SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MAY 3, 2019

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

1312

KA 16-01140

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH LEE, DEFENDANT-APPELLANT.

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

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Monroe County (Francis A. Affronti, J.), dated June 7, 2016. The order denied defendant's motion pursuant to CPL 440.10 to vacate his judgment of conviction.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Supreme Court, Monroe County, for a hearing pursuant to CPL 440.30 (5).

Memorandum: Defendant appeals from an order denying his CPL 440.10 motion to vacate a judgment convicting him, following a jury trial, of ten charges ranging from robbery in the first degree (Penal Law § 160.15 [1], [3]) to attempted petit larceny (§§ 110.00, 155.25). On a prior appeal, we affirmed the judgment of conviction (*People v Lee*, 284 AD2d 943, 943 [4th Dept 2001], *lv denied* 96 NY2d 920 [2001]).

Defendant filed seven postjudgment motions in state and federal court, all of which were denied. Defendant's codefendant, who was tried jointly with defendant, also filed several postjudgment motions and, in 2011, the Court of Appeals determined that the codefendant was entitled to a reconstruction hearing to determine whether he was present at a pretrial *Sandoval* hearing (*People v Walker*, 18 NY3d 839, 840 [2011]). Following the reconstruction hearing, Supreme Court concluded that the codefendant failed to meet his burden of establishing his absence from the *Sandoval* hearing (*People v Walker*, 117 AD3d 1578, 1579 [4th Dept 2014]). We reversed the order, vacated the codefendant's judgment of conviction, and granted him a new trial on the ground that the People, not the codefendant, had the burden of proving that he was present at the *Sandoval* hearing, which they failed to meet (*id*.). Defendant thereafter filed the instant CPL 440.10 motion, contending that he too was absent from the *Sandoval* hearing.

Supreme Court summarily denied the motion, and we granted his CPL 460.15 application for a certificate granting leave to appeal.

We agree with defendant that denial of the motion was not mandated by CPL 440.10 (2) (c) inasmuch as sufficient facts did not appear in the trial transcript to permit adequate review of defendant's *Sandoval* contention on his direct appeal (*see generally People v Pace*, 155 AD3d 1669, 1673 [4th Dept 2017]). Moreover, defendant's motion relied on, inter alia, the testimony from the codefendant's reconstruction hearing, which was unavailable to defendant when he perfected his direct appeal. During that hearing, the codefendant testified that he and defendant were brought into the courtroom together, implying that they both were absent from the *Sandoval* hearing.

Furthermore, "[a]lthough a court may refuse to consider issues that were or could have been raised in prior postjudgment motions, we nevertheless 'exercise our discretion to reach the merits' . . . and we conclude that the court erred in denying the motion without a hearing" (*People v Reed*, 159 AD3d 1551, 1552 [4th Dept 2018]; *see* CPL 440.10 [3] [b], [c]). In our view, because defendant submitted credible evidence indicating that he was absent from the *Sandoval* hearing, and the People failed to counter that showing, the court erred in denying his motion without first conducting a hearing to resolve that issue (*see Reed*, 159 AD3d at 1552-1553; *see also People v Jones*, 24 NY3d 623, 636 [2014]; *People v Parsons*, 114 AD3d 1154, 1154 [4th Dept 2014]). We therefore reverse the order and remit the matter to Supreme Court for a hearing pursuant to CPL 440.30 (5).

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

1319

KA 15-00277

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRANCE L. STRONG, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered November 14, 2014. The judgment convicted defendant, upon a jury verdict, of assault in the second degree (four counts), endangering the welfare of a child (four counts), attempted assault in the second degree and assault in the third degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, four counts of assault in the second degree (Penal Law § 120.05 [2]), and one count of attempted assault in the second degree (§§ 110.00, 120.05 [1]). In appeal No. 2, defendant appeals from his resentence on that conviction.

Initially, we dismiss the appeal from the judgment in appeal No. 1 insofar as it imposed sentence because that part of the judgment was superseded by the resentence at issue in appeal No. 2 (*see People v Weathington* [appeal No. 2], 141 AD3d 1173, 1173 [4th Dept 2016], *lv denied* 28 NY3d 975 [2016]). We also dismiss the appeal from the resentence in appeal No. 2 inasmuch as defendant has not raised any challenges with respect thereto (*see People v Griffin*, 151 AD3d 1824, 1825 [4th Dept 2017], *lv denied* 30 NY3d 949 [2017]).

We reject defendant's contention that Supreme Court erred in denying his challenge for cause to a prospective juror. Although no "particular expurgatory oath or 'talismanic' words [are required,] . . . [prospective] jurors must clearly express that any prior experiences

or opinions that reveal the potential for bias will not prevent them from reaching an impartial verdict" (*People v Arnold*, 96 NY2d 358, 362 [2001]; *see People v Mitchum*, 130 AD3d 1466, 1467 [4th Dept 2015]). Here, when a prospective juror's answers raised a concern, the court and defense counsel elicited unequivocal statements from the prospective juror that she would "decide the case impartially and based on the evidence" (*People v Garcia*, 148 AD3d 1559, 1560 [4th Dept 2017], *lv denied* 30 NY3d 980 [2017] [internal quotation marks omitted]).

We reject defendant's further contention that the court erred in denying his request to charge the jury with assault in the third degree as a lesser included offense of each of the assault in the second degree counts (*see People v Vaughn*, 36 AD3d 434, 436 [1st Dept 2007], *lv denied* 9 NY3d 870 [2007], *cert denied* 552 US 1284 [2008]; *People v Saunders*, 292 AD2d 780, 781 [4th Dept 2002], *lv denied* 98 NY2d 681 [2002]). "To establish a charge on a lesser included offense, a defendant must show both that the greater crime cannot be committed without having concomitantly committed the lesser by the same conduct, and that a reasonable view of the evidence supports a finding that he or she committed the lesser, but not the greater, offense" (*People v James*, 11 NY3d 886, 888 [2008]). Here, it is undisputed that the first prong of that test is satisfied because assault in the third degree (Penal Law § 120.00 [1]) is a lesser included offense of assault in the second degree as charged in the indictment (§ 120.05 [2]; *see People v Smith*, 121 AD3d 1568, 1569 [4th Dept 2014], *lv denied* 26 NY3d 1150 [2016]). With respect to the second prong, however, we conclude that there is no reasonable view of the evidence to support a finding that defendant "intended to cause physical injury to the victim[s] and that he caused physical injury to the victim[s], but that he did not do so 'by means of . . . a dangerous instrument' " (*People v Brown*, 117 AD3d 1536, 1538 [4th Dept 2014], quoting § 120.05 [2]; *see People v Agina*, 163 AD3d 980, 980 [2d Dept 2018], *lv denied* 32 NY3d 1062 [2018]).

The record amply establishes that defendant repeatedly struck the victims with a folded-over extension cord, leaving scars on both victims that were still visible months after the beatings. Under the circumstances in which the extension cord was used, it was "readily capable of causing . . . serious physical injury" (Penal Law § 10.00 [13]), and therefore constituted a dangerous instrument (*see People v Rozanski*, 209 AD2d 1018, 1018 [4th Dept 1994], *lv denied* 84 NY2d 1048 [1995]; *see also People v Still*, 26 AD3d 816, 817 [4th Dept 2006], *lv denied* 6 NY3d 853 [2006]).

We have reviewed defendant's remaining contention and conclude that it lacks merit.

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

1320

KA 15-00706

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

V MEMORANDUM AND ORDER

TERRANCE L. STRONG, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a resentence of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered March 10, 2015. Defendant was resentenced upon his conviction of assault in the second degree (four counts), endangering the welfare of a child (four counts), attempted assault in the second degree and assault in the third degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Strong* ([appeal No. 1] — AD3d — [May 3, 2019] [4th Dept 2019]).

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

1367

CA 18-01192

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

ABR WHOLESALERS, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GENA M. KING, DEFENDANT-APPELLANT,
MICHAEL J. WOODWARD, JR., AND HUGHESCO OF
BUFFALO, INC., DEFENDANTS.

BARCLAY DAMON LLP, BUFFALO (GREGORY ZINI OF COUNSEL), FOR DEFENDANT-APPELLANT.

GETMAN & BIRYLA, LLP, BUFFALO (AARON R. WALKOW OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered September 26, 2017. The order, among other things, granted plaintiff's motion for summary judgment.

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

Memorandum: Defendant Hughesco of Buffalo, Inc. (Hughesco) owed nearly $90,000 on its credit account with plaintiff for goods and materials that it had purchased prior to the death of its owner. After the owner's death, plaintiff requested that defendants Gena M. King, the owner's stepdaughter, and Michael J. Woodward, Jr., the then-operator of Hughesco, execute a promissory note in favor of plaintiff for the outstanding balance, in exchange for which plaintiff would continue to supply goods and materials to Hughesco on credit. King and Woodward signed the note, and three payments were made in accordance with the terms thereof. When payments ceased, plaintiff commenced this action seeking to enforce the note and to recover the balance owed. King appeals from an order granting plaintiff's motion for summary judgment on the complaint and denying her cross motion for summary judgment dismissing the complaint against her. We affirm.

Contrary to King's contention, we conclude that plaintiff met its initial burden by submitting a copy of the note and an affidavit from its director of finance attesting to King's failure to repay the note in accordance with its terms (*see Quadrant Mgt. Inc. v Hecker*, 102 AD3d 410, 410 [1st Dept 2013]; *Sandu v Sandu*, 94 AD3d 1545, 1546 [4th Dept 2012]; *see also Thor Gallery At S. DeKalb, LLC v Reliance Mediaworks [USA] Inc.*, 143 AD3d 498, 498 [1st Dept 2016]). Thus, the burden shifted to King to "come forward with evidentiary proof showing

the existence of a triable issue of fact with respect to a bona fide defense of the note" (*Sandu*, 94 AD3d at 1546 [internal quotation marks omitted]; *see Lamar v Vasile* [appeal No. 4], 49 AD3d 1218, 1219 [4th Dept 2008]; *Moezinia v Baroukhian*, 247 AD2d 452, 453 [2d Dept 1998]). Although "lack of consideration . . . and fraud in the inducement . . . may be bona fide defenses to a promissory note" (*Creative Culinary Concepts, LLC v Sam Greco Constr., Inc.*, 134 AD3d 1294, 1295 [3d Dept 2015]), here, King failed to raise triable issues of fact with respect to the existence of either defense (*see id.*).

King contends that Supreme Court erred in granting plaintiff's motion and denying her cross motion because her execution of the promissory note was unsupported by consideration. We reject that contention. "Consideration consists of either a benefit to the promisor or a detriment to the promisee" (*Anand v Wilson*, 32 AD3d 808, 809 [2d Dept 2006]; *see Weiner v McGraw-Hill, Inc.*, 57 NY2d 458, 464 [1982]). " '[I]t is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made as consideration for the promise made to him' " (*Weiner*, 57 NY2d at 464, quoting *Hamer v Sidway*, 124 NY 538, 545 [1891]; *see Anand*, 32 AD3d at 809). Although King asserts that she would not receive any significant financial benefit from Hughesco's continued viability, she concedes in her affidavit that she signed the note because she had "some concern for Hughesco's employees" and wanted to keep Hughesco in business. In so doing, she confirmed that plaintiff's promise to continue to supply materials on credit, which is "ample consideration" (*Movado Group v Presberg*, 259 AD2d 371, 371 [1st Dept 1999], *lv dismissed* 94 NY2d 794 [1999]), was something she sought to secure by executing the note.

King further asserts that the court erred in granting plaintiff's motion because there are issues of fact concerning whether plaintiff misrepresented the note as a guaranty for future credit purchases. We also reject that contention. Such a contention constitutes one for fraud in the factum, also known as fraud in the execution, i.e., "that the [party] was induced to sign something entirely different than what [the party] thought [he or] she was signing" (*Ackerman v Ackerman*, 120 AD3d 1279, 1280 [2d Dept 2014]; *see Dasz, Inc. v Meritocracy Ventures, Ltd.*, 108 AD3d 1084, 1084-1085 [4th Dept 2013]*; see generally* UCC 3-305, Official Comment 7). However, "[a] party to a writing is presumed to have read and understood the document which he [or she] signed" (*Marine Midland Bank v Idar Gem Distribs.*, 133 AD2d 525, 526 [4th Dept 1987]) and, absent some impairment, cannot justifiably rely on another's representation that the words used in the relevant document mean something other than what they plainly state (*see Countrywide Home Loans, Inc. v Gibson*, 157 AD3d 853, 856 [2d Dept 2018]; *Ackerman*, 120 AD3d at 1280; *see also Dasz, Inc.*, 108 AD3d at 1084-1085; *Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 266 [1st Dept 2008], *lv dismissed* 12 NY3d 748 [2009]; *Norstar Bank of Upstate NY v Office Control Sys.*, 165 AD2d 265, 268 [3d Dept 1991]). Here, the one-page, seven-sentence, conspicuously-labeled promissory note that King signed and twice initialed clearly articulated the obligation she

was agreeing to assume.

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

1390

CA 17-01811

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

DANIEL MANCUSO, AS EXECUTOR OF THE ESTATE OF ROSE M. KIJ, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KALEIDA HEALTH, DOING BUSINESS AS MILLARD FILLMORE GATES HOSPITAL, DEFENDANT-APPELLANT. (APPEAL NO. 1.)

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

BROWN CHIARI LLP, BUFFALO (MICHAEL C. SCINTA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Donna M. Siwek, J.), entered January 17, 2017. The judgment awarded plaintiff money damages upon a jury verdict.

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

Memorandum: Plaintiff commenced this action alleging that the negligence of defendant caused plaintiff's decedent to suffer serious and permanent injuries, including severe rhabdomyolysis and renal failure, conscious pain and suffering, and death. The case proceeded to trial, and a jury awarded plaintiff $1,000,000 for decedent's pain and suffering, fear of death and/or pre-death terror. After a judgment was entered on the verdict, Supreme Court denied defendant's motion to, inter alia, set aside the verdict. We affirm.

Decedent, who was 81 years old at the time, was admitted on August 16, 2007 to Millard Fillmore Gates Hospital (hospital), which is owned by defendant, for complaints of left-sided weakness and was diagnosed with having a transient ischemic attack (TIA). Decedent had a history of high cholesterol, coronary artery disease, and TIAs. She was taking Simvastatin, a cholesterol-lowering medication that her primary care physician began prescribing in 2006 in the dosage of 20 mg/daily. A possible side effect of Simvastatin, especially when taken in high doses, is the risk of developing rhabdomyolysis, which is the breakdown of muscles and resulting kidney damage.

After decedent was admitted to the hospital, she was prescribed 80 mg/daily of Simvastatin. Her hospital chart showed that the admitting physician ordered that she "continue on" the 80 mg/daily

dosage, even though it was undisputed that she was taking only 20 mg/daily of that medication at the time of her hospitalization. The hospital staff received a list of decedent's medications from the ambulance crew, which listed Simvastatin but not the dosage amount, and the emergency room nurses testified that it was the responsibility of the hospital to ask the family or call the patient's pharmacy, which name they were given, to obtain the correct dosage of the medications. There was no testimony given regarding how or why decedent's dosage of Simvastatin was changed upon admission to the hospital.

