SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JUNE 7, 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

1147

KA 16-00800

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT GREEN, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO, HODGSON RUSS LLP (PATRICK E. FITZSIMMONS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered February 20, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). The charge arose after a police officer observed the vehicle in which defendant was a passenger being operated in violation of the Vehicle and Traffic Law. The officer followed the vehicle in order to initiate a traffic stop, but the driver pulled over and stopped before the officer activated his lights. Upon approaching the vehicle, the officer observed that there were two occupants, one of whom, i.e., defendant, was moving around in the backseat and putting his hands in his front pocket as if he was "stuffing something either in his coat or in his pants as if to conceal it from [the officer]." Although it was winter, both the driver's and defendant's windows were open, and the officer detected the odor of marihuana emanating from the vehicle. The officer asked the driver and defendant for identification and thereafter learned that the driver's license of the driver had been revoked and that defendant did not have a driver's license.

The officer directed defendant to exit the vehicle and place his hands on the patrol car so that the officer could conduct a pat search. Defendant exited the vehicle as directed but thereafter fled, discarding components of a 9 millimeter Glock semiautomatic pistol as he ran. Defendant contends, inter alia, that Supreme Court erred in refusing to suppress the gun on the ground that the officer exceeded

his authority in ordering defendant to exit the vehicle and place his hands on the patrol car.

Because the driver pulled over of his own volition before the officer activated his emergency lights to initiate a traffic stop, the officer needed only an articulable basis to lawfully approach the occupants of the vehicle and request information (*see People v Harrison*, 57 NY2d 470, 475 [1982]). That basis was supplied by the officer's observation that the vehicle was being operated in violation of Vehicle and Traffic Law § 375 (2) (a) (1) (*see People v Robinson*, 97 NY2d 341, 349 [2001]). Thus, the officer's conduct "was justified in its inception" (*People v Nicodemus*, 247 AD2d 833, 835 [4th Dept 1998], *lv denied* 92 NY2d 858 [1998]).

The court determined that the officer had a founded suspicion of criminality prior to ordering defendant to exit the vehicle for the pat search. A founded suspicion of criminality standing alone, however, was insufficient to justify the officer's conduct in ordering defendant to place his hands on the patrol car in preparation for a pat search (*see generally People v Whorley*, 125 AD3d 1484, 1484 [4th Dept 2015], *lv denied* 25 NY3d 1173 [2015]). Nevertheless, in making its determination, the court credited the officer's testimony that he smelled fresh marihuana emanating from the vehicle and was experienced in detecting marihuana. It is well settled that "[t]he odor of marihuana emanating from a vehicle, when detected by an officer qualified by training and experience to recognize it, is sufficient to constitute probable cause to search a vehicle and its occupants" (*People v Cuffie*, 109 AD3d 1200, 1201 [4th Dept 2013], *lv denied* 22 NY3d 1087 [2014] [internal quotation marks omitted]). The court, however, did not address whether the officer's observation provided probable cause to search defendant's person, and we cannot affirm the court's refusal to suppress the gun "on a theory not reached by the suppression court" (*People v Ingram*, 18 NY3d 948, 949 [2012]; *see People v Concepcion*, 17 NY3d 192, 195 [2011]; *People v LaFontaine*, 92 NY2d 470, 473-474 [1998], *rearg denied* 93 NY2d 849 [1999]). We therefore hold the case, reserve decision, and remit the matter to Supreme Court for a determination whether the officer possessed the requisite justification to conduct a search of defendant (*see generally People v Sykes*, 110 AD3d 1437, 1438 [4th Dept 2013]).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

1299

CAF 17-00463

PRESENT: WHALEN, P.J., PERADOTTO, CARNI, NEMOYER, AND WINSLOW, JJ.

IN THE MATTER OF JARRETT P.

ONTARIO COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JEREMY P., RESPONDENT-APPELLANT.

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

HOLLY A. ADAMS, COUNTY ATTORNEY, CANANDAIGUA (HOLLY A. ADAMS OF COUNSEL), FOR PETITIONER-RESPONDENT.

PAUL BLEAKLEY, GENEVA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Ontario County (William F. Kocher, J.), entered February 15, 2017 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights and freed the subject child for adoption.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by dismissing the petition insofar as it alleges that respondent abandoned the subject child and vacating the disposition and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Ontario County, for further proceedings in accordance with the following 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 and freed the child for adoption. Preliminarily, contrary to the father's assertion, the record establishes that Family Court terminated his parental rights on both grounds asserted in the petition, i.e., abandonment *and* permanent neglect, and that the court met its obligation of setting forth the "facts it deem[ed] essential" to those determinations (CPLR 4213 [b]).

We agree with the father that petitioner failed to establish by clear and convincing evidence that he abandoned the child (*see generally* Social Services Law § 384-b [3] [g] [i]; [4] [b]). "An order terminating parental rights may be entered upon the ground that a child's parent 'abandoned such child for the period of six months immediately prior to the date on which the petition is filed in the court' " (*Matter of Mason H. [Joseph H.]*, 31 NY3d 1109, 1110 [2018], quoting § 384-b [4] [b]). A child is deemed abandoned "if the 'parent

evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency' " (*id.*, quoting § 384-b [5] [a]). "Parents are presumed able to visit and communicate with their children and, although incarcerated parents may be unable to visit, they are still presumed able to communicate with their children absent proof to the contrary" (*id.*; *see* § 384-b [2] [b]; [5] [a]; *Matter of Annette B.*, 4 NY3d 509, 514 [2005], *rearg denied* 5 NY3d 783 [2005]).

Here, the record establishes that the father—following up on a prior attempt to establish paternity that he had initially failed to adequately pursue—definitively established his paternity, while incarcerated, less than two months into the six-month period preceding the filing of the petition (*cf. Matter of Jake W.E. [Jonathan S.]*, 132 AD3d 990, 991 [2d Dept 2015], *lv denied* 27 NY3d 906 [2016]; *see generally Matter of Darrell J.D.J. [Kenneth R.]*, 156 AD3d 788, 789 [2d Dept 2017]). Thereafter, throughout the relevant period, the father initiated communications with the child's caseworker; sent the caseworker at least four letters inquiring about the child and included a card and drawing for the child in at least one of those letters; and participated in a service plan review. We conclude that the father's contacts "were not minimal, sporadic, or insubstantial" (*Matter of John F. [John F., Jr.]*, 149 AD3d 1581, 1582 [4th Dept 2017]; *cf. Matter of Anthony C.S. [Joshua S.]*, 126 AD3d 1396, 1397 [4th Dept 2015], *lv denied* 25 NY3d 911 [2015]; *Matter of Rakim D.D.S.*, 50 AD3d 1521, 1522 [4th Dept 2008], *lv denied* 10 NY3d 717 [2008]; *Matter of Elizabeth S.*, 275 AD2d 952, 953 [4th Dept 2000], *lv denied* 95 NY2d 769 [2000]). We therefore modify the order by dismissing the petition insofar as it alleges that the father abandoned the subject child.

We further conclude, however, that petitioner established by clear and convincing evidence that the father permanently neglected the child (*see generally* Social Services Law § 384-b [3] [g] [i]; [4] [d]; [7] [a]).

First, we reject the father's contention that petitioner failed to establish that it made diligent efforts to encourage and strengthen the parental relationship. The record establishes that, although the father was present at the hospital and believed he was the biological father when the child was born, he delayed several months before filing the initial paternity petition; thereafter refused to pay for the requisite DNA testing; missed the subsequent court appearance for the results, leading to dismissal of that petition; and did not file a second paternity petition until he was later incarcerated. The delays in establishing paternity were thus attributable to the father and, although the caseworker did not speak to the father about filing a paternity petition, she never discouraged him from doing so, and the record establishes that petitioner encouraged the establishment of his paternity by paying for the requisite DNA testing (*see generally Matter of Noah V.P. [Gino P.]*, 96 AD3d 1472, 1472 [4th Dept 2012]). Further, where, as here, a parent is incarcerated during the relevant time period, "an agency's duty [to make diligent efforts to encourage

and strengthen the parental relationship] may be satisfied by 'informing the parent of the child['s] well-being and progress, responding to the parent's inquiries, investigating relatives suggested by the parent as placement resources, and facilitating communication between the child[ ] and the parent' " (*Matter of Britiny U. [Tara S.]*, 124 AD3d 964, 966 [3d Dept 2015]; *see* Social Services Law § 384-b [7] [f]). Here, after the father was adjudicated the biological parent of the child while incarcerated, petitioner exercised diligent efforts by exchanging monthly letters and photographs with the father; facilitating the father's communications by providing him with stamped envelopes; providing him updates on the child's progress and medical condition; and engaging in two service plan reviews with him (*see Britiny U.*, 124 AD3d at 966; *Matter of Kaiden AA. [John BB.]*, 81 AD3d 1209, 1209-1210 [3d Dept 2011]). The father faults petitioner for not offering him services such as parenting, counseling, and substance abuse classes; however, inasmuch as the father was incarcerated, petitioner "was not required to provide 'services and other assistance . . . so that problems preventing the discharge of the child[ ] from care [could] be resolved or ameliorated' " (*Matter of Jaylysia S.-W.*, 28 AD3d 1228, 1229 [4th Dept 2006], quoting § 384-b [7] [f] [3]). Contrary to the father's further contention, the record establishes that he did not suggest relative placement resources to the caseworker during his incarceration and that the one relative who contacted the caseworker to inquire about the father's case did not indicate that she could be a viable placement resource for the child (*see generally Britiny U.*, 124 AD3d at 966).

Next, contrary to the father's contention, we conclude that " 'there is no evidence that [the father] had a realistic plan to provide an adequate and stable home for the child[ ]' " (*Matter of Christian C.-B. [Christopher V.B.]*, 148 AD3d 1775, 1777 [4th Dept 2017], *lv denied* 29 NY3d 917 [2017]; *see generally* Social Services Law § 384-b [7] [a], [c]). Although the father testified that he planned to move in with his own father after his release from incarceration and to work in construction, the caseworker testified that the father had never mentioned his own father prior to the hearing on the petition. Moreover, the father did not identify a placement resource for the child during the pendency of his incarceration, nor did he have an alternative proposal if he was not released from prison as planned. "The failure of an incarcerated parent to provide any realistic and feasible alternative to having the child[ ] remain in foster care until the parent's release from prison . . . supports a finding of permanent neglect" (*Matter of Alex C., Jr. [Alex C., Sr.]*, 114 AD3d 1149, 1150 [4th Dept 2014], *lv denied* 23 NY3d 901 [2014] [internal quotation marks omitted]; *see Britiny U.*, 124 AD3d at 966; *Matter of Joannis P. [Joseph Q.]*, 110 AD3d 1188, 1191 [3d Dept 2013], *lv denied* 22 NY3d 857 [2013]).

Finally, "where, as here, Family Court determined that there had been an abandonment as well as permanent neglect, a dispositional hearing is not mandated" (*Matter of Joseph H.*, 185 AD2d 682, 684 [4th Dept 1992]; *see Matter of Westchester County Dept. of Social Servs. [Terry W.]*, 207 AD2d 496, 497 [2d Dept 1994]; *Matter of Dlaine S.*, 72

AD2d 775, 776 [2d Dept 1979]). However, inasmuch as the permanent neglect finding is the only ground in the petition that petitioner established by clear and convincing evidence, "[t]he court was required to hold such a dispositional hearing upon its finding of permanent neglect unless the parties consented to dispense with the hearing" (*Matter of James V.*, 302 AD2d 916, 918 [4th Dept 2003]; *see* Family Ct Act § 625 [a]; *Matter of Kyle K.*, 49 AD3d 1333, 1335 [4th Dept 2008], *lv denied* 10 NY3d 715 [2008]; *Terry W.*, 207 AD2d at 497). The father asserts that he did not consent to dispense with a dispositional hearing, petitioner and the Attorney for the Child do not suggest otherwise, and the record is silent on the issue (*see James V.*, 302 AD2d at 918). We therefore further modify the order by vacating the disposition, and we remit the matter to Family Court to conduct a dispositional hearing or to elicit, on the record, a specific waiver from the parties.

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

1305

CA 18-01107

PRESENT: WHALEN, P.J., PERADOTTO, CARNI, NEMOYER, AND WINSLOW, JJ.

ROBERT BERNARD DICKINSON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BASSETT HEALTHCARE, MARSHALL E. PEDERSEN, JR., M.D., PATRICK DIETZ, M.D., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

CARTER, CONBOY, CASE, BLACKMORE, MALONEY & LAIRD, P.C., ALBANY (ADAM H. COOPER OF COUNSEL), FOR DEFENDANTS-APPELLANTS BASSETT HEALTHCARE, AND PATRICK DIETZ, M.D.

NAPIERSKI, VANDENBURGH, NAPIERSKI & O'CONNOR, LLP, ALBANY (JOHN W. VANDENBURGH OF COUNSEL), FOR DEFENDANT-APPELLANT MARSHALL E. PEDERSEN, JR., M.D.

ROBERT F. JULIAN, P.C., UTICA (ROBERT F. JULIAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Herkimer County (Norman I. Siegel, J.), entered November 21, 2017. The order, insofar as appealed from, denied in part the motion of defendant Marshall E. Pedersen, Jr., M.D., for summary judgment dismissing the complaint against him and denied in part the motion of defendants Bassett Healthcare and Patrick Dietz, M.D., for summary judgment dismissing the complaint against them.

It is hereby ORDERED that the order so appealed from is modified on the law by granting those parts of the motion of defendants Bassett Healthcare and Patrick Dietz, M.D., for summary judgment dismissing the complaint in its entirety against Patrick Dietz, M.D., and for summary judgment dismissing the complaint, as amplified by the bill of particulars, insofar as it asserts a claim of vicarious liability against Bassett Healthcare based on the alleged malpractice of Patrick Dietz, M.D., and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained as a result of malpractice on the part of Patrick Dietz, M.D., and Marshall E. Pedersen, Jr., M.D., employees of Bassett Healthcare (collectively, defendants). Defendants appeal from an order insofar as it denied in part their respective motions for summary judgment dismissing the complaint against them.

A defendant in a medical malpractice action meets its initial

burden on summary judgment by presenting " 'factual proof, generally consisting of affidavits, deposition testimony and medical records, to rebut the claim of malpractice by establishing that [he or she] complied with the accepted standard of care or did not cause any injury to the patient' " (*Webb v Scanlon*, 133 AD3d 1385, 1386 [4th Dept 2015]; *see Cole v Champlain Val. Physicians' Hosp. Med. Ctr.*, 116 AD3d 1283, 1285 [3d Dept 2014]). Here, defendants established on their respective motions both the absence of a departure from the relevant standard of care and the absence of causation, and thus plaintiff was "required to raise a triable issue of fact as to both of those elements" (*Swanson v Raju*, 95 AD3d 1105, 1107 [2d Dept 2012]).

In opposition to the motions, plaintiff submitted the affirmation of his expert, which raised an issue of fact whether Dr. Pedersen departed from accepted medical practice by causing an injury to plaintiff's iliac vein that narrowed the lumen and contributed to the formation of a thrombus. Supreme Court thus properly denied those parts of defendants' respective motions for summary judgment dismissing the complaint, as amplified by the bill of particulars, insofar as it asserts "claims against Dr. Pedersen surrounding the surgical procedure only" and asserts a claim of vicarious liability against Bassett Healthcare based on the alleged malpractice of Dr. Pedersen (*see generally Groff v Kaleida Health*, 161 AD3d 1518, 1521 [4th Dept 2018]).

We agree with Bassett Healthcare and Dr. Dietz, however, that the court should have granted those parts of their motion for summary judgment dismissing the complaint in its entirety against Dr. Dietz and for summary judgment dismissing the complaint, as amplified by the bill of particulars, insofar as it asserts a claim of vicarious liability against Bassett Healthcare based on the alleged malpractice of Dr. Dietz, and we therefore modify the order accordingly. In opposition to their motion, plaintiff's expert did not opine that Dr. Dietz caused the iliac vein injury and instead opined that Dr. Dietz deviated from the standard of care by insufficiently examining or testing the iliac vein following Dr. Pedersen's repair. Inasmuch as plaintiff's expert did not indicate the possible results of any such examination or testing, whether those results should have prompted a different course of treatment, or how Dr. Dietz's alleged departure from the standard of care otherwise caused plaintiff's injury, plaintiff failed to raise an issue of fact as to causation regarding Dr. Dietz (*see generally Webb*, 133 AD3d at 1387).

All concur except WHALEN, P.J., and PERADOTTO, J., who dissent in part and vote to reverse the order insofar as appealed from in accordance with the following memorandum: We respectfully dissent in part inasmuch as we agree with defendants-appellants that the opposing affirmation of plaintiff's expert is conclusory and insufficient to raise a triable issue of material fact whether the alleged malpractice of defendant Marshall E. Pedersen, Jr., M.D., was a proximate cause of plaintiff's claimed injuries (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *Matos v Schwartz*, 104 AD3d 650, 652 [2d Dept 2013]). Plaintiff's expert "failed to articulate, in a nonconclusory fashion" that plaintiff's claimed injuries would not have occurred

absent the alleged malpractice of Dr. Pedersen (*Goldsmith v Taverni*, 90 AD3d 704, 705 [2d Dept 2011]; *see generally Diaz*, 99 NY2d at 544; *Matos*, 104 AD3d at 652). The expert failed to address the potential causal relationship, raised by Dr. Pedersen in support of his motion for summary judgment, linking plaintiff's preoperative risk factors or the postoperative treatment of plaintiff to his development of a deep vein thrombosis two days after the surgery and the alleged complications resulting from that thrombosis. We would therefore reverse the order insofar as appealed from and grant defendants' respective motions for summary judgment dismissing the complaint against them in its entirety.

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

1307

CA 18-00120

PRESENT: WHALEN, P.J., PERADOTTO, CARNI, NEMOYER, AND WINSLOW, JJ.

CATHY TUMINNO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MARJORIE WAITE, DEFENDANT-RESPONDENT,
JAMES FLAGELLA, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

JAMES FLAGELLA, DEFENDANT-APPELLANT PRO SE.

GROSS SHUMAN P.C., BUFFALO (LESLIE MARK GREENBAUM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (PAUL V. WEBB, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Frank A. Sedita, III, J.), entered April 18, 2017. The order, inter alia, granted the motion of plaintiff to confirm in part and reject in part the Referee's report of sale.

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

Memorandum: In this action for, inter alia, the partition and sale of real property, defendant James Flagella appeals from an order that granted plaintiff's motion to, among other things, confirm the Referee's report of sale (report) insofar as it directs that the property be sold to defendant Marjorie Waite and reject the report insofar as it concludes that the sale of the property triggered a right of first refusal in favor of Flagella. We affirm.

Plaintiff and Waite were tenants in common of property they acquired by an executor's deed pursuant to the settlement of their mother's estate. In settling that estate, plaintiff, Waite, and the other named defendants signed a settlement agreement providing that plaintiff and Waite "agree to grant to [each of the other named defendants] the option to purchase the . . . property, in the event that [plaintiff and Waite], either jointly or severally, determine to sell, assign or transfer the . . . property to someone other than each other."

On a prior appeal, we vacated an order directing a sale of the property in the event that Flagella and the remaining defendants did

not exercise their "option to purchase," concluding that the "option" provided in the settlement agreement was in fact a right of first refusal that was not triggered by plaintiff's commencement of this action (*Tuminno v Waite*, 110 AD3d 1456, 1457 [4th Dept 2013]). We therefore remitted the matter to Supreme Court for further proceedings related to plaintiff's action.

On remittal, the court appointed a Referee, who recommended that the property be sold at public auction, and the court adopted that recommendation. Approximately one week before the auction was scheduled to take place, Waite purportedly entered into an agreement to sell the subject property to a third party (third-party agreement). Plaintiff was not a signatory to that agreement and did not consent to the sale. Thereafter, the third-party agreement was apparently abandoned, and the auction proceeded as scheduled.

Waite was the highest bidder at the auction. The Referee, however, determined in his report that the auction triggered the right of first refusal, which Flagella and another defendant sought to exercise. As noted, plaintiff moved, inter alia, to reject the report to that extent. The court granted plaintiff's motion, rejected the Referee's report with respect to the right of first refusal on the ground that neither the auction nor the third-party agreement triggered that right, and confirmed Waite's purchase of the property.

We reject Flagella's contention that the auction triggered his right of first refusal. By the terms of the settlement agreement, the right of first refusal is triggered by a determination of plaintiff and Waite to sell the property "to someone other than each other." Because Waite, not a third party, purchased the property at the auction, the auction did not trigger Flagella's right of first refusal.

