does not dispute on appeal that the court, having found that an award of sole custody was warranted, properly determined that it was in the best interests of the child for the mother to be the custodial parent (*see generally id.* at 1392-1393). Instead, the father further contends only that the court erred in failing to award him additional visitation time with the child. Contrary to the father's contention, the visitation schedule ordered by the court is supported by a sound

and substantial basis in the record (*see Matter of Golda v Radtke*, 112 AD3d 1378, 1378 [4th Dept 2013]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

697

CA 17-01986

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

JOSE RIVERA, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 120113.)
(APPEAL NO. 1.)

GOLDBERGER & DUBIN, P.C., NEW YORK CITY (STACEY VAN MALDEN OF COUNSEL), FOR CLAIMANT-APPELLANT.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (PATRICK A. WOODS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Judith A. Hard, J.), entered February 19, 2016. The order, among other things, granted the motion of defendant for leave to amend its answer.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Architectural Bldrs. v Pollard*, 267 AD2d 704, 705 [3d Dept 1999]; *see also* CPLR 5501 [a] [1]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

698

CA 17-01987

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

JOSE RIVERA, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 120113.)
(APPEAL NO. 2.)

GOLDBERGER & DUBIN, P.C., NEW YORK CITY (STACEY VAN MALDEN OF COUNSEL), FOR CLAIMANT-APPELLANT.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (PATRICK A. WOODS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Judith A. Hard, J.), entered September 14, 2017. The order denied the motion of claimant for summary judgment, granted the cross motion of defendant for summary judgment and dismissed the claim.

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

700

CA 18-00055

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

MARLON BENNETT, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 124031.)

FRANZBLAU DRATCH, P.C., NEW YORK CITY (BRIAN M. DRATCH OF COUNSEL), FOR CLAIMANT-APPELLANT.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Renee Forgensi Minarik, J.), entered March 7, 2017. The order granted the motion of defendant for summary judgment and dismissed the claim.

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

Memorandum: Claimant, a former prison inmate, filed this claim to recover damages for injuries that he sustained when he allegedly fell as a result of a dangerous condition on a walkway at the correctional facility where he had been incarcerated. The Court of Claims granted defendant's motion for summary judgment dismissing the claim. That was error.

We agree with claimant that the court erred in granting the motion upon concluding that the alleged defect was trivial as a matter of law. In seeking summary judgment on that ground, defendant was required to "make a prima facie showing that the defect [was], under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances [did] not increase the risks it pose[d]" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 79 [2015]; *see Clauss v Bank of Am., N.A.*, 151 AD3d 1629, 1631 [4th Dept 2017]). "[P]hysically small defects [are] actionable when their surrounding circumstances or intrinsic characteristics make them difficult for a pedestrian to see or to identify as hazards or difficult to traverse safely on foot" (*Hutchinson*, 26 NY3d at 79; *see Langgood v Carrols, LLC*, 148 AD3d 1734, 1735 [4th Dept 2017]). For example, physically small defects have been found to be actionable due to the presence of other defects in the surrounding area (*see Hutchinson*, 26 NY3d at 78, citing *Young v*

City of New York, 250 AD2d 383, 384 [1st Dept 1998]). Moreover, the Court of Appeals has cautioned that "a mechanistic disposition of a case based exclusively on the dimension of the sidewalk defect is unacceptable" (*Trincere v County of Suffolk*, 90 NY2d 976, 977-978 [1997]; *see Lupa v City of Oswego*, 117 AD3d 1418, 1419 [4th Dept 2014]).

Even assuming, arguendo, that defendant met its burden of demonstrating that the defect was trivial as a matter of law, we conclude that claimant raised an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In claimant's deposition testimony, which defendant submitted in support of the motion, claimant testified that he was proceeding along a walkway from the housing area to the commissary. It had rained, and a large puddle of water had accumulated on the walkway. Claimant attempted to step over the flooded portion of the walkway, but his foot came down on a portion of the walkway that was cracked and damaged. The concrete shifted under his foot, causing him to lose his balance, and he fell. In opposition, claimant submitted the deposition testimony of two correction officers who testified that inmates are required to use the walkway and are prohibited from stepping on the grass. One of those correction officers testified that he had to step around the puddle in the past, but he could not recall whether he avoided it by stepping on the grass. Viewing the facts and surrounding circumstances in the light most favorable to claimant (*see Valente v Lend Lease [US] Constr. LMB, Inc.*, 29 NY3d 1104, 1105 [2017]), we conclude that there is an issue of fact whether the walkway was "difficult to traverse safely on foot" (*Hutchinson*, 26 NY3d at 79).

We also agree with claimant that defendant failed to meet its burden of establishing that it lacked actual or constructive notice of the allegedly dangerous condition (*see Rivera v Tops Mkts., LLC*, 125 AD3d 1504, 1505 [4th Dept 2015]; *see generally Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]), and thus that the court erred in granting defendant's motion on that alternative ground. In support of the motion, defendant submitted the affidavit of a correction officer who had worked at the prison for the prior 27 years. The correction officer averred that he was familiar with the walkway and its condition before claimant fell, that the concrete was broken and uneven, and that water can gather there after it rains, but he did not consider the condition to be dangerous. Furthermore, the correction officer averred that he periodically walked the premises to look for anything in need of repair, and claimant testified at his deposition that the walkway was cracked prior to his arrival at the prison and that it flooded every time it rained.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

706

TP 18-00048

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

IN THE MATTER OF JUSTIN CORDOVA, PETITIONER,

V MEMORANDUM AND ORDER

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

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

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered January 8, 2018) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III hearing, that petitioner violated various inmate rules, including assault on an inmate in violation of inmate rule 100.10 (7 NYCRR 270.2 [B] [1] [i]). Contrary to petitioner's contention, the determination is supported by substantial evidence (*see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139 [1985]), i.e., the misbehavior report and the hearing testimony of its author, which established that petitioner approached the victim from behind and cut him and that, immediately after the incident, the victim identified petitioner as the assailant (*see generally Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]). The confidential testimony heard by the Hearing Officer provided a sufficient basis upon which to assess the credibility of the statements made by the victim to the author of the report (*see Matter of Porter v Annucci*, 156 AD3d 1430, 1430-1431 [4th Dept 2017]). Petitioner's denials raised, at most, an issue of credibility for resolution by the Hearing Officer (*see Foster*, 76 NY2d at 966).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

709

KA 16-01081

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RASHAWN C. AUSTIN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered January 6, 2016. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of manslaughter in the first degree (Penal Law § 125.20 [1]). We reject defendant's contention that County Court erred in failing to fulfill its statutory obligation to consider whether the circumstances warranted youthful offender treatment (*see* CPL 720.20 [1]; *People v Rudolph*, 21 NY3d 497, 499 [2013]). At sentencing, the court denied defendant youthful offender treatment, and attributed the denial to the seriousness of the crime. We conclude that the court's remarks establish that it "made an independent determination" whether to adjudicate defendant a youthful offender (*People v Richardson*, 128 AD3d 988, 989 [2d Dept 2015], *lv denied* 25 NY3d 1206 [2015]). Defendant's valid waiver of the right to appeal encompasses his challenge to the severity of the sentence, including the period of postrelease supervision (*see People v Blas*, 120 AD3d 585, 585 [2d Dept 2014], *lv denied* 24 NY3d 1001 [2014]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

710

KA 17-00018

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LASHAWN L. HARRIS, DEFENDANT-APPELLANT.

ROSEMARIE RICHARDS, GILBERTSVILLE, 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 (Marianne Furfure, A.J.), rendered November 3, 2016. The judgment convicted defendant, upon his plea of guilty, of aggravated unlicensed operation of a motor vehicle in the first degree.

Now, upon reading and filing the stipulation of discontinuance signed by defendant on March 12, 2018, and by the attorneys for the parties on February 22 and April 16, 2018,

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

711

KA 16-02262

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LESTER SCARBROUGH, DEFENDANT-APPELLANT.

ROBERT M. GRAFF, LOCKPORT, FOR DEFENDANT-APPELLANT.