After five days at the hospital, decedent's TIA symptoms improved and she was discharged for rehabilitation to Crestwood Health Care Center (Crestwood) for one week and then to Riverwood Health Care Center (Riverwood) (collectively, the Elderwoods). Crestwood and Riverwood continued giving decedent 80 mg/daily of Simvastatin, and her condition steadily deteriorated after a week at Riverwood. Her muscles became sore and weak, and she was eventually unable to lift her arms or head or get out of bed. She lost bladder control, was unable to feed herself, and was in pain. Laboratory tests showed that she had extremely high levels of creatine phosphokinase, an enzyme that is released into the bloodstream as muscles break down, and she was diagnosed with rhabdomyolysis. Riverwood discontinued giving her Simvastatin on September 13, 2007 and transferred her to Kenmore Mercy Hospital the following day. Decedent continued to deteriorate, her kidneys were failing, and she underwent dialysis and eventually died on October 10, 2007. The cause of death was severe rhabdomyolysis and renal failure.

Defendant's primary contention on appeal is that the court erred in precluding it from asserting the CPLR article 16 defense at trial. Under the unique circumstances of this case, we see no error by the court. Plaintiff initially commenced this action against defendant and the Elderwoods, and defendant, in its answer, asserted CPLR 1601 as an affirmative defense and asserted CPLR article 14 cross claims against the Elderwoods. When plaintiff discontinued the action against the Elderwoods, defendant's cross claims against them were converted to a third-party action. Discovery and motion practice ensued, and a trial on both plaintiff's action and defendant's third-party action was scheduled for September 2015. In July 2015, the Elderwoods moved to sever the third-party action on the ground that defendant had delayed discovery in the third-party action such that the discovery could not be completed before the upcoming trial date. The Elderwoods argued that they would be unduly prejudiced if forced to go to trial, and plaintiff would be unduly prejudiced by delaying the trial, so severance was "the only equitable solution." Defendant opposed severance, and the motion was denied.

The trial was rescheduled for November 2, 2016. On October 19, 2016, the court notified the parties that the trial would not start until November 9th, but jury selection would remain scheduled for November 2nd. On October 31, 2016, defendant, who had opposed the Elderwoods' motion for severance the previous year, brought an order to show cause seeking severance of the third-party action. Defendant

argued that severance was "now appropriate to avoid undue delay to the main action, prejudice to plaintiff, jury confusion, unnecessary expense to the parties, and waste of judicial resources." Defendant's counsel explained that he possibly had a scheduling conflict based on the new trial date because he had another trial scheduled to begin on November 21st. He therefore proposed severing the third-party action to make "the trial shorter and more efficient" with "less proof, fewer witnesses, fewer experts, and fewer attorneys." Importantly, counsel represented that "proof in the third-party action will not be duplicative to that put on in the main action. The proof in the third-party action would be limited to the care [decedent] received at the Elderwoods' facilities, *which will not be a topic in the main action*" (emphasis added). Counsel also argued that trying the actions separately would be less confusing to the jury because "there is a risk that the jury will struggle to differentiate the issues between the plaintiff and [defendant] and [defendant] and the Elderwoods."

Both plaintiff and the Elderwoods initially objected to severance, but, on November 1st, defendant and the Elderwoods stipulated to sever the third-party action. The order to show cause was not signed by the court and thus was never served upon plaintiff's counsel, but plaintiff's counsel represented at oral argument before this Court that representations similar to those made by defendant's counsel in his affidavit were made during the course of off-the-record conversations in the court's chambers, which defendant does not dispute.

At the ensuing jury trial, after plaintiff rested his case, defendant gave notice that it intended to submit evidence of fault against the Elderwoods and asked to have them included on the verdict sheet pursuant to CPLR article 16. The court prohibited defendant from introducing evidence of any negligence of the Elderwoods and denied defendant's request to instruct the jury to determine if the Elderwoods were at fault in causing decedent's injuries.

Subject to certain exceptions that are not applicable here (*see* CPLR 1602), CPLR article 16 provides that, in personal injury actions, "a tortfeasor whose culpability is apportioned at 50% or less is liable only for its proportionate share of noneconomic loss (e.g., pain and suffering, mental anguish) (CPLR 1600, 1601 [1])" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 556 n 6 [1992]; *see Morales v County of Nassau*, 94 NY2d 218, 223 [1999]). The Legislature enacted CPLR article 16 in 1986 as part of a broad tort reform package (*see Morales*, 94 NY2d at 223). The legislative history shows that the "driving purpose" behind the intent to "remedy the inequities created by joint and several liability on low-fault, deep pocket defendants . . . was to alleviate a liability insurance crisis" (*Artibee v Home Place Corp.*, 28 NY3d 739, 750 [2017] [internal quotation marks omitted]). As provided in CPLR 1601 (1), a defendant may raise the CPLR article 16 defense regarding a nonparty tortfeasor, provided that the plaintiff could obtain jurisdiction over that party (*see Hendrickson v Philbor Motors, Inc.*, 102 AD3d 251, 254 [2d Dept 2012]).

We agree with the court here that, because of the representations that were made by defendant when requesting severance of the third-party action, i.e., that the Elderwoods' care would not be a topic in the main action, it would be unduly prejudicial to plaintiff to allow defendant to then assert a CPLR article 16 defense based on that very topic - the care at the Elderwoods - in this case after plaintiff had rested. We agree with defendant that the fact that the third-party action was severed does not extinguish a defendant's article 16 defense. But, in this case, defendant represented before the trial started that the topic of care at the Elderwoods would not be discussed. If defendant had not made this representation, then plaintiff could have preempted or otherwise addressed this anticipated defense through opening statements and plaintiff's own lay and expert witnesses in plaintiff's case in chief, and thus could have suggested that the Elderwoods were not negligent before resting. As plaintiff's counsel asserts, he could have examined his witnesses at trial differently had he known that the topic of the Elderwoods' care, and thus the CPLR article 16 defense, was still on the table.

Although there was some testimony at the trial regarding the care decedent received at the Elderwoods, the main focus of the trial was the issue of defendant's medical treatment and conduct. Defendant's representation that the medical care rendered by the Elderwoods would not be an issue at plaintiff's trial affected plaintiff's strategy and presentation of his case. As noted above, it was not until plaintiff had rested his case that defendant asserted that it would submit evidence of the Elderwoods' alleged negligence and asked to have them included on the verdict sheet. We agree with plaintiff that, under the circumstances presented here, it would be unfair to plaintiff to allow defendant to address the Elderwoods' care and assert the CPLR article 16 defense at that point.

Defendant's remaining contentions on appeal are without merit. Defendant first contends that the court erred in denying its request to give the error in judgment charge to the jury. It is well settled that "a doctor may be liable only if the doctor's treatment decisions do not reflect his or her own best judgment, or fall short of the generally accepted standard of care" (*Nestorowich v Ricotta*, 97 NY2d 393, 399 [2002]). An "error in judgment" charge "is appropriate only in a narrow category of medical malpractice cases in which there is evidence that defendant physician considered and chose among several medically acceptable treatment alternatives" (*Martin v Lattimore Rd. Surgicenter*, 281 AD2d 866, 866 [4th Dept 2001]; *see Nestorowich*, 97 NY2d at 399; *Anderson v House of Good Samaritan Hosp.*, 44 AD3d 135, 139-140 [4th Dept 2007]).

This case does not fall within that narrow category (*see Rivenburg v Highland Hosp. of Rochester* [appeal No. 2], 72 AD3d 1571, 1573 [4th Dept 2010]). There was simply no evidence that there was any judgment made by hospital personnel to administer 80 mg/daily of Simvastatin to decedent. Decedent's hospital chart showed that the attending physician ordered her to "continue on" 80 mg/daily of Simvastatin, which was a clear error because she had been taking 20 mg/daily of that drug. Defendant never called that physician to

testify as to the circumstances of prescribing 80 mg/daily of Simvastatin. The evidence suggested that the hospital employees made a mistake and did not make an actual decision or judgment to increase the dosage. Although the testimony of defendant's expert showed that there *could* be circumstances under which prescribing 80 mg/daily of Simvastatin was a medically acceptable alternative, there was simply no evidence that anyone ever *considered* this alternative. Without evidence that medical personnel exercised any judgment or made any choice among medically acceptable alternatives, an error in judgment charge was simply unwarranted (*see generally Nestorowich*, 97 NY2d at 399-400).

Next, defendant contends that it was prejudiced when the court allowed decedent's treating physician to provide expert opinion testimony that he would not have administered 80 mg/daily of Simvastatin to decedent. We agree with plaintiff that defendant opened the door to that testimony by giving the jury the impression during cross-examination that, had the physician reviewed decedent's entire hospital record, he would conclude that administering 80 mg/daily of Simvastatin was appropriate. In any event, the disputed testimony that was objected to on re-direct examination was essentially the same testimony that the physician had given during his direct examination, upon which there was no objection.

Finally, defendant contends that the damages award deviates materially from what would be reasonable compensation (*see* CPLR 5501 [c]). Although defendant relies on *Backus v Kaleida Health* (91 AD3d 1284 [4th Dept 2012]), where the plaintiff also developed rhabdomyolysis, the plaintiff in that case had a much less severe case of rhabdomyolysis. Here, decedent developed rhabdomyolysis of her entire body. She became progressively weaker as her muscles broke down; she could not lift her arms, then could not walk, then could not keep her head up and lost bladder control. Her kidneys failed and she underwent dialysis. As her condition worsened, besides the increasing pain she felt, she was also aware that she was dying. Decedent began having symptoms of rhabdomyolysis around September 4th, and she died on October 10th, meaning that she had pain, suffering, and thoughts of her impending death for a month. We decline to disturb the damages award.

All concur except CARNI and LINDLEY, JJ., who dissent and vote to reverse in accordance with the following memorandum: We dissent and vote to reverse the judgment in appeal No. 1, grant defendant's posttrial motion in part, set aside the verdict, and grant a new trial. In our view, Supreme Court improperly precluded defendant from introducing evidence of the negligence of Crestwood Health Care Center and Riverwood Health Care Center (collectively, the Elderwoods) and pursuing an offset pursuant to CPLR article 16 (*see generally Siler v 146 Montague Assoc.*, 228 AD2d 33, 40-41 [2d Dept 1997], *appeal dismissed* 90 NY2d 927 [1997]). As the majority notes, the severance of the third-party action against the Elderwoods did not extinguish defendant's article 16 defense (*see Anderson v House of Good Samaritan Hosp.*, 44 AD3d 135, 144 [4th Dept 2007]; *DiCamillo v County of Nassau*, 293 AD2d 563, 564 [2d Dept 2002]). Instead, the majority concludes

that certain representations made by defendant in connection with severance of the third-party action also suggested that defendant would not pursue an article 16 defense at trial, and that plaintiff was entitled to rely on those representations. Based on the record before us, it appears that those representations were limited to defense counsel's attorney affidavit, submitted to the court in support of an order to show cause seeking severance.

As an initial matter, based on the record on appeal, it does not appear that plaintiff argued below, as he does on appeal, that the representations in this attorney affidavit prejudiced him, led him to believe that defendant would not pursue a CPLR article 16 defense at trial, or otherwise precluded defendant from pursuing that defense. Plaintiff's contentions that the representations contained in defendant's attorney affidavit prejudiced him or otherwise should have precluded defendant from raising an article 16 defense at trial are therefore not properly before us (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

Moreover, the record establishes that the court did not sign the order to show cause, it was not filed, and severance was thereafter accomplished by stipulation. Further, defense counsel represents on appeal that plaintiff was not served with the affidavit, did not receive a copy before trial, and thus could not have relied on it. Under these circumstances, we do not believe that plaintiff was entitled to rely on representations in defense counsel's attorney affidavit submitted in support of the ultimately unsigned order to show cause, especially where the record does not reflect that plaintiff received a copy of the affidavit before trial. Aside from these representations, the record does not reflect an alternative basis for the court to preclude defendant from introducing evidence of the Elderwoods' negligence in order to pursue an offset pursuant to CPLR article 16.

Mark W. Bennett

Entered: May 3, 2019

Clerk of the Court

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

1391

CA 17-01812

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

DANIEL MANCUSO, AS EXECUTOR OF THE ESTATE OF ROSE M. KIJ, DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

KALEIDA HEALTH, DOING BUSINESS AS MILLARD FILLMORE GATES HOSPITAL, DEFENDANT-APPELLANT. (APPEAL NO. 2.)

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

BROWN CHIARI LLP, BUFFALO (MICHAEL C. SCINTA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered October 13, 2017. The order denied the motion of defendant to set aside a jury verdict.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435, 435 [2d Dept 1989]; *see also* CPLR 5501 [a] [1]).

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

1431

KA 15-01407

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VELINE HICKS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered July 29, 2015. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fourth degree, unlawful fleeing a police officer in a motor vehicle in the third degree, reckless endangerment in the second degree, resisting arrest and unlawful possession of marihuana.

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, inter alia, criminal possession of a controlled substance (CPCS) in the third degree (Penal Law § 220.16 [1]) and reckless endangerment in the second degree (§ 120.20). We reject defendant's contention that Supreme Court erred in denying his pro se motion to dismiss the indictment on the ground that the People failed to provide him with reasonable notice of the grand jury proceedings (*see* CPL 190.50 [5] [a], [c]). A defendant does not have to be given "a specific time period for notice; rather, 'reasonable time' must be accorded to allow a defendant an opportunity to consult with [defense] counsel and decide whether to testify before a [g]rand [j]ury" (*People v Sawyer*, 96 NY2d 815, 816 [2001]; *see People v Gelling*, 163 AD3d 1489, 1491 [4th Dept 2018], *amended on rearg* 164 AD3d 1673 [4th Dept 2018], *lv denied* 32 NY3d 1003 [2018]). Here, the record establishes that the People gave defendant and his attorney 23 hours' notice that the matter was to be presented to the grand jury, which, under the specific circumstances of this case, constituted reasonable notice (*see Gelling*, 163 AD3d at 1491). Moreover, inasmuch as the indictment was not filed until approximately two months later and during that time " 'neither defendant nor defense counsel notified

the People that defendant intended to testify before the grand jury,' " we conclude that " 'defendant was not deprived of the right to testify' " (*id.*).