We reject Flagella's further contention that the third-party agreement triggered his right of first refusal to purchase the entire property interest. Plaintiff was not a party to that agreement, and therefore it is void insofar as it purports to convey the entire property interest (*see Bee Jay Indus. Corp. v Fina*, 98 AD2d 738, 738-739 [2d Dept 1983], *affd* 62 NY2d 851 [1984]; *SJSJ Southold Realty, LLC v Fraser*, 33 AD3d 784, 785 [2d Dept 2006]). Because the third-party agreement could not have validly conveyed the entire property interest to someone other than plaintiff or Waite, it did not trigger a right of first refusal to purchase the entire property interest.

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

1345

CA 18-00647

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

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

V MEMORANDUM AND ORDER

JOHN R. STENSRUD, MARIA B. STENSRUD, RESPONDENTS-APPELLANTS, ET AL., RESPONDENT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.) entered December 15, 2016. The order, among other things, granted petitioner's motion to strike a portion of respondents-appellants' appraisal report and to preclude proposed expert testimony.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion insofar as it sought to strike that part of respondents-appellants' appraisal report with respect to "investment value" and insofar as it sought to preclude testimony of respondents-appellants' proposed expert that is consistent with the determination and proof of valuation in respondents-appellants' appraisal report, and as modified the order is affirmed without costs.

Memorandum: In this condemnation proceeding, respondents-appellants (respondents) appeal from an order that granted petitioner's motion in limine to strike that part of respondents' appraisal report with respect to "investment value" and to preclude respondents' proposed expert from testifying at trial and that denied respondents' cross motion in limine to strike petitioner's appraisal report. As an initial matter, we note that the order is appealable inasmuch as it limited "the scope of the issues at trial" by precluding the introduction of evidence regarding respondents' primary method of property valuation (*Dischiavi v Calli*, 125 AD3d 1435, 1436 [4th Dept 2015]).

We agree with respondents that Supreme Court erred in granting the motion insofar as it sought to strike that part of their appraisal

report with respect to "investment value," and we therefore modify the order accordingly. "The measure of damages in condemnation is the fair market value of the condemned property in its highest and best use on the date of the taking" (*Matter of City of New York [Franklin Record Ctr.]*, 59 NY2d 57, 61 [1983]). There is "no fixed method for determining [fair market] value" (*Matter of Allied Corp. v Town of Camillus*, 80 NY2d 351, 356 [1992], *rearg denied* 81 NY2d 784 [1993]; *see generally Matter of Consolidated Edison Co. of N.Y., Inc. v City of New York*, 8 NY3d 591, 597 [2007]) and, absent evidence of a recent sale of the subject property, "the courts have traditionally valued property by one of three methods: comparable sales, capitalization of income or reproduction cost less depreciation" (*Allied Corp.*, 80 NY2d at 356; *see Matter of Oakwood Beach Bluebelt, Stage 1 [City of New York—Yeshivas Ch'San Sofer, Inc.]*, 164 AD3d 1453, 1456 [2d Dept 2018]). Where, as here, "the highest and best use is the one the property presently serves and that use is income-producing, then the capitalization of income is a proper method of valuation" (*Matter of City of New York [Oceanview Terrace]*, 42 NY2d 948, 949 [1977]; *see Matter of Town of Riverhead v Saffals Assoc.*, 145 AD2d 423, 423 [2d Dept 1988]; *see generally Matter of Techniplex III v Town & Vil. of E. Rochester*, 125 AD3d 1412, 1413-1415 [4th Dept 2015]). In our view, the stricken portion of respondents' appraisal report, although titled "investment valuation," applied an income capitalization approach using the standard income capitalization formula, i.e., value equals net income divided by a capitalization rate (*see Matter of Hempstead Country Club v Board of Assessors*, 112 AD3d 123, 136 [2d Dept 2013]), and applied factors that, according to respondents' appraiser, accurately reflect the property's value and would make the property more appealing to prospective purchasers. To the extent that petitioner contends that certain factors considered by respondents' appraiser in valuing the property do not accurately reflect market value, "[t]he fact that some aspects of the valuation methodology [of respondents' appraiser] may be subject to question goes to the weight to be accorded the appraisal[]," not its admissibility (*Techniplex III*, 125 AD3d at 1413).

Contrary to respondents' contention, the court properly granted the motion to the extent that it sought to preclude the testimony of respondents' expert regarding his own valuation of the property, which resulted in a proposed valuation higher than that set forth in respondents' appraisal report. At trial, respondents are "limited in their affirmative proof of value to matters set forth in their respective appraisal reports" (22 NYCRR 202.61 [e]; *see Matter of Town of Guilderland [Pietrosanto]*, 267 AD2d 837, 837-838 [3d Dept 1999]). Thus, the court properly precluded respondents' expert from presenting testimony regarding valuation beyond that contained in respondents' appraisal report.

We agree with respondents, however, that the court erred in granting the motion insofar as it sought to preclude the testimony of their proposed expert that is consistent with the determination and proof of valuation in their appraisal report, and we therefore further modify the order accordingly. Respondents' expert disclosure reflects

that their expert intends to testify that the income capitalization method should be used to determine the property value in this case, and to critique petitioner's use of an alternative valuation method. To the extent that respondents are able to qualify him as an expert at trial, their expert should be permitted to testify in support of the valuation methods employed by respondents' appraiser and to critique those methods used by petitioner.

Finally, contrary to respondents' further contention, the court properly denied respondents' cross motion to strike petitioner's appraisal report. As with respondents' appraisal report, the issue whether petitioner's appraisal report accurately reflects the value of respondents' property is an issue for trial (*see Techniplex III*, 125 AD3d at 1413).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

1395

CA 18-01208

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

DESHANE LEVERE, SHARMA EAGAN, SIERRA PEREZ AND SHADIE PEREZ, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, A MUNICIPAL CORPORATION, POLICE DEPARTMENT OF CITY OF SYRACUSE AND ERIC V. GERACE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A POLICE OFFICER OF CITY OF SYRACUSE, DEFENDANTS-APPELLANTS.

KRISTEN E. SMITH, CORPORATION COUNSEL, SYRACUSE (TODD LONG OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

COHEN COMPAGNI BECKMAN APPLER & KNOLL, PLLC, SYRACUSE (ANASTASIA M. SEMEL OF COUNSEL), AND FIELD LAW GROUP, P.C., NEW YORK CITY, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered December 21, 2017. The order, insofar as appealed from, denied in part defendants' motion for summary judgment dismissing plaintiffs' complaint.

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

Memorandum: Plaintiffs commenced this action seeking to recover damages for injuries they allegedly sustained when the vehicle in which they were traveling was struck in an intersection by a police vehicle operated by defendant Eric V. Gerace (defendant officer), a police officer employed by defendant Police Department of the City of Syracuse, while he was responding to an emergency call. Defendants thereafter moved for summary judgment dismissing the complaint on the grounds that the defendant officer's conduct was measured by the "reckless disregard" standard of care under Vehicle and Traffic Law § 1104 and his operation of the police vehicle was not reckless as a matter of law and that plaintiffs did not sustain a serious injury as a result of the accident within the meaning of Insurance Law § 5102 (d). Supreme Court determined, in essence, that the reckless disregard standard did not apply but granted the motion in part on the ground that plaintiffs had either not sustained any serious injuries or not sustained certain categories of serious injury. The court otherwise denied defendants' motion, and defendants appeal from the

order to that extent. We reverse the order insofar as appealed from.

We agree with defendants that the court erred in determining that the defendant officer's conduct was not measured by the "reckless disregard" standard of care under Vehicle and Traffic Law § 1104 (e) (*see generally Kabir v County of Monroe*, 16 NY3d 217, 230-231 [2011]; *Dodds v Town of Hamburg*, 117 AD3d 1428, 1429 [4th Dept 2014]). That standard of care "applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104 (b)" (*Kabir*, 16 NY3d at 220) and, if applicable, the driver is "shielded from liability unless [he or she] is shown to have acted with 'reckless disregard' of the safety of others" (*Palmer v City of Syracuse*, 13 AD3d 1229, 1230 [4th Dept 2004]). Here, there is no dispute that the defendant officer was operating an "authorized emergency vehicle" and was "involved in an emergency operation" at the time of the accident (§ 1104 [a]). Furthermore, defendants' submissions in support of their motion established as a matter of law that the defendant officer was performing exempted conduct when he "proceed[ed] past a steady red signal . . . , but only after slowing down as may be necessary for safe operation" (§ 1104 [b] [2]; *see* § 1104 [a]), and plaintiffs failed to raise a triable issue of fact on that issue (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

We note that the court's and plaintiffs' reliance on our decision in *LoGrasso v City of Tonawanda* (87 AD3d 1390 [4th Dept 2011]) is misplaced. Unlike the officer in *LoGrasso*, who complied with the rules of the road and thus was not subject to the reckless disregard standard of care (*id.* at 1391), the defendant officer here engaged in conduct that ordinarily constitutes a violation of Vehicle and Traffic Law § 1111 (d) (1) but is specifically exempted from the rules of the road under section 1104 (b) (2), i.e., he proceeded against a steady red light.

We further agree with defendants that they met their initial burden of establishing as a matter of law that the defendant officer's conduct did not "rise to the level of recklessness required of the driver of an emergency vehicle in order for liability to attach" (*Szczerbiak v Pilat*, 90 NY2d 553, 557 [1997]; *see* Vehicle and Traffic Law § 1104 [e]), and plaintiffs failed to raise a triable issue of fact (*see Nikolov v Town of Cheektowaga*, 96 AD3d 1372, 1373 [4th Dept 2012]). The purpose of the reckless disregard standard is to avoid "judicial second-guessing" of emergency vehicle drivers' split-second decisions that are made under high pressure conditions and to mitigate against the risk that liability might deter emergency vehicle drivers from acting decisively and taking calculated risks in the performance of their duties (*Frezzell v City of New York*, 24 NY3d 213, 217 [2014] [internal quotation marks omitted]; *see Saarinen v Kerr*, 84 NY2d 494, 501-502 [1994]). Thus, "for liability to be predicated upon a violation of Vehicle and Traffic Law § 1104, there must be evidence that the actor had intentionally done an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with

conscious indifference to the outcome" (*Frezzell*, 24 NY3d at 217 [internal quotation marks omitted]; *see Palmer*, 13 AD3d at 1229).

Here, the defendant officer's uncontroverted testimony established that he was responding to a disturbance call that was "[p]riority 1," i.e., the highest priority level, and that he took several precautions before proceeding into the intersection against the red light. Specifically, he slowed his vehicle to an almost complete stop, looked to his right and left, and then slowly proceeded into the intersection at a speed of about five miles per hour. When plaintiffs' vehicle came into the defendant officer's peripheral vision, he "slammed" his brake and attempted to avoid colliding with plaintiffs' vehicle. Where, as here, a defendant officer takes precautionary measures before engaging in exempted conduct under Vehicle and Traffic Law § 1104 (b), the police officer does not act with reckless disregard for the safety of others (*see Williams v Fassinger*, 119 AD3d 1368, 1369 [4th Dept 2014], *lv denied* 24 NY3d 912 [2014]; *Dodds*, 117 AD3d at 1430; *cf. Nikolov*, 96 AD3d at 1373-1374).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

1405

KA 14-01085

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ELOY COLON, ALSO KNOWN AS ELOY COLON TORRES,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (John J. Connell, J.), rendered March 2, 2007. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal sexual act in the first degree (Penal Law § 130.50 [3]), arising from anal sexual conduct perpetrated by defendant on the seven-year-old victim. The case was initiated in Supreme Court (Valentino, J.) and then transferred to County Court (Connell, J.) prior to trial.

Contrary to defendant's contention, Supreme Court properly refused to allow him access to various mental health and school records of the victim. Such records are confidential (*see People v Tirado*, 109 AD3d 688, 688 [4th Dept 2013], *lv denied* 22 NY3d 959 [2013], *reconsideration denied* 22 NY3d 1091 [2014], *cert denied* 574 US —, 135 S Ct 183 [2014]; *People v Boyea*, 222 AD2d 937, 938 [3d Dept 1995], *lv denied* 88 NY2d 934 [1996]), and defendant failed to establish that the interests of justice significantly outweighed their confidentiality inasmuch as he failed to demonstrate that the records contained information relevant to defendant's guilt or innocence (*see Tirado*, 109 AD3d at 688-689; *People v Bassett*, 55 AD3d 1434, 1437 [4th Dept 2008], *lv denied* 11 NY3d 922 [2009]) or to the victim's ability to perceive and recall events (*see People v Brown*, 24 AD3d 884, 887 [3d Dept 2005], *lv denied* 6 NY3d 832 [2006]; *cf. People v Baranek*, 287 AD2d 74, 78-79 [2d Dept 2001]). Indeed, the record reflects that Supreme Court reviewed the requested records in camera and concluded that they contained no such information (*see generally People v Kiah*,

156 AD3d 1054, 1056-1057 [3d Dept 2017], *lv denied* 31 NY3d 984 [2018]). Contrary to defendant's related contention, County Court did not abuse its discretion in preventing defense counsel from asking prosecution witnesses about the victim's mental health diagnoses and medications inasmuch as there was no indication that those lines of inquiry were likely to produce material relevant to the trial, i.e., to the determination of defendant's guilt or innocence (*see Tirado*, 109 AD3d at 688-689; *Brown*, 24 AD3d at 887). For the same reason, we conclude that the court did not abuse its discretion in precluding testimony from defendant's expert psychologist (*see generally People v Lee*, 96 NY2d 157, 162 [2001]; *People v Lemery*, 107 AD3d 1593, 1594 [4th Dept 2013], *lv denied* 22 NY3d 956 [2013]).

The record on appeal belies defendant's contention that Supreme Court failed to conduct an in camera review of the victim's mental health records from two hospitals (*see generally People v Green*, 72 AD3d 1601, 1602 [4th Dept 2010]; *People v Gholston*, 130 AD2d 843, 844 [3d Dept 1987], *lv denied* 70 NY2d 799 [1987]). Additionally, in light of the lengthy and unexplained delay of defendant in pursuing this appeal, we reject defendant's contention that he is entitled to summary reversal of the judgment of conviction on the ground that those records were eventually purged and destroyed by County Court (*see People v Delarosa*, 282 AD2d 296, 296 [1st Dept 2001], *lv denied* 99 NY2d 557 [2002]; *see also People v Carter*, 91 AD3d 967, 967-968 [2d Dept 2012], *lv denied* 18 NY3d 992 [2012]; *People v Quinones*, 36 AD3d 459, 460 [1st Dept 2007], *lv denied* 8 NY3d 926 [2007]). In any event, defendant failed to make an "appropriate showing" that "alternative methods to provide an adequate record [were] not available" (*People v Glass*, 43 NY2d 283, 286 [1977]; *see People v Yavru-Sakuk*, 98 NY2d 56, 59 [2002]).

We reject defendant's contention that County Court's jury charge with respect to the concepts of reasonable doubt and proof beyond a reasonable doubt was erroneous and confusing. The court's charge, read as a whole, conveyed to the jury the proper standard that " 'a reasonable doubt is to be distinguished from a doubt based on a whim, sympathy, or some other vague reason' " (*People v Allen*, 301 AD2d 57, 62 [4th Dept 2002], *lv denied* 99 NY2d 625 [2003]). The fact that the court defined a reasonable doubt as a doubt for which one is "able to assign a reason" does not constitute error. The same concept, in fact, appears in the Criminal Jury Instructions (*see* CJI2d[NY] Presumption of Innocence, Burden of Proof, Proof Beyond a Reasonable Doubt; *see also* 1 CJI[NY] 6.20).

Contrary to defendant's further contention, the court's *Allen* charge as a whole was "encouraging rather than coercive" (*People v Ford*, 78 NY2d 878, 880 [1991]). The fact that the court referred to the possibility of another jury selection and a retrial in the event the jury could not reach a verdict did not render the *Allen* charge coercive. Those concepts appear at least twice in the standard deadlock charge in the Criminal Jury Instructions (*see* CJI2d[NY] Deadlock Charge).

Defendant additionally contends that the court erred in denying his motion seeking a mistrial or, alternatively, to strike the testimony of the victim on the ground that the prosecutor violated the court's directive not to speak to the victim during a break in testimony. That contention is without merit. The record establishes that there was no substantive violation of the court's directive, and thus we cannot conclude that the court erred in denying the motion (*see People v Garner*, 145 AD3d 1573, 1574 [4th Dept 2016], *lv denied* 29 NY3d 1031 [2017]; *see also People v Smith*, 28 AD3d 204, 205 [1st Dept 2006], *lv denied* 7 NY3d 763 [2006]). Defendant's contention that he was deprived of a fair trial because the court failed to instruct the jury that it could not consider matters relating to sentence or punishment during the course of its deliberations is not preserved for our review (*see* CPL 470.05 [2]) and, in any event, is without merit (*see People v Diaz*, 191 AD2d 642, 642-643 [2d Dept 1993], *lv denied* 81 NY2d 1072 [1993]). We have examined defendant's remaining contentions and conclude that none warrants reversal or modification of the judgment.

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

1409

CAF 17-01141

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

IN THE MATTER OF RICHARD K.H.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

EMILIE P., RESPONDENT-APPELLANT,
AND GERALD F.M., RESPONDENT-RESPONDENT.

PETER J. DIGIORGIO, JR., UTICA, FOR RESPONDENT-APPELLANT.

SCOTT A. OTIS, WATERTOWN, FOR RESPONDENT-RESPONDENT.

KRYSTAL A. RUPERT, LOWVILLE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Lewis County (Daniel R. King, J.), entered June 2, 2017 in a proceeding pursuant to Family Court Act article 5. The order, inter alia, declared respondent Gerald F.M. to be the father of the subject child.

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

Memorandum: Respondent mother appeals from an order that dismissed the instant paternity petition, without a hearing, on the ground of equitable estoppel (*see* Family Ct Act § 532 [a]). We affirm for reasons stated in the decision at Family Court. We write only to note that, contrary to the mother's contention, the court had " 'sufficient information to render an informed decision consistent with the child's best interests' " (*Matter of Edward WW. v Diana XX.*, 79 AD3d 1181, 1182 [3d Dept 2010]; *cf. Matter of Eugene F.G. v Darla D.*, 261 AD2d 958, 959 [4th Dept 1999]). Inasmuch as the court was " 'fully familiar with relevant background facts regarding the parties and the child from several past proceedings,' " there was no need for a hearing on the petition (*Matter of Chrysler v Fabian*, 66 AD3d 1446, 1447 [4th Dept 2009], *lv denied* 13 NY3d 715 [2010]; *see Matter of Walberg v Rudden*, 14 AD3d 572, 572 [2d Dept 2005]).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

1414

CA 18-01279

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

EDWARD C. VAN LOAN, JR., AND KAREN DUFFY, AS EXECUTORS OF THE ESTATE OF CHARLOTTE S. VAN LOAN, DECEASED, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ROBIN V. JONES, DEFENDANT-APPELLANT.

LAW OFFICES OF HARIRI & CRISPO, NEW YORK CITY (RONALD D. HARIRI OF COUNSEL), FOR DEFENDANT-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (JOHN M. DELANEY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered October 3, 2017. The order and judgment, among other things, adjudged that defendant pay the Estate of Charlotte S. Van Loan the sum of $150,000 plus interest.

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

Memorandum: Prior to her death, decedent Charlotte S. Van Loan commenced this action seeking, inter alia, to recover money that defendant withdrew from decedent's bank account without her permission. Edward C. Van Loan, Jr., and Karen Duffy, as executors of decedent's estate, were substituted as plaintiffs following decedent's death, and thereafter Supreme Court granted their motion for summary judgment on their first cause of action, for repayment of $150,000 withdrawn by defendant from decedent's bank account, together with interest.

Initially, we note that defendant appeals, as stated in her notice of appeal, from an "Order and Decision" dated September 14, 2017 and entered October 3, 2017. That description identifies a decision, from which no appeal lies; nevertheless, in the absence of prejudice to plaintiffs, we will exercise our discretionary power to treat the notice of appeal as valid and the appeal as properly taken from the order and judgment entered October 3, 2017 (*see* CPLR 5520 [c]; *Marrow v State of New York*, 105 AD3d 1371, 1372 [4th Dept 2013]; *Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]).