LESTER SCARBROUGH, DEFENDANT-APPELLANT PRO SE.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara Sheldon, J.), rendered February 17, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted rape in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted rape in the first degree (Penal Law §§ 110.00, 130.35 [1]). Contrary to defendant's contention in his main and pro se supplemental briefs, we conclude that his waiver of the right to appeal is valid (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]). "The '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]; *see People v Weinstock*, 129 AD3d 1663, 1663 [4th Dept 2015], *lv denied* 26 NY3d 1012 [2015]; *People v Smith*, 122 AD3d 1300, 1301 [4th Dept 2014], *lv denied* 25 NY3d 1172 [2015]). Defendant's challenge in his main and pro se supplemental briefs to the legal sufficiency of the evidence before the grand jury does not survive either his guilty plea (*see People v Hansen*, 95 NY2d 227, 232 [2000]; *People v Oswold*, 151 AD3d 1756, 1756-1757 [4th Dept 2017], *lv denied* 29 NY3d 1131 [2017]), or his valid waiver of the right to appeal (*see People v Oliveri*, 49 AD3d 1208, 1208 [4th Dept 2008]). Defendant's contention in his main and pro se supplemental briefs that defense counsel was ineffective for failing to afford him an opportunity to testify before the grand jury and for failing to conduct a thorough investigation also does not survive either his guilty plea or his valid waiver of the right to appeal (*see People v Grandin*, 63 AD3d 1604, 1604 [4th Dept 2009], *lv*

denied 13 NY3d 744 [2009]). We further conclude that defendant's valid waiver of the right to appeal encompasses his challenge in his main and pro se supplemental briefs to the severity of the sentence (*see People v Cochran*, 156 AD3d 1474, 1474 [4th Dept 2017], *lv denied* 30 NY3d 1114 [2018]; *People v Oberdorf*, 136 AD3d 1291, 1292 [4th Dept 2016], *lv denied* 27 NY3d 1073 [2016]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

713

CAF 17-00815

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

IN THE MATTER OF STACY MARTINEZ,
PETITIONER-RESPONDENT,

V ORDER

JASON M. MCMASTERS, RESPONDENT-APPELLANT.

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

DAVID J. PAJAK, ALDEN, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered April 3, 2017 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted the petition and awarded petitioner sole custody of the subject child.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the report of the Referee at Family Court.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

715

CAF 16-01277

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

IN THE MATTER OF SEAN B.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

SUSAN B., RESPONDENT-APPELLANT.

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

JAMES E. BROWN, BUFFALO, FOR PETITIONER-RESPONDENT.

REBECCA J. TALMUD, WILLIAMSVILLE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered July 8, 2016 in a proceeding pursuant to Family Court Act article 10. The order determined that respondent has neglected the subject child.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated at Family Court.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

723

CA 18-00135

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

MALLORY C. EHLERS, PLAINTIFF-APPELLANT,

V ORDER

WILLIAM A. BYRNES AND ALL ERECTION AND CRANE RENTAL CORP., DEFENDANTS-RESPONDENTS.

CHIACCHIA & FLEMING, LLP, HAMBURG (LISA A. POCH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CARTAFALSA, TURPIN & LENOFF, LLP, NEW YORK CITY (BRIAN P. MINEHAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Matthew J. Murphy, III, A.J.), entered April 6, 2017. The order denied the motion of plaintiff seeking leave to renew her opposition to defendants' motion for summary judgment dismissing the complaint.

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

726

CA 17-01261

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

CAROLYN D. MCCLENDON, PLAINTIFF-APPELLANT,

V ORDER

LILLIE V. WELCH, DEFENDANT-RESPONDENT.

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

LAW OFFICES OF JOHN TROP, BUFFALO (MATTHEW T. MURRAY, III, OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered March 24, 2017. The order, inter alia, granted in part the motion of defendant seeking to vacate plaintiff's note of issue and certificate of readiness and seeking fees and costs.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 7, 2018,

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

727

CA 16-00722

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

IN THE MATTER OF MATTHEW M. COBADO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JOHN R. SEARLES, CATTARAUGUS COUNTY
ADMINISTRATOR RECORD APPEALS OFFICER,
RESPONDENT-RESPONDENT.

MATTHEW M. COBADO, PETITIONER-APPELLANT PRO SE.

ERIC M. FIRKEL, COUNTY ATTORNEY, LITTLE VALLEY, FOR
RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Cattaraugus County (Jeremiah J. Moriarty, III, J.), entered February 25, 2016 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment that dismissed his CPLR article 78 petition seeking disclosure of certain documents pursuant to the Freedom of Information Law ([FOIL] Public Officers Law art 6). We affirm. The District Attorney and the Deputy Chief Clerk of Cattaraugus County Court certified that their respective agencies do not possess the requested documents (*see* § 89 [3] [a]; *see also Matter of Rattley v New York City Police Dept.*, 96 NY2d 873, 875 [2001]; *Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 279 [1996]). Even assuming, arguendo, that the documents requested by petitioner under FOIL exist, including the requested "Confidential Informant(s) Sheet(s)" and "cooperative agreement(s)," we note that records concerning confidential informants and cooperation agreements are expressly exempted from disclosure under FOIL (*see* § 87 [2] [e] [i], [iii]; *Brown v Town of Amherst*, 195 AD2d 979, 980 [4th Dept 1993]). Thus, contrary to petitioner's contention, the court properly dismissed the petition inasmuch as respondent's denial of petitioner's FOIL request was not affected by an error of law (*see generally Matter of Spring v County of Monroe*, 141 AD3d 1151, 1151 [4th Dept 2016]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

728

KA 14-00501

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL T. CHESS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered December 11, 2013. The judgment convicted defendant, upon a jury verdict, of rape in the first degree (three counts) and robbery in the first degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of three counts of rape in the first degree (Penal Law § 130.35 [1]) and robbery in the first degree (§ 160.15 [3]) and, in appeal No. 2, defendant appeals from a judgment convicting him upon the same jury verdict of two counts of rape in the first degree (§ 130.35 [1]), menacing in the second degree (§ 120.14 [1]), and two counts of petit larceny (§ 155.25). We note at the outset that defendant's contentions apply to both appeals unless specified otherwise herein. We reject defendant's contention that Supreme Court abused its discretion in refusing to recuse itself (*see People v Hazzard*, 129 AD3d 1598, 1598 [4th Dept 2015], *lv denied* 26 NY3d 968 [2015]). Where, as here, "recusal is sought based upon 'impropriety as distinguished from legal disqualification, the judge . . . is the sole arbiter' " of whether to grant such a motion (*People v Moreno*, 70 NY2d 403, 406 [1987]). Here, defendant made no showing that the court displayed actual bias in its evidentiary rulings (*see People v McCray*, 121 AD3d 1549, 1551 [4th Dept 2014], *lv denied* 25 NY3d 1204 [2015]). We further reject defendant's contention that the court's remarks during the first trial, which ended in a mistrial, were indicative of bias against defendant that carried over to the second trial (*see generally People v Walker*, 100 AD3d 1522, 1523 [4th Dept 2012], *lv denied* 20 NY3d 1104 [2013]).

Defendant next contends that the court abused its discretion in denying his requests for substitution of counsel. We reject that contention. The determination "[w]hether counsel is substituted is within 'the discretion and responsibility' of the trial judge . . . , and a court's duty to consider such a motion is invoked only where a defendant makes a 'seemingly serious request[]' " (*People v Porto*, 16 NY3d 93, 99-100 [2010]; *see People v Dodson*, 30 NY3d 1041, 1042 [2017]). Defendant's first request for new counsel was based on broad complaints that were insufficient to trigger the court's duty to inquire (*see People v Jones*, 149 AD3d 1576, 1577-1578 [4th Dept 2017], *lv denied* 29 NY3d 1129 [2017]; *People v Correa*, 145 AD3d 1640, 1640-1641 [4th Dept 2016]). In any event, we conclude that the court conducted the requisite "minimal inquiry" to determine whether substitution of counsel was warranted (*People v Sides*, 75 NY2d 822, 825 [1990]). The court "allowed defendant to air his concerns about defense counsel, and . . . reasonably concluded that defendant's vague and generic objections had no merit or substance" (*People v Linares*, 2 NY3d 507, 511 [2004]), and "properly concluded that defense counsel was 'reasonably likely to afford . . . defendant effective assistance' of counsel" (*People v Bradford*, 118 AD3d 1254, 1255 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014]). Defendant's second and third requests for new counsel " '[a]t most, . . . evinced disagreements with counsel over strategy . . . , which were not sufficient grounds for substitution' " (*Bradford*, 118 AD3d at 1255; *see People v Jones*, 107 AD3d 1584, 1585 [4th Dept 2013], *lv denied* 22 NY3d 1088 [2014], *reconsideration denied* 23 NY3d 1021 [2014]). For example, defendant complained that defense counsel failed to make a bail application, despite the fact that defendant committed many of the crimes charged in appeal No. 2 when he was out on bail while a retrial was pending for the charges in appeal No. 1. The court noted that it told counsel and defendant many times that any bail application would have been futile.