Defendant's contention that a police sergeant's testimony about defendant's intent to sell cocaine improperly usurped the jury's fact-finding role is unpreserved (*see People v Pierre*, 37 AD3d 1172, 1173 [4th Dept 2007], *lv denied* 8 NY3d 989 [2007]). In any event, any error in permitting the police sergeant to testify to the effect that defendant " 'possessed [the cocaine] with the intent to sell' it" (*People v Brown*, 52 AD3d 1175, 1177 [4th Dept 2008], *lv denied* 11 NY3d 923 [2009]) was harmless (*see People v Salaam*, 46 AD3d 1130, 1131-1132 [3d Dept 2007], *lv denied* 10 NY3d 816 [2008]; *People v Hartzog*, 15 AD3d 866, 867 [4th Dept 2005], *lv denied* 4 NY3d 831 [2005]; *People v Wright*, 283 AD2d 712, 713-714 [3d Dept 2001], *lv denied* 96 NY2d 926 [2001]).

Defendant's contention that the evidence is legally insufficient with respect to his conviction of CPCS in the third degree and reckless endangerment in the second degree is also unpreserved (*see People v Gray*, 86 NY2d 10, 19 [1995]). 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 is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Contrary to defendant's contention concerning CPCS in the third degree, the weight of the evidence, including the testimony establishing that defendant possessed a "bulk amount" of unpackaged cocaine and six knotted plastic bags filled with less than one gram of cocaine each, consistent with street-level sales, supports the jury's conclusion that defendant intended to sell narcotic drugs in his possession (*see People v Bell*, 296 AD2d 836, 837 [4th Dept 2002], *lv denied* 98 NY2d 766 [2002]; *People v Belo*, 240 AD2d 964, 966 [3d Dept 1997], *lv denied* 91 NY2d 869 [1997]; *see also People v Smith*, 217 AD2d 910, 910 [4th Dept 1995]). Additionally, contrary to defendant's contention concerning reckless endangerment in the second degree, the weight of the evidence supports the jury's conclusion that defendant recklessly engaged in conduct that created a substantial risk of serious physical injury inasmuch as he led police on a high-speed chase through a residential neighborhood and, in so doing, traveled at more than twice the speed limit on the wrong side of the street, ignored stop signs, and almost struck two moving vehicles and two parked cars (*see generally People v Jackson*, 126 AD3d 1508, 1511 [4th Dept 2015]; *People v Lostumbo*, 107 AD3d 1395, 1396 [4th Dept 2013]).

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

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

66

CA 18-01611

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

WALTER KRYCH AND PENELOPE KRYCH,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ROBERT BREDENBERG, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

BOUVIER LAW LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICES OF RICHARD S. BINKO, CHEEKTOWAGA (RICHARD S. BINKO OF COUNSEL), CHEEKTOWAGA, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), entered January 23, 2018. The order denied in part the motion of defendant Robert Bredenberg for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking to recover damages for injuries sustained by Walter Krych (plaintiff) when, while playing a round of golf, he was struck by a golf ball hit by Robert Bredenberg (defendant). Defendant appeals from an order that denied in part his motion for summary judgment seeking dismissal of the complaint against him. We affirm.

It is well established that "[a] person who chooses to participate in a sport or recreational activity consents to certain risks that 'are inherent in and arise out of the nature of the sport generally and flow from such participation' " (*Anand v Kapoor*, 15 NY3d 946, 947-948 [2010], quoting *Morgan v State of New York*, 90 NY2d 471, 484 [1997]). "A court evaluating the duty of care owed to a plaintiff by a coparticipant in sport must therefore consider the risks that the plaintiff assumed and 'how those assumed risks qualified defendant['s] duty to him [or her]' " (*id.* at 948). "However, a plaintiff 'will not be deemed to have assumed the risks of reckless or intentional conduct or concealed or unreasonably increased risks' " (*id.*). "[I]nasmuch as 'the assumption of risk to be implied from participation in a sport with awareness of the risk is generally a question of fact for a jury . . . , dismissal of a complaint as a matter of law is warranted [only] when on the evidentiary materials before the court no fact issue remains for decision by the trier of fact' " (*Sopkovich v Smith*,

164 AD3d 1598, 1600 [4th Dept 2018], quoting *Maddox v City of New York*, 66 NY2d 270, 279 [1985]).

As the Court of Appeals has stated, "[a]lthough the object of the game of golf is to drive the ball as cleanly and directly as possible toward its ultimate intended goal (the hole), the possibility that the ball will fly off in another direction is a risk inherent in the game" (*Rinaldo v McGovern*, 78 NY2d 729, 733 [1991]; *see Anand*, 15 NY3d at 948). Thus, while a golfer owes a duty to use due care in striking a golf ball (*see Nussbaum v Lacopo*, 27 NY2d 311, 318 [1970]; *see also Johnston v Blanchard*, 301 NY 599, 600 [1950]; 1A NY PJI3d 2:55 at 404-405 [2019]), "the mere fact that a golf ball did not travel in the intended direction does not establish a viable negligence claim" (*Rinaldo*, 78 NY2d at 733; *see Jenks v McGranaghan*, 30 NY2d 475, 479 [1972]). "To provide an actionable theory of liability, a person injured by a mishit golf ball must affirmatively show that the golfer failed to exercise due care by adducing proof, for example, that the golfer 'aimed so inaccurately as to unreasonably increase the risk of harm' " (*Rinaldo*, 78 NY2d at 733; *see Nussbaum*, 27 NY2d at 319).

Here, contrary to defendant's contention, Supreme Court properly denied his motion with respect to the first two allegations of negligence against him. Indeed, we conclude that defendant's own submissions raise a question of fact whether he failed to exercise due care by hitting his golf ball from the tee so prematurely as to unreasonably increase the risk of striking plaintiff while plaintiff was in the fairway on the same hole (*see generally Rinaldo*, 78 NY2d at 733-734). As plaintiffs correctly contend, this case does not involve a shanked, sliced, hooked, or mishit shot (*cf. Anand*, 15 NY3d at 947; *Rinaldo*, 78 NY2d at 731, 733-734; *Delaney v MGI Land Dev., LLC*, 72 AD3d 1254, 1255 [3d Dept 2010]; *Milligan v Sharman*, 52 AD3d 1238, 1239 [4th Dept 2008]). Rather, despite his deposition testimony indicating that he had an unobstructed view from the elevated tee box of plaintiff's group ahead on the fairway, defendant decided to tee off with his driver, and he hit his golf ball straight down the center where it struck plaintiff in the head as he retreated toward his golf cart following the audible call of "fore" from defendant's group. Defendant—a skilled, self-described bogey golfer—maintained that two of his playing partners had teed off before him, that plaintiff's group was 100 or 150 yards beyond where those drives landed, and that he believed plaintiff's group was far enough away from the tee box that he would not hit them. Defendant also submitted, however, the conflicting deposition testimony of plaintiff, who believed that defendant was the first to tee off in his group because plaintiff had not previously heard any other golf balls being hit, and who estimated that he was positioned only between 150 and 200 yards from the tee when he was struck by defendant's golf ball. We note that defendant's contention that he hit an unexpectedly long drive of more than 300 yards is based entirely on the purported hearsay statement of a golf professional who arrived at the scene following the incident and, in any event, plaintiff expressly denied during his deposition that he was positioned 300 yards from the tee at the time of the incident. Furthermore, defendant testified at his deposition that he typically hit golf balls with his driver approximately 250 or 260 yards.

Consequently, defendant's submissions raise an issue of fact whether he unreasonably increased the risk of striking plaintiff with his golf ball by teeing off when plaintiff, who was visible in the fairway on the same hole, was still positioned well within the typical range of defendant's drive (*see generally Jenks*, 30 NY2d at 480; *Johnston*, 301 NY at 600).

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

87

CA 18-01683

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

DONNA ACOX, INDIVIDUALLY AND AS ADMINISTRATOR
FOR THE ESTATE OF THOMAS ACOX, DECEASED,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

JEFF PETROSKI & SONS, INC.,
DEFENDANT-APPELLANT-RESPONDENT,
AND BRIAN SPINK, DEFENDANT-RESPONDENT.

GOLDBERG SEGALLA LLP, SYRACUSE (WILLIAM J. GREAGAN OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

HANCOCK ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (JENNIFER L. WANG OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal and cross appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered May 30, 2018. The order and judgment, inter alia, denied the motion of defendant Jeff Petroski & Sons, Inc. for summary judgment dismissing the complaint and all cross claims against it and granted in part the cross motion of plaintiff for summary judgment.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying plaintiff's cross motion in its entirety and granting in part the motion of defendant Jeff Petroski & Sons, Inc. and dismissing the second and third causes of action, and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiff, individually and as administrator of the estate of Thomas Acox, commenced this Labor Law and common-law negligence action seeking damages related to the death of her husband, Thomas Acox (decedent), who fell through a hole in the first floor of a residence owned by defendant Brian Spink. At the time of the accident, the residence was under construction and defendant Jeff Petroski & Sons, Inc. (P & S) was the general contractor on the project. Decedent had gone to the residence to measure windows as a precursor to the installation of window treatments, and he was alone inside at the time of the accident. The hole, into which a circular staircase was to be constructed, had allegedly been barricaded by

scaffolds to prevent access. At the time decedent's body was found, the scaffold closest to the windows had been moved away from the wall, permitting access to two windows.

P & S and Spink separately moved for summary judgment dismissing the complaint against them, and plaintiff cross-moved for partial summary judgment on liability. Now, P & S appeals and plaintiff cross-appeals from the order and judgment that granted in part plaintiff's cross motion and denied the motion of P & S. We conclude that Supreme Court erred in granting that part of plaintiff's cross motion seeking summary judgment on liability on the Labor Law § 240 (1) cause of action and in denying those parts of the motion of P & S seeking summary judgment dismissing the Labor Law §§ 240 (1) and 241 (6) causes of action.

We agree with P & S that plaintiff is not entitled to summary judgment on liability on the Labor Law § 240 (1) cause of action and that P & S is entitled to summary judgment dismissing that cause of action inasmuch as the work of measuring windows for the future installation of window treatments is not a protected activity under Labor Law § 240 (1). The work did not involve a "significant physical change to the configuration or composition of the building or structure" (*Joblon v Solow*, 91 NY2d 457, 465 [1998]; *see Wormuth v Freeman Interiors, Ltd.*, 34 AD3d 1329, 1330 [4th Dept 2006]), was not "performed in the context of the larger construction project" (*Amendola v Rheedlen 125th St., LLC*, 105 AD3d 426, 427 [1st Dept 2013]), and was not "necessary and incidental to the construction of the home" (*Nowak v Kiefer*, 256 AD2d 1129, 1130 [4th Dept 1998], *lv dismissed in part and denied in part* 93 NY2d 887 [1999], *rearg dismissed* 93 NY2d 1000 [1999]; *cf. Martin v Back O'Beyond*, 198 AD2d 479, 480 [2d Dept 1993]).

We likewise agree with P & S that it is entitled to summary judgment dismissing the Labor Law § 241 (6) cause of action. The work being performed by decedent was not protected work under Labor Law § 241 (6) inasmuch as decedent " 'was not involved with [any] construction' " (*Wormuth*, 34 AD3d at 1330; *see Fabrizio v City of New York*, 306 AD2d 87, 87-88 [1st Dept 2003]), and the window treatment work was separate and "distinct from the construction work" (*Amendola*, 105 AD3d at 427). We therefore modify the order and judgment by denying plaintiff's cross motion in its entirety, granting in part the motion of P & S, and dismissing the Labor Law §§ 240 (1) and 241 (6) causes of action.

Based on our determination, we do not address the remaining contentions of plaintiff and P & S concerning the Labor Law §§ 240 (1) and 241 (6) causes of action.

With respect to the remaining causes of action or claims for negligence and wrongful death against P & S, we conclude that the court properly denied summary judgment to both plaintiff and P & S. Contrary to their respective contentions, there are triable issues of fact whether decedent's own negligence was a proximate cause or the sole proximate cause of the accident (*see generally Acevedo v Camac*,

293 AD2d 430, 430-431 [2d Dept 2002]). Moreover, with respect to plaintiff's allegations that decedent's injuries and death occurred as a result of a dangerous condition on the premises, P & S failed to "establish as a matter of law that [it] did not exercise any supervisory control over the general condition of the premises or that [it] neither created nor had actual or constructive notice of the dangerous condition on the premises" (*Solecki v Oakwood Cemetery Assn.*, 158 AD3d 1088, 1089 [4th Dept 2018] [internal quotation marks omitted]; *see Ozimek v Holiday Val., Inc.*, 83 AD3d 1414, 1416 [4th Dept 2011]).

Finally, we reject the contention of P & S that, as a third-party contractor, it owed no duty of care to decedent, who was on the site without P & S's knowledge and at the behest of Spink (*see Ragone v Spring Scaffolding, Inc.*, 46 AD3d 652, 654 [2d Dept 2007]; *see also Babiack v Ontario Exteriors, Inc.*, 106 AD3d 1448, 1450 [4th Dept 2013]; *Wade v Bovis Lend Lease LMB, Inc.*, 102 AD3d 476, 477 [1st Dept 2013]).

Entered: May 3, 2019

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 17-00453

PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLIFTON HUNT, ALSO KNOWN AS PETER HUNT,
DEFENDANT-APPELLANT.

ANDREW D. CORREIA, 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 (Dennis M. Kehoe, J.), rendered December 20, 2016. The judgment convicted defendant, upon a jury verdict, of rape in the third degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of rape in the third degree (Penal Law § 130.25 [2]) and endangering the welfare of a child (§ 260.10 [1]). The conviction arises from defendant engaging in sexual intercourse with a 15-year-old victim. Preliminarily, defendant's challenge to the legal sufficiency of the evidence is unpreserved for our review because his general motion for a trial order of dismissal was not " 'specifically directed' at" any alleged shortcoming in the evidence now raised on appeal (*People v Ford*, 148 AD3d 1656, 1657 [4th Dept 2017], *lv denied* 29 NY3d 1079 [2017], quoting *People v Gray*, 86 NY2d 10, 19 [1995]; *see People v Simmons*, 133 AD3d 1227, 1227 [4th Dept 2015]).

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]). The resolution of issues of credibility and the weight to be accorded to the evidence are primarily questions to be determined by the jury (*see People v Abon*, 132 AD3d 1235, 1236 [4th Dept 2015], *lv denied* 27 NY3d 1127 [2016]) and, here, the jury had the opportunity to see and hear the victim's testimony about the sexual encounter with defendant, which was detailed, coherent and internally consistent. "Great deference is accorded to the fact-finder's opportunity to view the

witnesses, hear the testimony and observe demeanor" (*Bleakley*, 69 NY2d at 495; *see People v Mateo*, 2 NY3d 383, 410 [2004], *cert denied* 542 US 946 [2004]; *People v Gay*, 105 AD3d 1427, 1428 [4th Dept 2013]), and we perceive no basis for disturbing the jury's determination in this case.