Contrary to defendant's contention, the court properly granted plaintiffs' motion. We reject defendant's contention that plaintiffs failed to support their motion with the affidavit of someone with personal knowledge of the relevant events (*see generally* CPLR 3212 [b]). In addition to the affidavit of the attorney who attempted on behalf of decedent to obtain a promissory note for repayment of the money withdrawn from decedent's bank account, plaintiffs submitted the affidavit of defendant, originally submitted in a separate probate proceeding involving the same parties in Surrogate's Court. Therein, defendant averred that she had an oral agreement with decedent "that the $150,000 would be paid back with the interest [decedent] would have made if the money had been left in the bank," and that this loan was to be repaid within two years. In opposition, defendant failed to raise an issue of fact whether the money she borrowed was not to be repaid to decedent but was to be deducted from defendant's inheritance upon decedent's death. In the affidavit defendant submitted in opposition to plaintiffs' motion, and in direct contrast to her earlier sworn statements, defendant averred that she and decedent "agreed that in exchange for the loan and the services my husband and I provided to her for over 40 years, the $150,000 for the loan would be taken out of [defendant's] inheritance upon [decedent's] death." Defendant further averred that, as such, there were questions of fact "whether [she] should be absolved of liability for the 'loan.' " Inasmuch as defendant's later affidavit contradicts her earlier one and appears to be tailored to avoid summary judgment on the admitted loan (*see Tronolone v Jankowski*, 74 AD3d 1721, 1722 [4th Dept 2010]; *see also Castro v City of New York*, 94 AD3d 1032, 1033 [2d Dept 2012], *lv denied* 19 NY3d 813 [2012]; *Garcia v Good Home Realty, Inc.*, 67 AD3d 424, 425 [1st Dept 2009]), the assertions in the later affidavit are insufficient to raise an issue of fact precluding summary judgment (*see Tronolone*, 74 AD3d at 1722). Finally, we reject defendant's contention that the court erred in granting plaintiffs summary judgment because plaintiffs' first cause of action is inextricably intertwined with defendant's counterclaim for the fair and reasonable value of the services rendered by her to decedent.

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

1415

CA 18-01235

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

DONALD PRESTON, AS EXECUTOR OF THE ESTATE OF
LAWRENCE A. PRESTON, DECEASED,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CASTLE POINTE, LLC, SL MASTER LESSEE II, LLC,
HEALTH CARE REIT, INC., HCRI PENNSYLVANIA
PROPERTIES HOLDING COMPANY, HCRI ILLINOIS
PROPERTIES, LLC, HCRI WISCONSIN PROPERTIES, LLC,
SENIOR LIFESTYLE MANAGEMENT, LLC,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.

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

KAUFMAN BORGEEST & RYAN LLP, VALHALLA (JACQUELINE MANDELL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered August 11, 2017. The order granted the motion of defendants Castle Pointe, LLC, SL Master Lessee II, LLC, Health Care Reit, Inc., HCRI Pennsylvania Properties Holding Company, HCRI Illinois Properties, LLC, HCRI Wisconsin Properties, LLC, and Senior Lifestyle Management, LLC, seeking summary judgment dismissing plaintiff's amended complaint against them.

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

Memorandum: Plaintiff commenced this premises liability action seeking damages for, inter alia, the wrongful death and conscious pain and suffering of his father, Lawrence A. Preston (decedent), a 96-year-old man who allegedly drowned in a retention pond on property owned, leased, or operated by defendants-respondents (defendants) and containing the senior citizen independent living facility in which decedent resided. Plaintiff appeals from an order granting defendants' motion for summary judgment dismissing the amended complaint against them. We affirm.

In support of their motion, defendants established that decedent's body was found in the pond a day after he was last seen leaving the apartment building in which he resided. The record

contains no information concerning how he came to be there. The Monroe County Medical Examiner concluded that decedent collapsed into the pond and died of drowning. In opposition to the motion, however, plaintiff contended, inter alia, that decedent may have slipped on the pond's sloping bank and slid into the water.

" 'A landowner has a duty to exercise reasonable care in maintaining [its] property in a safe condition under all of the circumstances, including the likelihood of injury to others, the seriousness of the potential injuries, the burden of avoiding the risk, and the foreseeability of a potential plaintiff's presence on the property' . . . However, a landowner has no duty to protect or warn against an open and obvious condition that is inherent or incidental to the nature of the property, and that could be reasonably anticipated by those using it" (*Groom v Village of Sea Cliff*, 50 AD3d 1094, 1094 [2d Dept 2008]; *see Commender v Strathmore Ct. Home Owners Assn.*, 151 AD3d 1014, 1015 [2d Dept 2017]).

Here, defendants met their initial burden on the motion by establishing that the pond, including its sloping bank, was an open and obvious condition inherent or incidental to the nature of the property and that it was known to decedent prior to the accident (*see Mossberg v Crow's Nest Mar. of Oceanside*, 129 AD3d 683, 683-684 [2d Dept 2015]; *Progressive Northeastern Ins. Co. v Town of Oyster Bay*, 40 AD3d 612, 613 [2d Dept 2007]; *see also Barnaby v Rice*, 75 AD2d 179, 182 [3d Dept 1980], *affd* 53 NY2d 720 [1981]). "A slippery condition on a [pond's bank] is necessarily incidental to its nature and location near a body of water" (*Mossberg*, 129 AD3d at 684; *see Groom*, 50 AD3d at 1094-1095; *see also Pomianowski v City of New York*, 67 AD3d 761, 762 [2d Dept 2009]).

After defendants met their initial burden on the motion, "the burden then shifted to [plaintiff] 'to produce evidentiary proof in admissible form sufficient to raise a material issue of fact to avoid summary judgment' " (*Primax Props., LLC v Monument Agency, Inc.*, 158 AD3d 1336, 1337 [4th Dept 2018]; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). We agree with defendants that he failed to do so. We note in particular that the engineering expert's affidavit that plaintiff submitted fails to indicate that it was based on any studies, regulations, codes, or statutes, "nor is the expert's conclusion that the [retention pond] was defective and unsafe . . . supported by foundational facts, such as a deviation from industry standards or statistics showing the frequency of injuries caused by" the lack of safety measures proposed by the expert (*Kiersznowski v Gregory B. Shankman, M.D., P.C.*, 67 AD3d 1366, 1367 [4th Dept 2009] [internal quotation marks omitted]; *see Baehre v Sagamore Resort Hotel, Inc.*, 4 AD3d 810, 811 [4th Dept 2004]; *see generally Romano v Stanley*, 90 NY2d 444, 451 [1997]). Plaintiff failed to introduce evidence in admissible form in support of his remaining contention and thus failed to raise a triable issue of fact with respect to that

contention (*see generally Alvarez*, 68 NY2d at 324).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

1437

CA 18-00494

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

SANTINA GATTO, AS ADMINISTRATRIX OF THE ESTATE OF YVONNE A. RUBINO, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ALLSTATE INDEMNITY COMPANY, DEFENDANT, AND DIONISIO (DION) ROMAN, JR., DEFENDANT-APPELLANT.

WOOD, SMITH, HENNING & BERMAN, LLP, NEW YORK CITY (NANCY QUINN KOBA OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHELE E. DETRAGLIA, UTICA, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Norman I. Siegel, J.), dated December 18, 2017. The order, insofar as appealed from, denied the motion of defendant Dionisio (Dion) Roman, Jr. for summary judgment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion of defendant Dionisio (Dion) Roman, Jr. is granted and the complaint against him is dismissed.

Memorandum: In 2006, Yvonne A. Rubino (decedent) contacted Dionisio (Dion) Roman, Jr. (defendant), an insurance agent, to procure a homeowner's insurance policy covering her residence. Defendant Allstate Indemnity Company (Allstate) thereafter issued decedent a policy for the initial term of May 17, 2006 to May 17, 2007 with decedent listed on the policy as the only insured. The policy was renewed each year thereafter and, despite the fact that decedent died in December 2010, the policy was in force for the term of May 17, 2013 to May 17, 2014 with decedent still listed as the only insured. After the residence was destroyed by fire in January 2014, decedent's daughter Leonarda Tomaino filed a claim under the policy, and Allstate disclaimed coverage. Plaintiff, also a daughter of decedent and the administratrix of decedent's estate, thereafter commenced this action against Allstate and defendant. With respect to defendant, plaintiff alleged, inter alia, that he breached his duty to notify Allstate of decedent's death and to ensure that the property was properly insured. Specifically, plaintiff alleged that defendant was informed of decedent's death in 2011 and again in 2012 when Tomaino made payments directly to defendant to renew the policy. Defendant moved for summary judgment dismissing the complaint against him, and appeals from an order that, inter alia, denied his motion.

Viewing the evidence in the light most favorable to plaintiff (*see Page One Auto Sales, Inc. v Brown & Brown of N.Y., Inc.*, 83 AD3d 1482, 1483 [4th Dept 2011]), we conclude that Supreme Court erred in denying the motion. Defendant met his initial burden of establishing as a matter of law that he owed no duty to plaintiff, Tomaino, or decedent's estate inasmuch as he demonstrated that none was a client. Indeed, defendant's submissions established that decedent, alone, was his client and that, after her death, no one represented the estate until September 2014, approximately eight months after the fire and four years after her death. Plaintiff failed to raise an issue of fact sufficient to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Furthermore, even assuming, arguendo, that Tomaino was a client of defendant, we conclude that defendant established his entitlement to summary judgment as a matter of law. Defendant established that he had no common-law duty to advise, guide, or direct her to obtain insurance coverage for additional insureds in light of decedent's death (*see Nicotera v Allstate Ins. Co.*, 147 AD3d 1474, 1476 [4th Dept 2017], *lv denied* 29 NY3d 907 [2017]; *Sawyer v Rutecki*, 92 AD3d 1237, 1237 [4th Dept 2012], *lv denied* 19 NY3d 804 [2012]; *see also Thompson & Bailey, LLC v Whitmore Group, Ltd.*, 34 AD3d 1001, 1002-1003 [3d Dept 2006], *lv denied* 8 NY3d 807 [2007]), and he further established that he did not " 'assume or acquire duties in addition to those fixed at common law' " (*Nicotera*, 147 AD3d at 1476). Here, defendant demonstrated that there were no payments made to him beyond the alleged premium payments, that there was no interaction with Tomaino regarding questions of coverage, and that no special relationship was formed between himself and Tomaino (*see id.* at 1476-1477; *Sawyer*, 92 AD3d at 1237-1238; *see also Petri Baking Prods., Inc. v Hatch Leonard Naples, Inc.*, 151 AD3d 1902, 1903-1904 [4th Dept 2017]). Indeed, defendant submitted the deposition testimony of Tomaino, in which she testified that there was no discussion with defendant about any need for changes to the policy and that she was not asked for a copy of any death certificate, thus establishing the absence of any interaction regarding questions of coverage. Additionally, even assuming, arguendo, that Tomaino was a client of defendant and that she informed him of decedent's death and made premium payments to him in 2012 and 2013, we conclude that such events are insufficient to raise a triable issue of fact whether defendant owed a duty to her to notify Allstate of decedent's death and to ensure that the property was properly insured (*see generally Zuckerman*, 49 NY2d at 562).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

1466

CA 18-01177

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

HOPE A.L., AN INFANT UNDER THE AGE OF FOURTEEN YEARS, BY HER MOTHER AND NATURAL GUARDIAN, CASSANDRA L., AND CASSANDRA L., INDIVIDUALLY, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

UNITY HOSPITAL OF ROCHESTER, DOING BUSINESS AS UNITY HOSPITAL, ET AL., DEFENDANTS, ANDREW W. MURPHY, M.D., AND WESTSIDE ANESTHESIA ASSOCIATES OF ROCHESTER, LLP, DEFENDANTS-RESPONDENTS.

WEITZ & LUXENBERG, P.C., NEW YORK CITY, POLLACK, POLLACK, ISAAC & DECICCO, LLP (JILLIAN ROSEN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered April 25, 2018. The order granted the motion of defendants Andrew W. Murphy, M.D., and Westside Anesthesia Associates of Rochester, LLP, for summary judgment and dismissed the complaint against them.

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

Memorandum: The infant plaintiff and her mother Cassandra L. (plaintiff) commenced this action seeking damages based on allegations that they sustained injuries after, inter alia, Andrew W. Murphy, M.D. (defendant) and defendant Westside Anesthesia Associates of Rochester, LLP (collectively, defendants) negligently "fail[ed] to be present and available to timely render anesthesia care for the performance of an obstetrical delivery" and that defendants failed to obtain plaintiff's informed consent. We conclude that Supreme Court properly granted defendants' motion for summary judgment dismissing the complaint against them.

Plaintiffs contend that, in order for defendants to satisfy their prima facie burden on their motion with respect to the causes of action for negligence in this medical malpractice action, they were required to establish their entitlement to judgment as a matter of law on both the element of departure from the accepted standard of care

and the element of causation, and plaintiffs further contend that the affidavit of defendant was insufficient to meet defendants' burden with respect to the element of departure. We reject those contentions.

Contrary to plaintiffs' contention, to meet their initial burden on the motion, defendants were required to "present factual proof, generally consisting of affidavits, deposition testimony and medical records, to rebut the claim of malpractice by establishing that they complied with the accepted standard of care *or* did not cause any injury to the patient" (*Cole v Champlain Val. Physicians' Hosp. Med. Ctr.*, 116 AD3d 1283, 1285 [3d Dept 2014] [emphasis added]; *see Aliosha v Ostad*, 153 AD3d 591, 592 [2d Dept 2017]; *Webb v Scanlon*, 133 AD3d 1385, 1386 [4th Dept 2015]).

Contrary to plaintiffs' further contention, defendants established as a matter of law that they did not depart from the accepted standard of care. Here, defendants submitted the affidavit of defendant, which "address[ed] each of the specific factual claims of negligence raised in plaintiff[s'] bill of particulars" (*Larsen v Banwar*, 70 AD3d 1337, 1338 [4th Dept 2010]), and was "detailed, specific and factual in nature" (*Macaluso v Pilcher*, 145 AD3d 1559, 1560 [4th Dept 2016] [internal quotation marks omitted]; *see Groff v Kaleida Health*, 161 AD3d 1518, 1520 [4th Dept 2018]). Defendant stated that he did not delay the delivery of the infant plaintiff by being unavailable; did not fail to prepare for a timely cesarean section; did not provide ineffective or untimely anesthesia; did not delay plaintiff's cesarean section; did not fail to properly respond to an obstetrical emergency; and did not fail to properly monitor, provide and/or timely administer adequate oxygen. Defendant further averred that, because he was not involved in supervising ancillary and junior staff, he could not have been negligent in failing to do so. Thus, defendant's affidavit, combined with his deposition testimony and the accompanying medical records submitted in support of the motion, provides a thorough summary of defendant's conduct, and provides his opinion, within a reasonable degree of medical certainty, that defendants did not "deviate[] and/or depart[ ] during [their] care and treatment of plaintiff[ ] . . . during her labor and delivery of [the infant plaintiff]." We therefore conclude that defendants established their entitlement to judgment as a matter of law (*see Suib v Keller*, 6 AD3d 805, 806 [3d Dept 2004]).

We reject plaintiffs' contention that the affidavit of their expert raised triable issues of fact sufficient to defeat defendants' motion. "It is well settled that '[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat [a] defendant physician's summary judgment motion' " (*Occhino v Fan*, 151 AD3d 1870, 1871 [4th Dept 2017], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]). Here, plaintiffs offered, as the sole evidence to defeat defendants' motion for summary judgment, the affidavit of an anesthesiologist who opined that defendant deviated from the standard of care by, inter alia, delaying

the administration of anesthesia. Inasmuch as the expert's affidavit contains allegations that are conclusory and "unsupported by the medical evidence in the record before us" (*Bagley v Rochester General Hosp.*, 124 AD3d 1272, 1274 [4th Dept 2015]), and his ultimate assertions are " 'unsupported by any evidentiary foundation' " (*id.* at 1273, quoting *Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]), we conclude that his opinion " 'should be given no probative force and is insufficient to withstand summary judgment' " (*id.*, quoting *Diaz*, 99 NY2d at 544).

With respect to the cause of action for medical malpractice based on lack of informed consent, plaintiffs contend that defendant's deposition testimony established that he obtained consent from plaintiff *after* the administration of the spinal anesthesia, and that defendant failed to establish that the delay in obtaining plaintiff's consent comported with the standard of care applicable to anesthesiologists. We conclude, however, that defendant's uncontroverted deposition testimony and plaintiff's certified medical records established as a matter of law that defendant obtained plaintiff's verbal consent for the spinal anesthesia at 2:20 p.m., when he met with her in the labor room before she was moved into the operating room and before defendant administered the anesthesia (*see Gray v Williams*, 108 AD3d 1085, 1086 [4th Dept 2013]). Defendant testified that, when he obtained plaintiff's verbal consent, he did not have the written consent form with him. As a result, plaintiff did not sign the form until 3:10 p.m., after the administration of the spinal anesthesia in the operating room. Although a signed consent form is not necessarily required where, as here, the physician providing the treatment in a medical malpractice action submits testimonial evidence that the physician obtained the patient's verbal consent to perform the procedure (*compare* Public Health Law § 2805-d, *with* § 2442), we note that defendant obtained both verbal and written consent from plaintiff. We further conclude that plaintiffs failed to raise a triable issue of fact with respect to the alleged delay in obtaining plaintiff's informed consent (*see generally Alvarez*, 68 NY2d at 325; *Gennaro v Dziuban* [appeal No. 2], 277 AD2d 939, 940 [4th Dept 2000]).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

1469

KA 16-00801

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDWARD PETTIFORD, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered March 28, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that Supreme Court erred in refusing to suppress, as the fruit of an unlawful search and seizure, the gun that was found in the vehicle in which defendant was a passenger and the cocaine that was subsequently found on defendant's person during a search incident to his arrest. The charges against defendant arose after the police, who were investigating a recent stabbing, encountered defendant in a vehicle matching the description and anticipated location of the stabbing suspect's vehicle given in a police dispatch.

We conclude that the police conduct was justified in its inception and at every subsequent stage of the encounter leading to defendant's arrest (*see People v Bradley*, 137 AD3d 1611, 1611 [4th Dept 2016], *lv denied* 27 NY3d 1128 [2016]; *see generally People v De Bour*, 40 NY2d 210, 222-223 [1976]). Contrary to defendant's contention, the police action in pulling up behind the subject vehicle, which had parked in defendant's driveway after passing the officers' patrol car, constituted only a level two intrusion (*see People v Spencer*, 84 NY2d 749, 753 [1995], *cert denied* 516 US 905 [1995]; *People v Harrison*, 57 NY2d 470, 475 [1982]) despite the fact that a police vehicle blocked the subject vehicle's egress from the driveway (*see People v Ruiz*, 100 AD3d 451, 451 [1st Dept 2012], *lv*

denied 20 NY3d 1065 [2013]; *People v Thomas*, 19 AD3d 32, 35 [1st Dept 2005], *lv denied* 5 NY3d 795 [2005]). The police at that point had the requisite founded suspicion to justify the level two intrusion.

The police escalated the encounter to a level three intrusion when they approached defendant, who had begun to exit the vehicle, and ordered him to remain in the vehicle (*see Harrison*, 57 NY2d at 475-476; *see also Thomas*, 19 AD3d at 36). Evaluating the totality of the circumstances (*see People v Simmons*, 30 NY3d 957, 958 [2017]), we conclude that the police conduct was justified by the officers' reasonable suspicion that defendant was the suspect described in the dispatch (*see generally De Bour*, 40 NY2d at 223). The officers found defendant less than two miles away from the scene of the stabbing, which had occurred approximately 20 minutes earlier. Defendant's gender, race, height, and weight matched the description of the stabbing suspect. Furthermore, witnesses at the scene of the stabbing informed the police that the suspect left the scene in a small silver vehicle driven by a black female and that the vehicle may have been headed toward a residence on Mark Avenue. Defendant was a passenger in a silver vehicle driven by a black female, and the driveway in which the driver parked the vehicle was 50 to 75 yards from Mark Avenue. Under those circumstances, the police reasonably concluded that defendant was the suspect for whom they were looking (*see People v Santiago*, 142 AD3d 1390, 1391 [4th Dept 2016], *lv denied* 28 NY3d 1127 [2016]; *People v Powell*, 101 AD3d 1783, 1785 [4th Dept 2012], *lv denied* 20 NY3d 1102 [2013]; *People v Moss*, 89 AD3d 1526, 1527 [4th Dept 2011], *lv denied* 18 NY3d 885 [2012]). In light of the report that the suspect was armed with a knife, we further conclude that, upon asking defendant to exit the vehicle, the police lawfully frisked him for weapons (*see De Bour*, 40 NY2d at 223; *People v Thompson*, 132 AD3d 1364, 1364-1365 [4th Dept 2015], *lv denied* 27 NY3d 1156 [2016]).

We reject defendant's claim that the police conduct was unreasonable because the officers failed to use an available, less intrusive procedure to establish his identity and verify whether he was the person described by the witnesses to the stabbing (*see generally People v Pruitt*, 158 AD3d 1138, 1139-1140 [4th Dept 2018], *lv denied* 31 NY3d 1120 [2018]). Both of defendant's suggested procedures, i.e., that the police could have searched computer databases for his photograph or conducted a showup procedure with witnesses from the stabbing scene, would have entailed removing defendant from the vehicle so that his facial features and build could be seen, either by the police or by witnesses, and thus were no less intrusive than the procedure used by the officers.