We reject defendant's contention that the court erred in permitting him to proceed pro se at the start of the second trial. In order for a defendant's waiver of the right to counsel to be knowing, voluntary, and intelligent, the court must "undertake a searching inquiry designed to insur[e] that the defendant [is] aware of the dangers and disadvantages of proceeding without counsel" (*People v Crampe*, 17 NY3d 469, 481 [2011] [internal quotation marks omitted]), and we conclude that the court conducted that inquiry before determining that the waiver was knowing, voluntary, and intelligent. Contrary to defendant's contention, his request to proceed pro se was not equivocal simply because it was "preceded by an unsuccessful request for new counsel" (*People v Lewis*, 114 AD3d 402, 404 [1st Dept 2014]; *see People v Malone*, 119 AD3d 1352, 1354 [4th Dept 2014], *lv denied* 24 NY3d 1003 [2014]). We reject defendant's further contention that the court erred in failing to grant him an adjournment to give him more time to prepare for the trial (*see People v Hickman*, 177 AD2d 739, 739 [3d Dept 1991], *lv denied* 79 NY2d 920 [1992]).

Contrary to defendant's contention, the court properly admitted evidence of certain alleged bad acts by defendant that were relevant

to his intent to commit the crimes herein (*see generally People v Cass*, 18 NY3d 553, 561-562 [2012]). Defendant's contention that the court should have limited the *Molineux* evidence to the crimes charged in appeal No. 1 is not preserved for our review (*see generally People v Williams*, 107 AD3d 1516, 1516 [4th Dept 2013], *lv denied* 21 NY3d 1047 [2013]), as is his contention that the court failed to issue an order on the People's motion for consolidation, and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to defendant's contention, the court's failure to issue an order on the consolidation motion does not constitute a mode of proceedings error (*see generally People v Thomas*, 28 AD3d 239, 239 [1st Dept 2006], *lv denied* 6 NY3d 898 [2006]; *People v Olds*, 269 AD2d 849, 849 [4th Dept 2000]).

We reject defendant's contention that the court abused its discretion in denying his motion for a mistrial after a sworn juror was removed, upon defendant's consent, as grossly unqualified. Although the court was incorrect in believing that granting the motion would have led to the application of double jeopardy (*see People v Ferguson*, 67 NY2d 383, 388 [1986]), we reject defendant's contention that this was the court's sole ground for denying the motion. Rather, the record establishes that the court properly concluded that there was no basis for a mistrial inasmuch as the trial could proceed with just one alternate juror (*see* CPL 270.30 [1]; *People v Ashley*, 145 AD2d 782, 783 [3d Dept 1988]).

Defendant contends that the court erred in sua sponte exercising a peremptory challenge on defendant's behalf to excuse a prospective juror. Upon our review of the record, we conclude that defendant, who was proceeding pro se at the time, in fact impliedly requested that challenge after consulting with standby counsel. We reject defendant's further contention that the court abused its discretion in sua sponte excusing a juror for cause. The court's questions showed that the prospective juror had "a state of mind that [was] likely to preclude him from rendering an impartial verdict based upon the evidence adduced at the trial" (CPL 270.20 [1] [b]; *see People v Vargas*, 88 NY2d 363, 379 [1996]).

With respect to appeal No. 1, we reject defendant's contention that the court erred in failing to suppress his statements to a police officer. We agree with the court that defendant was not in custody where, as here, he was not handcuffed, he agreed to sit in the back of the police vehicle, and the investigatory questioning was brief (*see People v Davis*, 229 AD2d 969, 969-970 [4th Dept 1996], *lv denied* 88 NY2d 1020 [1996]). With respect to appeal No. 2, we reject defendant's contention that the conviction of one of the two counts of both rape in the first degree and petit larceny is not supported by legally sufficient evidence (*see People v Bleakley*, 69 NY2d 490, 495 [1987]). Furthermore, viewing the evidence in light of the elements of those crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict in appeal No. 2 is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Finally, we conclude that the sentence in each appeal is not unduly harsh or severe.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

730

KA 16-01192

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT STANLEY, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALAN WILLIAMS OF COUNSEL), 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 (Kenneth F. Case, J.), rendered June 15, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of attempted robbery in the third degree (Penal Law §§ 110.00, 160.05), for which he was sentenced as a second felony offender to concurrent indeterminate terms of imprisonment of 2 to 4 years. Defendant failed to preserve for our review his contention that County Court erred in finding that he is a second felony offender based on a prior conviction of attempted reckless endangerment in the first degree, which is a legally impossible crime, because he did not challenge the predicate felony statement filed by the People pursuant to CPL 400.21 and did not object to the court's determination (*see People v Smith*, 73 NY2d 961, 962-963 [1989]; *People v Williams*, 118 AD3d 1429, 1430 [4th Dept 2014], *lv denied* 24 NY3d 1222 [2015]). In any event, defendant's contention lacks merit. It is well settled that a defendant may plead guilty to a legally impossible crime (*see People v Foster*, 19 NY2d 150, 153-154 [1967]; *People v Cordoba*, 80 AD3d 461, 462 [1st Dept 2011], *lv denied* 16 NY3d 857 [2011]), and there is no authority for defendant's claim that a legally impossible crime cannot be the prior felony for predicate sentencing purposes.

Finally, even assuming, arguendo, that defendant's waiver of the right to appeal does not encompass his challenge to the severity of the sentence, we perceive no basis in the record upon which to modify the sentence as a matter of discretion in the interest of justice (*see*

CPL 470.15 [6] [b]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

731

KA 15-01655

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY D. MCCLARY, DEFENDANT-APPELLANT.

MICHAEL G. CIANFARANO, OSWEGO, FOR DEFENDANT-APPELLANT.

ANTHONY D. MCCLARY, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered July 24, 2015. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree (four counts), criminal possession of a controlled substance in the third degree (five counts), criminally using drug paraphernalia in the second degree (three counts) and perjury in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, four counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and five counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1]), defendant contends that the evidence is legally insufficient to support the conviction. Defendant failed to preserve his contention for our review, inasmuch as he made only a general motion for a trial order of dismissal with respect to all but one count (*see People v Gray*, 86 NY2d 10, 19 [1995]) and, with respect to that one count, he failed to renew his motion after presenting evidence (*see People v Hines*, 97 NY2d 56, 62 [2001], *rearg denied* 97 NY2d 678 [2001]; *People v Huitt*, 149 AD3d 1481, 1482 [4th Dept 2017], *lv denied* 30 NY3d 950 [2017]). We note, however, that " 'we necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of defendant's challenge regarding the weight of the evidence' " (*People v Stepney*, 93 AD3d 1297, 1298-1299 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]). 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 conclude that the verdict is not against the weight of the evidence

(*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant failed to preserve for our review his contention that County Court improperly penalized him for exercising his right to a jury trial when it imposed a sentence greater than that offered during plea negotiations (*see People v Jackson*, 159 AD3d 1372, 1373 [4th Dept 2018]), and defendant concedes that he failed to preserve for our review his contention concerning prosecutorial misconduct on summation. We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). To the extent that defendant's contention that he received ineffective assistance of counsel is based on matters outside the record on appeal, his contention must be raised by way of a motion pursuant to CPL article 440 (*see generally People v Johnson*, 81 AD3d 1428, 1428 [4th Dept 2011], *lv denied* 16 NY3d 896 [2011]). To the extent that we are able to review the remaining instances of alleged ineffective assistance on the record before us, we conclude that he received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, the sentence imposed is not unduly harsh or severe.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

732

KA 15-01997

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY LANKFORD, DEFENDANT-APPELLANT.