We reject defendant's contention that he was deprived of a fair trial by misconduct on the part of the prosecutor during summation. The comments by the prosecutor were not so egregious as to deny defendant a fair trial (*see People v Ielfield*, 132 AD3d 1298, 1299 [4th Dept 2015], *lv denied* 27 NY3d 1152 [2016]; *People v Hunter*, 115 AD3d 1330, 1331 [4th Dept 2014], *lv denied* 23 NY3d 1038 [2014]), and any potential prejudice was alleviated by County Court's rulings and instructions to the jury (*see People v Flowers*, 151 AD3d 1843, 1844 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018]), which the jury is presumed to have followed (*see People v Allen*, 78 AD3d 1521, 1521 [4th Dept 2010], *lv denied* 16 NY3d 827 [2011]).

Defendant further contends that he was denied effective assistance of counsel. We reject that contention. Defendant failed to meet his burden of demonstrating "the absence of strategic or other legitimate explanations" for defense counsel's allegedly deficient conduct (*People v Rivera*, 71 NY2d 705, 709 [1988]; *see People v Carver*, 27 NY3d 418, 421 [2016]). 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]).

Inasmuch as defendant failed to raise in the trial court his contention that he was denied the right to confront witnesses, that contention is not preserved for our review (*see People v Liner*, 9 NY3d 856, 856-857 [2007], *rearg denied* 9 NY3d 941 [2007]). 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]).

Finally, the sentence is not unduly harsh or severe.

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

163

CA 17-01769

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

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR MASTR SPECIALIZED LOAN TRUST 2006-3 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-3, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL T. MILLER, DEBORAH L. MILLER, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

RAS BORISKIN, LLC, WESTBURY (CHRISTOPHER LESTAK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SCOTT BIELICKI, SHERRILL, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered November 10, 2016. The order, among other things, disallowed plaintiff from interest, costs, disbursements, attorney's fees and late fees accruing after February 2012.

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

Memorandum: The interlocutory order on appeal is not appealable as of right pursuant to CPLR 5701 (a) (2) because it did not decide a motion made on notice (*see Novastar Mtge., Inc. v Melius*, 145 AD3d 1419, 1420 [3d Dept 2016]; *Ramos v Schoonmaker Homes—John Steinberg, Inc.*, 213 AD2d 534, 535 [2d Dept 1995]; *see generally* CPLR 2211; *Sholes v Meagher*, 100 NY2d 333, 335 [2003]). We decline to treat the notice of appeal as an application for leave to appeal under CPLR 5701 (c).

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

216

CA 17-01446

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

MARK HOGAN AND ELIZABETH HOGAN, INDIVIDUALLY, AND AS PARENTS AND NATURAL GUARDIANS OF JACK A. HOGAN, AN INFANT, AND ITHACA G. HOGAN, AN INFANT, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

DAVID VANDEWATER, DEFENDANT-RESPONDENT, FRANK P. ROSE AND GINA NICOLETTI, DEFENDANTS. (APPEAL NO. 1.)

BOSMAN LAW FIRM, LLC, ROME (A.J. BOSMAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

MARK D. GORIS, CAZENOVIA, FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Lewis County (James P. McClusky, J.), entered May 5, 2017. The judgment, among other things, dismissed plaintiffs' complaint against defendant David Vandewater.

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

Memorandum: Plaintiffs commenced this action seeking damages for, inter alia, false imprisonment. Plaintiffs and defendants own property on and around Hiawatha Lake in Lewis County. On the day of the incident, plaintiff Mark Hogan (Hogan) drove his two children down a private road to look at a camp that was for sale; the camp was approximately 3/4 of a mile from Hogan's property. Defendant Frank P. Rose, believing that Hogan was trespassing and wanting to have proof of same, parked his vehicle across the road, thus blocking Hogan's egress. Eventually, the police arrived and told Rose to move his vehicle, and Hogan and his children left in their vehicle. After a jury trial, the jury determined that plaintiffs were not confined and thus rendered a verdict in defendants' favor. In appeal Nos. 1, 3 and 4, plaintiffs appeal from three judgments that, inter alia, dismissed the complaint against the three respective defendants upon the jury verdict. We note at the outset that each of plaintiffs' contentions is directed at all three of those judgments.

We reject plaintiffs' contention that they are entitled to a new trial because the trial justice recused himself after the trial but before plaintiffs' posttrial motion was decided. The trial justice

had to recuse himself because he had just learned that his wife was a second cousin to the wife of one of the defendants, and plaintiffs' posttrial motion was therefore assigned to a different justice. Judiciary Law § 21 did not prohibit the second justice from deciding the posttrial motion inasmuch as "the perspective of the trial judge was not essential to the proper evaluation of [plaintiffs'] contentions for posttrial relief" (*Gayle v Port Auth. of N.Y. & N.J.*, 6 AD3d 183, 183-184 [1st Dept 2004]; *see Bonasera v Town of Islip*, 19 AD3d 525, 526-527 [2d Dept 2005]).

We also reject plaintiffs' contention that they should be granted judgment as a matter of law. "A court may set aside a jury verdict as not supported by legally sufficient evidence and enter judgment as a matter of law only where 'there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial' " (*Doolittle v Nixon Peabody LLP*, 155 AD3d 1652, 1654 [4th Dept 2017], quoting *Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]; *see* CPLR 4404 [a]), and that cannot be said here.

Plaintiffs further contend that the verdict is against the weight of the evidence. A jury verdict should be set aside as against the weight of the evidence only if the evidence preponderated so heavily in favor of plaintiffs that the verdict could not have been reached on any fair interpretation of the evidence (*see Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]). A claim for false imprisonment may be made "against one who has unlawfully robbed the plaintiff of his or her 'freedom from restraint of movement' " (*De Lourdes Torres v Jones*, 26 NY3d 742, 759 [2016]). The plaintiff must establish "that the defendant intended to confine the plaintiff, that the plaintiff was conscious of the confinement, that the plaintiff did not consent to the confinement and that the confinement was not privileged" (*id.*; *see Zegarelli-Pecheone v New Hartford Cent. Sch. Dist.*, 132 AD3d 1258, 1259 [4th Dept 2015]). Here, the only issue was whether Hogan and his children were, in fact, confined. We conclude that the verdict is not against the weight of the evidence inasmuch as the jury's conclusion that Hogan and his children were not confined is supported by a fair interpretation of the evidence. Although Hogan and his children could not leave the area using their vehicle, the testimony and the inferences from the testimony established that they could have walked back to their property (*see Kim v BMW of Manhattan, Inc.*, 35 AD3d 315, 315-316 [1st Dept 2006]).

We reject plaintiffs' further contention that Supreme Court improperly instructed the jury on the issue of confinement. The court set forth the elements of a cause of action for false imprisonment and further instructed the jury that intentionally preventing a plaintiff from traveling by a certain method in and of itself was not confinement, and that it was not confinement where the plaintiff refused to utilize a means of egress available to him or her. We conclude that the court's "charge as a whole adequately conveyed the proper legal principles" (*Schmidt v Buffalo Gen. Hosp.*, 278 AD2d 827, 828 [4th Dept 2000], *lv denied* 96 NY2d 710 [2001]; *see generally*

Barrett v Watkins, 82 AD3d 1569, 1570-1571 [3d Dept 2011]; *Kim*, 35 AD3d at 315-316).

Plaintiffs also contend that the court erred in allowing testimony regarding alleged prior trespasses and other bad acts committed by Hogan with respect to his neighbors. We agree with the court that Hogan opened the door to that testimony by testifying that he had resolved all problems with his neighbors amicably and did not understand why defendants acted as they did that evening. The evidence was relevant to Hogan's credibility and also relevant to the mitigation of damages (*see Broughton v State of New York*, 37 NY2d 451, 459 [1975]; *Hines v City of Buffalo*, 79 AD2d 218, 224 [4th Dept 1981]). Plaintiffs' contention that the court erred in allowing defendant David Vandewater "to stand up away from the witness stand repeatedly" is not preserved for our review. Vandewater's counsel asked the court for permission for the witness to step down from the witness stand to point out areas on a map exhibit, and there was no objection by plaintiffs when the court granted that request. When plaintiffs' counsel asked that the witness be seated later on in his testimony, the record shows that the witness resumed the witness stand, and there was no further objection by plaintiffs. Plaintiffs' additional contention that the court erred in refusing to allow them to introduce in evidence a tape recorded conversation that would rebut Vandewater's testimony is without merit. Plaintiffs were improperly attempting to impeach the witness on a collateral matter using extrinsic evidence (*see Badr v Hogan*, 75 NY2d 629, 635 [1990]; *Dunn v Garrett* [appeal No. 2], 138 AD3d 1387, 1388 [4th Dept 2016]). We have considered plaintiffs' remaining contentions regarding alleged trial errors and conclude that they are without merit.

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

217

CA 18-00562

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

MARK HOGAN AND ELIZABETH HOGAN, INDIVIDUALLY, AND AS PARENTS AND NATURAL GUARDIANS OF JACK A. HOGAN, AN INFANT, AND ITHACA G. HOGAN, AN INFANT, PLAINTIFFS-APPELLANTS,

V ORDER

DAVID VANDEWATER, FRANK P. ROSE, AND GINA NICOLETTI, DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.)

BOSMAN LAW FIRM, LLC, ROME (A.J. BOSMAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

MARK D. GORIS, CAZENOVIA, FOR DEFENDANT-RESPONDENT DAVID VANDEWATER.

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

BARCLAY DAMON LLP, ROCHESTER (KELSEY TILL THOMPSON OF COUNSEL), FOR DEFENDANT-RESPONDENT GINA NICOLETTI.

Appeal from an order of the Supreme Court, Lewis County (Patrick F. MacRae, J.), entered December 18, 2017. The order, among other things, denied that part of plaintiffs' motion seeking judgment as a matter of law and a new trial on damages or, alternatively, a new trial.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435, 435 [2d Dept 1989]; *see also* CPLR 5501 [a] [1]).

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

218

CA 18-01893

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

MARK HOGAN AND ELIZABETH HOGAN, INDIVIDUALLY, AND AS PARENTS AND NATURAL GUARDIANS OF JACK A. HOGAN, AN INFANT, AND ITHACA G. HOGAN, AN INFANT, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

DAVID VANDEWATER, FRANK P. ROSE, DEFENDANTS, AND GINA NICOLETTI, DEFENDANT-RESPONDENT. (APPEAL NO. 3.)

BOSMAN LAW FIRM, LLC, ROME (A.J. BOSMAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BARCLAY DAMON LLP, ROCHESTER (KELSEY TILL THOMPSON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Lewis County (James P. McClusky, J.), entered May 5, 2017. The judgment, among other things, dismissed plaintiffs' complaint against defendant Gina Nicoletti.

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

Same memorandum as in *Hogan v Vandewater* ([appeal No. 1] — AD3d — [May 3, 2019] [4th Dept 2019]).

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

219

CA 18-01894

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

MARK HOGAN AND ELIZABETH HOGAN, INDIVIDUALLY, AND AS PARENTS AND NATURAL GUARDIANS OF JACK A. HOGAN, AN INFANT, AND ITHACA G. HOGAN, AN INFANT, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

DAVID VANDEWATER AND GINA NICOLETTI, DEFENDANTS, AND FRANK P. ROSE, DEFENDANT-RESPONDENT. (APPEAL NO. 4.)

BOSMAN LAW FIRM, LLC, ROME (A.J. BOSMAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

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

Appeal from a judgment of the Supreme Court, Lewis County (James P. McClusky, J.), entered May 5, 2017. The judgment, among other things, dismissed plaintiffs' complaint against defendant Frank P. Rose.

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

Same memorandum as in *Hogan v Vandewater* ([appeal No. 1] — AD3d — [May 3, 2019] [4th Dept 2019]).

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

220

CA 18-02064

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

JILL TOHER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW J. DUCHNYCZ, JR., DEFENDANT-APPELLANT.

COSTELLO, COONEY & FEAFRON, PLLC, CAMILLUS (ERIN K. SKUCE OF COUNSEL), FOR DEFENDANT-APPELLANT.

SCOTT OBERMAN, HERKIMER, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Charles C. Merrell, J.), entered July 26, 2018. 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 reversed on the law without costs, the motion is granted and the complaint is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries that she sustained when she was bitten by a dog owned by tenants living in a house owned by defendant. Defendant appeals from an order denying his motion for summary judgment dismissing the complaint. We reverse.

It is well established that " '[t]o recover against a landlord for injuries caused by a tenant's dog on a theory of strict liability, the plaintiff must demonstrate that the landlord: (1) had notice that a dog was being harbored on the premises[,] (2) knew or should have known that the dog had vicious propensities, and (3) had sufficient control of the premises to allow the landlord to remove or confine the dog' " (*Kraycer v Fowler St., LLC*, 147 AD3d 1038, 1039 [2d Dept 2017]). Here, it is undisputed that defendant was aware that a dog was kept on the premises by his tenants and that he could have required them to remove or confine the dog. Nevertheless, defendant met his initial burden on the motion by establishing as a matter of law that he lacked actual or constructive knowledge that his tenants' dog had any vicious propensities (*see Faraci v Urban*, 101 AD3d 1753, 1754 [4th Dept 2012]; *LePore v DiCarlo*, 272 AD2d 878, 879 [4th Dept 2000], *lv denied* 95 NY2d 961 [2000]; *Gill v Welch*, 136 AD2d 940, 940 [4th Dept 1988]), and plaintiff failed to raise a triable issue of fact (*see Faraci*, 101 AD3d at 1754-1755; *cf. Arrington v Cohen*, 150 AD3d 1695, 1696 [4th Dept 2017]).

Furthermore, to the extent that plaintiff's complaint includes a negligence cause of action, we conclude that the court erred in failing to dismiss that cause of action inasmuch as "[c]ases involving injuries inflicted by domestic animals may only proceed under strict liability based on the owner's knowledge of the animal's vicious propensities, not on theories of common-law negligence" (*Russell v Hunt*, 158 AD3d 1184, 1185 [4th Dept 2018] [internal quotation marks omitted]).

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

267

TP 18-01775

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

IN THE MATTER OF CAROL HILL, AGENT UNDER POWER OF ATTORNEY FOR STEWART HILL, PETITIONER,

V MEMORANDUM AND ORDER

HOWARD ZUCKER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH, RESPONDENT.

THE MARRONE LAW FIRM, P.C., SYRACUSE (ANTHONY A. MARRONE, II, OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (PATRICK A. WOODS 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, Onondaga County [James P. Murphy, J.], entered July 24, 2018) to review a determination of respondent. The determination denied petitioner's application for chronic care medical assistance benefits.

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

Memorandum: Petitioner applied for medical assistance (Medicaid) for her husband in April 2017. Over the next four months, the Onondaga County Department of Social Services (DSS) sent petitioner four document requests, each time extending the deadline for petitioner to comply. Petitioner submitted some but not all of the requested documents, and DSS denied the application on September 12, 2017 for petitioner's failure to provide all requested documents. After a fair hearing, respondent affirmed DSS's decision, and petitioner commenced this CPLR article 78 proceeding seeking to annul respondent's determination.