We agree with the People that defendant failed to establish standing to challenge the consent to search the vehicle given to the police by the driver thereof (*see People v Reynolds*, 216 AD2d 883, 883 [4th Dept 1995], *lv denied* 86 NY2d 801 [1995], citing *People v Ponder*, 54 NY2d 160, 164-166 [1981]). In any event, the record establishes that the driver voluntarily consented to the search of the vehicle that yielded the gun under the front passenger seat (*see People v Washington*, 50 AD3d 1539, 1540 [4th Dept 2008], *lv denied* 11 NY3d 742

[2008]). Upon determining that defendant did not possess a valid firearms permit, the police had probable cause to arrest him (*see De Bour*, 40 NY2d at 223) and then search his person incident to that lawful arrest (*see People v Pace*, 143 AD3d 1286, 1287 [4th Dept 2016], *lv denied* 28 NY3d 1149 [2017]).

We have examined defendant's remaining claims and conclude that none warrants reversal or modification of the judgment.

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

1477

OP 18-01073

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

IN THE MATTER OF THE FRANK J. LUDOVICO SCULPTURE TRAIL CORP., PETITIONER,

V MEMORANDUM AND ORDER

TOWN OF SENECA FALLS, RESPONDENT.

CHALIFOUX LAW, P.C., PITTSFORD (SHEILA M. CHALIFOUX OF COUNSEL), FOR PETITIONER.

BARCLAY DAMON LLP, ROCHESTER (MARK R. MCNAMARA OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to Eminent Domain Procedure Law § 207 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) to annul a determination of respondent. The determination resolved to acquire an easement over certain real property.

It is hereby ORDERED that the determination is unanimously annulled on the law without costs and the petition is granted.

Memorandum: Petitioner commenced this original proceeding pursuant to EDPL 207 seeking to annul a determination of respondent to acquire an easement along a nature trail commemorating the women's rights movement in order to install a sewer line. We agree with petitioner that the determination must be annulled based upon respondent's failure to comply with EDPL article 2. Specifically, respondent failed to comply with the provisions of the State Environmental Quality Review Act ([SEQRA] ECL art 8) when its Town Board adopted a negative declaration pursuant to that act without taking the requisite hard look at the project's impact on wildlife or providing a reasoned elaboration of the basis for its determination of no significant impact on wildlife or surface water (*see* EDPL 207 [C] [3]).

In determining whether the lead agency complied with the substantive requirements of SEQRA, judicial review is " 'limited to whether the lead agency . . . identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination' " (*Matter of Wellsville Citizens for Responsible Dev., Inc. v Wal-Mart Stores, Inc.*, 140 AD3d 1767, 1768 [4th Dept 2016]; *see Matter of Friends of P.S. 163, Inc. v Jewish Home Lifecare, Manhattan*, 30 NY3d 416, 430

[2017], *rearg denied* 31 NY3d 929 [2018]). The requirement that the lead agency "set forth its determination of significance in a written form containing a reasoned elaboration" is in the regulations (6 NYCRR 617.7 [b] [4]; *see Matter of Rochester Eastside Residents for Appropriate Dev., Inc. v City of Rochester*, 150 AD3d 1678, 1680 [4th Dept 2017]). " 'SEQRA's procedural mechanisms mandate strict compliance, and anything less will result in annulment of the lead agency's determination of significance' " (*Rochester Eastside Residents for Appropriate Dev., Inc.*, 150 AD3d at 1679; *see Matter of City Council of City of Watervliet v Town Bd. of Town of Colonie*, 3 NY3d 508, 515 [2004]).

On November 19, 2015, the New York State Department of Environmental Conservation (DEC) made respondent aware that its database indicated the presence of certain endangered, threatened, or rare animal and plant species on the project site. Those species included the northern long-eared bat, the imperial moth, and the northern bog violet. In addition, the database indicated the presence of inland salt marsh. The DEC recommended that respondent conduct a survey of the professional literature and determine whether the project site contains habitats favorable to such species and, if so, that respondent conduct a field survey to determine whether the species are present. The DEC instructed that, if respondent determined that such species are present, modifications should be considered to minimize impact. There is no indication that respondent conducted such a survey. Instead, the record establishes that respondent assumed the presence of the species and noted them, along with the Indiana bat, in the December 2015 environmental assessment form (EAF). In part 3 of the EAF, respondent reasoned that there would be no direct take of bats because the clearing of any trees in which the bats roost would occur during the winter months when the bats are hibernating in caves. There was, however, no such reasoning with respect to the imperial moth, the northern bog violet, or any animal or plant species that might live or grow in the inland salt marsh. Their presence was merely noted in part 3 of the form, along with the bare conclusion that there would be no significant impact on those species. We thus conclude that the Town Board failed to take a hard look at the project's impact on wildlife (*see generally Wellsville Citizens for Responsible Dev., Inc.*, 140 AD3d at 1769) and failed to make a reasoned elaboration of the basis for its determination (*see generally Rochester Eastside Residents for Appropriate Dev., Inc.*, 150 AD3d at 1680).

In addition, the DEC made certain recommendations for avoiding impacts on surface water, particularly the stream corridor. In order to avoid such impacts, respondent noted in part 3 of the EAF that it planned to reroute sewer main locations "to the extent practicable" and that, if impracticable, sanitary sewer piping "can be horizontally directionally drilled to avoid impacts." On the previous page, however, respondent had already noted its intent to use directional drilling "when possible." Thus, respondent anticipated that there would be circumstances where rerouting was impracticable or directional drilling was impossible. Respondent did not address how it planned to avoid adverse impacts on the stream corridor in

particular, or surface water in general, in circumstances where rerouting was impracticable and horizontal directional drilling was impossible, nor did respondent conclude that both such circumstances cannot or do not simultaneously exist on this site. By all appearances, respondent merely set forth general practices for avoiding significant adverse impacts on surface water and stream corridors without providing a reasoned elaboration that, by implementing such practices in this particular project, respondent would successfully avoid any significant adverse impacts on surface water. We thus conclude that the Town Board failed to make a reasoned elaboration of the basis for its determination (*see generally id.*).

We reject petitioner's challenge to the negative declaration with respect to historic and archaeological resources; noise, odor, and light; and consistency with community character.

Therefore, we conclude that the negative declaration with respect to wildlife and surface water is arbitrary and capricious (*see Wellsville Citizens for Responsible Dev., Inc.*, 140 AD3d at 1769-1770), and thus the determination of respondent to acquire an easement over petitioner's real property must be annulled (*see* EDPL 207 [C] [3]).

In light of our determination, we do not consider petitioner's remaining grounds for annulment.

Entered: June 7, 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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CA 17-02146

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

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

V MEMORANDUM AND ORDER

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

MICHAEL J. DOWD, LEWISTON, FOR PLAINTIFFS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Niagara County (Daniel Furlong, J.), entered August 1, 2017. The order, insofar as appealed from, granted that part of the motion of defendant County of Niagara seeking summary judgment dismissing the complaint against it.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in part, and the complaint is reinstated against defendant County of Niagara.

Memorandum: In appeal No. 1, plaintiffs appeal from an order insofar as it granted that part of the motion of defendant County of Niagara (County) for summary judgment dismissing the complaint against it. In appeal No. 2, plaintiffs appeal from an order granting the motion of defendant Cambria Volunteer Fire Company, Inc. (Cambria) for summary judgment dismissing the complaint against it.

In appeal No. 1, we agree with plaintiffs that Supreme Court erred in granting the County's motion insofar as it sought summary judgment dismissing the complaint against it because there are issues of fact whether defendant Russell Jackman, a coroner employed by the County, was acting within the scope of his employment at the time of the alleged tort and, therefore, whether the County is vicariously liable for his conduct under the theory of respondeat superior (*see generally Riviello v Waldron*, 47 NY2d 297, 302-303 [1979]). Although it is generally a question for the jury whether an employee is acting within the scope of employment (*see id.*; *Carlson v Porter* [appeal No. 2], 53 AD3d 1129, 1131 [4th Dept 2008], *lv denied* 11 NY3d 708 [2008]), an employer is not liable as a matter of law "if the employee was 'acting solely for personal motives unrelated to the furtherance of

the employer's business' " (*Mazzarella v Syracuse Diocese* [appeal No. 2], 100 AD3d 1384, 1385 [4th Dept 2012]).

Here, there is evidence that Jackman's decision to transfer a portion of the remains of plaintiffs' son (decedent) to defendant Vincent Salerno, the Fire Chief of Cambria, was driven by a work-related purpose, rather than Jackman's own personal interests (*cf. N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 251 [2002]; *Mazzarella*, 100 AD3d at 1385; *Burlarley v Wal-Mart Stores, Inc.*, 75 AD3d 955, 956 [3d Dept 2010]). Furthermore, there are issues of fact whether it was foreseeable that Jackman, in performing his obligations as a county coroner, might negligently remove, transport, or even transfer decedent's remains. "[F]or an employee to be regarded as acting within the scope of his [or her] employment, the employer need not have foreseen the precise act or the exact manner of the injury as long as the general type of conduct may have been reasonably expected" (*Riviello*, 47 NY2d at 304). An employee's "[m]ere . . . deviation from the line of . . . duty does not relieve [the] employer of responsibility" (*Stewartson v Gristede's Supermarket*, 271 AD2d 324, 325 [1st Dept 2000]; *see generally Riviello*, 47 NY2d at 304).

In appeal No. 2, however, we reject plaintiffs' contention that the court erred in granting Cambria's motion. The unrefuted evidence showed that Cambria's employee, Salerno, had only personal motives for requesting decedent's remains from Jackman, i.e., to further his own interest in training dogs to locate cadavers (*see Mazzarella*, 100 AD3d at 1385; *Burlarley*, 75 AD3d at 956; *see also Dykes v McRoberts Protective Agency*, 256 AD2d 2, 3 [1st Dept 1998]). Salerno had no official duties that required him to train cadaver dogs or obtain human remains to train such dogs.

We reject plaintiffs' further contention that Cambria's motion was premature (*see* CPLR 3212 [f]). About four years elapsed between the commencement of the action and the motion, and plaintiffs have not provided an excuse for why they could not have conducted any depositions or completed discovery during that time (*see Avraham v Allied Realty Corp.*, 8 AD3d 1079, 1079 [4th Dept 2004]).

Finally, we have considered plaintiffs' remaining contention and conclude that it lacks merit.

Entered: June 7, 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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CA 18-00676

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

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

V MEMORANDUM AND ORDER

COUNTY OF NIAGARA, ET AL., DEFENDANTS,
AND CAMBRIA VOLUNTEER FIRE COMPANY, INC.,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

MICHAEL J. DOWD, LEWISTON, FOR PLAINTIFFS-APPELLANTS.

TADDEO & SHAHAN, LLP, SYRACUSE (STEVEN C. SHAHAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Daniel Furlong, J.), entered July 13, 2017. The order granted the motion of defendant Cambria Volunteer Fire Company, Inc., for summary judgment dismissing the complaint against it.

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

Same memorandum as in *Dunn v County of Niagara* ([appeal No. 1] — AD3d — [June 7, 2019] [4th Dept 2019]).

Entered: June 7, 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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TP 18-01652

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

IN THE MATTER OF KYLE WATSON, PETITIONER,

V MEMORANDUM AND ORDER

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

KYLE WATSON, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [M. William Boller, A.J.], entered September 7, 2018) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated an inmate rule.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated inmate rule 103.10 (7 NYCRR 270.2 [B] [4] [i] [extortion]). Contrary to petitioner's contention, we conclude that Supreme Court properly transferred the entire proceeding to this Court inasmuch as the "petition raises a substantial evidence question, and the remaining points made by petitioner are not objections that could have terminated the proceeding within the meaning of CPLR 7804 (g)" (*Matter of Quintana v City of Buffalo*, 114 AD3d 1222, 1223 [4th Dept 2014], *lv denied* 23 NY3d 902 [2014]). We further conclude that the misbehavior report, the hearing testimony, the documentary evidence, and the confidential information together constitute substantial evidence supporting the determination (*see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139 [1985]).

We reject petitioner's contention that the hearing officer was biased (*see Matter of Colon v Fischer*, 83 AD3d 1500, 1501-1502 [4th Dept 2011]). The fact that the hearing officer rejected petitioner's denial of guilt is insufficient to establish bias (*see Matter of Edwards v Fischer*, 87 AD3d 1328, 1329 [4th Dept 2011]). In addition, the record does not support petitioner's contention that the hearing

officer failed to make an independent assessment of the reliability of the confidential information (*see generally Matter of Weaver v Goord*, 301 AD2d 770, 770-771 [3d Dept 2003], *lv denied* 100 NY2d 505 [2003]). Contrary to petitioner's further contention, he had no right to confront and cross-examine the confidential source (*see Matter of Heard v Annucci*, 155 AD3d 1166, 1167 [3d Dept 2017]). Finally, petitioner's contention that the determination must be annulled because the hearing was unreasonably delayed in violation of 7 NYCRR 251-5.1 (b) is without merit. The hearing was extended to obtain the testimony of witnesses, which is permissible (*see Matter of Wright v New York State Dept. of Corr. & Community Supervision*, 155 AD3d 1137, 1138 [3d Dept 2017], *appeal dismissed* 30 NY3d 1090 [2018]). Moreover, that regulation is "directory only" (*Matter of Comfort v Irvin*, 197 AD2d 907, 908 [4th Dept 1993], *lv denied* 82 NY2d 662 [1993]), and where, as here, there is no showing of prejudice resulting from the delay, the failure to complete the hearing in a timely manner does not warrant annulment of the determination (*see Matter of Rosales v Annucci*, 151 AD3d 1748, 1749 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017]; *Matter of Dash v Goord*, 255 AD2d 978, 978-979 [4th Dept 1998]).

Entered: June 7, 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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CAF 18-00406

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

IN THE MATTER OF BRIAN J. RUSSELL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JENNIFER A. CARDINALI RUSSELL,
RESPONDENT-APPELLANT.

GARY MULDOON, ESQ., ATTORNEY FOR THE CHILD,
APPELLANT.

FRIEDMAN & RANZENHOFER, P.C., AKRON (MICHAEL H. RANZENHOFER OF COUNSEL), FOR RESPONDENT-APPELLANT.

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

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

Appeals from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered February 5, 2018 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner Brian J. Russell sole custody of the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother and the Attorney for the Child (AFC) appeal from an order that, inter alia, modified the parties' prior custody and visitation order by awarding sole custody of the subject child to petitioner father with visitation to the mother. We affirm.

As a preliminary matter, we reject the father's challenges to the record on appeal. First, because the father did not appeal from the order settling the record, we are unable to address his challenge to the propriety of that order (*see Matter of Nickie M.A. [Pablo F.]*, 144 AD3d 1576, 1577 [4th Dept 2016]). Second, although two trial exhibits listed in that order were not submitted to us with the record, there was ample trial testimony about the contents of those documents and their significance in the context of this case. We thus conclude that the record is sufficient for us to decide this appeal on the merits (*cf. Gray v Williams*, 108 AD3d 1085, 1087 [4th Dept 2013]). Third, contrary to the father's contention, the transcript of the *Lincoln*

hearing was properly submitted under seal with the record on appeal. The stenographic record of an in camera interview of an infant in a custody proceeding must be provided to this Court whenever an appeal is taken in such a proceeding (*see* CPLR 4019 [b]).

The mother and the AFC contend that Family Court's determination to award sole custody to the father with visitation to the mother is not in the child's best interests. We reject that contention and conclude that the court's determination is supported by a sound and substantial basis in the record. "The court's determination in a custody matter is entitled to great deference and will not be disturbed where . . . it is based on a careful weighing of appropriate factors" (*Matter of Stanton v Kelso*, 148 AD3d 1809, 1810 [4th Dept 2017] [internal quotation marks omitted]; *see generally Fox v Fox*, 177 AD2d 209, 210-211 [4th Dept 1992]). Those factors include (1) the continuity and stability of the existing custodial arrangement, including the relative fitness of the parents and the length of time the present custodial arrangement has continued; (2) the relative quality of each parent's home environment; (3) each parent's ability to provide for the child's emotional and intellectual development; (4) the parents' relative financial status and ability to provide for the child; (5) the child's wishes; and (6) the need of the child to live with siblings (*see Fox*, 177 AD2d at 210).

Here, the court heard the testimony of the mother, her son, the father, and an expert psychologist, among others. The testimony established that, in the wake of the tragic drinking-and-driving death of the mother's fiancé, elements of parental alienation, instigated by actions of the mother, arose in the child's relationship with the father. More particularly, the mother allowed the child to believe that the fiancé was her actual father, allowed the child to refer to the deceased fiancé as "dad" and to the father by his first name, allowed the child to wear clothes memorializing the fiancé during visits with the father, and encouraged discussion in her household about the father's presumed participation in an alleged conspiracy to "ruin" the family. The mother admitted that she disregarded provisions of the prior custody order; she also filed a petition seeking to deprive the father of overnight, weekend, and holiday visitation. The father, unlike the mother, held a stable, full-time job for more than a decade, made attempts to get the child needed mental health counseling—efforts that were undermined by the mother—and testified that he would continue to promote the child's relationship with the mother. We thus conclude that there is a sound and substantial basis for the determination that an award of sole custody to the father and visitation to the mother is in the child's best interests, and we therefore decline to disturb that determination (*see Matter of Thayer v Ennis*, 292 AD2d 824, 825 [4th Dept 2002]).

Contrary to the mother's further contention, the court here had no statutory obligation to consider the effect of domestic violence on the best interests of the child. "Where either party to an action concerning custody of or a right to visitation with a child alleges in a sworn petition or complaint or sworn answer, cross-petition, counterclaim or other sworn responsive pleading that the other party

has committed an act of domestic violence against the party making the allegation or a family or household member of either party . . . and such allegations are proven by a preponderance of the evidence, the court must consider the effect of such domestic violence upon the best interests of the child" (Domestic Relations Law § 240 [1] [a]). A best interests determination is not supported by sound and substantial evidence in the record where the court fails to consider any pleaded, proved allegations of domestic violence (*see Matter of Rodriguez v Guerra*, 28 AD3d 775, 776-777 [2d Dept 2006]). Here, however, the only pleaded allegations of domestic violence committed by the father were contained in a family offense petition that was withdrawn prior to the commencement of trial, and thus there were no pleaded allegations of domestic violence before the court.

Finally, we have considered the mother's remaining contention and conclude that it does not require modification or reversal of the order.

Entered: June 7, 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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CA 18-01482

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

IN THE MATTER OF GERALD TOMASSI,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, RESPONDENT-RESPONDENT.

FLAHERTY & SHEA, BUFFALO (KATHLEEN E. HOROHOE OF COUNSEL), FOR PETITIONER-APPELLANT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (J. CHRISTINE CHIRIBOGA OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered April 18, 2018 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

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

Memorandum: Petitioner is a former firefighter for respondent who was granted performance of duty disability retirement benefits (*see* Retirement and Social Security Law § 363-c). Thereafter, petitioner received a supplemental benefit until respondent discontinued payment thereof when petitioner attained the mandatory service retirement age of 62 (*see* General Municipal Law § 207-a [2]; Retirement and Social Security Law § 384-d [i]). Petitioner commenced this proceeding pursuant to CPLR article 78 seeking, inter alia, reimbursement and reinstatement of the supplemental benefit on the grounds that an amendment to Retirement and Social Security Law § 384-d (i) increased the mandatory service retirement age applicable to him to 65 and that he was being denied equal protection of the law inasmuch as other similarly situated firefighters continued to receive the supplemental benefit from respondent. Supreme Court denied the petition, and we affirm.

"It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature" (*Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208 [1976]). Contrary to petitioner's contention, we conclude that the plain language of the amendment and the legislative history thereof establish that the amendment was intended, as relevant here, to permit certain firefighter members of the retirement system

who are "capable of performing the duties of their position" to continue working until the age of 65 while retaining the mandatory service retirement age of 62 for other firefighters enrolled in the subject retirement plan (Retirement and Social Security Law § 384-d [i], as amended by L 2008, ch 585). Further, "[w]hen the terms of related statutes are involved, as is the case here, they must be analyzed in context and in a manner that 'harmonize[s] the related provisions . . . [and] renders them compatible' " (*Matter of M.B.*, 6 NY3d 437, 447 [2006]). Here, inasmuch as it is undisputed that petitioner is not "capable of performing the duties of [his] position" (Retirement and Social Security Law § 384-d [i]), "the mandatory service retirement age applicable to him" is 62 and, thus, the court properly determined that petitioner was not entitled to the supplemental benefit after he attained that age (General Municipal Law § 207-a [2]).