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

TIMOTHY LANKFORD, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered April 6, 2015. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree and attempted petit larceny.

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 second degree (Penal Law § 140.25 [2]) and attempted petit larceny (§§ 110.00, 155.25). The conviction arose from an incident in which police officers, responding to a 911 call of a burglary in process, arrived to find defendant and two other males dressed in black clothing on the porch of the subject house. The inside of the house was ransacked and the front door was damaged. Gloves and masks were found on the other two men, and a third set of gloves and a black ski mask were found discarded in the alleyway next to the home, which was situated underneath the porch on which defendant had been found. A crowbar and the victim's cell phone were recovered from the backpack carried by one of the other men. Defendant initially denied knowing the two men and insisted that he had just been found at the wrong place at the wrong time. Testimony given at trial by the mother of one of the other two men established that defendant was related to both men, had known them all of his life, and had at one time lived for a period of time with one of the men.

Defendant's contention in his main and pro se supplemental briefs that the evidence is legally insufficient because the People failed to establish that he engaged in any criminal conduct is unpreserved for

our review by his general motion for a trial order of dismissal based on "the failure of the People to prove a prima [facie] case" (*see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Parsons*, 30 AD3d 1071, 1072 [4th Dept 2006], *lv denied* 7 NY3d 816 [2006]). Although defendant raised that contention in his CPL 330.30 motion, "a motion pursuant to CPL 330.30 does not preserve for our review a contention that is not otherwise preserved" (*People v Calkins*, 1 AD3d 1021, 1022 [4th Dept 2003], *lv denied* 1 NY3d 625 [2004]).

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 in his main and pro se supplemental briefs that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). While an acquittal may not have been unreasonable, we conclude that "the jury correctly weighed the evidence when it convicted defendant of [burglary in the second degree and attempted petit larceny]" (*Danielson*, 9 NY3d at 349). "Great deference is to be accorded to the [factfinder]'s resolution of credibility issues based upon its superior vantage point and its opportunity to view witnesses, observe demeanor and hear the testimony" (*People v Martin*, 122 AD3d 1424, 1425 [4th Dept 2014], *lv denied* 25 NY3d 951 [2015] [internal quotation marks omitted]), and we see no reason to disturb the jury's credibility determinations.

We further conclude, contrary to defendant's contention in his pro se supplemental brief, that defense counsel provided meaningful representation (*see generally People v Benevento*, 91 NY2d 708, 712 [1998]). Counsel diligently presented defendant's theory of the case, effectively cross-examined witnesses, provided cogent opening and closing statements, and lodged appropriate objections throughout the proceedings. With respect to the specific contentions raised by defendant concerning the allegedly ineffective representation he received, we conclude that defendant was not "denied effective assistance of trial counsel merely because counsel [did] not make a motion or argument that [had] little or no chance of success" (*People v Joslyn*, 103 AD3d 1254, 1256 [4th Dept 2013], *lv denied* 21 NY3d 944 [2013] [internal quotation marks omitted]; *see People v Barksdale*, 129 AD3d 1497, 1498 [4th Dept 2015], *lv denied* 26 NY3d 926 [2015], *reconsideration denied* 26 NY3d 1007 [2015]).

Contrary to defendant's contention in his main brief, the sentence is not unduly harsh or severe. We have reviewed defendant's remaining contention in his pro se supplemental brief and conclude that it is without merit.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

733

KA 14-00500

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL T. CHESS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered December 11, 2013. The judgment convicted defendant, upon a jury verdict, of rape in the first degree (two counts), menacing in the second degree and petit larceny (two counts).

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

Same memorandum as in *People v Chess* ([appeal No. 1] — AD3d — [June 8, 2018] [4th Dept 2018]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

739

CA 17-01997

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

CHRISTOPHER FISCHER AND GABRIELLE LONERGAN, ON BEHALF OF THEMSELVES AND ALL OTHER EMPLOYEES SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS,

V ORDER

MICHAEL'S BANQUET FACILITY, INC., DEFENDANT, JOSEPH GARGANO AND JOSEPH A. GARGANO, RESPONDENTS.

THOMAS & SOLOMON LLP, ROCHESTER (JESSICA L. LUKASIEWICZ OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GROSS SHUMAN P.C., BUFFALO (KEVIN R. LELONEK OF COUNSEL), FOR RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, Jr., J.), entered January 9, 2017. The order denied the motion of plaintiffs for leave to amend the complaint to add Joseph Gargano and Joseph A. Gargano as defendants.

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

740

CA 17-02032

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

THOMAS GILEWICZ, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BRYLIN HOSPITAL, ALSO KNOWN AS BRYLIN HOSPITALS, DR. KANG BALVINDER, BUFFALO GENERAL PSYCHIATRIC UNIT AND BUFFALO GENERAL HOSPITAL, DEFENDANTS-RESPONDENTS.

LAW OFFICE OF JOSEPH G. MAKOWSKI, LLC, BUFFALO (JOSEPH MAKOWSKI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FELDMAN KIEFFER, LLP, BUFFALO (ADELA APRODU OF COUNSEL), FOR DEFENDANT-RESPONDENT BRYLIN HOSPITAL, ALSO KNOWN AS BRYLIN HOSPITALS.

RICOTTA & VISCO, BUFFALO (TOMAS J. CALLOCCHIA OF COUNSEL), FOR DEFENDANT-RESPONDENT DR. KANG BALVINDER.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (ADAM P. DEISINGER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS BUFFALO GENERAL PSYCHIATRIC UNIT AND BUFFALO GENERAL HOSPITAL.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered August 7, 2017. The order denied plaintiff's motion for leave to renew and leave to reague.

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.

Memorandum: In this medical malpractice action, defendants moved for, inter alia, summary judgment dismissing the second amended complaints against them. Supreme Court granted the motions, and plaintiff moved for leave to renew and reargue. Plaintiff now appeals from an order denying his motion. We dismiss the appeal from that part of the order denying that part of plaintiff's motion seeking leave to reargue inasmuch as no appeal lies therefrom (*see Kirchner v County of Niagara*, 153 AD3d 1572, 1574 [4th Dept 2017]). Contrary to plaintiff's contention, the court properly denied that part of the motion seeking leave to renew. Plaintiff failed to submit "new facts not offered on the prior motion[s] that would change the prior determination" (CPLR 2221 [e] [2]; *see Matter of Kairis v Graham*, 118 AD3d 1494, 1494-1495 [4th Dept 2014]). The alleged new facts were known to plaintiff and presented to the court at oral argument of

defendants' motions.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

741

CA 17-02175

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

IN THE MATTER OF BABY BOY O.

BRITTNEY L.P. AND NICHOLAS J.P., PETITIONERS-RESPONDENTS;
MELODY O., RESPONDENT-APPELLANT;
ADOPTION S.T.A.R., AND SEAN D. LAIR, GUARDIAN AD LITEM, RESPONDENTS-RESPONDENTS.

MEMORANDUM AND ORDER

NIXON PEABODY LLP, ALBANY (CAITLIN A. DONOVAN OF COUNSEL), FOR RESPONDENT-APPELLANT.

ASHCRAFT FRANKLIN & YOUNG, LLP, ROCHESTER (GREGORY A. FRANKLIN OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

GLEASON, DUNN, WALSH & O'SHEA, ALBANY (BRENDAN C. O'SHEA OF COUNSEL), FOR RESPONDENT-RESPONDENT ADOPTION S.T.A.R.

DEVALK, POWER, LAIR & WARNER, P.C., SODUS (SEAN D. LAIR OF COUNSEL), RESPONDENT-RESPONDENT PRO SE.

Appeal from an order of the Surrogate's Court, Wayne County (Richard M. Healy, S.), entered March 16, 2017. The order granted the petition for approval of the adoption of Baby Boy O.