We agree with respondent that his denial of petitioner's application for Medicaid benefits based on petitioner's failure to submit required documentation is supported by substantial evidence (*see Matter of Schaffer v Zucker*, 165 AD3d 1266, 1267 [2d Dept 2018]; *Matter of Stevens v Onondaga County Dept. of Social Servs.*, 8 AD3d 995, 996 [4th Dept 2004]). We reject petitioner's contention that the determination was arbitrary and capricious because she submitted all outstanding documents before the fair hearing (*cf. Matter of Taylor v*

Bane, 199 AD2d 1071, 1071 [4th Dept 1993]). Petitioner had numerous opportunities to submit the outstanding documentation, unlike the petitioner in *Taylor*. Under the circumstances, DSS appropriately treated petitioner's late submissions as a reapplication for benefits, and respondent did not act arbitrarily in affirming DSS's September 12, 2017 denial of the initial application.

Contrary to petitioner's further contention, the determination that she failed to show good cause for failing to submit the required documents before the deadline is supported by substantial evidence (*see Schaffer*, 165 AD3d at 1267; *Matter of Medford Multicare Ctr. v Zucker*, 161 AD3d 1160, 1162 [2d Dept 2018]; *Matter of Pagnani v Suffolk County Dept. of Social Servs.*, 152 AD3d 696, 696 [2d Dept 2017]). Petitioner failed to meet her burden of "notifying the social services district of the reasons for failing to comply with an eligibility requirement and . . . furnishing evidence to support any claim of good cause" (18 NYCRR 351.26 [b]; *see* 18 NYCRR 351.26 [a] [1], [3]).

Finally, petitioner's contention that DSS failed to conduct a collateral investigation (*see* 18 NYCRR 360-2.3 [a] [3]) is improperly raised for the first time in her petition (*see Matter of Peckham v Calogero*, 12 NY3d 424, 430 [2009]; *Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000]; *Matter of Notman v New York State Dept. of Health*, 162 AD3d 1704, 1705 [4th Dept 2018]). Petitioner's failure to raise that issue at the fair hearing deprived "the administrative agency of the opportunity to prepare a record reflective of its expertise and judgment" with regard to that issue and, as a result, petitioner has failed to exhaust her administrative remedies with respect to that issue (*Yarbough*, 95 NY2d at 347 [internal quotation marks omitted]; *see Notman*, 162 AD3d at 1705; *see generally* Social Services Law § 22 [1], [5]). We have no discretionary authority to review petitioner's contention (*see Matter of J.C. Smith, Inc. v New York State Dept. of Economic Dev.*, 163 AD3d 1517, 1520 [4th Dept 2018], *lv denied* 32 NY3d 1191 [2019]; *see generally Matter of Khan v New York State Dept. of Health*, 96 NY2d 879, 880 [2001]).

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

275

KA 18-00520

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN E. SCHMIEGE, DEFENDANT-APPELLANT.

ROBERT M. GRAFF, LOCKPORT, 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 November 16, 2017. 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: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted burglary in the third degree (Penal Law §§ 110.00, 140.20). Defendant validly waived his right to appeal (*see People v Johnson*, 169 AD3d 1480, 1481 [4th Dept 2019], *lv denied* — NY3d — [Mar. 27, 2019]; *People v Link*, 166 AD3d 1581, 1581 [4th Dept 2018], *lv denied* 32 NY3d 1174 [2019]), and that waiver forecloses his challenge to the severity of both the incarceration and restitution components of his sentence (*see Johnson*, 169 AD3d at 1481; *People v Kesick*, 119 AD3d 1371, 1372 [4th Dept 2014]; *see generally People v Allen*, 82 NY2d 761, 763 [1993]).

Defendant's further contention that Supreme Court violated CPL 430.10 by imposing restitution after the conclusion of the sentencing hearing implicates the legality of his sentence and thus survives his valid appeal waiver (*see People v Moore*, 124 AD3d 1386, 1387 [4th Dept 2015]; *People v Carpenter*, 19 AD3d 730, 731 [3d Dept 2005], *lv denied* 5 NY3d 804 [2005]; *see generally People v Campbell*, 97 NY2d 532, 535 [2002]). Nevertheless, that contention lacks merit because CPL 430.10 applies only to the incarceration component of a sentence, not to the restitution component (*see Matter of Pirro v Angiolillo*, 89 NY2d 351, 356 [1996]; *People v Johnson*, 208 AD2d 1175, 1175-1176 [3d Dept 1994], *lv denied* 85 NY2d 910 [1995]). Indeed, it is well established that a court may impose restitution within a reasonable time after the sentencing hearing if, as here, the People announce their intent to seek restitution during that hearing (*see People v Swiatowy*, 280 AD2d

71, 73 [4th Dept 2001], *lv denied* 96 NY2d 868 [2001]).

Finally, defendant argues that the court violated the plea bargain by imposing $3,700 in restitution instead of the $1,850 mentioned during the plea colloquy. Although that argument survives defendant's valid appeal waiver (*see People v Copes*, 145 AD3d 1639, 1639 [4th Dept 2016], *lv denied* 28 NY3d 1182 [2017]), it is nevertheless unpreserved for appellate review (*see People v Wilson*, 289 AD2d 1088, 1088 [4th Dept 2001], *lv denied* 98 NY2d 656 [2002]; *see generally People v Williams*, 27 NY3d 212, 219-225 [2016]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see People v Hoke*, 167 AD3d 1549, 1550 [4th Dept 2018], *lv denied* — NY3d — [Mar. 26, 2019]; *Wilson*, 289 AD2d at 1088).

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

280

CAF 18-01015

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

IN THE MATTER OF CARLOS M. SANCHEZ,
PETITIONER-APPELLANT,

V ORDER

ALBA M. MERCEDES, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

ELISABETH M. ROSSOW, CHEEKTOWAGA, FOR PETITIONER-APPELLANT.

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

JENNIFER PAULINO, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered April 17, 2018 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted the motion of respondent to dismiss the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Whitney v Whitney* [appeal No. 3], 154 AD3d 1295, 1295 [4th Dept 2017]).

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

281

CAF 18-01016

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

IN THE MATTER OF CARLOS M. SANCHEZ,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ALBA M. MERCEDES, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

ELISABETH M. ROSSOW, CHEEKTOWAGA, FOR PETITIONER-APPELLANT.

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

JENNIFER PAULINO, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered April 17, 2018 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, dismissed the petition for a modification of visitation.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the fourth ordering paragraph and as modified the order is affirmed without costs.

Memorandum: In this Family Court Act article 6 proceeding, petitioner father appeals from an order that, inter alia, dismissed his petition to modify a prior custody and visitation order. We agree with the father that Family Court improperly conditioned his right to file future petitions to modify the governing custody and visitation arrangement upon his completion of anger management treatment, and we therefore modify the order accordingly (*see Matter of Smith v Loyster*, 156 AD3d 1490, 1491 [4th Dept 2017]; *Matter of Vieira v Huff*, 83 AD3d 1520, 1522 [4th Dept 2011]). Given the father's history of frivolous and vexatious filings in this matter, however, the court did not abuse its discretion by prohibiting him from filing any future modification petitions without prior judicial approval (*see Matter of Naclerio v Naclerio*, 132 AD3d 679, 680 [2d Dept 2015]; *see generally Carney v Carney*, 160 AD3d 218, 228 [4th Dept 2018]).

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

304

CA 18-01591

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

BROADWAY WAREHOUSE CO., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BROOKS C. ANDERSON, DEFENDANT-RESPONDENT.

ROACH, LENNON & BROWN, PLLC, BUFFALO (J. MICHAEL LENNON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered April 16, 2018. The order granted the motion of defendant to dismiss the complaint.

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

Memorandum: We affirm for the reason stated at Supreme Court. We add only that, although we agree with plaintiff that defendant has mischaracterized plaintiff's claim as one to recover collection costs in enforcing an earlier judgment against defendant, any mischaracterization of plaintiff's claim does not warrant a different result.

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

309

CA 18-01590

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

BROADWAY WAREHOUSE CO., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BUFFALO BARN BOARD, LLC, ET AL., DEFENDANTS,
EMPIRE BUILDING DIAGNOSTICS, INC., AND EBD
MANAGEMENT, LLC, DEFENDANTS-RESPONDENTS.

ROACH, LENNON & BROWN, PLLC, BUFFALO (J. MICHAEL LENNON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (ANDREW O. MILLER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered June 21, 2018. The order, insofar as appealed from, granted that part of the motion of defendants Empire Building Diagnostics, Inc., and EBD Management, LLC, seeking summary judgment and dismissed the second amended complaint against them.

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

Memorandum: Plaintiff and defendant Buffalo Barn Board, LLC (BBB) entered into a lease agreement pursuant to which plaintiff would lease its warehouse to BBB, whose principal personally guaranteed the lease. After BBB defaulted on the lease and plaintiff obtained a default judgment against the guarantor, plaintiff commenced this action against defendants Empire Building Diagnostics, Inc. and EBD Management, LLC (collectively, EBD defendants), entities with whom BBB did business, and BBB. In each cause of action against the EBD defendants, plaintiff sought to recover the amount due under the lease plus interest, as well as the "costs, disbursements and reasonable attorney's fees of th[e] action."

In a prior appeal, we determined that Supreme Court (Walker, A.J.) properly granted the EBD defendants' cross motion insofar as it sought summary judgment dismissing the first two causes of action against them but properly denied the cross motion insofar as it sought summary judgment dismissing the remaining two causes of action against them (*Broadway Warehouse Co. v Buffalo Barn Bd., LLC*, 143 AD3d 1238, 1240-1241 [4th Dept 2016]). Thereafter, BBB's principal, pursuant to his personal guaranty, paid plaintiff the amount due under the lease agreement plus interest, and the EBD defendants moved to dismiss as

moot the remaining causes of action against them. We conclude that Supreme Court properly granted that motion.

Inasmuch as plaintiff has received all the relief to which it would be entitled with respect to its causes of action against the EBD defendants, plaintiff is no longer aggrieved (*see Oparaji v Madison Queens-Guy Brewer*, 302 AD2d 439, 440 [2d Dept 2003]). Contrary to plaintiff's contention, the court properly determined that plaintiff is not entitled to an award of attorney's fees as against the EBD defendants. "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' " (*Broadway Warehouse Co. v Buffalo Barn Bd., LLC*, 162 AD3d 1496, 1497 [4th Dept 2018]). Here, such an award was not authorized by any statute, and there was no stipulation or agreement between plaintiff and the EBD defendants that would permit such an award.

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

313

KA 16-01806

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHERRY L. MCDONALD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered July 13, 2016. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: On appeal from a judgment convicting her upon a jury verdict of murder in the second degree (Penal Law §§ 20.00, 125.25 [1]), defendant contends that the conviction is not supported by legally sufficient evidence and that the verdict is against the weight of the evidence. We agree, and we therefore reverse the judgment and dismiss the indictment.

The People's theory at trial was that the codefendant, defendant's boyfriend, shot the victim multiple times after the victim exited a bar and was walking to his vehicle, thereby killing him. The People argued that defendant drove the codefendant to the scene, picked him up after the murder, and then drove him to his residence. After a joint trial, a jury found both defendant and the codefendant guilty of murder in the second degree.

"It is well settled that, even in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is 'whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the fact finder on the basis of the evidence at trial, viewed in the light most favorable to the People' " (*People v Hines*, 97 NY2d 56, 62 [2001], *rearg denied* 97 NY2d 678 [2001]; *see People v Rossey*, 89 NY2d 970, 971-972 [1997]; *People v Cabey*, 85 NY2d 417, 420-421 [1995]). As relevant here, a

person is guilty of murder in the second degree when, "[w]ith intent to cause the death of another person, he [or she] causes the death of such person" (Penal Law § 125.25 [1]). Defendant was convicted based solely on her liability as an accessory. A person is criminally liable for the conduct of another that constitutes an offense "when, acting with the mental culpability required for the commission thereof, he [or she] solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct" (§ 20.00; *see People v Croley*, 163 AD3d 1056, 1056 [3d Dept 2018]). "Intent to kill may be inferred from defendant's conduct as well as the circumstances surrounding the crime" (*People v Price*, 35 AD3d 1230, 1231 [4th Dept 2006], *lv denied* 8 NY3d 926 [2007]; *see Croley*, 163 AD3d at 1056). A jury is also "entitled to infer that a defendant intended the natural and probable consequences of his [or her] acts" (*People v Hough*, 151 AD3d 1591, 1593 [4th Dept 2017], *lv denied* 30 NY3d 950 [2017] [internal quotation marks omitted]). Nonetheless, "[i]t is essential that the intent . . . to kill be fairly deducible from the proof and that the proof exclude any other purpose" (*People v Monaco*, 14 NY2d 43, 46 [1964]).

Here, defendant contends that even if there is legally sufficient evidence to support the codefendant's conviction, the People failed to present legally sufficient evidence establishing that defendant shared the codefendant's intent to cause the victim's death. We agree. Viewing the evidence in the light most favorable to the People, the People established that defendant was observed inside a bar shortly after 1:30 a.m. on the night of the shooting staring at the victim and his girlfriend. They further established that defendant owned a silver Infiniti sedan; that a silver Infiniti was observed near the bar prior to and after the shooting; that the codefendant approached the victim on foot after the victim left the bar with his girlfriend and shot him at approximately 2:10 a.m.; that defendant and the codefendant exchanged phone calls shortly after the shooting; and that, after the shooting, the codefendant was picked up in a silver Infiniti and driven to his home, at which point two people exited the vehicle. The People also submitted evidence of defendant's consciousness of guilt, i.e., evidence that defendant lied to the police regarding her and the codefendant's whereabouts on the evening of the shooting and that, within days after the shooting, defendant obtained a new cell phone and got rid of the Infiniti.

A "defendant's presence at the scene of the crime, alone, is insufficient for a finding of criminal liability" (*Cabey*, 85 NY2d at 421, citing *People v Sanchez*, 61 NY2d 1022, 1023 [1984]; *see People v Lopez*, 137 AD3d 1166, 1167 [2d Dept 2016]). Indeed, evidence that a defendant was at the crime scene and even assisted the perpetrator in removing evidence of that crime is insufficient to support a defendant's conviction where the People fail to offer evidence from which the jury could rationally exclude the possibility that the defendant was without knowledge of the perpetrator's intent (*see People v La Belle*, 18 NY2d 405, 411-412 [1966]; *see also People v Robinson*, 90 AD2d 249, 251 [4th Dept 1982], *affd* 60 NY2d 982 [1983]). "An aider and abettor must share the intent or purpose of the principal actor, and there can be no partnership in an act where there

is no community of purpose" (*La Belle*, 18 NY2d at 412 [internal quotation marks omitted]). We have no difficulty concluding that there is a valid line of reasoning and permissible inferences by which the jury could have found that defendant intentionally aided the codefendant after the murder, but we cannot conclude that there is legally sufficient evidence to support the inference that defendant shared the codefendant's intent to kill the victim (*see People v Eldridge*, 302 AD2d 934, 935 [4th Dept 2003], *lv denied* 99 NY2d 654 [2003]; *see generally Robinson*, 90 AD2d at 251). The People offered no motive for the crime (*cf. People v Ficarrota*, 91 NY2d 244, 249 [1997]), and the evidence indicating that defendant was staring at the victim 40 minutes before the shooting and that defendant may have dropped off the codefendant at the bar prior to the shooting was plainly insufficient to establish that defendant was aware of and shared the codefendant's intent to kill the victim (*cf. Rossey*, 89 NY2d at 972).