We also conclude that petitioner adduced "no evidence . . . to support a finding that [he] ha[d] 'been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment' " (*Matter of Gray v Town of Oppenheim*, 289 AD2d 743, 745 [3d Dept 2001], *lv denied* 98 NY2d 606 [2002], quoting *Village of Willowbrook v Olech*, 528 US 562, 564 [2000]; *see Matter of Sicoli v Town of Lewiston*, 112 AD3d 1342, 1343-1344 [4th Dept 2013]). Thus, the court properly determined that the record did not support petitioner's contention that respondent denied him equal protection of the law.

Entered: June 7, 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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CA 18-01680

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

ANDREA KALINOWSKI AND JAMES KALINOWSKI,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

UNITED CHAIR COMPANY, INC., HAWORTH, INC.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

GOLDBERG SEGALLA LLP, BUFFALO (BRADLEY J. STEVENS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered June 6, 2018. The order denied the motion of defendants United Chair Company, Inc., and Haworth, Inc. for summary judgment dismissing plaintiffs' complaint against them.

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 Andrea Kalinowski (plaintiff), a correction officer who worked at the Erie County Correctional Facility (Facility), when she sat on a chair that broke causing her to fall to the floor. Supreme Court denied the motion of United Chair Company, Inc. and Haworth, Inc. (defendants) for summary judgment dismissing the complaint against them. We affirm.

Contrary to defendants' contention, even assuming, arguendo, that they met their initial burden "by presenting competent evidence that [the chair] was not defective" (*Ramos v Howard Indus., Inc.*, 10 NY3d 218, 221 [2008]; *see Cassatt v Zimmer, Inc.*, 161 AD3d 1549, 1550 [4th Dept 2018]), we conclude that plaintiffs raised a triable issue of fact in opposition to the motion by offering "competent evidence identifying a specific flaw" in the chair (*Speller v Sears, Roebuck & Co.*, 100 NY2d 38, 42 [2003]). Plaintiffs submitted the affidavit of a woodworking and engineering expert in which the expert identified a specific manufacturing flaw upon his review of, inter alia, deposition testimony of witnesses, documentary evidence, and photographs of the broken chair that were taken at the Facility following the accident. The expert opined to a reasonable degree of engineering certainty that

the two dowels visible at the joint where the chair leg broke were inadequately glued, which created a weak link and caused the joint to fail. He explained that a critical phase of the manufacturing process for a chair is the uniform and adequate application of glue in order to avoid creating a weak joint. He further explained the basis for his conclusion that the dowels of the subject chair were inadequately glued during the manufacturing process, i.e., he observed in the photographs that the dowels were bare with no residual wood from the fractured chair leg remaining bonded to the dowels, which was consistent with the failure of the manufacturer to adequately coat the dowels and corresponding holes with glue. The expert also opined that the failure of the dowel joint was due to the lack of glue therein, which "stemmed from the date of the chair's manufacture." Thus, contrary to defendants' contention, we conclude that "[p]laintiff[s'] expert based his opinion not on speculation but on his knowledge of the [chair's] parts and their functions, documentary evidence, witnesses' deposition testimony, and reasonable inferences drawn from photographs taken of the [chair] at the scene of the failure" (*Scholastic Inc. v Pace Plumbing Corp.*, 129 AD3d 75, 87 [1st Dept 2015]).

We also reject defendants' further contention that they are entitled to summary judgment because plaintiffs' expert failed to exclude all other possible causes for the chair's failure not attributable to defendants. Inasmuch as plaintiffs' theory relates to a specific manufacturing flaw in the chair, i.e., inadequately glued dowels creating a weak joint, plaintiffs "were not required to rule out all other possible causes of the accident" (*Call v Banner Metals, Inc.*, 45 AD3d 1470, 1471 [4th Dept 2007]; *cf. Ramos*, 10 NY3d at 223; *Speller*, 100 NY2d at 42). In any event, even assuming, arguendo, that plaintiffs were required to rule out alternative causes, we conclude that "plaintiffs raised a triable question of fact by offering competent evidence which, if credited by the jury, was sufficient to rebut defendants' alternative cause evidence" (*Speller*, 100 NY2d at 43; *see Norton v Albany County Airport Auth.*, 52 AD3d 871, 874 [3d Dept 2008]). In particular, given the nature of the manufacturing defect that he identified and the evidence before him, plaintiffs' expert ruled out the age of the chair, environmental conditions, storage damage, misuse, and plaintiff's weight as possible causes of the chair's collapse.

Defendants additionally contend that the court should have granted their request to dismiss the complaint against them as a sanction for spoliation of evidence because plaintiffs negligently allowed the chair to be discarded. We reject that contention. Here, prior to commencing a separate proceeding against, as relevant here, the County of Erie (County), plaintiffs made affirmative efforts to preserve the chair by seeking and obtaining a court order directing the County to do so. It was the County, not plaintiffs, that inadvertently discarded the chair in violation of that court order approximately two years prior to plaintiffs' commencement of the instant action against defendants. The record thus establishes that "plaintiffs, who were never in possession of the [chair], did not discard the [chair] in an effort to frustrate discovery" and that,

"under the circumstances, . . . plaintiffs cannot be held responsible for a nonparty's accidental loss of the [chair]" (*Cordero v Mirecle Cab Corp.*, 51 AD3d 707, 709 [2d Dept 2008]; *see Franco Belli Plumbing & Heating & Sons, Inc. v Dimino*, 164 AD3d 1309, 1313-1314 [2d Dept 2018]; *Shay v Mozer, Inc.*, 80 AD3d 687, 687-688 [2d Dept 2011]). Moreover, we note that "plaintiffs were prejudiced along with [defendants] by the loss of the [chair]" (*Cordero*, 51 AD3d at 709; *see Fotiou v Goodman*, 74 AD3d 1140, 1141 [2d Dept 2010]), and that defendants will be able to defend the action with the available evidence, including eyewitness accounts and the contemporaneous photographs of the broken chair (*see generally Burke v Queen of Heaven R.C. Elementary Sch.*, 151 AD3d 1608, 1609-1610 [4th Dept 2017]; *Gaoming You v Rahmouni*, 147 AD3d 729, 730-731 [2d Dept 2017]).

Entered: June 7, 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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CA 18-01458

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

DOUGLAS F., INDIVIDUALLY AND AS FATHER AND NATURAL GUARDIAN OF ALEX F., AN INFANT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAMSVILLE CENTRAL SCHOOL DISTRICT, WILLIAMSVILLE CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, AND MILL MIDDLE SCHOOL, DEFENDANTS-APPELLANTS.

HURWITZ & FINE, P.C., BUFFALO (TODD C. BUSHWAY 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, Erie County (Mark J. Grisanti, A.J.), entered November 8, 2017. The order denied the motion of defendants seeking, inter alia, to set aside a jury verdict.

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

Memorandum: Plaintiff's son sustained personal injuries when, while walking down a hallway at defendant Mill Middle School (school), he was struck in the head by a 90-pound wooden bathroom door that opened outward into the hallway on his right. The door was located between the cafeteria and the auditorium. Plaintiff commenced this action against defendants asserting, inter alia, a cause of action for negligence based on the outward-swinging door and the school's policy of instructing students to walk on the right-hand side of the hallways. After a trial on the issue of liability only, the jury returned a verdict in favor of plaintiff. Supreme Court thereafter denied defendants' posttrial motion seeking, inter alia, to set aside the verdict, and this appeal ensued. We affirm.

As a preliminary matter, we agree with plaintiff that defendants have abandoned any contention that the court erred in permitting plaintiff's expert architect to testify (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). Defendants' primary contention on appeal is that the testimony of the expert was speculative and conclusory and that, because it was the sole evidence of defendants' negligence presented by plaintiff, the verdict is not

supported by legally sufficient evidence. We reject that contention.

When asked on direct examination whether the outward-swinging door constituted "good architectural soundness and building design practice," the expert agreed that it was "not a safe and sound practice," but he never identified any past or present rule, regulation, code, or industry standard that defendants had violated in having the door swing outward. Even assuming, arguendo, that the expert's testimony did not have the requisite evidentiary foundation (*see Hotaling v City of New York*, 55 AD3d 396, 399 [1st Dept 2008], *affd* 12 NY3d 862 [2009]; *Buchholz v Trump 767 Fifth Ave., LLC*, 5 NY3d 1, 8-9 [2005]), we nevertheless conclude that there is a "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" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]; *see Doolittle v Nixon Peabody LLP*, 155 AD3d 1652, 1654 [4th Dept 2017]). That evidence, which we have evaluated in light of the unchallenged jury instructions given by the court (*see Harris v Armstrong*, 64 NY2d 700, 702 [1984]; *Doolittle*, 155 AD3d at 1655; *see also Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265, 272-273 [2007]), included testimony from the school's principal that it would have been safer for students walking in the hallway to have the door open inward and that the likelihood of the door opening into someone's path was increased because the students were instructed to walk on the right side of the hallway next to the door. In addition, the director of facilities for defendant Williamsville Central School District at the time of the incident testified that it was very possible that the outward-swinging door could strike someone walking down the hallway, that he did not know of any reason why the door opened outward, and that the door could have been modified by his staff in a short time at minimal expense. The jury was also able to consider trial exhibits including oversized photographs and architectural schemata to help it determine whether, in light of all the circumstances (*see Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]; *Clauss v Bank of Am., N.A.*, 151 AD3d 1629, 1631 [4th Dept 2017]), the bathroom door was, as charged by the court, "reasonably safe." Thus, even apart from the testimony of the expert, there is legally sufficient evidence from which the jury could conclude, based on common sense and the ordinary experience and knowledge possessed by laypersons (*see generally Havas v Victory Paper Stock Co.*, 49 NY2d 381, 386 [1980]; *Meiselman v Crown Hgts. Hosp.*, 285 NY 389, 395-396 [1941]), that the outward-opening door was not reasonably safe.

Finally, to the extent that defendants contend that they cannot be held liable because they had no prior notice of the dangerous nature of the outward-swinging door, we conclude that such contention is without merit. "Defendants' knowledge that the condition was dangerous is not a precursor to the imposition of liability" (*Matter of Mitchell v NRG Energy, Inc.*, 125 AD3d 1542, 1543 [4th Dept 2015]; *see Harris v Seager*, 93 AD3d 1308, 1308-1309 [4th Dept 2012]).

Entered: June 7, 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 16-00844

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARQUAN EDWARDS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered October 20, 2015. The judgment convicted defendant, upon a jury verdict, of attempted murder in the first degree, robbery in the first degree (two counts), assault in the first degree, criminal use of a firearm in the first degree and criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted on counts one through five, seven and eight of the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, attempted murder in the first degree (Penal Law §§ 110.00, 125.27 [1] [a] [vii]; [b]) and assault in the first degree (§ 120.10 [1]). 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 reject defendant's contention that his conviction of attempted murder in the first degree and assault in the first degree is against the weight of the evidence with respect to the element of intent (*see People v Torres*, 136 AD3d 1329, 1330 [4th Dept 2016], *lv denied* 28 NY3d 937 [2016], *cert denied* — US —, 137 S Ct 661 [2017]; *People v Lopez*, 96 AD3d 1621, 1622 [4th Dept 2012], *lv denied* 19 NY3d 998 [2012]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We agree with defendant, however, that he is entitled to a new trial because Supreme Court violated his right to counsel. Although "[t]he right of an indigent criminal defendant to the services of a court-appointed lawyer does not encompass a right to appointment of successive lawyers at defendant's option[,] . . . the right to be represented by counsel of one's own choosing is a valued one, and a defendant may be entitled to new assigned counsel upon showing 'good

cause for a substitution' " (*People v Sides*, 75 NY2d 822, 824 [1990]). Thus, trial courts are required to conduct at least a " 'minimal inquiry' " when a defendant voices " 'seemingly serious' " complaints about his or her assigned defense counsel (*People v Porto*, 16 NY3d 93, 100 [2010], quoting *Sides*, 75 NY2d at 824-825).

Here, we conclude that defendant "articulated complaints about his assigned counsel that were sufficiently serious to trigger the court's duty to engage in an inquiry regarding those complaints" (*People v Beard*, 100 AD3d 1508, 1510 [4th Dept 2012]). At a pretrial appearance, defendant requested that the court assign him new counsel because, among other things, defense counsel had failed to file discovery demands and omnibus motions. After defendant's request, defense counsel erroneously stated, "[t]hose were filed already," and the court stated, "I have them here. I'm holding them in my hand." However, the People concede that, although certain discovery demands were served on the People, defense counsel never filed any omnibus motions.

Upon being told that omnibus motions had been filed, defendant informed the court that he had never received them. The court replied, "Well, that's a different issue, okay? So you've got to get a copy of your paperwork, all right? What else?" The court never conducted an inquiry into defendant's serious complaint that defense counsel failed to file any omnibus motions and, instead, proceeded under the mistaken belief that they had been filed. Although "[t]he court might well have found upon limited inquiry that defendant's request was without genuine basis, . . . it could not so summarily dismiss th[at] request" based on a mistaken belief that omnibus motions had been filed (*Sides*, 75 NY2d at 825). Thus, we conclude that the court violated defendant's right to counsel by failing to make a minimal inquiry concerning his serious complaint, and we therefore reverse the judgment and grant a new trial on counts one through five, seven and eight of the indictment (*see Beard*, 100 AD3d at 1511-1512).

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

Entered: June 7, 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 15-01278

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BREANNA L. SIMPSON, DEFENDANT-APPELLANT.

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

BREANNA L. SIMPSON, DEFENDANT-APPELLANT PRO SE.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN, FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered May 29, 2015. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree, criminal possession of a weapon in the third degree and assault in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the sentence imposed on count two of the indictment to an indeterminate term of 2⅓ to 7 years' imprisonment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting her, upon a jury verdict, of manslaughter in the first degree (Penal Law § 125.20 [1]), assault in the first degree (§ 120.10 [1]), and criminal possession of a weapon (CPW) in the third degree (§ 265.02 [1]). The conviction arises from defendant's fatal stabbing of her fiancé in their apartment. At trial, defendant conceded that she caused the victim's death, but she argued that the stabbing occurred accidentally during an argument. Notably, defendant did not present a justification defense, and she neither sought nor received a justification instruction.

We reject defendant's contentions in her main and pro se supplemental briefs that the conviction of manslaughter in the first degree and assault in the first degree is not supported by legally sufficient evidence and that the verdict on those crimes is against the weight of the evidence with respect to the element of intent to seriously injure (*see generally People v Sanchez*, 32 NY3d 1021, 1022-1023 [2018]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). " 'A jury is entitled to infer that a defendant intended the natural and probable consequences of his [or her] acts' " (*People v Barboni*, 21

NY3d 393, 405 [2013]) and, here, the natural and probable consequence of defendant's conduct in thrusting a knife four inches into the victim's torso is, at a minimum, serious physical injury (*see People v Fitzrandolph*, 162 AD3d 1537, 1537-1538 [4th Dept 2018], *lv denied* 32 NY3d 937 [2018], *reconsideration denied* 32 NY3d 1111 [2018]; *People v Madore*, 145 AD3d 1440, 1442 [4th Dept 2016], *lv denied* 29 NY3d 1034 [2017]; *People v Tigner*, 51 AD3d 1045, 1045 [2d Dept 2008], *lv denied* 13 NY3d 863 [2009], *reconsideration denied* 14 NY3d 806 [2010]). We therefore conclude that the evidence is legally sufficient to sustain the conviction of manslaughter and assault inasmuch as there is a "valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial" (*Bleakley*, 69 NY2d at 495). Additionally, viewing the evidence in light of the contested element of intent as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that "an acquittal [on those crimes] would have been unreasonable . . . , and thus the verdict [thereon] is not against the weight of the evidence" (*People v Weezorak*, 134 AD3d 1590, 1590 [4th Dept 2015], *lv denied* 27 NY3d 970 [2016]). The record refutes any fair inference that the victim accidentally fell upwards onto the knife in defendant's hand, and defendant's decision following the stabbing to forgo calling 911 until after she had cleaned up the crime scene undermines her claim of accident beyond any reasonable doubt. Given that the defense of justification was not submitted to the jury, defendant's assertion that the verdict is against the weight of the evidence because her conduct was justified lacks merit (*see People v Mahon*, 160 AD3d 563, 563 [1st Dept 2018], *lv denied* 31 NY3d 1119 [2018]). In light of our determination, we reject defendant's further contentions in her main and pro se supplemental briefs that the conviction of CPW in the third degree is not supported by legally sufficient evidence and that the verdict on that count is against the weight of the evidence inasmuch as the success of those contentions "depends on the success of" her challenge to the manslaughter and assault convictions (*People v McLaurin*, 260 AD2d 944, 945 [3d Dept 1999], *lv denied* 93 NY2d 1022 [1999]; *see People v Graves*, 163 AD3d 16, 19 n 1 [4th Dept 2018]).

Defendant next contends in her main and pro se supplemental briefs that her statements to the police were involuntary and should have been suppressed because she was suffering from a "panic attack, intoxication, tiredness, and questionable mental health." Because defendant failed to raise that specific contention at the suppression hearing or in her motion papers, however, it is unpreserved for appellate review (*see People v Turriago*, 90 NY2d 77, 84 [1997], *rearg denied* 90 NY2d 936 [1997]; *People v Brown*, 120 AD3d 954, 955 [4th Dept 2014], *lv denied* 24 NY3d 1118 [2015]; *People v Carlson*, 277 AD2d 158, 159 [1st Dept 2000], *lv denied* 96 NY2d 733 [2001]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see generally* CPL 470.15 [3] [c]).

Defendant's challenge in her main brief to County Court's failure to remove juror number 10 for implied bias is unpreserved because she did not seek to remove that juror either for cause or peremptorily

(*see People v Bradford*, 118 AD3d 1254, 1254-1255 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014]). We decline to exercise our power to review the issue as a matter of discretion in the interest of justice (*see generally* CPL 470.15 [6] [a]).

Contrary to defendant's further contention in her main and pro se supplemental briefs, the court properly admitted *Molineux* evidence regarding her prior assault conviction for stabbing the victim in a recent unrelated incident. That evidence was highly relevant to rebut defendant's accident defense (*see People v D'Andrea*, 187 AD2d 753, 753-754 [3d Dept 1992], *lv denied* 81 NY2d 884 [1993]), and its probity outweighed its prejudicial effect (*see People v Lawrence*, 4 AD3d 436, 436-437 [2d Dept 2004], *lv denied* 2 NY3d 802 [2004]; *see also People v Murray*, 155 AD3d 1106, 1111 [3d Dept 2017], *lv denied* 31 NY3d 1015 [2018]; *People v Walker*, 293 AD2d 411, 411-412 [1st Dept 2002], *lv denied* 98 NY2d 682 [2002]). *People v Bradley* (20 NY3d 128, 130-131 [2012]), upon which defendant relies, is distinguishable because the defendant in that case was not claiming that the charged stabbing was accidental.

In her main brief, defendant raises six grounds for her contention that defense counsel rendered ineffective assistance at trial. We reject each ground and conclude that defense counsel, who secured defendant's acquittal on the top count of the indictment, provided meaningful representation (*see generally People v Gross*, 26 NY3d 689, 693-696 [2016]). We address each of defendant's six grounds in turn.

Defendant's assertion that defense counsel was ineffective for failing to craft a successful motion for public funds to retain a forensic pathologist lacks merit because defendant failed to establish that a successful motion for such funds could have been made under these circumstances (*see People v Larkins*, 153 AD3d 1584, 1586 [4th Dept 2017], *lv denied* 30 NY3d 1061 [2017]; *see also Bradford*, 118 AD3d at 1255-1256). We reject defendant's contention that defense counsel was ineffective for "failing to preserve [defendant's] losing legal sufficiency claims" (*Graves*, 163 AD3d at 23 n 5) and for failing to challenge juror number 10, who, like defendant, had a troubled family history and thus might have been sympathetic to the defense (*see People v Thompson*, 21 NY3d 555, 558 [2013]). We reject defendant's contention that defense counsel was ineffective for failing to call a particular doctor to present a defense based upon battered woman's syndrome inasmuch as that doctor's written report did not diagnose defendant with battered woman's syndrome; in fact, the report reached many conclusions that were damaging to the defense, and it thus cannot be said that defense counsel had no legitimate strategic reason for failing to call that doctor on defendant's behalf (*see People v Ross*, 118 AD3d 1413, 1416 [4th Dept 2014], *lv denied* 24 NY3d 964 [2014]; *People v Muller*, 57 AD3d 1113, 1114-1115 [3d Dept 2008], *lv denied* 12 NY3d 761 [2009]). Defendant's complaint about defense counsel's performance during opening and closing arguments "merely amounts to a second-guessing of counsel's trial strategy and does not establish ineffectiveness" (*People v Burgos*, 259 AD2d 266, 267 [1st Dept 1999],

lv denied 93 NY2d 923 [1999]; *see People v Devictor-Lopez*, 155 AD3d 1434, 1438 [3d Dept 2017]).