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

Memorandum: Shortly after the birth of the subject child, Melody O. (respondent), the child's biological mother, executed a surrender of guardianship and custody of the child to respondent Adoption S.T.A.R. Respondent subsequently executed a revocation of her surrender, and the parties, pursuant to a stipulated order, later agreed that her surrender of the child was voluntary and effective and that her revocation was proper and timely. The stipulated order triggered a hearing to determine the issue of custody of the child based on his best interests (*see* Social Services Law § 384 [5], [6]).

Social Services Law § 384 (6) provides that, "[i]n an action or proceeding to determine the custody of a child not in foster care surrendered for adoption and placed in an adoptive home or to revoke or annul a surrender instrument in the case of such child placed in an adoptive home, the parent or parents who surrendered such child shall have no right to the custody of such child superior to that of the adoptive parents, notwithstanding that the parent or parents who

surrendered the child are fit, competent and able to duly maintain, support and educate the child. The custody of such child shall be awarded solely on the basis of the best interests of the child, and there shall be no presumption that such interests will be promoted by any particular custodial disposition." "The primary factors to be considered in determining what custodial disposition will be in a child's best interests include the ability to provide for the child's emotional and intellectual development, the quality of the home environment, and the parental guidance provided . . . In addition, other relevant considerations include the original placement of the child, the length of that placement, the financial status and ability of the parents to provide for the child, and the relative fitness of the prospective adoptive parents and the biological parents" (*Matter of Anya W. [Darryl W.—Chalika W.-R.]*, 156 AD3d 709, 710 [2d Dept 2017]).

Contrary to respondent's contention, we conclude that the determination of Surrogate's Court to permit petitioners, the adoptive parents, to complete the adoption is supported by the record inasmuch as "the adoptive parents demonstrated the ability to establish and maintain continuous stable relationships and employment, and the record demonstrates that they are better suited to meet the day-to-day and life-long physical, emotional, and material needs of the child" (*id.* at 709; *see Matter of Baby Boy M.*, 269 AD2d 450, 450-451 [2d Dept 2000]).

We similarly reject respondent's contention that the Surrogate erred in crediting the expert testimony regarding bonding and attachment disorder. In our view, that testimony was not unduly speculative, and the fact that the studies cited by the expert were based on children removed from their biological parents, as opposed to their adoptive parents, was an issue relevant to the weight to be given to the testimony, not its admissibility (*see generally Likos v Niagara Frontier Tr. Metro Sys., Inc.*, 149 AD3d 1474, 1476 [4th Dept 2017]).

We reject respondent's further contentions concerning the validity of her surrender. The record establishes that her unambiguous, open-court stipulation that the surrender was voluntary was reduced to an order that provided, inter alia, that respondent "recognizes that her surrender was properly, voluntarily, and knowingly given, without undue pressure and not under duress; and she withdraws any objections which she has made to the manner in which her surrender was given" (*see* CPLR 2104).

Finally, contrary to respondent's contention, we conclude that she was not denied effective assistance of counsel inasmuch as she did not "demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*Matter of Reinhardt v Hardison*, 122 AD3d 1448, 1449 [4th Dept 2014] [internal quotation marks omitted]; *see Matter of Brenden O.*, 20 AD3d 722, 723 [3d Dept

2005]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

744

CA 18-00029

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

MARIA FEDERCZYK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GARDEN GATE HEALTH CARE FACILITY AND GARDEN GATE HEALTH CARE FACILITY, LLC, DEFENDANTS-RESPONDENTS.

BROWN CHIARI LLP, BUFFALO (THERESA M. WALSH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HARRIS BEACH PLLC, BUFFALO (JASON T. BRITT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered March 9, 2017. The order, insofar as appealed from, granted that part of defendants' motion seeking summary judgment dismissing the complaint to the extent that the complaint, as amplified by the supplemental bill of particulars, alleges that defendants' alleged negligence was a proximate cause of plaintiff's September 9, 2013 fall.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, that part of the motion with respect to the 2013 injury is denied and the complaint, as amplified by the supplemental bill of particulars, is reinstated to that extent.

Memorandum: Plaintiff commenced this action seeking damages arising from the alleged negligent care and treatment she received while she was an inpatient at defendant Garden Gate Health Care Facility (Garden Gate) in November 2008. Plaintiff alleged that defendants' care and treatment caused her to develop foot sores requiring hospitalization in December 2008 as well as subsequent treatment because the foot sores never fully resolved, and she alleged that she fractured her right femur when she tripped and fell in 2013 as a result of the continuing treatment related to her foot sores. Defendants moved for summary judgment dismissing the complaint, and Supreme Court granted the motion in part, dismissing the complaint, as amplified by the supplemental bill of particulars, to the extent that it related to the 2013 injury and to the extent that plaintiff sought punitive damages. Plaintiff, as limited by her brief, challenges only that part of the order concerning the 2013 injury.

We agree with plaintiff that the court erred in granting that part of defendants' motion with respect to the 2013 injury. Although defendants met their initial burden by submitting an expert's affidavit establishing that any negligence by defendants was not a proximate cause of the 2013 fall, plaintiff raised triable issues of fact to defeat the motion (*see Selmensberger v Kaleida Health*, 45 AD3d 1435, 1435-1436 [4th Dept 2007]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Plaintiff submitted the affidavit of a physician who averred that the foot sores developed while she was an inpatient at Garden Gate, as a result of defendants' negligent care and treatment. Moreover, he averred that plaintiff underwent continuous treatment due to those injuries and it was that treatment that ultimately caused the fall and subsequent injuries in 2013. We thus conclude that "[t]he motion papers presented a credibility battle between the parties' experts, and issues of credibility are properly left to a jury for its resolution" of those issues (*Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623, 624 [2d Dept 2003]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

750

CA 17-01873

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

PATRICK C. CHASE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JASON ALAN MARSH, TOWN OF MACHIAS AND TOWN OF MACHIAS HIGHWAY DEPARTMENT, DEFENDANTS-RESPONDENTS.

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

BOUVIER LAW LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cattaraugus County (Jeremiah J. Moriarty, III, J.), entered July 20, 2017. The order, insofar as appealed from, dismissed the complaint against defendants Jason Alan Marsh and Town of Machias upon defendants' motion for summary judgment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in part and the complaint is reinstated against defendants Jason Alan Marsh and Town of Machias.

Memorandum: In February 2015, plaintiff was driving to church with his daughter when he crested a hill and observed a snowplow owned by defendant Town of Machias and driven by its employee, defendant Jason Alan Marsh (collectively, defendants), traveling in reverse up the hill. Plaintiff was unable to brake in time and struck the rear end of the plow. The plow continued in reverse for three to four seconds following impact while pushing plaintiff's vehicle, before Marsh realized that the collision had occurred. Plaintiff thereafter commenced this action alleging that Marsh operated the snowplow in a negligent and reckless manner and seeking damages for his injuries. Defendants and defendant Town of Machias Highway Department (Highway Department) moved for summary judgment dismissing the complaint, and Supreme Court granted the motion. Plaintiff did not oppose the motion with respect to the Highway Department, and contends on appeal that the court erred in granting those parts of the motion with respect to defendants, who contended in support thereof that Marsh had not acted with the requisite reckless disregard needed for a finding of liability pursuant to Vehicle and Traffic Law § 1103 (b). We agree with plaintiff, and we therefore reverse the order insofar as appealed from.

Defendants failed to meet their initial burden of establishing that Marsh did not operate the snowplow with reckless disregard for the safety of others, and defendants thus were not entitled to summary judgment dismissing the complaint against them. Vehicle and Traffic Law § 1103 (b) "exempts from the rules of the road all vehicles actually engaged in work on a highway" (*Riley v County of Broome*, 95 NY2d 455, 465 [2000]; *see Hofmann v Town of Ashford*, 60 AD3d 1498, 1499 [4th Dept 2009]). However, the statute does not protect snowplow drivers "from the consequences of their reckless disregard for the safety of others" (§ 1103 [b]). The operator of a snowplow acts with such "reckless disregard" when he or she " 'acts in conscious disregard of a known or obvious risk that is so great as to make it highly probable that harm will follow' " (*Haist v Town of Newstead*, 27 AD3d 1133, 1134 [4th Dept 2006]; *see Bliss v State of New York*, 95 NY2d 911, 913 [2000]; *Rockland Coaches, Inc. v Town of Clarkstown*, 49 AD3d 705, 706 [2d Dept 2008]). The reckless disregard standard "requires a showing of more than a momentary judgment lapse" (*Saarinen v Kerr*, 84 NY2d 494, 502 [1994]; *see Riley*, 95 NY2d at 466).