Even assuming, arguendo, that the evidence is legally sufficient, 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 further conclude that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). A review of the weight of the evidence requires us to first determine whether an acquittal would not have been unreasonable (*see Danielson*, 9 NY3d at 348). If so, we must " 'weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony' " (*Bleakley*, 69 NY2d at 495). We conclude that an acquittal would not have been unreasonable in this case and, based on the weight of the evidence, we further conclude that the jury was not justified in finding defendant guilty beyond a reasonable doubt.

As noted above, there is evidence, through the testimony of the victim's girlfriend, that defendant was in the bar staring at the victim and his girlfriend 40 minutes prior to the shooting. However, that testimony is not corroborated by other evidence (*cf. People v Ratliff*, 165 AD3d 845, 845 [2d Dept 2018], *lv denied* 32 NY3d 1128 [2018]). Notably, the surveillance video did not show defendant ever entering or leaving the bar, and the bartender that night, who was familiar with defendant and the codefendant, did not testify that defendant was inside the bar that night. In addition, the testimony of the victim's girlfriend is inconsistent with the People's theory that defendant and the codefendant circled around the neighborhood of the bar in the Infiniti for 40 minutes before the shooting and that defendant then dropped off the codefendant near the bar at 1:55 a.m. In addition, although the People attempted throughout the trial to create an inference that defendant was always the driver of the Infiniti, the People presented evidence establishing that the codefendant was driving the car prior to the shooting. Specifically, the codefendant was identified as the person on the surveillance video who, at 1:11 a.m., parked and exited the vehicle from the driver's seat, and then spoke to someone who was not defendant before ultimately driving off. While the surveillance video does not rule out the possibility that defendant was a passenger in the vehicle at

that time, no passenger can be seen in the video, there is no indication such as by way of movement or a cell phone light that a passenger was inside the vehicle, and no one else can be seen entering or exiting the vehicle despite defendant allegedly being spotted in the bar minutes later. In short, the People submitted no proof that defendant was inside the Infiniti prior to the shooting. Indeed, although defendant was the recognized owner of the vehicle, two witnesses associated the Infiniti with the codefendant and not defendant, and thus it is not reasonable to infer that defendant had exclusive control over the vehicle.

In addition, while the evidence supports the inference that the codefendant made an 11-second phone call to defendant at 2:16 a.m. and that the codefendant received a call from defendant at 2:19 a.m., the codefendant also made two other phone calls in between those times, the recipients of which are unknown, with one call lasting 43 seconds.

We thus conclude that the People failed to establish beyond a reasonable doubt that defendant shared the codefendant's intent to kill, and the verdict finding defendant guilty of murder in the second degree is against the weight of the evidence (*see Croley*, 163 AD3d at 1060; *People v Bailey*, 94 AD3d 904, 904-905 [2d Dept 2012], *lv denied* 19 NY3d 957 [2012]).

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

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

315

KA 17-00741

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAYMOND CAMPAGNA, JR., DEFENDANT-APPELLANT.

HEIDI S. CONNOLLY, SKANEATELES, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (DIANE M. ADSIT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered January 24, 2017. The judgment convicted defendant, upon his plea of guilty, of aggravated vehicular homicide, aggravated vehicular assault, driving while intoxicated, a misdemeanor, and reckless driving.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the term of probation imposed on counts one and five of the amended indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, aggravated vehicular homicide (Penal Law § 125.14 [5]), aggravated vehicular assault (§ 120.04-a [4]), and driving while intoxicated as a misdemeanor (Vehicle and Traffic Law §§ 1192 [2]; 1193 [1] [b] [i]).

Preliminarily, we conclude that "the imposition of a five-year term of probation with an ignition interlock device with respect to the [aggravated] vehicular [homicide and aggravated vehicular] assault counts is illegal pursuant to Penal Law § 60.21" (*People v Giacona*, 130 AD3d 1565, 1566 [4th Dept 2015]; *see People v Flagg*, 107 AD3d 1613, 1614 [2013], *lv denied* 22 NY3d 1138 [2014]). As relevant here, the mandatory term of probation with an ignition interlock device pursuant to section 60.21 applies only to a defendant convicted of a violation of Vehicle and Traffic Law § 1192 (2), (2-a) or (3) (*see Giacona*, 130 AD3d at 1566; *Flagg*, 107 AD3d at 1614). " 'Although this issue was not raised before the [sentencing] court or on appeal, we cannot allow an [illegal] sentence to stand' " (*People v Davis*, 37 AD3d 1179, 1180 [4th Dept 2007], *lv denied* 8 NY3d 983 [2007]). The proper remedy is to vacate the term of probation imposed on the aggravated vehicular homicide and aggravated vehicular assault counts (*see Giacona*, 130 AD3d at 1566; *Flagg*, 107 AD3d at 1614), and we

therefore modify the judgment accordingly. We note, however, that County Court properly included the ignition interlock condition as a component of the three-year term of probation imposed as part of the sentence on the conviction of misdemeanor driving while intoxicated under Vehicle and Traffic Law § 1192 (2) (*see Giacona*, 130 AD3d at 1566).

We further conclude that the sentence, as modified, is not unduly harsh or severe.

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

319

CAF 17-01274

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

IN THE MATTER OF DAGAN B.

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

MEMORANDUM AND ORDER

CALLA B., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

HOLLY A. ADAMS, COUNTY ATTORNEY, CANANDAIGUA, FOR PETITIONER-RESPONDENT.

TIFFANY M. SORGEN, CANANDAIGUA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Ontario County (Frederick G. Reed, A.J.), entered July 5, 2017 in a proceeding pursuant to Family Court Act article 10. The order, among other things, placed the subject child in the care and custody of petitioner until the next permanency hearing.

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

Memorandum: In this neglect proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order of disposition that, inter alia, continued the placement of the subject child in the care and custody of petitioner (DSS). Although the mother's challenge to the disposition "is moot inasmuch as it is undisputed that superseding permanency orders have since been entered" (*Matter of Anthony L. [Lisa P.]*, 144 AD3d 1690, 1691 [4th Dept 2016], *lv denied* 28 NY3d 914 [2017]), and the exception to the mootness doctrine does not apply (*cf. Matter of Jamie J. [Michelle E.C.]*, 30 NY3d 275, 281 [2017]), her appeal brings up for review the order of fact-finding determining that the mother neglected the child (*see Anthony L.*, 144 AD3d at 1691). However, on a prior appeal, we determined that DSS established by a preponderance of the evidence that the child was neglected as a result of the mother's mental illness and rejected the mother's contention that a finding of mental illness must be supported by a particular diagnosis or by medical evidence (*Matter of Thomas B. [Calla B.]*, 139 AD3d 1402, 1403-1404 [4th Dept 2016]). "That determination is the law of the case, which forecloses the mother's

challenge to that finding in the instant appeal" (*Matter of Burke H. [Richard H.]*, 134 AD3d 1499, 1503 [4th Dept 2015]). Contrary to the mother's contention, there was no new evidence presented at the dispositional hearing that would change our prior determination, nor was there any showing of any subsequent change in the law (*see Matter of Renee P.-F. v Frank G.*, 161 AD3d 1163, 1165-1166 [2d Dept 2018], *lv denied* 32 NY3d 910, 911 [2018]; *Matter of Yamilette M.G. [Marlene M.]*, 118 AD3d 698, 699 [2d Dept 2014], *lv denied* 24 NY3d 906 [2014]; *see generally Micro-Link, LLC v Town of Amherst*, 155 AD3d 1638, 1640 [4th Dept 2017]).

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

320

CAF 17-01536

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

IN THE MATTER OF DAGAN B.

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

ORDER

CALLA B., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

HOLLY A. ADAMS, COUNTY ATTORNEY, CANANDAIGUA, FOR PETITIONER-RESPONDENT.

TIFFANY M. SORGEN, CANANDAIGUA, ATTORNEY FOR THE CHILD.

Appeal from an amended order of the Family Court, Ontario County (Frederick G. Reed, A.J.), entered August 11, 2017 in a proceeding pursuant to Family Court Act article 10. The amended order, among other things, placed the subject child in the care and custody of petitioner until the next permanency hearing.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Kolasz v Levitt*, 63 AD2d 777, 779 [3d Dept 1978]).

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

335

KA 16-00785

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID E. PENN, III, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered December 2, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). He contends that Supreme Court erred in denying, without a hearing, that part of his omnibus motion that sought to suppress physical evidence, i.e., the drugs recovered during the search of a vehicle that belonged to other individuals. We reject that contention and conclude that the court properly determined that defendant lacked standing to challenge the search of the vehicle from which drugs were recovered. It is well settled that a request to suppress evidence obtained as the result of an allegedly unlawful search and seizure may be denied without a hearing where the defendant does not allege a proper legal basis for suppression or if the "sworn allegations of fact do not as a matter of law support the ground alleged" (CPL 710.60 [3] [b]; *see People v Mendoza*, 82 NY2d 415, 421 [1993]). "Hearings are not automatic or generally available for the asking by boilerplate allegations. Rather, . . . factual sufficiency [is to] be determined with reference to the face of the pleadings, the context of the motion and defendant's access to information" (*Mendoza*, 82 NY2d at 422).

Here, defendant was not entitled to a hearing because his motion papers conclusively established that "defendant lacks standing to challenge the search of [the vehicle], since [defendant] was not the person against whom the search was directed[,] and he cannot complain

that his constitutional privacy protections have been infringed as a result of [the search]" (*People v Hogue*, 133 AD3d 1209, 1212 [4th Dept 2015], *lv denied* 27 NY3d 1152 [2016] [internal quotation marks omitted]). To the extent defendant contends that he was entitled to a suppression hearing based on his own purportedly illegal arrest, we conclude that a determination that his arrest was illegal would not require suppression of the drugs because there is no basis to conclude that the discovery of the drugs in the vehicle was causally related to defendant's arrest (*see People v Crouch*, 70 AD3d 1369, 1370 [4th Dept 2010], *lv denied* 15 NY3d 773 [2010]; *People v Cooley*, 48 AD3d 1091, 1091 [4th Dept 2008], *lv denied* 10 NY3d 861 [2008])

We have considered defendant's remaining contention, and conclude that it does not require reversal or modification of the judgment.

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

337

KA 16-01904

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAMAN DERBY, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered June 9, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), defendant contends that County Court erred in refusing to suppress the evidence seized as the result of a search by parole officers of his person and the pickup truck in which he was sitting. We affirm.

Defendant contends that the search of his person and the pickup truck in which he was seated were not related to the duties of the parole officers who performed the search. We reject that contention. It is well settled that a parolee's "right to be free from unreasonable searches and seizures, guaranteed by [the] Federal and State Constitutions . . . , remains inviolate" (*People ex rel. Piccarillo v New York State Bd. of Parole*, 48 NY2d 76, 82 [1979]). Nevertheless, "in any evaluation of the reasonableness of a particular search or seizure the fact of defendant's status as a parolee is always relevant and may be critical; what may be unreasonable with respect to an individual who is not on parole may be reasonable with respect to one who is" (*People v Huntley*, 43 NY2d 175, 181 [1977]).

Here, the evidence at the suppression hearing establishes that two parole officers received email notifications that defendant's ankle bracelet was not properly charged, which was a violation of a

condition of defendant's release to parole supervision. The evidence further establishes that, when the parole officers arrived to investigate the issue, defendant remained seated in a pickup truck and refused to acknowledge their presence or answer questions until they removed him from that vehicle. Based on that violation of the conditions of his release and his subsequent suspicious behavior, the parole officers searched defendant and the vehicle. Thus, the evidence from the hearing supports the court's determination that the parole officers who conducted the search were motivated to do so by "legitimate reasons related to defendant's status as a parolee" (*People v Johnson*, 94 AD3d 1529, 1532 [4th Dept 2012], *lv denied* 19 NY3d 974 [2012]). Furthermore, the parole officers testified that the owner of the pickup truck gave them permission to search it, and the court credited that testimony. In addition, no members of other law enforcement agencies assisted the parole officers in the search, nor was there any evidence that the parole officers were used as "a 'conduit' for doing what the police could not do otherwise" (*People v Mackie*, 77 AD2d 778, 779 [4th Dept 1980]). Consequently, we conclude that the record supports the court's determination that the search was "rationally and reasonably related to the performance of the parole officer's duty" and was conducted "to detect and to prevent parole violations for the protection of the public from the commission of further crimes" (*Huntley*, 43 NY2d at 181; *see People v Carey*, 162 AD3d 1476, 1477 [4th Dept 2018], *lv denied* 32 NY3d 936 [2018]).

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

338

KA 12-00161

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EUGENE FRENCH, DEFENDANT-APPELLANT.

BETH A. RATCHFORD, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered December 1, 2011. 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: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]). Defendant contends that County Court failed to conduct a proper inquiry into his request for substitution of counsel. We reject that contention. The court made the requisite "minimal inquiry" into defendant's claims before making a determination that there was no good cause for substitution of counsel (*People v Small*, 166 AD3d 1471, 1471 [4th Dept 2018], *lv denied* 32 NY3d 1177 [2019]; *see People v Smith*, 18 NY3d 588, 592-593 [2012]; *People v Bradford*, 118 AD3d 1254, 1255 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014]).

Defendant's first ground for seeking substitution, i.e., that the District Attorney assigned an Assistant Public Defender to represent him as defense counsel, " 'did not suggest a serious possibility of good cause for substitution' " (*People v Burdine*, 147 AD3d 1471, 1473 [4th Dept 2017], *amended on rearg* 149 AD3d 1626 [4th Dept 2017], *lv denied* 29 NY3d 1076 [2017]). Defendant's second ground for seeking substitution was based on "vague assertions" that defense counsel did not contact him or visit him more often (*People v MacLean*, 48 AD3d 1215, 1217 [4th Dept 2008], *lv denied* 10 NY3d 866 [2008], *reconsideration denied* 11 NY3d 790 [2008]; *see People v Benson*, 265 AD2d 814, 814-815 [4th Dept 1999], *lv denied* 94 NY2d 860 [1999], *cert denied* 529 US 1076 [2000]), and likewise " 'did not suggest a serious possibility of good cause for substitution' " (*Burdine*, 147 AD3d at 1473). Defendant's final ground for seeking substitution was that he disagreed with defense counsel's strategic decision not to have him

testify before the grand jury. It is well settled, however, that disagreement on matters of strategy does not constitute good cause for substitution of counsel (*see Smith*, 18 NY3d at 593; *People v Holmes*, 284 AD2d 984, 984 [4th Dept 2001], *lv denied* 96 NY2d 919 [2001]; *see also People v Hogan*, 26 NY3d 779, 781 [2016]).