Defendant's remaining allegation of ineffective assistance of counsel is that defense counsel failed to "speak on [her] behalf[] on the Record" at sentencing. It is undisputed, however, that defense counsel made a sentencing argument in chambers, the content of which does not appear in the record. Thus, because that particular allegation involves matters outside the record on appeal, it must be raised in a motion pursuant to CPL 440.10 (*see People v McCray*, 165 AD3d 595, 597 [1st Dept 2018], *lv denied* 32 NY3d 1175 [2019]).

We note, however, that the court imposed an illegal sentence of 3½ to 7 years' imprisonment on defendant's conviction for CPW in the third degree. Because defendant was not sentenced as a predicate felon, the minimum period of her indeterminate sentence on this conviction must be one-third of the maximum period, not one-half as fixed by the court (*see* Penal Law § 70.00 [3] [b]). "Although the issue is not raised by either party, we cannot allow an illegal sentence to stand" (*People v Considine*, 167 AD3d 1554, 1555 [4th Dept 2018]). We therefore modify the judgment by reducing defendant's sentence on that count to an indeterminate term of 2⅓ to 7 years' imprisonment (*see People v Mc Farland*, 306 AD2d 931, 931 [4th Dept 2003]; *see generally People v LaSalle*, 95 NY2d 827, 829 [2000]). As so modified, the sentence is not unduly harsh or severe.

Defendant's remaining contentions in her main and pro se supplemental briefs are meritless. The uniform sentence and commitment form, however, must be corrected in three respects (*see generally People v Cutaia*, 167 AD3d 1534, 1536 [4th Dept 2018], *lv denied* 33 NY3d 947 [2019]). First, the form must be amended to state that the indictment charged defendant with assault in the first degree under Penal Law § 120.10 (1), not section 120.10 (2). Second, the form must be amended to state that defendant was convicted of manslaughter in the first degree under section 125.20 (1), not section 125.50. Finally, the form must be amended to state that defendant was convicted upon a jury verdict, not upon her plea of guilty.

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

79

CAF 17-01464

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

IN THE MATTER OF HEAVENLY A., KURT A., AND MIKE A.

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

MEMORANDUM AND ORDER

TINA A., RESPONDENT,
AND MICHAEL P., RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered August 2, 2017 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent Michael P. had neglected the subject children.

It is hereby ORDERED that said appeal is unanimously dismissed except insofar as respondent Michael P. challenges the denial of his motion to dismiss the petition against him, and the order is affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent-appellant (respondent) appeals from an order of fact-finding and disposition that, inter alia, adjudged the subject children to be neglected. Prior to the fact-finding hearing, respondent moved to dismiss the neglect petition against him on the ground that he was not a person legally responsible for the children. Family Court reserved decision. Subsequently, respondent failed to appear at the fact-finding hearing and his attorney declined to participate in his absence. The court proceeded with the hearing and thereafter entered its order of fact-finding and disposition upon respondent's default.

Contrary to respondent's contention, because he failed to appear at the fact-finding hearing and his attorney, although present, did not participate in the hearing, the order was entered upon his default (*see Matter of Shawn A. [Milisa C.B.]*, 85 AD3d 1598, 1598-1599 [4th Dept 2011], *lv denied* 17 NY3d 713 [2011]; *Matter of Brittany C. [Linda C.]*, 67 AD3d 788, 789 [2d Dept 2009], *lv denied* 14 NY3d 702, 703

[2010]). No appeal lies from an order entered upon the default of the appealing party (*see* CPLR 5511; *Matter of Rottenberg v Clarke*, 144 AD3d 1627, 1627 [4th Dept 2016]). Nevertheless, respondent's appeal from the order brings up for review "matters which were the subject of contest" before the court (*James v Powell*, 19 NY2d 249, 256 n 3 [1967], *rearg denied* 19 NY2d 862 [1967]; *see Rottenberg*, 144 AD3d at 1627), i.e., respondent's motion to dismiss (*see Brittany C.*, 67 AD3d at 789).

Respondent contends that the court should have dismissed the neglect petition against him because he was not a person legally responsible for the children. We reject that contention. The term "person legally responsible" includes "the child's custodian, guardian, [or] any other person responsible for the child's care at the relevant time" (Family Ct Act § 1012 [g]). "A person is a proper respondent in an article 10 proceeding as an 'other person legally responsible for the child's care' if that person acts as the functional equivalent of a parent in a familial or household setting" (*Matter of Yolanda D.*, 88 NY2d 790, 796 [1996]; *see Matter of Gary J. [Engerys J.]*, 154 AD3d 939, 940 [2d Dept 2017]). "Determining whether a particular person has acted as the functional equivalent of a parent is a discretionary, fact-intensive inquiry which will vary according to the particular circumstances of each case. Factors such as the frequency and nature of the contact between the child and respondent, the nature and extent of the control exercised by the respondent over the child's environment, the duration of the respondent's contact with the child, and the respondent's relationship to the child's parent(s) are some of the variables which should be considered and weighed by a court" (*Yolanda D.*, 88 NY2d at 796; *see Gary J.*, 154 AD3d at 940-941). The term includes the partner of a parent where that partner participates in the family setting on a regular basis and therefore shares responsibility for supervising the children (*see Gary J.*, 154 AD3d at 941).

Here, we conclude that the court properly determined that respondent acted as "the functional equivalent of a parent in a familial or household setting" for the children (*Yolanda D.*, 88 NY2d at 796; *see Gary J.*, 154 AD3d at 941). With respect to the allegations of educational neglect in the petition, petitioner's caseworker testified at the fact-finding hearing that, during the 2016-2017 school year, the children were absent from school more often than not. She further testified that, as of March 2, 2017, the date of the petition, respondent resided with the children and their mother and that he provided care for the children. School records received in evidence listed respondent as the children's emergency contact and indicated that, on at least one occasion during the relevant time period, he called the school to report the absence of one of the children. Moreover, due to respondent's failure to appear at the hearing, the court was entitled to draw the strongest possible inference against him (*see Matter of Jayla A. [Chelsea K.—Isaac C.]*, 151 AD3d 1791, 1793

[4th Dept 2017], *lv denied* 30 NY3d 902 [2017]).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

101

CA 18-01141

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

MARK BRATGE AND KATRINA BRATGE,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JEFFERY SIMONS, ET AL., DEFENDANTS,
COUNTY OF ONEIDA AND ONEIDA COUNTY CHILD
ADVOCACY CENTER, DEFENDANTS-RESPONDENTS.

FRANK POLICELLI, UTICA, FOR PLAINTIFFS-APPELLANTS.

BARTH SULLIVAN BEHR, SYRACUSE (DANIEL K. CARTWRIGHT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered March 19, 2018. The order granted the motion of defendants County of Oneida and Oneida County Child Advocacy Center for summary judgment dismissing the complaint against them.

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

Memorandum: This action arises from an accusation made against Mark Bratge (plaintiff), a junior high school teacher, by a student in one of his classes. Plaintiff was prosecuted on charges arising from that accusation, but was acquitted after a bench trial. Insofar as relevant here, plaintiffs commenced this action seeking damages for personal injuries under the theory of malicious prosecution. They appeal from an order granting the motion of County of Oneida and Oneida County Child Advocacy Center (collectively, defendants) for summary judgment dismissing the complaint against them. We affirm.

Initially, we note that plaintiffs conceded in Supreme Court that the first, third and fourth causes of action should be dismissed against defendants, and on appeal plaintiffs do not present any argument concerning those causes of action. Consequently, they have abandoned any challenge to the dismissal of those causes of action (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). Therefore, only the second cause of action, for malicious prosecution against these defendants is at issue on this appeal.

We reject plaintiffs' contention that the court should have permitted further discovery before determining the motion. It is well settled that a party opposing summary judgment on the ground that

additional discovery is needed must "demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant" (*Buto v Town of Smithtown*, 121 AD3d 829, 830 [2d Dept 2014] [internal quotation marks omitted]; *see* CPLR 3212 [f]; *Gannon v Sadeghian*, 151 AD3d 1586, 1588 [4th Dept 2017]). Here, we agree with defendants that plaintiffs' " 'mere hope' that further depositions would disclose evidence to prove their case is insufficient to support denial of the motion" (*Boyle v Caledonia-Mumford Cent. Sch.*, 140 AD3d 1619, 1621 [4th Dept 2016], *lv denied* 28 NY3d 905 [2016]).

With respect to the merits, we conclude that defendants met their initial burden of establishing their entitlement to judgment as a matter of law, and plaintiffs failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). It is well settled that, in order "[t]o obtain recovery for malicious prosecution, a plaintiff must establish that a criminal proceeding was commenced, that it was terminated in favor of the accused, that it lacked probable cause, and that the proceeding was brought out of actual malice" (*Martinez v City of Schenectady*, 97 NY2d 78, 84 [2001]; *see Broughton v State of New York*, 37 NY2d 451, 457 [1975], *cert denied* 423 US 929 [1975]; *Putnam v County of Steuben*, 61 AD3d 1369, 1370 [4th Dept 2009], *lv denied* 13 NY3d 705 [2009]). Thus, " '[p]robable cause to believe that a person committed a crime is a complete defense to claims of . . . malicious prosecution' " (*Batten v City of New York*, 133 AD3d 803, 805 [2d Dept 2015], *lv denied* 28 NY3d 902 [2016]; *see Broyles v Town of Evans*, 147 AD3d 1496, 1496 [4th Dept 2017]; *see e.g. Kirchner v County of Niagara*, 153 AD3d 1572, 1573 [4th Dept 2017]).

"In the context of a malicious prosecution cause of action, probable cause consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty . . . It is well established that information provided by an identified citizen accusing another of a crime is legally sufficient to provide the police with probable cause to arrest" (*Dann v Auburn Police Dept.*, 138 AD3d 1468, 1470 [4th Dept 2016] [internal quotation marks omitted]; *see Mahoney v State of New York*, 147 AD3d 1289, 1291 [3d Dept 2017], *lv denied* 30 NY3d 906 [2017]; *Lyman v Town of Amherst*, 74 AD3d 1842, 1843 [4th Dept 2010]). Although the identified citizen in this case was a minor, "the sole testimony of a minor is sufficient to establish probable cause" (*Medina v City of New York*, 102 AD3d 101, 106 [1st Dept 2012]), and she provided a sworn deposition accusing plaintiff of committing the crime of which he was accused. Contrary to plaintiffs' contention, the "mere denial by the accused of the complainant's claims will not constitute 'materially impeaching circumstances' or grounds for questioning the complainant's credibility so as to raise a question of fact as to probable cause" (*id.* at 105), and "[t]here is nothing in the record that suggests that [defendants' investigator] should have questioned the complainant['s] credibility" (*Grimes v City of New York*, 106 AD3d 441, 441 [1st Dept 2013]). Consequently, the court properly concluded that the

investigator had " '[p]robable cause to believe that [plaintiff] committed a crime, [which] is a complete defense to claims of . . . malicious prosecution' " (*Batten*, 133 AD3d at 805).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

103

CA 18-01601

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

BACKER & ASSOCIATES, LLC, AND MARCELLA BACKER, INDIVIDUALLY, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

PPB ENGINEERING & SYSTEMS DESIGN, INC., AND WESLEY POFF, INDIVIDUALLY, DEFENDANTS-APPELLANTS.

HARRIS, CHESWORTH, JOHNSTONE & WELCH, LLP, ROCHESTER (KAREN R. SANDERS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

THE GLENNON LAW FIRM, P.C., ROCHESTER (FRANK J. FIELDS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered November 8, 2017. The order denied the motion of defendants seeking, inter alia, to vacate the note of issue and certificate of readiness.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion seeking to vacate the note of issue and certificate of readiness, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs provided defendant PPB Engineering & Systems Design, Inc. (PPB) with consulting services with respect to the design, manufacture and operation of optical fiber preforms. After PPB terminated its independent contractor agreement with plaintiffs, plaintiffs commenced this action and asserted causes of action for breach of contract, unjust enrichment and conversion. Defendants appeal from an order that denied their motion to vacate the note of issue and certificate of readiness and for a protective order.

We agree with defendants that Supreme Court erred in denying that part of their motion seeking to vacate the note of issue and certificate of readiness. It is well established that "a note of issue should be vacated when it is based upon a certificate of readiness that contains erroneous facts" (*Cromer v Yellen*, 268 AD2d 381, 381 [1st Dept 2000]). Here, contrary to the statements on the certificate of readiness, discovery was incomplete when the note of issue and certificate of readiness were filed. Thus, "a material fact in the certificate of readiness [was] incorrect," and the note of issue and certificate of readiness must be vacated (*Donald v Ahern*, 96 AD3d 1608, 1611 [4th Dept 2012] [internal quotation marks omitted];

see 22 NYCRR 202.21 [e]; *Place v Chaffee-Sardinia Volunteer Fire Co.*, 143 AD3d 1271, 1273 [4th Dept 2016]; *Simon v City of Syracuse Police Dept.*, 13 AD3d 1228, 1229 [4th Dept 2004], *lv dismissed* 5 NY3d 746 [2005]). We therefore modify the order accordingly.

Contrary to defendants' further contention, the court did not abuse its discretion in denying their application for a protective order for the purpose of protecting defendants' intellectual property and trade secrets. " 'The supervision of discovery, the setting of reasonable terms and conditions for disclosure, and the determination of whether a particular discovery demand is appropriate, are all matters within the sound discretion of the trial court' " (*Chamberlain, D'Amanda, Oppenheimer & Greenfield LLP v Wilson*, 101 AD3d 1640, 1641 [4th Dept 2012]). Thus, "the court's determination of discovery issues should be disturbed only upon a showing of clear abuse of discretion" (*Roswell Park Cancer Inst. Corp. v Sodexho Am., LLC*, 68 AD3d 1720, 1721 [4th Dept 2009]). Here, in their motion, defendants requested that the court issue a protective order that included the designation of a third-party neutral expert and an "attorney and expert eyes only" designation for disclosure. The court denied defendants' request, and directed the parties to execute a confidentiality stipulation and order and to proceed with discovery pursuant to Rule 11-g of the Rules of the Commercial Division of the Supreme Court (*see* 22 NYCRR 202.70). The confidentiality stipulation and order provides, inter alia, that "Confidential Information shall be utilized by the Receiving Party and its Counsel only for purposes of this litigation and for no other purposes. Any violation of this Stipulation and Order may be enforced as a contempt of Court." We conclude that the court provided defendants with adequate protection of their intellectual property and trade secrets.

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

110

CA 18-01603

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

VICTOR KETCH AND SHARON D. KETCH,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

RIDGE OVERHEAD DOOR, INC., ALSO KNOWN AS THE
OVERHEAD DOOR CO. OF NORTH TONAWANDA,
DEFENDANT-RESPONDENT.

CONNORS LLP, BUFFALO (CAITLIN M. HIGGINS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LIPPMAN O'CONNOR, BUFFALO (ROBERT H. FLYNN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered November 30, 2017. The order denied the motion of plaintiffs for summary judgment and granted the cross motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs commenced this action seeking to recover damages for injuries sustained by Victor Ketch (plaintiff) at his place of employment. Plaintiff, a mechanic employed by a school district (employer), was walking into a garage after fixing a bus when a closing garage door struck him on the head. Defendant had performed an undetermined number of repairs on the garage doors during the preceding six-year period, and plaintiffs alleged that plaintiff's injuries were caused by defendant's failure to detect a lack of functioning safety devices on the door that struck him. Supreme Court granted defendant's cross motion for summary judgment dismissing the complaint. We affirm.

We reject plaintiffs' contention that plaintiff was a third-party beneficiary of a contract between defendant and the employer. Although we agree with plaintiffs that a contract to repair the garage doors may be implied in fact as a result of the conduct of defendant and the employer (*see generally AMCAT Global, Inc. v Greater Binghamton Dev., LLC*, 140 AD3d 1370, 1371 [3d Dept 2016], *lv denied* 28 NY3d 904 [2016]), a party asserting third-party beneficiary rights under a contract must also establish, inter alia, " 'that the contract was intended for [his or her] benefit' " (*Mendel v Henry Phipps Plaza*

W., Inc., 6 NY3d 783, 786 [2006]; *see Logan-Baldwin v L.S.M. Gen. Contrs., Inc*., 94 AD3d 1466, 1468 [4th Dept 2012]). Here, the contract was intended entirely for the benefit of the employer, not its employees.

Contrary to plaintiffs' further contention, the court properly concluded that defendant owed no duty of care to plaintiff under any of the exceptions identified in *Espinal v Melville Snow Contrs.* (98 NY2d 136, 140 [2002]). "In any negligence action, the threshold issue before the court is whether the defendant owed a legally recognized duty to the plaintiff" (*Gilson v Metropolitan Opera*, 5 NY3d 574, 576 [2005]). There are "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care—and thus be potentially liable in tort—to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launche[s] a force or instrument of harm' . . . ; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties . . . and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Espinal*, 98 NY2d at 140; *see Lingenfelter v Delevan Terrace Assoc.*, 149 AD3d 1522, 1523 [4th Dept 2017]).

Defendant established as a matter of law that none of the exceptions applies, and plaintiffs failed to raise an issue of fact with respect to any of them (*see Sniatecki v Violet Realty, Inc.*, 98 AD3d 1316, 1320-1321 [4th Dept 2012]; *Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 214 [2d Dept 2010]). First, plaintiffs contend that defendant's failure to detect the lack of functioning safety devices launched an instrument of harm, but the deposition testimony of plaintiff's coworkers established that the safety devices were disconnected years before defendant was hired to perform repairs. Because defendant's failure to detect that those devices were nonoperational merely continued the status quo, defendant cannot be said to have " 'launched a force or instrument of harm' " (*Espinal*, 98 NY2d at 142, quoting *Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168 [1928]). Second, plaintiff's deposition testimony established that he was aware that defendant was not hired to perform routine inspections or preventative maintenance, and thus plaintiff cannot be said to have "detrimentally relie[d] on the continued performance of the contracting party's duties" (*id.* at 140). Third, there was no continuing contractual relationship between defendant and the employer, which continued to use its own employees to perform many of the smaller repairs of the premises, and thus we cannot say that defendant "entirely displaced" the employer's duty to maintain the premises safely (*id.*).

We have reviewed plaintiffs' remaining contentions and conclude that they do not require reversal or modification of the order.

Entered: June 7, 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 15-00162

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TODD JONES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered November 20, 2014. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, and the matter is remitted to Monroe County Court for further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of burglary in the first degree (Penal Law § 140.30 [4]). We agree with defendant that he is entitled to vacatur of his guilty plea because County Court violated his right to counsel when it failed to conduct a sufficient inquiry into his complaint regarding defense counsel's representation of him. "Under our State and Federal Constitutions, an indigent defendant in a criminal case is guaranteed the right to counsel" (*People v Medina*, 44 NY2d 199, 207 [1978]; *see* US Const, 6th Amend; NY Const, art I, § 6; *People v Linares*, 2 NY3d 507, 510 [2004]). Consistent with that guarantee, trial courts have the "ongoing duty" to " 'carefully evaluate serious complaints about counsel' " (*Linares*, 2 NY3d at 510, quoting *Medina*, 44 NY2d at 207; *see People v Sides*, 75 NY2d 822, 824 [1990]).

Whether to grant a defendant's request to substitute counsel is "within the 'discretion and responsibility' of the trial judge" (*People v Porto*, 16 NY3d 93, 99 [2010], quoting *Medina*, 44 NY2d at 207), and "a court's duty to consider such a motion is invoked only where a defendant makes a 'seemingly serious request[ ]' " (*id.* at 99-100, quoting *Sides*, 75 NY2d at 824). It is therefore "incumbent upon a defendant to make specific factual allegations of 'serious complaints about counsel' " (*id.* at 100, quoting *Medina*, 44 NY2d at 207). If a defendant makes such a showing, "the court must make at

least a 'minimal inquiry,' and discern meritorious complaints from disingenuous applications by inquiring as to 'the nature of the disagreement [with counsel] or its potential for resolution' " (*id.*, quoting *Sides*, 75 NY2d at 825).