Here, defendants' submissions in support of the motion establish that Marsh had been a driver of the snowplow route for 15 years and was aware that an intersection where he could safely turn around was less than a quarter of a mile away. Despite that knowledge, Marsh drove the snowplow in reverse, in front of a hill that obscured his view of approaching traffic on a narrow, two-lane country road with a speed limit of 55 miles per hour, without first sounding his horn in warning. Marsh's deposition testimony that he did not realize that he had collided with plaintiff's vehicle until several seconds after the collision raises a question of fact whether he was utilizing his rear view mirrors while traveling in reverse. We therefore conclude that defendants failed to establish that Marsh was not reckless as a matter of law or that the decisions made by him constituted a momentary lapse in judgment (*see Freitag v Village of Potsdam*, 155 AD3d 1227, 1231 [3d Dept 2017], citing *Bliss*, 95 NY2d at 913; *see generally Szczerbiak v Pilat*, 90 NY2d 553, 556-557 [1997]; *Saarinen*, 84 NY2d at 502).

In view of our determination that defendants failed to meet their initial burden, we do not consider the sufficiency of plaintiff's opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

753

KA 13-01133

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL WILSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

MICHAEL WILSON, DEFENDANT-APPELLANT PRO SE.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Onondaga County Court (Donald E. Todd, A.J.), dated February 17, 2012. The order denied defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting defendant of rape in the first degree, predatory sexual assault against a child and endangering the welfare of a child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Onondaga County Court for a hearing pursuant to CPL 440.30 (5) in accordance with the same memorandum as in *People v Wilson* ([appeal No. 2] — AD3d — [June 8, 2018] [4th Dept 2018]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

754

KA 15-00248

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL WILSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

MICHAEL WILSON, DEFENDANT-APPELLANT PRO SE.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Onondaga County Court (Thomas J. Miller, J.), dated November 25, 2014. The order denied defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting defendant of rape in the first degree, predatory sexual assault against a child and endangering the welfare of a child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Onondaga County Court for a hearing pursuant to CPL 440.30 (5) in accordance with the following memorandum: Defendant was convicted in County Court (Walsh, J.) of, inter alia, predatory sexual assault against a child (Penal Law § 130.96) and rape in the first degree (§ 130.35 [1]) in 2010, and we affirmed the judgment of conviction on direct appeal (*People v Wilson*, 112 AD3d 1317 [4th Dept 2013], *lv denied* 23 NY3d 1069 [2014]). While the direct appeal was pending, defendant filed two separate CPL 440.10 motions seeking to vacate the judgment of conviction on various grounds, including ineffective assistance of counsel, prosecutorial misconduct, newly discovered evidence and actual innocence. In the order in appeal No. 1, County Court (Todd, A.J.) denied the first motion without a hearing. In the order in appeal No. 2, County Court (Miller, J.) denied the second motion following a hearing related to the allegations of newly discovered evidence. We conclude that the court in appeal No. 1 erred in summarily denying the first motion and, in appeal No. 2, erred in failing to hold a hearing with respect to the claim of ineffective assistance of counsel.

In both appeal Nos. 1 and 2, many of defendant's allegations of ineffective assistance of counsel are based on evidence outside the record of the direct appeal. Where, as here, "an ineffective assistance of counsel claim involves . . . 'mixed claims' relating to both record-based and nonrecord-based issues . . . [, such] claim may be brought in a collateral proceeding, *whether or not* the [defendant] could have raised the claim on direct appeal" (*People v Evans*, 16 NY3d 571, 575 n 2 [2011], *cert denied* 565 US 912 [2011]). In such situations, i.e., where the "claim of ineffective assistance of counsel cannot be resolved without reference to matter outside of the record, a CPL 440.10 proceeding is the appropriate forum for reviewing the claim *in its entirety*" (*People v Kocaj*, 160 AD3d 766, 767 [2d Dept 2018] [emphasis added]; *see People v Taylor*, 156 AD3d 86, 91-92 [3d Dept 2017], *lv denied* 30 NY3d 1120 [2018]). That is because "each alleged shortcoming or failure by defense counsel should not be viewed as a separate 'ground or issue raised upon the motion' . . . Rather, a 'defendant's claim of ineffective assistance of counsel constitutes a single ground or issue upon which relief is requested' " (*Taylor*, 156 AD3d at 91). In other words, "such a claim constitutes a single, unified claim that must be assessed in totality" (*id.* at 92).

We thus conclude that the motions in appeal Nos. 1 and 2, insofar as they raised allegations of ineffective assistance of counsel, were not procedurally barred and should not have been summarily denied on that ground. Moreover, we further conclude that the court in both appeals should not have denied the motions without a hearing on the respective claims of ineffective assistance of counsel. In support of his claims in appeal Nos. 1 and 2, "defendant established that 'there were sufficient questions of fact . . . whether [trial counsel] had an adequate explanation' for [her] failure to pursue certain lines of defense on cross-examination or for [her] failure to call an expert on defendant's behalf, and defendant 'is therefore entitled to an opportunity to establish that [he] was deprived of meaningful legal representation' " (*People v Caldavado*, 26 NY3d 1034, 1036 [2015]). For example, defense counsel failed to address at trial evidence in the medical records that tended to disprove allegations of penetration. We also note that defendant presented sworn allegations supporting his contention that DNA buccal swabs were taken from him by the use of excessive force. Such an allegation, if true, would support suppression of the damaging DNA evidence had such a motion been made (*see People v Smith*, 95 AD3d 21, 26-28 [4th Dept 2012]). No such motion was made, and "[s]uch a failure, in the absence of a reasonable explanation for it, is hard to reconcile with a defendant's constitutional right to . . . effective assistance of counsel" (*People v Turner*, 5 NY3d 476, 481 [2005]). We thus reverse the orders in appeal Nos. 1 and 2 and remit the matters to County Court to conduct a single hearing before one judge on defendant's respective claims of ineffective assistance of counsel in their entirety.

With respect to defendant's allegations of newly discovered evidence in appeal No. 2, i.e., the victim's recantation of the allegations, we conclude that the court properly determined following a hearing that the victim's alleged recantation did not provide a basis to vacate the judgment of conviction (*see generally People v*

Wong, 11 AD3d 724, 725-726 [3d Dept 2004]).

We have reviewed the myriad other contentions raised by defendant in both motions and conclude that they are without merit.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

755

KA 16-01832

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOSHUA O. PETERKIN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.), rendered April 3, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that said appeal is unanimously dismissed (*see People v Scholz*, 125 AD3d 1492, 1492 [4th Dept 2015], *lv denied* 25 NY3d 1077 [2015]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

756

KA 18-00036

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOSHUA O. PETERKIN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a resentence of the Steuben County Court (Joseph W. Latham, J.), rendered July 31, 2014. Defendant was resentenced upon his conviction of attempted criminal possession of a controlled substance in the third degree.

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

757

KA 15-02160

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JEFFREY MOORE, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTEN N. MCDERMOTT OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered July 22, 2015. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the first degree.

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

760

CA 18-00001

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

PAUL S. POLAKIEWICZ, PLAINTIFF-RESPONDENT,

V ORDER

ZACHARY J. COLE, DEFENDANT-APPELLANT.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (MARTHA E. DONOVAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

FESSENDEN LAUMER & DEANGELO, PLLC, JAMESTOWN (MARY B. SCHILLER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Frank A. Sedita, III, J.), entered October 24, 2017. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

766

CA 18-00198

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

ISRAEL JENKINS, PLAINTIFF-RESPONDENT,

V ORDER

WILLIE JAMES ALSTON, JR., ET AL., DEFENDANTS,
AND TIEN NGUYEN, DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (GRETA K. KOLCON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered June 29, 2017. The order denied the motion of defendant Tien Nguyen for summary judgment dismissing the complaint against her.