Inasmuch as defendant's three claims do not establish good cause for substitution of counsel, and inasmuch as there was nothing in the record before the court to establish that defense counsel would not have been "reasonably likely to afford . . . defendant effective assistance" of counsel (*People v Medina*, 44 NY2d 199, 208 [1978]), we conclude that the court did not abuse its discretion in denying defendant's request (*see People v Linares*, 2 NY3d 507, 510 [2004]).

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

366

CA 18-02127

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

DONALD G. COPELAND, PLAINTIFF-RESPONDENT,

V ORDER

CONCRETE APPLIED TECHNOLOGIES CORPORATION, MICHAEL SALVADORE, DOING BUSINESS AS CONCRETE APPLIED TECHNOLOGIES CORPORATION, DOING BUSINESS AS CATCO AND FERRARO PILE & SHORINGS, INC., DEFENDANTS-APPELLANTS.

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

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

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered August 14, 2018. The order denied in part defendants' motion to compel.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties,

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

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

372

TP 18-01839

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

IN THE MATTER OF CHRISTIAN CENTRAL ACADEMY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS,
RESPONDENT-PETITIONER,
AND KATHLEEN LYSEK, RESPONDENT.

BARCLAY DAMON LLP, SYRACASE (MICHAEL J. BALESTRA OF COUNSEL), FOR PETITIONER-RESPONDENT.

CAROLINE J. DOWNEY, GENERAL COUNSEL, BRONX (TONI ANN HOLLIFIELD OF COUNSEL), FOR RESPONDENT-PETITIONER.

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Timothy J. Walker, A.J.], entered October 1, 2018) to review a determination of respondent-petitioner New York State Division of Human Rights. The determination found unlawful discrimination on the basis of familial status.

It is hereby ORDERED that the determination is unanimously confirmed without costs, the petition is dismissed, the cross petition is granted, and petitioner-respondent is directed to pay to the Comptroller of the State of New York the sum of $3,000 for a civil fine and penalty, with interest at the rate of 9% per annum commencing May 16, 2018, and to comply with the remaining parts of the determination.

Memorandum: Petitioner-respondent (petitioner) commenced this proceeding pursuant to Executive Law § 298 seeking to annul the determination of respondent-petitioner New York State Division of Human Rights (SDHR) that petitioner had, through its hiring policy, unlawfully discriminated against respondent Kathleen Lysek on the basis of familial status. The determination, inter alia, assessed a $3,000 civil fine and penalty, with statutory interest accruing from the date of SDHR's final determination, i.e., May 16, 2018. SDHR filed a cross petition seeking to confirm and enforce the determination. The matter was transferred to this Court pursuant to Executive Law § 298 to review petitioner's contention that SDHR's determination is not supported by substantial evidence. For reasons stated in the decision of SDHR, we confirm the determination, dismiss

the petition, grant the cross petition, and direct petitioner to pay to the Comptroller of the State of New York the sum of $3,000 for a civil fine and penalty, with interest at the rate of 9% per annum commencing May 16, 2018, and to comply with the remaining parts of the determination. We write only to note that, contrary to petitioner's contention that the record lacks a sufficient basis for the imposition of that fine and penalty, we conclude that SDHR properly imposed the fine and penalty upon its determination that petitioner "committed an unlawful discriminatory act" (Executive Law § 297 [4] [c] [vi]; *see generally Matter of Stellar Dental Mgt. LLC v New York State Div. of Human Rights*, 162 AD3d 1655, 1658 [4th Dept 2018]).

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

397

TP 18-02318

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

IN THE MATTER OF IRRON JOHNSON, PETITIONER,

V MEMORANDUM AND ORDER

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

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered December 12, 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 modified on the law and the petition is granted in part by annulling those parts of the determination finding that petitioner violated inmate rules 106.10 (7 NYCRR 270.2 [B] [7] [i]) and 107.10 (7 NYCRR 270.2 [B] [8] [i]) and vacating the recommended loss of good time, and as modified the determination is confirmed without costs, respondent is directed to expunge from petitioner's institutional record all references to the violation of those rules, and the matter is remitted to respondent for further proceedings in accordance with the following memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking to annul a determination, following a tier III disciplinary hearing, that he violated various inmate rules. One charge was dismissed upon administrative appeal, but the determination that petitioner had violated inmate rules 106.10 (7 NYCRR 270.2 [B] [7] [i] [refusing a direct order]), 107.10 (7 NYCRR 270.2 [B] [8] [i] [interference with an employee]), and 180.14 (7 NYCRR 270.2 [B] [26] [v] [urinalysis testing violation]) was affirmed. We conclude that there is substantial evidence to support the determination with respect to inmate rule 180.14 (*see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139 [1985]).

As respondent correctly concedes, however, the determination with respect to inmate rules 106.10 and 107.10 is not supported by

substantial evidence (*see Matter of Monroe v Fischer*, 87 AD3d 1300, 1301 [4th Dept 2011]). We therefore modify the determination and grant the petition in part by annulling those parts of the determination finding that petitioner violated those inmate rules, and we direct respondent to expunge from petitioner's institutional record all references to the violation of those inmate rules (*see Matter of Stewart v Fischer*, 109 AD3d 1122, 1123 [4th Dept 2013], *lv denied* 22 NY3d 858 [2013]; *Monroe*, 87 AD3d at 1301). Although there is no need to remit the matter to respondent for reconsideration of those parts of the penalty already served by petitioner, we note that the Hearing Officer also recommended two months' loss of good time, and the record does not reflect the relationship between the violations and that recommendation (*see Monroe*, 87 AD3d at 1301). We therefore further modify the determination by vacating the recommended loss of good time, and we remit the matter to respondent for reconsideration of that recommendation in light of our decision with respect to inmate rule 180.14 (*see id.*).

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

400

KA 16-01240

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARFIELD HECTOR, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered June 17, 2016. The judgment convicted defendant, upon his plea of guilty, of offering a false instrument for filing in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed as a matter of discretion in the interest of justice and on the law, the plea is vacated, and the matter is remitted to Supreme Court, Onondaga County, for further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of offering a false instrument for filing in the first degree (Penal Law former § 175.35). We agree with defendant that his plea was not knowingly, intelligently, and voluntarily entered (*see generally People v Aloi*, 78 AD3d 1546, 1547 [4th Dept 2010]). Although defendant failed to preserve that contention for our review because "his motion to withdraw his plea was made on grounds different from those advanced on appeal" (*People v Gibson*, 140 AD3d 1786, 1787 [4th Dept 2016], *lv denied* 28 NY3d 1072 [2016]), and this case does not fall within the "narrow exception" to the preservation rule (*People v Lopez*, 71 NY2d 662, 666 [1988]), we exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see Aloi*, 78 AD3d at 1547).

"A trial court has the constitutional duty to ensure that a defendant, before pleading guilty, has a full understanding of what the plea connotes and its consequences" (*People v Ford*, 86 NY2d 397, 402-403 [1995]; *see Aloi*, 78 AD3d at 1547). After Supreme Court accepted defendant's guilty plea, defendant stated that he was confused by the plea proceeding, and the court asked him if he had any questions about the consequences of pleading guilty. Defendant then

made a series of remarks from which it became apparent that he did not understand the nature of the crime to which he had entered his guilty plea. Although defendant was "obviously confused," the court made no further inquiry whether he understood the plea or its consequences (*People v Sypnier*, 300 AD2d 1061, 1061 [4th Dept 2002]). We therefore reverse the judgment, vacate the plea, and remit the matter to Supreme Court for further proceedings on the indictment (*see Aloi*, 78 AD3d at 1547; *Sypnier*, 300 AD2d at 1061).

In light of our determination, we do not consider defendant's remaining contentions.

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

404

KA 17-00300

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN R. CHRISLEY, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Genesee County Court (Charles N. Zambito, J.), dated January 31, 2017. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously reversed in the interest of justice and on the law without costs and the matter is remitted to Genesee County Court for further proceedings in accordance with the following memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends that County Court violated his right to due process by sua sponte assessing points on a theory not raised by the Board of Examiners of Sex Offenders (Board) or the People (*see People v Maus*, 162 AD3d 1415, 1416 [3d Dept 2018]; *People v Griest*, 143 AD3d 1058, 1059 [3d Dept 2016]; *People v Hackett*, 89 AD3d 1479, 1480 [4th Dept 2011]). The People correctly contend that defendant failed to preserve that contention for our review inasmuch as he "raised no objection at the hearing when the court indicated its intent to assign points under that risk factor and articulated its reasons for doing so, nor did he seek an adjournment or otherwise request additional time to respond" (*People v Bush*, 105 AD3d 1179, 1180 [3d Dept 2013], *lv denied* 21 NY3d 860 [2013]; *cf. Maus*, 162 AD3d at 1417; *Hackett*, 89 AD3d at 1480). We nevertheless review defendant's contention in the interest of justice "in light of the substantial infringement upon [his] due process and statutory rights" (*People v Hernaiz*, 126 AD3d 771, 772 [2d Dept 2015]; *see People v Souverain*, 137 AD3d 765, 766 [2d Dept 2016]).

"The due process guarantees in the United States and New York Constitutions require that a defendant be afforded notice of the hearing to determine his or her risk level pursuant to SORA and a

meaningful opportunity to respond to the risk level assessment" (*Hackett*, 89 AD3d at 1480). As a result, "[a] defendant has both a statutory and constitutional right to notice of points sought to be assigned" (*Griest*, 143 AD3d at 1059; *see* Correction Law § 168-d [3]; *Maus*, 162 AD3d at 1416-1417), and "a court's sua sponte departure from the Board's recommendation at the hearing, without prior notice, deprives the defendant of a meaningful opportunity to respond" (*People v Segura*, 136 AD3d 496, 497 [1st Dept 2016]; *see Hackett*, 89 AD3d at 1480). Here, neither the Board nor the People requested the assessment of points for a continuing course of sexual misconduct on the ground that defendant engaged in three or more acts of sexual contact with the victim over a period of at least two weeks (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 10 [2006]). The Board recommended no point assessment under that category, and the People recommended that points be assessed under that category on the sole ground that, as indicted, defendant had committed two acts of sexual *contact* against the victim. The court correctly determined that points could not be assessed for only two acts of sexual contact inasmuch as neither of the indicted incidents involved "an act of sexual intercourse, oral sexual conduct, anal sexual conduct or aggravated sexual contact" (*id.*). At the conclusion of the SORA hearing, however, the court proceeded to assign additional points under that category on the ground that the grand jury testimony of the victim's mother established that there was a third uncharged incident of sexual contact. Defendant was never provided any notice that points would be assessed as a result of a third uncharged incident and thus was not given a meaningful opportunity to respond to the court's risk level assessment. We therefore reverse the order, vacate defendant's risk level determination, and remit the matter to County Court for a new risk level determination, and a new hearing if necessary, in compliance with Correction Law § 168-n (3) and defendant's due process rights (*see Hackett*, 89 AD3d at 1480).

We have reviewed defendant's remaining challenges to the risk level determination and conclude that they lack merit.

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

431

CA 18-01779

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

RICKEY D. SPENCER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, BUFFALO POLICE DEPARTMENT, COREY KRUG, AND "FIRST NAME UNKNOWN" HASSETT, DEFENDANTS-APPELLANTS.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (MAEVE E. HUGGINS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LAW OFFICES OF JAMES MORRIS, BUFFALO (JAMES E. MORRIS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.) entered April 2, 2018. The order granted plaintiff's motion to compel depositions and denied defendants' cross motion seeking a protective order and a stay of depositions.

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

Memorandum: Plaintiff commenced this action seeking to recover damages based on alleged violations of his constitutional rights and personal injuries sustained when two police officers, including defendant Corey Krug, used excessive force against him. Defendants contend that Supreme Court erred in granting plaintiff's motion pursuant to CPLR 3124 for an order compelling Krug's deposition and denying their cross motion pursuant to CPLR 2201 and 3103 (a) for a protective order staying Krug's deposition until completion of a pending criminal prosecution against him. We reject that contention.

Pursuant to CPLR 4501, which "provides statutory protection parallel to that of the constitutional right against self-incrimination" (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4501; *see* US Const Amend V; NY Const art I, § 6), a witness in a civil action is not required "to give an answer which will tend to accuse himself [or herself] of a crime" (CPLR 4501). Nonetheless, " '[a] blanket refusal to answer questions based upon the . . . privilege against self-incrimination cannot be sustained absent unique circumstances, and . . . the privilege may only be asserted where there is reasonable cause to apprehend danger from a direct answer' " (*Matter of Astor*, 62 AD3d 867, 869 [2d Dept 2009]). "[W]hile courts have recognized the

difficulty faced by defendants in choosing between presenting evidence in their own behalf and asserting their [constitutional] right[against self-incrimination], 'a court need not permit a defendant to avoid this difficulty by staying a civil action until a pending criminal prosecution has been terminated' " (*id.*, quoting *Steinbrecher v Wapnick*, 24 NY2d 354, 365 [1969], *rearg denied* 24 NY2d 1038 [1969]; *see Lloyd v Catholic Charities of Diocese of Albany*, 23 AD3d 783, 784 [3d Dept 2005]; *Access Capital v DeCicco*, 302 AD2d 48, 52-53 [1st Dept 2002]; *Walden Mar. v Walden*, 266 AD2d 933, 933 [4th Dept 1999]). Moreover, "invoking the privilege against self-incrimination is generally an insufficient basis for precluding discovery in a civil matter" (*Access Capital*, 302 AD2d at 52; *see Astor*, 62 AD3d at 869; *Lloyd*, 23 AD3d at 784; *Walden Mar.*, 266 AD2d at 933).

Here, the court did not abuse its discretion in granting plaintiff's motion for an order compelling Krug's deposition and refusing to grant defendants' cross motion for a protective order staying the deposition until completion of the pending criminal prosecution against him (*see Walden Mar.*, 266 AD2d at 933). The criminal prosecution concerns other incidents that did not involve plaintiff (*see Galper v Burkes*, 44 AD3d 451, 452 [1st Dept 2007]; *cf. Britt v International Bus Servs.*, 255 AD2d 143, 144 [1st Dept 1998]; *DeSiervi v Liverzani*, 136 AD2d 527, 528 [2d Dept 1988]) and, even if certain questions at the deposition might relate to the criminal prosecution, Krug "may . . . assert the privilege [only] when he reasonably perceives a risk from answering a particular question posed during the deposition" (*Lloyd*, 23 AD3d at 784; *see Astor*, 62 AD3d at 869). Contrary to defendants' contention, they did not demonstrate that they will suffer prejudice if Krug's deposition is conducted while his criminal prosecution is pending by being deprived of critical and necessary testimony thereby rendering them unable to assert a competent defense (*cf. Britt*, 255 AD2d at 144), particularly because the incident involving plaintiff does not form the basis for the criminal prosecution (*see Galper*, 44 AD3d at 452; *see also Walden Mar.*, 266 AD2d at 933-934).