Here, during the plea colloquy, defendant attempted to inform the court that he was pleading guilty only because he was not receiving effective assistance of counsel. Although vague and conclusory complaints about counsel generally are insufficient to trigger the court's duty to make an inquiry (*see People v Chess*, 162 AD3d 1577, 1578-1579 [4th Dept 2018]; *People v Watkins*, 77 AD3d 1403, 1404 [4th Dept 2010], *lv denied* 15 NY3d 956 [2010]), the court here "failed to provide defendant with an opportunity to explain his complaints" (*People v Tucker*, 139 AD3d 1399, 1400 [4th Dept 2016]; *see People v Beard*, 100 AD3d 1508, 1512 [4th Dept 2012]; *People v Branham*, 59 AD3d 244, 245 [1st Dept 2009]; *see also Sides*, 75 NY2d at 824-825). The court refused to accept defendant's pro se letter regarding the matter and did not otherwise allow defendant to expand upon his claim of ineffective assistance of counsel. Defendant's "request may well have been a frivolous delaying tactic" (*People v Rodriguez*, 46 AD3d 396, 397 [1st Dept 2007], *lv denied* 10 NY3d 844 [2008]). Nevertheless, we conclude that the court had "no basis to completely cut off the discussion without hearing any explanation" (*id.*). A "defendant must at least be given an opportunity to state the basis for his [or her] application" (*People v Bryan*, 31 AD3d 295, 296 [1st Dept 2006]).

Moreover, under the facts of this case, we reject the People's contention that defendant abandoned his request when he decided to plead guilty while still represented by the same attorney. After refusing to allow defendant to articulate his complaints about defense counsel, the court essentially gave defendant an ultimatum: plead guilty with present counsel or proceed to trial with present counsel (*cf. People v Ocasio*, 81 AD3d 1469, 1470 [4th Dept 2011], *lv denied* 16 NY3d 898 [2011], *cert denied* 565 US 910 [2011]; *People v Hobart*, 286 AD2d 916, 916 [4th Dept 2001], *lv denied* 97 NY2d 683 [2001]). The People also contend that defendant's challenge to the court's denial of his implicit request for substitution of counsel is foreclosed by his guilty plea. We reject that contention because, for the reasons discussed herein, defendant's contention "implicates the voluntariness of the plea" (*People v Morris*, 94 AD3d 1450, 1451 [4th Dept 2012], *lv denied* 19 NY3d 976 [2012] [internal quotation marks omitted]).

Based upon the foregoing, the judgment should be reversed and the plea vacated (*see Sides*, 75 NY2d at 825; *Branham*, 59 AD3d at 245). In light of our conclusion, there is no need to address defendant's remaining contentions.

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

124

CA 18-00045

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

IN THE MATTER OF MELVIN MOORE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, AND PATRICK M. O'FLYNN, SHERIFF OF MONROE COUNTY, RESPONDENTS-RESPONDENTS.

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

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (FREDERICK A. BRODIE OF COUNSEL), FOR RESPONDENT-RESPONDENT ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION.

MICHAEL E. DAVIS, COUNTY ATTORNEY, ROCHESTER (MICHELE ROMANCE CRAIN OF COUNSEL), FOR RESPONDENT-RESPONDENT PATRICK M. O'FLYNN, SHERIFF OF MONROE COUNTY.

Appeal from a judgment (denominated order) of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered November 24, 2017 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding challenging a jail time credit determination made by the Monroe County Sheriff's Department. Petitioner was sentenced in 1986 to concurrent terms of incarceration, the longest of which was 10 to 20 years. He was released on parole in 1998 but was thereafter declared delinquent as of November 1, 1999. Petitioner was arrested on December 27, 1999 on a variety of charges (the new charges), and a parole violation warrant was lodged against him the following day. By a release order dated December 30, 1999, petitioner was released from custody on the new charges, but he remained incarcerated at the Monroe County Jail on the parole violation. Petitioner was re-arrested on the new charges on December 5, 2001. Following his conviction on several of those charges, defendant was sentenced on April 25, 2003.

Petitioner contends that the 704 days of jail time between December 31, 1999 and December 4, 2001 should have been credited against the term of the sentence on his 2003 conviction. We reject that contention. Because petitioner was in custody during that 704-day period on the parole violation warrant, the credit accrued during this period applied, by operation of law, to the interrupted 1986 sentence, even if, as petitioner contends, he should not have been "released" on the new charges on December 30, 1999 (*see* Penal Law § 70.40 [3] [c]; *Matter of Ellis v Head Clerk, Otisville Correctional Facility*, 128 AD2d 525, 526-527 [2d Dept 1987]). Pursuant to Penal Law § 70.30 (3), "petitioner is not entitled to jail time credit against the [2003] sentence for the jail time that was [properly] credited against the [1986] sentence" (*Matter of Graham v Walsh*, 108 AD3d 1230, 1231 [4th Dept 2013] [internal quotation marks omitted]; *see Matter of Smith v Annucci*, 162 AD3d 1430, 1431-1432 [3d Dept 2018], *lv denied* 32 NY3d 909 [2018]; *Matter of Jones v New York State Dept. of Corr. Servs.*, 305 AD2d 891, 892 [3d Dept 2003], *appeal dismissed* 100 NY2d 613 [2003]). Supreme Court thus properly dismissed the petition.

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

125

CA 18-01404

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

MARY A. PAUSZEK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

AMY M. WAYLETT, DEFENDANT-APPELLANT,
MICHAEL LIN AND JUEL LIN, ALSO KNOWN AS
JEWEL C. LIN, DEFENDANTS.

WALSH, ROBERTS & GRACE, BUFFALO (ROBERT P. GOODWIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

FESSENDEN, LAUMER & DEANGELO, PLLC, JAMESTOWN (MARY B. SCHILLER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Frank A. Sedita, III, J.), entered January 23, 2018. The order denied the motion of defendant Amy M. Waylett for summary judgment dismissing the amended complaint against her.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she tripped in a "divot" on her own property and fell after she was frightened by a dog owned by her neighbors, defendants Michael Lin and Juel Lin, also known as Jewel C. Lin, who were renting their home from Amy M. Waylett (defendant). Supreme Court denied defendant's motion for summary judgment dismissing the amended complaint against her, and we affirm.

Contrary to defendant's contention, she failed to establish as a matter of law that she did not owe a duty of care to plaintiff. Although plaintiff was injured on her own property, the conduct of the dog in question occurred on defendant's property (*cf. Walker v Gold*, 70 AD3d 1349, 1350 [4th Dept 2010], *lv denied* 14 NY3d 712 [2010]; *Seiger v Dercole*, 50 AD3d 1524, 1524 [4th Dept 2008]; *Ruffin v Dykes*, 37 AD3d 1191, 1191 [4th Dept 2007]; *Weipert v Oldfield*, 298 AD2d 974, 974 [4th Dept 2002]), and defendant's own evidence raised a triable issue of fact whether she took "reasonable precautions for the protection of third persons" (*Strunk v Zoltanski*, 62 NY2d 572, 577 [1984]).

Contrary to her further contentions, defendant also failed to establish as a matter of law that the dog did not have vicious

propensities or that she lacked notice of those propensities (*see id.*). In support of her motion, defendant submitted evidence that, after the Lins moved into the premises, the dog was observed lunging at or jumping on people. Although "barking and running around" is generally considered normal canine behavior and does not amount to vicious propensities (*Collier v Zambito*, 1 NY3d 444, 447 [2004]), "[a] known tendency to attack others, even in playfulness, as in the case of the overly friendly large dog with a propensity for enthusiastic jumping up on visitors, will be enough to make [a] defendant[] liable for damages resulting from such an act" (*Lewis v Lustan*, 72 AD3d 1486, 1487 [4th Dept 2010] [internal quotation marks omitted]). In addition, the act of lunging at people may also be considered a vicious propensity (*see Merwin v McCann*, 129 AD2d 925, 926 [3d Dept 1987]; *cf. Gill v Welch*, 136 AD2d 940, 940 [4th Dept 1988]; *see also Sorel v Iacobucci*, 221 AD2d 852, 853 [3d Dept 1995]; *O'Brien v Amman*, 21 Misc 3d 1118[A], 2008 NY Slip Op 52096 [U], *3 [Sup Ct, Allegany County 2008]).

With respect to whether defendant had notice of the dog's allegedly vicious propensities, defendant submitted evidence that plaintiff's husband had complained about those very propensities to defendant's property manager, i.e., her agent. Although the property manager denied receiving such complaints, he admitted observing similar behavior by the dog. "The general rule is that knowledge acquired by an agent acting within the scope of his [or her] agency is imputed to his [or her] principal and the latter is bound by such knowledge [even if] the information is never actually communicated to [the principal]" (*Center v Hampton Affiliates*, 66 NY2d 782, 784 [1985]; *see Kirschner v KPMG LLP*, 15 NY3d 446, 465 [2010]). Thus, regardless whether the property manager informed defendant of what he heard or observed of the dog's allegedly vicious propensities, defendant is deemed to have notice of those propensities.

Inasmuch as defendant failed to meet her initial burden on the motion, the burden never shifted to plaintiff to raise a triable issue of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

152

KA 17-00278

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT G. MCDONALD, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BENJAMIN MARGO 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 December 13, 2016. The judgment convicted defendant, after a nonjury trial, of driving while ability impaired 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: Defendant appeals from a judgment convicting him following a bench trial of driving while ability impaired (Vehicle and Traffic Law § 1192 [1]) and aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a] [i]). We reject defendant's contention that Supreme Court erred in refusing to suppress statements he made to the police before he received his *Miranda* warnings because he was subjected to custodial interrogation. The evidence at the *Huntley* hearing, as credited by the court (*see People v Prochilo*, 41 NY2d 759, 761 [1977]; *People v Moore*, 295 AD2d 969, 969 [4th Dept 2002], *lv denied* 98 NY2d 770 [2002]), established that a police sergeant initially observed defendant's failure to stop his vehicle at a stop sign. The sergeant followed defendant and activated the emergency lights on his police vehicle to signal to defendant to pull over. Defendant did not pull over but instead made three additional turns onto other streets without signaling. The sergeant observed defendant as he parked his vehicle in a lurching fashion, exited the vehicle, and then began walking on the sidewalk with a staggering gait. The sergeant exited his police vehicle and repeatedly commanded defendant to stop and return to his vehicle, but defendant continued walking. When the sergeant caught up to defendant, defendant stated that he was walking to a bar located approximately one block away. The sergeant noted that defendant's breath smelled of alcohol, that his eyes were glassy, bloodshot, and

watery, and that his speech was slurred. The sergeant testified that he handcuffed defendant upon apprehending defendant on the sidewalk because he was uncertain why defendant had been trying to evade him and what defendant's intentions were. The sergeant walked defendant to the police vehicle and seated defendant on the back seat thereof with the door open and defendant's feet on the ground outside. The sergeant then asked defendant if he had a driver's license, where he was going, and if he had been drinking. Defendant stated that he was headed to a nearby bar and subsequently stated that he had previously consumed two drinks and that his driver's license had been revoked.

Contrary to defendant's contention, we conclude that his answers to the sergeant's questions were not the product of a custodial interrogation requiring *Miranda* warnings. " 'It is well established that not every forcible detention constitutes an arrest' " (*People v Pruitt*, 158 AD3d 1138, 1139 [4th Dept 2018], *lv denied* 31 NY3d 1120 [2018]) and, under the circumstances noted above, we agree with the court that the sergeant's use of handcuffs did not transform the detention into a de facto arrest. Rather, the sergeant's use of the handcuffs to effect the detention was warranted in light of the threat that defendant might take additional evasive action (*see People v Allen*, 73 NY2d 378, 379-380 [1989]; *People v Floyd*, 158 AD3d 1146, 1147 [4th Dept 2018], *lv denied* 31 NY3d 1081 [2018]).

We further conclude that seating defendant on the back seat of the police vehicle did not transform the sergeant's questioning into a custodial interrogation. The sergeant lawfully, although forcibly, detained defendant for investigatory purposes based on his observation of defendant committing several traffic infractions (*see People v Pealer*, 89 AD3d 1504, 1506 [4th Dept 2011], *affd* 20 NY3d 447 [2013], *cert denied* 571 US 846 [2013], *rearg denied* 24 NY3d 993 [2014]; *see generally People v Carver*, 124 AD3d 1276, 1278 [4th Dept 2015], *affd* 27 NY3d 418 [2016]). Given defendant's visible intoxication, staggering gait, and prior evasive actions, a " 'less intrusive means of fulfilling the police investigation' " than seating defendant partially in the police vehicle " 'was not readily apparent' " (*People v Howard*, 129 AD3d 1654, 1656 [4th Dept 2015], *lv denied* 27 NY3d 999 [2016]; *see People v Williams*, 73 AD3d 1097, 1099-1100 [2d Dept 2010], *lv dismissed* 15 NY3d 779 [2010]). Here, the sergeant's "action fell short of the level of intrusion upon defendant's liberty and privacy that constitutes an arrest" (*People v Hicks*, 68 NY2d 234, 240 [1986]; *see Howard*, 129 AD3d at 1655-1656). In addition, the sergeant's questions were investigatory rather than custodial in nature (*see People v Lagreca*, 221 AD2d 1026, 1026 [4th Dept 1995], *lv denied* 87 NY2d 923 [1996]; *see also People v Spencer*, 289 AD2d 877, 879 [3d Dept 2001], *lv denied* 98 NY2d 655 [2002]; *People v Swan*, 277 AD2d 1033, 1033 [4th Dept 2000], *lv denied* 96 NY2d 788 [2001]).

Finally, we conclude that any error in refusing to suppress the disputed statements is harmless beyond a reasonable doubt (*see generally People v Crimmins*, 36 NY2d 230, 237 [1975]; *People v Hough*,

151 AD3d 1591, 1593 [4th Dept 2017], *lv denied* 30 NY3d 950 [2017]).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

154

KA 09-00823

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMUEL K. HAILE, DEFENDANT-APPELLANT.

MARY WHITESIDE, NORTH HOLLYWOOD, CALIFORNIA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered March 5, 2009. The judgment convicted defendant, upon a jury verdict, of intimidating a victim or witness in the third degree, aggravated harassment in the second degree, harassment in the second degree, and attempted assault in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of intimidating a victim or witness in the third degree (Penal Law § 215.15 [1]), aggravated harassment in the second degree (§ 240.30 former [1]), harassment in the second degree (§ 240.26 [1]), and attempted assault in the third degree (§§ 110.00, 120.00 [1]). Defendant contends that County Court erred in determining, following a *Sirois* hearing, that the People presented clear and convincing evidence that defendant "wrongfully made use of his relationship with the victim in order to pressure her to violate her duty to testify" (*People v Jernigan*, 41 AD3d 331, 332 [1st Dept 2007], *lv denied* 9 NY3d 923 [2007]) and thus erred in permitting the prosecution to use the grand jury testimony of that witness in their direct case (*see generally People v Geraci*, 85 NY2d 359, 365-367 [1995]; *People v Vernon*, 136 AD3d 1276, 1277-1278 [4th Dept 2016], *lv denied* 27 NY3d 1076 [2016]).

We reject that contention. The People presented evidence that the missing witness was ready and willing to testify while defendant was in jail during the grand jury proceedings but became reluctant after defendant was released and the trial date drew closer. Days prior to the trial, the witness's mother observed the witness leave with defendant and their child for several hours. When the witness returned to the mother's home, the witness "started talking about the

subpoena that she had received. Started saying things like they can't do anything to me if I don't show up. The subpoena wasn't served properly. There's nothing that they can do if I don't show up to court. Things of that nature." The mother reported to the prosecutor that she had never heard the witness use legal terminology like that before.

The hearing testimony further established that defendant was the last person to see the missing witness on the morning she was scheduled to appear in court and that the witness was thereafter uncharacteristically out of touch with family and friends. Cell phone records admitted in evidence, however, established frequent communication between the cell phones belonging to defendant and to the witness on that day and the days prior, including numerous phone calls that corresponded with breaks in the court proceedings (*see Jernigan*, 41 AD3d at 332). Defendant's relative also observed the witness in defendant's home during the time in which law enforcement officers were attempting to locate her on a material witness warrant. Further, although the prosecution never informed the witness of the updated trial schedule following the witness's failure to appear, the witness appeared at court two days after the *Sirois* hearing "at the perfect moment to save defendant from the impending admission of her damning grand jury testimony" (*People v Smart*, 23 NY3d 213, 222 [2014]). Moreover, in light of that evidence, any error of the court in admitting at the hearing evidence of a statement obtained by law enforcement officers from defendant during the search for the witness in violation of defendant's right to counsel is harmless (*see People v Lopez*, 16 NY3d 375, 386 [2011]).

Contrary to defendant's contention, we conclude that the evidence is legally sufficient to support the conviction with respect to the charges of intimidating a victim or witness in the third degree, aggravated harassment in the second degree, and attempted assault in the third degree (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Further, viewing the evidence in light of the elements of all 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). Finally, we have reviewed defendant's remaining contentions and conclude that they are without merit.

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

164

CA 18-00986

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

JOHN T. DILLON AND D. TIMOTHY DILLON,
PLAINTIFFS,

V MEMORANDUM AND ORDER

PEAK ENVIRONMENTAL, LLC, MARCUS E. O'ROURKE, JR.
AND TIMOTHY M. O'ROURKE, DEFENDANTS-APPELLANTS.

PEAK ENVIRONMENTAL, LLC, MARCUS E.
O'ROURKE, JR., AND TIMOTHY M. O'ROURKE,
THIRD-PARTY PLAINTIFFS-APPELLANTS,

V

SAUNDERS KAHLER, LLP, AND CAMILLE T. KAHLER,
INDIVIDUALLY, AND DOING BUSINESS AS SAUNDERS
KAHLER, LLP, THIRD-PARTY DEFENDANTS-RESPONDENTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (DAVID A. KATZ OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND THIRD-PARTY PLAINTIFFS-APPELLANTS.

CABANISS CASEY LLP, ALBANY (DAVID B. CABANISS OF COUNSEL), FOR THIRD-PARTY DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered January 3, 2018. The order, inter alia, granted the motion of third-party defendants to dismiss the third-party complaint and denied the cross motion of defendants-third-party plaintiffs to disqualify third-party defendants from acting as plaintiffs' counsel.

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

Memorandum: Plaintiffs commenced this action against defendants-third-party plaintiffs (third-party plaintiffs) seeking damages for, inter alia, fraudulent inducement and breach of contract. Third-party plaintiffs subsequently commenced this third-party action against third-party defendants, i.e., the law firm and the individual attorney representing plaintiffs in the main action. Third-party plaintiffs now appeal from an order that, inter alia, granted the motion of third-party defendants to dismiss the third-party complaint for failure to state a cause of action pursuant to CPLR 3211 (a) (7) and

denied the cross motion of third-party plaintiffs seeking to disqualify third-party defendants from acting as counsel to plaintiffs in the main action. We affirm.

Contrary to third-party plaintiffs' contention, Supreme Court properly dismissed the third-party complaint pursuant to CPLR 3211 (a) (7). The sole cause of action alleged in the third-party complaint was for contribution and/or indemnification, and there is no dispute that third-party plaintiffs withdrew the claim for indemnification at oral argument. "Contribution may not be sought where the underlying action is for breach of contract or where the damages sought are purely for economic loss" (*Livingston v Klein*, 256 AD2d 1214, 1214 [4th Dept 1998]; *see Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 24 [1987]; *Laur & Mack Contr. Co. v Di Cienzo*, 274 AD2d 960, 960 [4th Dept 2000], *lv denied in part and dismissed in part* 96 NY2d 895 [2001]). "[T]he touchstone for purposes of whether one can seek contribution is not the nature of the claim in the underlying complaint but the measure of damages sought therein" (*Children's Corner Learning Ctr. v A. Miranda Contr. Corp.*, 64 AD3d 318, 324 [1st Dept 2009]).

Here, although plaintiffs' first cause of action in the underlying complaint against third-party plaintiffs alleges fraudulent inducement, the relief that plaintiffs seek with respect to that cause of action is the "difference between the value of [p]laintiffs' ownership interests as represented by [third-party plaintiffs] at the beginning of liquidation negotiations and the purchase price agreed upon at the closing." In other words, plaintiffs seek the monetary benefit of the contractual bargain that they would have received but for third-party plaintiffs' alleged improper action, and thus "the damages sought are purely for economic loss" (*Livingston*, 256 AD2d at 1214). Inasmuch as there is no dispute that plaintiffs' remaining causes of action in the underlying complaint also allege only economic loss, third-party plaintiffs' contribution claim was properly dismissed (*see Children's Corner Learning Ctr.*, 64 AD3d at 324).

Further, although the third-party complaint alleges in support of third-party plaintiffs' contribution claim that plaintiffs sustained damages as a result of legal malpractice committed by third-party defendants, the third-party complaint does not allege that third-party plaintiffs sustained damages as a result thereof (*cf. Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, 80 NY2d 377, 380-381 [1992], *rearg denied* 81 NY2d 955 [1993]). To the extent that third-party plaintiffs' submission of extrinsic evidence purporting to support a direct claim of legal malpractice could have been construed by the court as a request for leave to amend their third-party complaint, such a request was properly denied because third-party plaintiffs' new claim is patently lacking in merit (*see Broyles v Town of Evans*, 147 AD3d 1496, 1497 [4th Dept 2017]). Third-party plaintiffs' contention that they relied to their detriment on an email from third-party defendant Camille T. Kahler regarding the terms of the agreement between plaintiffs and third-party plaintiffs is belied by third-party plaintiffs' own correspondence.