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

767

CA 17-02090

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

BONNIE J. YONKER, PLAINTIFF-APPELLANT,

V ORDER

ANNALIS E. KAMINSKI, DOAN BUICK, INC., AND
DOAN MOTOR CARS, LLC, DEFENDANTS-RESPONDENTS.

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

GOLDBERG SEGALLA LLP, ROCHESTER (NICHOLAS J. PONTZER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Monroe County (Debra A. Martin, A.J.), entered November 15, 2017. The judgment, upon a jury verdict, found in favor of defendants and against plaintiff.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 17, 2018,

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

775

KA 16-01492

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CORBIN J. KINSEY, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered August 11, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of stolen property in the third degree, unauthorized use of a vehicle in the third degree (two counts) and grand larceny in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, grand larceny in the third degree (Penal Law § 155.35 [1]), defendant contends that the waiver of the right to appeal is not valid, and he challenges the severity of the sentence. We agree with defendant that the waiver of the right to appeal is invalid because the perfunctory inquiry made by Supreme 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]). Although defendant also signed a written waiver of the right to appeal, "[t]he court did not inquire of defendant whether he understood the written waiver or whether he had even read the waiver before signing it" (*People v Bradshaw*, 18 NY3d 257, 262 [2011]; *see People v Sanford*, 138 AD3d 1435, 1436 [4th Dept 2016]). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

777

KA 14-00176

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KIMBERLY J. JONES, ALSO KNOWN AS KIMBERLY SMITH,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered July 1, 2013. The judgment convicted defendant, upon her plea of guilty, of arson in the second degree.

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

778

KA 16-02101

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES J. GOULD, DEFENDANT-APPELLANT.

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

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara Sheldon, J.), rendered July 27, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted burglary in the third degree (Penal Law §§ 110.00, 140.20), defendant contends that his waiver of the right to appeal is not valid, and he challenges the severity of the sentence. Contrary to defendant's contention, the record establishes that he voluntarily, knowingly and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]). The valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see People v Lococo*, 92 NY2d 825, 827 [1998]; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

781

KA 16-01236

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAMAR DAVIS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP 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 (David W. Foley, A.J.), rendered July 11, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and criminal possession 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 him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a controlled substance in the fifth degree (§ 220.06 [5]). With respect to defendant's contention that evidence should have been suppressed as the result of an unreasonable search and seizure, we affirm for reasons stated in the decision at County Court (Pietruszka, J.). Contrary to defendant's further contention, the two-year period of postrelease supervision imposed by County Court (Foley, A.J.) for the conviction of criminal possession of a controlled substance in the fifth degree is not illegal (*see* §§ 70.45 [2] [c]; 70.70 [4] [b]), and the sentence imposed for that count is not unduly harsh or severe.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

787

CA 17-01275

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

REVEREND CHRISTOPHER EZEH, PLAINTIFF-APPELLANT,

V ORDER

DANIEL J. CONDON AND THE CATHOLIC DIOCESE OF ROCHESTER, DEFENDANTS-RESPONDENTS.

CHRISTOPHER EZEH, PLAINTIFF-APPELLANT PRO SE.

HARRIS BEACH PLLC, PITTSFORD (AARON T. FRAZIER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered April 27, 2017. The order, among other things, granted the motion of defendants to dismiss the complaint, and dismissed the complaint.

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

789

CA 17-02088

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

JULIE E. PASEK, INDIVIDUALLY AND AS POWER OF ATTORNEY FOR JAMES G. PASEK, PLAINTIFF-RESPONDENT,

V ORDER

CATHOLIC HEALTH SYSTEM, INC., ET AL., DEFENDANTS, GREGORY V. TOBIAS, M.D. AND GEORGE R. BANCROFT, M.D., DEFENDANTS-APPELLANTS.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (J. MARK GRUBER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BROWN CHIARI LLP, BUFFALO (ANGELO S. GAMBINO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered February 24, 2017. The order denied the motion of defendants Gregory V. Tobias, M.D., and George R. Bancroft, M.D., to dismiss the complaint against them.

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

794

CA 17-02174

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

HUEBSCHER CONSULTING CORP., AND ERIC HUEBSCHER,
PLAINTIFFS-APPELLANTS,

V ORDER

WESTGATE NURSING HOME, INC., DEFENDANT-RESPONDENT.

RAYMOND C. STILWELL, AMHERST, FOR PLAINTIFFS-APPELLANTS.

Appeal from an order of the Supreme Court, Monroe County (William K. Taylor, J.), dated March 22, 2017. The order, among other things, granted defendant's cross motion to dismiss the complaint.

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

796

KA 17-00489

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEWIS SMITH, DEFENDANT-APPELLANT.

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

LEWIS SMITH, DEFENDANT-APPELLANT PRO SE.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered January 17, 2017. The judgment convicted defendant, upon his 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.

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), defendant contends that his plea was not knowing, voluntary and intelligent because the prosecutor, eight months before the plea, incorrectly stated that defendant could be sentenced as a persistent felony offender (*cf. People v Boykins*, — AD3d —, —, 2018 NY Slip Op 02919, *2-3 [Apr. 27, 2018] [4th Dept 2018]). Defendant's contention is not preserved for our review inasmuch as he "did not move to withdraw the plea or to vacate the judgment of conviction on [the] ground" now raised on appeal (*People v Brown*, 151 AD3d 1951, 1952 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017]; *see People v Gast*, 114 AD3d 1270, 1270 [4th Dept 2014], *lv denied* 22 NY3d 1198 [2014]). In any event, that contention is without merit (*see People v Johnson*, 24 AD3d 1259, 1259 [4th Dept 2005], *lv denied* 6 NY3d 814 [2006]; *see also People v Morrison*, 78 AD3d 1615, 1616 [4th Dept 2010], *lv denied* 16 NY3d 834 [2011]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

804

CA 17-01170

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

CHARLES HARRISON AND KATHRYN HARRISON,
PLAINTIFFS-APPELLANTS,

V ORDER

ALLSTATE INDEMNITY COMPANY, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

WELCH, DONLON & CZARPLES, CORNING (ANNA CZARPLES OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

CHELUS HERDZIK SPEYER & MONTE, P.C., BUFFALO (KATY M. HEDGES OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Marianne Furfure, A.J.), entered March 31, 2017. The order, among other things, denied plaintiffs' cross motion for summary judgment against defendant Allstate Indemnity Company.

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

808

CA 18-00073

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

NANETTE DAVIS AND ROLAND DAVIS,
PLAINTIFFS-RESPONDENTS,

V ORDER

FARVIEW GOLF COURSE AND COUNTRY INN, A JOINT VENTURE, FARVIEW CONSTRUCTION CORP., AND JOHNSTONE GROUP, LIMITED, DEFENDANTS-APPELLANTS.

DIXON & HAMILTON, LLP, GETZVILLE (MICHAEL B. DIXON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CELLINO & BARNES, P.C., ROCHESTER (ROBERT L. VOLTZ OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), dated June 5, 2017. The order denied the motion of defendants for summary judgment dismissing the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 5, 2018,

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

829

CA 17-01009

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

ALFRED E. EASTON, JR., AND JANET EASTON,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V ORDER

M.A. MORTENSON COMPANY, MODERN MOSAIC LIMITED,
HARBORCENTER DEVELOPMENT, LLC,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.

M.A. MORTENSON COMPANY, ET AL.,
THIRD-PARTY PLAINTIFFS,

V

PRECAST SERVICES INC., THIRD-PARTY
DEFENDANT-RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

MAXWELL MURPHY, LLC, BUFFALO (JOHN F. MAXWELL OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

HURWITZ & FINE, P.C., BUFFALO (DAVID R. ADAMS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS AND THIRD-PARTY PLAINTIFFS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (CORY J. WEBER OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered September 19, 2016. The order, inter alia, denied the motion of plaintiffs for partial summary judgment on liability against defendants-respondents.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 22, 2018,

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

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

830

CA 17-01010

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

ALFRED E. EASTON, JR., AND JANET EASTON,
PLAINTIFFS-APPELLANTS,

V ORDER

M.A. MORTENSON COMPANY, MODERN MOSAIC LIMITED
AND HARBORCENTER DEVELOPMENT, LLC,
DEFENDANTS-RESPONDENTS.