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

455

KA 15-01680

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. HEAD, DEFENDANT-APPELLANT.

NANCY J. BIZUB, BUFFALO, FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, SPECIAL DISTRICT ATTORNEY, BATAVIA, AND NEW YORK PROSECUTORS TRAINING INSTITUTE, INC., ALBANY (LAUREN D. KONSUL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered July 8, 2015. The judgment convicted defendant, upon a jury verdict, of assault in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of assault in the second degree (Penal Law § 120.05 [3], [7]). Defendant's conviction stems from an altercation he had with correction officers while he was an inmate at a correctional facility. Defendant contends that County Court erred in ordering that defendant's inmate witnesses remain shackled while testifying without giving a reason for such restraints and without providing any curative instructions to the jury. As defendant correctly concedes, he did not preserve his contention for our review (*see* CPL 470.05 [2]; *see generally People v Cooke*, 24 NY3d 1196, 1197 [2015], *cert denied* — US —, 136 S Ct 542 [2015]; *People v Rouse*, 79 NY2d 934, 935 [1992]; *People v Morales*, 132 AD3d 1410, 1410 [4th Dept 2015], *lv denied* 27 NY3d 1072 [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]). We reject defendant's contention that he was denied effective assistance of counsel on the ground that defense counsel failed to preserve this issue for our review. Defendant failed " 'to demonstrate the absence of strategic or other legitimate explanations' for counsel's allegedly deficient conduct" (*People v Atkins*, 107 AD3d 1465, 1465 [4th Dept 2013], *lv denied* 21 NY3d 1040 [2013], quoting *People v Rivera*, 71 NY2d 705, 709 [1988]). 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]).

We reject defendant's contention that the evidence is legally insufficient because the People failed to disprove his justification defense. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to disprove the justification defense (*see People v Williams*, 134 AD3d 1572, 1573 [4th Dept 2015]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). In addition, 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).

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

459

CA 18-01877

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

GAIL G. FELLOWS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DOLORES ROSATI AND ROCCO ROSATI,
DEFENDANTS-APPELLANTS.

GREGG A. STARCZEWSKI, UTICA, FOR DEFENDANTS-APPELLANTS.

MARK A. WOLBER, UTICA, FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered December 14, 2017. The order and judgment awarded plaintiff money damages after a nonjury trial.

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

Memorandum: On appeal from an order and judgment that awarded plaintiff money damages following a nonjury trial, we reject defendants' contention that the evidence is legally insufficient to establish that plaintiff suffered severe emotional distress. Although severe emotional distress is an element of the tort of intentional infliction of emotional distress (*see Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]), Supreme Court properly concluded that plaintiff was not required to present objective medical evidence in order to establish that element of her cause of action (*see Zane v Corbett*, 82 AD3d 1603, 1608 [4th Dept 2011]).

All concur except CARNI, J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent. Not all emotional distress is actionable, and thus the tort of intentional infliction of emotional distress requires, inter alia, a showing of "*severe* emotional distress" (*Howell v New York Post Co.*, 81 NY2d 115, 121 [1993] [emphasis added]). A plaintiff alleging that he or she has sustained severe emotional distress must substantiate that injury, a burden that generally requires the production of medical evidence (*see Cusimano v United Health Servs. Hosps., Inc.*, 91 AD3d 1149, 1152 [3d Dept 2012], *lv denied* 19 NY3d 801 [2012]; *Roche v Claverack Coop. Ins. Co.*, 59 AD3d 914, 918 [3d Dept 2009]; *Millan v City of New York*, 16 AD3d 290, 290 [1st Dept 2005]). Here, plaintiff failed to present medical evidence that she sustained an injury or sought medical treatment as a result of defendants' conduct. Although

I agree with the majority that medical proof is not required in all cases in order to establish severe emotional distress, in my view this case does not inherently present a "likelihood of genuine and serious mental distress, arising from the special circumstances" (*Zane v Corbett*, 82 AD3d 1603, 1608 [4th Dept 2011] [internal quotation marks omitted]). Absent medical evidence, therefore, plaintiff's proof here was insufficient to establish that she suffered severe emotional distress and thus insufficient to establish her cause of action (*see Cusimano*, 91 AD3d at 1152).

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

465

CA 18-02215

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

TODD FORMAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CARRIER CORPORATION, DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, SYRACUSE (AARON M. SCHIFFRIK OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF DAVID S. GRASSO, CENTRAL SQUARE (DAVID S. GRASSO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered September 11, 2018. The order, among other things, denied in part defendant's motion for summary judgment.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries that he allegedly sustained when he fell on the roof of defendant's building while performing asbestos remediation. We reject defendant's contention that Supreme Court erred in denying those parts of its motion seeking summary judgment dismissing the common-law negligence and Labor Law § 200 causes of action. Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to maintain a safe construction site" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]). Inasmuch as plaintiff alleges that a defective condition on the premises caused the accident, defendant had the initial burden of establishing that it did not create the defective condition or have actual or constructive notice of it in order to demonstrate its entitlement to summary judgment on those causes of action (*see Verel v Ferguson Elec. Constr. Co., Inc.*, 41 AD3d 1154, 1156 [4th Dept 2007]; *see generally Ramirez v Metropolitan Transp. Auth.*, 106 AD3d 799, 801-802 [2d Dept 2013]). Because defendant failed to meet its burden, the court properly denied its motion with respect to the common-law negligence and Labor Law § 200 causes of action (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

477

KA 16-02341

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER ALFANO, DEFENDANT-APPELLANT.

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

TODD J. CASELLA, DISTRICT ATTORNEY, PENN YAN (MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (W. Patrick Falvey, J.), rendered October 18, 2016. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class E felony, and aggravated unlicensed operation of a motor vehicle in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of felony driving while intoxicated (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i]) and aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a] [i]), defendant contends that his waiver of the right to appeal is invalid. We reject that contention. The oral plea colloquy, together with the written waiver of the right to appeal executed by defendant, establishes that he knowingly, intelligently, and voluntarily waived his right to appeal, and that he understood that the right to appeal is separate and distinct from the rights automatically forfeited by pleading guilty (*see People v Bryant*, 28 NY3d 1094, 1096 [2016]; *People v Livermore*, 161 AD3d 1569, 1569 [4th Dept 2018], *lv denied* 32 NY3d 939 [2018]; *People v Moore*, 158 AD3d 1312, 1312 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]). Contrary to defendant's contention, County Court " 'inquire[d] of defendant whether he understood the written waiver' " and ensured that " 'he had . . . read the waiver before signing it' " (*People v Mobayed*, 158 AD3d 1221, 1222 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]), and the court "was not required to specify during the colloquy which specific claims survive the waiver" (*People v Rodriguez*, 93 AD3d 1334, 1335 [4th Dept 2012], *lv denied* 19 NY3d 966 [2012]; *see Livermore*, 161 AD3d at 1569).

Defendant's remaining contentions are encompassed by his valid

waiver of the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 255-256 [2006]).

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

486

CAF 18-00438

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

IN THE MATTER OF HAYLEIGH C.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

RONALD S., RESPONDENT-APPELLANT.

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

PAULA A. CAMPBELL, BATAVIA, FOR PETITIONER-RESPONDENT.

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered March 12, 2018 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: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order that, inter alia, terminated his parental rights with respect to the subject child on the ground of permanent neglect. We affirm. The father failed to request a suspended judgment at the dispositional hearing, and thus he failed to preserve his sole contention on appeal that Family Court abused its discretion in failing to issue a suspended judgment (*see Matter of Justin T. [Wanda T.—Joseph M.]*, 154 AD3d 1338, 1339-1340 [4th Dept 2017], *lv denied* 30 NY3d 910 [2018]; *Matter of Joshua T.N. [Tommie M.]*, 140 AD3d 1763, 1764 [4th Dept 2016], *lv denied* 28 NY3d 904 [2016]). In any event, a suspended judgment is unwarranted where, as here, the parent has not made any progress in addressing the issues that led to the child's removal (*see Justin T.*, 154 AD3d at 1340).

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

512

CA 18-02224

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

EILEEN A. GARDINER AND DONALD T. GARDINER,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

DAVID R. HALLERAN, M.D., INDIVIDUALLY AND AS AGENT, OFFICER AND/OR EMPLOYEE OF COLON RECTAL ASSOCIATES OF CENTRAL NEW YORK, LLP, ET AL.,
DEFENDANTS,
LAWRENCE C. CALABRESE, M.D., INDIVIDUALLY AND AS AN AGENT, OFFICER AND/OR EMPLOYEE OF ST. JOSEPH'S IMAGING ASSOCIATES, PLLC, AND ST. JOSEPH'S IMAGING ASSOCIATES, PLLC,
DEFENDANTS-RESPONDENTS.

PORTER NORDBY HOWE LLP, SYRACUSE (ERIC C. NORDBY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (CHRISTOPHER F. DEFRANCESCO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered April 19, 2018. The order granted the motion of defendants-respondents for summary judgment and dismissed the complaint against them.

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

Memorandum: Plaintiffs commenced this medical malpractice action in connection with a surgical procedure performed upon plaintiff Eileen A. Gardiner. Supreme Court erred in granting the motion of defendants-respondents (defendants) for summary judgment dismissing the complaint against them. Even assuming, arguendo, that defendants met their initial burden on their motion, we agree with plaintiffs that their medical expert's affidavit raised triable issues of fact in opposition (*see Fay v Satterly*, 158 AD3d 1220, 1221 [4th Dept 2018]). Where, as here, the "nonmovant's expert affidavit 'squarely opposes' the affirmation of the moving parties' expert, the result is 'a classic battle of the experts that is properly left to a jury for

resolution' " (*Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018]).

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

529

CAF 17-02141

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

IN THE MATTER OF ABIGAIL H. AND BREANNA D.

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

MEMORANDUM AND ORDER

DANIEL D., RESPONDENT-APPELLANT.

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

COURTNEY S. RADICK, OSWEGO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered November 9, 2017 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent with respect to the subject children.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order that, following his admission of permanent neglect, adjudged the subject children permanently neglected and, after a dispositional hearing, terminated his parental rights. We affirm. Preliminarily, we note that the portion of the order finding permanent neglect was entered on the admission and consent of the father, and the father never moved to vacate that finding or to withdraw his admission or consent. Thus, the father's contention that his admission was not knowing or voluntary, which is raised for the first time on appeal, is not properly before us (*see Matter of Kh'Niayah D. [Niani J.]*, 155 AD3d 1649, 1650 [4th Dept 2017], *lv denied* 31 NY3d 901 [2018]; *Matter of Xavier O.V. [Sabino V.]*, 117 AD3d 1567, 1567 [4th Dept 2014], *lv denied* 24 NY3d 903 [2014]; *see also Matter of Dah'Marii G. [Cassandra G.]*, 156 AD3d 1479, 1480 [4th Dept 2017]; *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]).

Furthermore, the father's contention concerning the audio recordings of the proceedings is not properly before us inasmuch as it is raised for the first time on appeal (*see generally Ciesinski v Town*

of Aurora, 202 AD2d 984, 985 [4th Dept 1994]). In any event, that contention lacks merit inasmuch as the few gaps in the transcripts attributable to inaudible portions of the recordings are not significant and do not preclude meaningful appellate review (*see Matter of Haly S.W.*, 141 AD3d 1106, 1107 [4th Dept 2016]; *Matter of Devre S. [Carlee C.]*, 74 AD3d 1848, 1849 [4th Dept 2010]; *Matter of Savage v Cota*, 66 AD3d 1491, 1492 [4th Dept 2009]).

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

544

KA 16-01404

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLARENCE WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (John L. DeMarco, J.), entered June 20, 2016. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order classifying him as a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.). Although defendant was presumptively a level two risk based on the risk assessment instrument prepared by the Board of Examiners of Sex Offenders, County Court granted the People's request to assess points for two additional risk factors, making defendant a presumptive level three risk. The court denied defendant's request for a downward departure. We reject defendant's contention that the court erred in failing to grant a downward departure to a level one risk based on his poor physical health. Although a defendant's current medical condition may under certain circumstances constitute a basis for a downward departure (*see generally People v Stevens*, 55 AD3d 892, 893-894 [2d Dept 2008]), here defendant failed to demonstrate by a preponderance of the evidence that his alleged medical impairments at the time of the SORA determination would reduce the risk of his own recidivism or the danger he poses to the community (*see People v Rocano-Quintuna*, 149 AD3d 1114, 1114-1115 [2d Dept 2017], *lv denied* 29 NY3d 916 [2017]; *People v Loughlin*, 145 AD3d 1426, 1428 [4th Dept 2016], *lv denied* 29 NY3d 906 [2017]; *see generally People v Gillotti*, 23 NY3d 841, 861 [2014]).

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court

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

560

CA 18-01710

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

JOHN BOBIK, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 127961.)

FRANZBLAU DRATCH, P.C., NEW YORK CITY (BRIAN M. DRATCH OF COUNSEL), FOR CLAIMANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (J. David Sampson, J.), entered January 23, 2018. The judgment dismissed the claim after a trial.

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

Memorandum: Claimant, an inmate at a correctional facility, commenced this action seeking damages for injuries he allegedly sustained when he slipped and fell while mowing the facility's lawn. We reject claimant's contention that the determination of the Court of Claims dismissing the claim following trial is against the weight of the evidence.

"While it is well settled that this Court has the authority to independently consider the weight of the evidence on an appeal in a nonjury case, deference is still afforded to the findings of the [court] where, as here, they are based largely on credibility determinations" (*Payne v State of New York*, 144 AD3d 1490, 1491 [4th Dept 2016] [internal quotation marks omitted]; *see Janczylik v State of New York*, 126 AD3d 1485, 1485 [4th Dept 2015]). Here, we conclude that a fair interpretation of the evidence supports the court's determination that claimant failed to establish by a preponderance of the evidence, inter alia, that the conditions present on the day of the accident were unsafe or that the correction officer ordered claimant to mow the section of hill where he allegedly slipped (*see Mosley v State of New York*, 150 AD3d 1659, 1660 [4th Dept 2017]). The court reasonably credited the testimony of the correction officer supervising claimant at the time of the accident that the grass was not wet and that claimant did not appear to be wet after the accident, undermining claimant's allegations that he slipped on wet grass and

fell to the wet ground. In addition, claimant failed to present evidence that the correction officer specifically directed him to mow the patch of grass on the hill where he slipped.

We reject claimant's request to take judicial notice of proof he failed to present at trial (*see Matter of Carano*, 96 AD3d 1556, 1556 [4th Dept 2012]; *Sanders v Tim Hortons*, 57 AD3d 1419, 1420 [4th Dept 2008]).

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court