M.A. MORTENSON COMPANY, ET AL.,
THIRD-PARTY PLAINTIFFS,

V

PRECAST SERVICES INC., THIRD-PARTY
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

MAXWELL MURPHY, LLC, BUFFALO (JOHN F. MAXWELL OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HURWITZ & FINE, P.C., BUFFALO (DAVID R. ADAMS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS AND THIRD-PARTY PLAINTIFFS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (CORY J. WEBER OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered April 3, 2017. The order, inter alia, denied the motion of plaintiffs for partial summary judgment on liability.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 22, 2018,

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

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

MOTION NO. (586/05) KA 03-00322. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WALLACE DRAKE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, PERADOTTO, TROUTMAN, AND WINSLOW, JJ. (Filed June 8, 2018.)

MOTION NO. (933/14) KA 12-01069. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CLARENCE E. SCARVER, ALSO KNOWN AS "C," DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, AND WINSLOW, JJ. (Filed June 8, 2018.)

MOTION NO. (343/15) KA 11-02364. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DENYS ALMEIDA, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, CARNI, CURRAN, AND WINSLOW, JJ. (Filed June 8, 2018.)

MOTION NO. (994/15) KA 11-01119. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MARQUIS PARKER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, LINDLEY, CURRAN, AND TROUTMAN, JJ. (Filed June 8, 2018.)

MOTION NO. (131/17) KA 10-00287. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V FRANK GARCIA, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, CURRAN, AND TROUTMAN, JJ. (Filed June 8, 2018.)

MOTION NO. (411/17) CA 16-01124. -- COUNTY OF JEFFERSON, PLAINTIFF-RESPONDENT, V ONONDAGA DEVELOPMENT, LLC, DEFENDANT-APPELLANT. -- Motion for reargument be and the same hereby is granted in part and, upon reargument, the memorandum and order entered June 16, 2017 (151 AD3d 1793) is amended by deleting the ninth paragraph of the memorandum and replacing it with the following paragraph:

> To the extent that the County contends that the encroachment was permissible under the doctrine of lateral support, the County's submissions in support of its motion do not contain that contention, and thus that contention is not properly before us (*see Ciesinski*, 202 AD2d at 985). Although the County asserts that it raised that contention in the memoranda of law that it submitted in support of its motion, we note that the memoranda of law are not part of the record on appeal, and the County failed to object to defendant's submitted appendix and failed to submit its own appendix containing those memoranda (*see* CPLR 5528 [b]; 22 NYCRR 1000.4 [d] [2] [ii]; *Lyndaker v Board of Educ. of W. Can. Val. Cent. Sch. Dist.*, 129 AD3d 1561, 1564-1565 [4th Dept 2015]; *see generally Zawatski v Cheektowaga-Maryvale Union Free Sch. Dist.*, 261 AD2d 860, 860 [4th Dept 1999], *lv denied* 94 NY2d 754 [1999]).

PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ. (Filed June 8, 2018.)

MOTION NO. (1098/17) CA 15-02155. -- PATRICIA A. RICKICKI, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF DAVID P. RICKICKI, DECEASED, PLAINTIFF-APPELLANT, V BORDEN CHEMICAL, DIVISION OF BORDEN, INC., ET AL., DEFENDANTS, UNIMIN CORPORATION AND U.S. SILICA COMPANY, DEFENDANTS-RESPONDENTS. (ACTION NO. 1.) MICHAEL C. CROWLEY AND SHARON M.

CROWLEY, PLAINTIFFS-APPELLANTS, V C-E MINERALS, INC., ET AL., DEFENDANTS, UNIMIN CORPORATION, UNIMIN SPECIALTY MINERALS, INC., MEYERS CHEMICALS, U.S. SILICA COMPANY, MALVERN MINERALS COMPANY, FERRO CORPORATION, NYCO MINERALS COMPANY AND CHARLES B. CHRYSTAL CO., INC., DEFENDANTS-RESPONDENTS. (ACTION NO. 2.) (APPEAL NO. 1.) -- Motions for reargument or leave to appeal to the Court of Appeals, and other relief denied. PRESENT: WHALEN, P.J., SMITH, CARNI, DEJOSEPH, AND CURRAN, JJ. (Filed June 8, 2018.)

MOTION NO. (1099/17) CA 15-02156. -- PATRICIA A. RICKICKI, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF DAVID P. RICKICKI, DECEASED, PLAINTIFF-APPELLANT, V BORDEN CHEMICAL, DIVISION OF BORDEN, INC., ET AL., DEFENDANTS, UNIMIN CORPORATION AND U.S. SILICA COMPANY, DEFENDANTS-RESPONDENTS. (ACTION NO. 1.) MICHAEL C. CROWLEY AND SHARON M. CROWLEY, PLAINTIFFS-APPELLANTS, V C-E MINERALS, INC., ET AL., DEFENDANTS, UNIMIN CORPORATION, UNIMIN SPECIALTY MINERALS, INC., MEYERS CHEMICALS, U.S. SILICA COMPANY, MALVERN MINERALS COMPANY, FERRO CORPORATION, NYCO MINERALS COMPANY AND CHARLES B. CHRYSTAL CO., INC., DEFENDANTS-RESPONDENTS. (ACTION NO. 2.) (APPEAL NO. 2.) -- Motions for reargument or leave to appeal to the Court of Appeals, and other relief denied. PRESENT: WHALEN, P.J., SMITH, CARNI, DEJOSEPH, AND CURRAN, JJ. (Filed June 8, 2018.)

MOTION NO. (1417/17) CA 16-01639. -- JEFFREY'S AUTO BODY, INC., PLAINTIFF-APPELLANT, V ALLSTATE INSURANCE COMPANY AND ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND TROUTMAN, JJ. (Filed June 8, 2018.)

MOTION NO. (1418/17) CA 16-01640. -- NICK'S GARAGE, INC., PLAINTIFF-APPELLANT, V ALLSTATE INSURANCE COMPANY, ALLSTATE INDEMNITY COMPANY, AND ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND TROUTMAN, JJ. (Filed June 8, 2018.)

MOTION NO. (50/18) KA 16-00046. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHEILA M. KOWAL, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, NEMOYER, AND WINSLOW, JJ. (Filed June 8, 2018.)

MOTION NO. (191/18) CA 17-01429. -- RANDAL D. SMITH AND ALICIA SMITH, PLAINTIFFS-APPELLANTS, V SAFECO INSURANCE COMPANY OF AMERICA, DEFENDANT-RESPONDENT, ET AL., DEFENDANT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY,

CURRAN, AND WINSLOW, JJ. (Filed June 8, 2018.)

MOTION NO. (218/18) KAH 17-00592. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. JOHN A.J. HINSPETER, II, PETITIONER-APPELLANT, V DALE A. ARTUS, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT. -- Motion for reargument denied. PRESENT: WHALEN, P.J., SMITH, LINDLEY, DEJOSEPH, AND NEMOYER, JJ. (Filed June 8, 2018.)

MOTION NO. (222/18) KA 11-01135. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MUZZAMMIL S. HASSAN, ALSO KNOWN AS MO HASSAN, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: WHALEN, P.J., SMITH, LINDLEY, DEJOSEPH, AND NEMOYER, JJ. (Filed June 8, 2018.)

MOTION NO. (361/18) CA 17-01554. -- LORNA FORBES, AS EXECUTOR OF THE ESTATE OF HUGH FORBES, DECEASED, PLAINTIFF-RESPONDENT, V CARIS LIFE SCIENCES, INC., CARIS DIAGNOSTICS, INC., MIRCA LIFE SCIENCES, INC., AND MIRACA HOLDING GROUP, INC., DEFENDANTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND WINSLOW, JJ. (Filed June 8, 2018.)

MOTION NO. (363/18) CA 17-01248. -- JONATHAN R. GUSTKE, PLAINTIFF-APPELLANT-RESPONDENT, V JONATHAN T. NICKERSON, BRIAN H. FOLEY, DEFENDANTS-RESPONDENTS, MARY BETH LIPOME AND MARY A. HOURT,

DEFENDANTS-RESPONDENTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND WINSLOW, JJ. (Filed June 8, 2018.)