Finally, the court did not abuse its discretion by denying third-party plaintiffs' cross motion to disqualify third-party defendants from acting as counsel to plaintiffs in the main action (*see generally Bison Plumbing City v Benderson*, 281 AD2d 955, 955 [4th Dept 2001]).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

167

CA 18-01678

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

MOHAMMED ZEIDAN AND HIBA ABUHAMDEH,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

SCOTT'S DEVELOPMENT COMPANY, SCOTT'S SPLASH LAGOON, INC., DOING BUSINESS AS SPLASH LAGOON INDOOR WATER PARK RESORT AND SCOTT ENTERPRISES, LLC, DOING BUSINESS AS SPLASH LAGOON INDOOR WATER PARK RESORT,
DEFENDANTS-RESPONDENTS.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (RICHARD A. NICOTRA OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN, ERIE, PENNSYLVANIA (PATRICK M. CAREY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Daniel Furlong, J.), entered January 11, 2018. The order granted the motion of defendants to dismiss the complaint.

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

Memorandum: Mohammed Zeidan (plaintiff) allegedly sustained injuries when, after going down a water slide at a water park in Pennsylvania owned and/or operated by defendants, he was struck by another patron who was sent down the water slide too closely behind him. Plaintiffs commenced this action asserting a cause of action for negligence based on defendants' alleged improper supervision of the water slide and inadequate training of the water park employees, as well as a derivative cause of action on behalf of plaintiff's spouse. Contrary to plaintiffs' contention, Supreme Court properly granted the motion of defendants to dismiss the complaint for lack of personal jurisdiction (*see* CPLR 3211 [a] [8]). "[I]n opposition to a motion to dismiss pursuant to CPLR 3211 (a) (8), [plaintiffs] need only make a prima facie showing that the defendant[s] . . . [were] subject to the personal jurisdiction of" the court (*Halas v Dick's Sporting Goods*, 105 AD3d 1411, 1412 [4th Dept 2013] [internal quotation marks omitted]). Here, however, having accepted as true the allegations set forth in the complaint and in plaintiffs' opposition papers, and having accorded plaintiffs the benefit of every favorable inference (*see Whitcraft v Runyon*, 123 AD3d 811, 812 [2d Dept 2014]), we

conclude that plaintiffs failed to meet that burden (*see id.*; *cf. Halas*, 105 AD3d at 1412).

Contrary to plaintiffs' contention, they failed to make a prima facie showing of jurisdiction pursuant to CPLR 302 (a) (1) inasmuch as they failed to demonstrate "an 'articulable nexus' or 'substantial relationship' " between at least one element of their negligence cause of action and defendants' alleged contacts with New York (*D&R Global Selections, S.L. v Bodega Olegario Falcon Pineiro*, 29 NY3d 292, 298 [2017]; *see Mejia-Haffner v Killington, Ltd.*, 119 AD3d 912, 914 [2d Dept 2014]; *cf. Halas*, 105 AD3d at 1412; *see also Leuthner v Homewood Suites by Hilton*, 151 AD3d 1042, 1043-1044 [2d Dept 2017]). For a similar reason, plaintiffs failed to make a prima facie showing of jurisdiction pursuant to CPLR 302 (a) (4). Although plaintiffs alleged that defendant Scott Enterprises, LLC owns property in New York, there is no indication in the record that such ownership gave rise to plaintiffs' allegations of negligence at the water park in Pennsylvania (*see generally D&R Global Selections, S.L.*, 29 NY3d at 298-299; *Black Riv. Assoc. v Newman*, 218 AD2d 273, 276-277 [4th Dept 1996]).

Plaintiffs also failed to make a prima facie showing of jurisdiction pursuant to CPLR 302 (a) (3). Indeed, plaintiff's alleged injuries did not occur "within" New York (*id.*). It is undisputed that the alleged injuries were sustained in Pennsylvania, and the fact that plaintiff may have suffered medical consequences in New York after returning home is insufficient to establish jurisdiction under CPLR 302 (a) (3) (*see McGowan v Smith*, 52 NY2d 268, 274-275 [1981]; *cf. Halas*, 105 AD3d at 1412; *see also Paterno v Laser Spine Inst.*, 24 NY3d 370, 381 [2014]; *Bloomgarden v Lanza*, 143 AD3d 850, 852 [2d Dept 2016]).

In light of our determination that plaintiffs failed to make the requisite showing under an applicable provision of CPLR 302, we see no need to reach plaintiffs' contention concerning due process (*see generally LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 [2000]).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

185

CA 18-00946

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

MARIA NEVAREZ, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

UNIVERSITY OF ROCHESTER, STRONG MEMORIAL HOSPITAL, AND ANNETTE E. SESSIONS, M.D., DEFENDANTS-RESPONDENTS.

NEVAREZ AND NEVAREZ, ROCHESTER (JUAN A. NEVAREZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER (DANIEL P. PURCELL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment and order (one paper) of the Supreme Court, Monroe County (John J. Ark, J.), entered February 14, 2018. The judgment and order, among other things, granted defendants' motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this medical malpractice action seeking damages for injuries sustained by plaintiff during a transurethral resection of a tumor. Supreme Court granted defendants' motion for summary judgment dismissing the complaint. We affirm.

"It is well settled that, on a motion for summary judgment, a defendant in a medical malpractice action bears the initial burden of establishing either that there was no deviation or departure from the applicable standard of care or that any alleged departure did not proximately cause the plaintiff's injuries" (*Bagley v Rochester Gen. Hosp.*, 124 AD3d 1272, 1273 [4th Dept 2015]). "A defendant physician may submit his or her own affidavit to meet that burden, but that affidavit must be 'detailed, specific and factual in nature' . . . , and must 'address each of the specific factual claims of negligence raised in [the] plaintiff's bill of particulars' " (*Webb v Scanlon*, 133 AD3d 1385, 1386 [4th Dept 2015]). Here, defendants submitted the affidavit of defendant Annette E. Sessions, M.D., which addressed each of plaintiff's claims of negligence. Sessions's affidavit satisfied defendants' initial burden by establishing both that the defendants did not deviate or depart from the applicable standard of care and that any alleged departure did not cause any injury to plaintiff.

Contrary to plaintiff's contention, she failed to raise a triable issue of fact. "[E]xpert opinion evidence from a party defendant in a medical malpractice action which is otherwise sufficient to show entitlement to summary judgment requires some expert response from plaintiff on the question of alleged deviation from proper and approved medical practice" (*Webb*, 133 AD3d at 1387 [internal quotation marks omitted]). In opposition to defendants' motion, plaintiff submitted affidavits from two medical experts. Even assuming, arguendo, that both medical experts adequately set forth a foundation to support the reliability of their opinions (*see Chillis v Brundin*, 150 AD3d 1649, 1650 [4th Dept 2017]), we conclude that " 'the expert[s'] ultimate assertions are speculative' " and those opinions therefore have no probative value and are insufficient to raise an issue of fact (*Occhino v Fan*, 151 AD3d 1870, 1871 [4th Dept 2017]; *see Golden v Pavlov-Shapiro*, 138 AD3d 1406, 1406 [4th Dept 2016], *lv denied* 28 NY3d 913 [2017]; *Moran v Muscarella*, 87 AD3d 1299, 1300 [4th Dept 2011]). Both of plaintiff's medical expert affidavits pre-date defendants' motion by approximately 5 years, and were previously submitted in opposition to an earlier motion to dismiss the complaint. Consequently, neither affidavit addresses Sessions's opinions regarding notes in plaintiff's medical records that were made after the expert affidavits were drafted. Nor do the affidavits of plaintiff's experts address the opinions that Sessions gave during her deposition with respect to plaintiff's post-operative care, and with respect to proximate cause, i.e., that plaintiff's urinary symptoms existed prior to the surgery/treatment and there is no medical evidence establishing that any of the symptoms have worsened after the surgery/treatment. We thus conclude that the affidavits of plaintiff's experts are "entirely conclusory in nature and lack[] any details[,] and thus [are] insufficient to raise the existence of a triable factual issue concerning medical malpractice" (*Macaluso v Pilcher*, 145 AD3d 1559, 1561 [4th Dept 2016] [internal quotation marks omitted]). Contrary to plaintiff's remaining contention, the affidavits and deposition transcripts of plaintiff and her mother do not constitute an "expert medical response" to defendants' submissions and are therefore insufficient to raise a triable question of fact (*Webb*, 133 AD3d at 1387).

Entered: June 7, 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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CA 18-00861

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

FRANK VALENTE AND DARLENE VALENTE,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

UTICA FIRST INSURANCE COMPANY,
DEFENDANT-APPELLANT-RESPONDENT.

FARBER BROCKS & ZANE L.L.P., GARDEN CITY (SHERRI N. PAVLOFF OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

BARTH SULLIVAN BEHR, BUFFALO (LAURENCE D. BEHR OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Niagara County (Sara Sheldon, A.J.), entered January 26, 2018. The order, among other things, denied the motion of defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting defendant's motion, dismissing the amended complaint and granting judgment in favor of defendant as follows:

> It is ADJUDGED AND DECLARED that defendant is not obligated to provide coverage to plaintiffs for the underlying claim,

and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking, inter alia, a declaration that defendant is obligated to provide insurance coverage for damage to plaintiffs' house pursuant to a homeowners' insurance policy issued by defendant. Defendant appeals and plaintiffs cross-appeal from an order that denied defendant's motion for summary judgment dismissing the complaint and for judgment on its counterclaim for a declaration that defendant is not obligated to provide coverage to plaintiffs for the underlying claim, granted those parts of plaintiffs' cross motion seeking leave to amend their complaint and to be relieved of certain admissions, and denied that part of plaintiffs' cross motion for a declaration that defendant is obligated to provide coverage to them for their underlying claim.

We agree with defendant on its appeal that, regardless of whether

we rely upon the allegations in plaintiffs' original or amended complaint, defendant is not obligated to provide coverage for plaintiffs' underlying claim because the insurance policy's earth movement exclusion applies to the damage caused to their home (*see Kula v State Farm Fire & Cas. Co.*, 212 AD2d 16, 21 [4th Dept 1995], *lv dismissed in part and denied in part* 87 NY2d 953 [1996]). Thus, Supreme Court erred in denying defendant's motion, and we therefore modify the order accordingly. The insurance policy provided that "earth movement" included "earth sinking," "shifting," or "contracting." Even assuming, arguendo, that there was a sinking of the ground underneath the house's foundation as opposed to erosion or washout, we conclude that such sinking nevertheless constituted earth movement that proximately caused the claimed loss (*see id*. at 20). It is irrelevant that the earth movement may have been precipitated by the peril of above-surface downspout water, which is arguably covered by the policy, as opposed to sump pump leakage, which is excluded from coverage, because here it was the earth movement, not the flow of water, that proximately caused the damage to the house (*see Sheehan v State Farm Fire & Cas. Co.*, 239 AD2d 486, 487 [2d Dept 1997]). Thus, we conclude that the earth movement exclusion applies and defendant is not obligated to cover plaintiffs' loss (*see generally Kula*, 212 AD2d at 20-21).

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

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

203

KA 17-00614

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON R. VOTRA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oswego County Court (Donald E. Todd, J.), rendered November 22, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [1]). Contrary to defendant's contention, the record 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 Moore*, 158 AD3d 1312, 1312 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]).

Even assuming, arguendo, that defendant's contention that the proceedings were electronically recorded and later transcribed in violation of Judiciary Law § 295 survives both the guilty plea and waiver of the right to appeal (*see generally People v Harrison*, 85 NY2d 794, 796-797 [1995]), we conclude that the contention is unpreserved because defendant did not object to the use of the electronic recording device or the absence of a stenographer (*see People v Bennett*, 165 AD3d 1624, 1625 [4th Dept 2018]; *People v Rogers*, 159 AD3d 1558, 1559 [4th Dept 2018], *lv denied* 31 NY3d 1152 [2018]). Regardless, neither reversal nor a reconstruction hearing is required here because defendant failed to demonstrate that he was prejudiced by the use of a transcribed recording instead of a stenographer (*see Harrison*, 85 NY2d at 796; *cf. People v Henderson*, 140 AD3d 1761, 1761 [4th Dept 2016]).

Although not precluded by the valid waiver of the right to appeal, defendant's contention that his guilty plea was not knowing, intelligent, and voluntary is not preserved because he did not move to withdraw the plea or to vacate the judgment of conviction on the ground now asserted on appeal (*see People v Smith*, 162 AD3d 1597, 1597 [4th Dept 2018], *lv denied* 32 NY3d 941 [2018]; *People v Sanford*, 138 AD3d 1435, 1436 [4th Dept 2016]).

Finally, the valid waiver of the right to appeal encompasses defendant's challenge to the severity of the sentence.

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

204

KA 15-00473

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LATANYA L. WASHINGTON, ALSO KNOWN AS LATONYA L. WASHINGTON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered October 23, 2014. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting her, upon a jury verdict, of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]), arising from an incident where she carried an electronic stun gun in her purse while attempting to enter the Monroe County Hall of Justice. We affirm.

Defendant's contention regarding the legal sufficiency of the evidence with respect to the operability of the stun gun is not preserved for our review inasmuch as her motion for a trial order of dismissal was not " 'specifically directed' at [that] alleged" deficiency in the proof (*People v Gray*, 86 NY2d 10, 19 [1995]; *see generally People v Boyd*, 153 AD3d 1608, 1609 [4th Dept 2017], *lv denied* 30 NY3d 1103 [2018]). In any event, the evidence, which included the testimony of a firearms examiner who tested the device at issue, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to support the conviction. Indeed, there is a "valid line of reasoning and permissible inferences which could lead a rational person to the conclusion" (*People v Bleakley*, 69 NY2d 490, 495 [1987]) that the device possessed by defendant was an " '[e]lectronic stun gun' " that was operable (Penal Law § 265.00 [15-c]; *see generally People v Berrezueta*, 31 NY3d 1091, 1092 [2018], *rearg denied* 32 NY3d 1016 [2018]; *People v Williams*, 151 AD3d 1834, 1835 [4th Dept 2017], *lv denied* 29 NY3d 1135 [2017]).

By failing to request different jury instructions or object to the charge as given, defendant "failed to preserve [her] challenge[] to the jury instructions" (*People v VanGorden*, 147 AD3d 1436, 1440 [4th Dept 2017], *lv denied* 29 NY3d 1037 [2017]; *see People v Johnson*, 103 AD3d 1251, 1252 [4th Dept 2013], *lv denied* 21 NY3d 1005 [2013]).

Defendant's challenges to the felony complaint and the grand jury proceedings are not properly before us. " 'The felony complaint was superseded by the indictment [upon which defendant was found] guilty,' " thereby rendering academic any issue with respect to the felony complaint (*People v Mitchell*, 132 AD3d 1413, 1416 [4th Dept 2015], *lv denied* 27 NY3d 1072 [2016]), and County Court's determination with respect to the legal sufficiency of the evidence before the grand jury is "not reviewable upon an appeal from an ensuing judgment of conviction based upon legally sufficient trial evidence" (CPL 210.30 [6]; *see People v Figueroa*, 156 AD3d 1348, 1349-1350 [4th Dept 2017], *lv denied* 31 NY3d 1013 [2018]).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

211

OP 18-01660

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

IN THE MATTER OF STEPHEN P. MCNERLIN, PETITIONER,

V MEMORANDUM AND ORDER

HONORABLE VICTORIA M. ARGENTO, MONROE COUNTY COURT JUDGE, AND SANDRA J. DOORLEY, DISTRICT ATTORNEY OF MONROE COUNTY, RESPONDENTS.

THOMAS A. CORLETTA, ROCHESTER, FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to prohibit the prosecution of petitioner.

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

Memorandum: Petitioner was driving in the City of Rochester when he allegedly struck a vehicle, left the scene, struck a second vehicle, and eventually parked his vehicle at a gas station in the Town of Greece, where he was arrested. He was issued two traffic tickets from the Rochester Police Department for leaving the scene of a property damage incident without reporting (Vehicle and Traffic Law § 600 [1] [a]). The tickets were referred to the Rochester branch of the New York State Department of Motor Vehicles Traffic Violations Bureau (Bureau). Petitioner was convicted of the traffic violations after hearings at the Bureau and was issued fines. Petitioner was also charged by an indictment with two counts of driving while intoxicated as a class E felony (DWI) (§§ 1192 [2], [3]; 1193 [1] [c] [i] [A]). Petitioner moved to dismiss the indictment on double jeopardy grounds, which was denied. Petitioner then commenced this original CPLR article 78 proceeding seeking to prohibit his prosecution on the indictment.

Petitioner correctly concedes that there is no federal constitutional double jeopardy violation here. "Under the Federal Constitution, double jeopardy arises only upon separate prosecutions arising out of the same 'offence' " (*People v Latham*, 83 NY2d 233, 237 [1994]). The United States Supreme Court employs a "same-elements"

test, also known as the *Blockburger* test (*Blockburger v United States*, 284 US 299 [1932]), that "inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution" (*United States v Dixon*, 509 US 688, 696 [1993]). Here, the elements of DWI (*see* Vehicle and Traffic Law § 1192 [2], [3]) and leaving the scene of a property damage incident without reporting (*see* § 600 [1] [a]) are not the same; among other things, a person does not need to be intoxicated to be found guilty of leaving the scene of a property damage incident without reporting, and does not need to cause property damage to be found guilty of DWI.

Petitioner, however, contends that New York employs a different, "same conduct" test, and thus prosecution is barred by the Double Jeopardy Clause of the State Constitution. We reject that contention. In *Matter of Corbin v Hillery* (74 NY2d 279, 289-290 [1989], *affd sub nom. Grady v Corbin*, 495 US 508 [1990]), the Court of Appeals recognized the *Blockburger* test but, relying on "pointed dictum" from a later Supreme Court case, determined that double jeopardy applied where the prosecution intended to rely on the acts underlying traffic offenses as part of its proof on, inter alia, a homicide count. This is known as the "same conduct" test. The Supreme Court agreed with the Court of Appeals and thus affirmed (*Grady*, 495 US at 510, 514-516). However, in *Dixon*, the Supreme Court overruled *Grady*, holding that "[t]he 'same-conduct' rule it announced is wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy" (*Dixon*, 509 US at 704). The Supreme Court reiterated that the *Blockburger* test is the appropriate test for federal double jeopardy claims.

Petitioner contends that *Corbin* remains good law in New York, but the Court of Appeals has held that "[t]he Double Jeopardy Clauses in the State and Federal Constitutions are nearly identically worded, and we have never suggested that state constitutional double jeopardy protection differs from its federal counterpart" (*Matter of Suarez v Byrne*, 10 NY3d 523, 534 [2008], *rearg denied* 11 NY3d 753 [2008]; *see People v Lingle*, 16 NY3d 621, 631 [2011]). Moreover, in *People v Biggs* (1 NY3d 225, 230-231 [2003]), the Court of Appeals set forth the *Blockburger* test, not the same conduct test, when analyzing a defendant's claim that the double jeopardy clauses of both the Federal and State Constitutions barred a subsequent prosecution. We therefore conclude that the constitutional double jeopardy analysis is the same under federal and state law, and that there is no constitutional double jeopardy violation here (*see People v Madden*, 49 AD3d 1264, 1265 [4th Dept 2008], *lv denied* 10 NY3d 936 [2008]).

We also reject petitioner's contention that prosecution of the DWI charges is barred by statutory double jeopardy. The New York Legislature has "enacted statutory double jeopardy provisions offering broader protection than the Federal Constitution requires" (*Suarez*, 10 NY3d at 534, citing CPL art 40 and *Latham*, 83 NY2d at 237; *see Matter of Polito v Walsh*, 8 NY3d 683, 690 [2007], *rearg denied* 9 NY3d 918 [2007]). Petitioner relies on CPL 40.20 (2), which provides that "[a]

person may not be separately prosecuted for two offenses based upon the same act or criminal transaction," unless certain exceptions apply. "[A] person 'is prosecuted' for an offense, within the meaning of section 40.20, when he is charged therewith by an accusatory instrument filed in a court of this state or of any jurisdiction within the United States, and when the action either: . . . [t]erminates in a conviction upon a plea of guilty; or . . . [p]roceeds to the trial stage" (CPL 40.30 [1]). The Bureau is an administrative agency where traffic infractions must be established by clear and convincing evidence and where a finding of guilt may result in the imposition of a fine, but not imprisonment (*see* Vehicle and Traffic Law §§ 225 [former (1)]; 227 [1], [4] [a]; *Matter of Rosenthal v Hartnett*, 36 NY2d 269, 271-272 [1975]; *People v Serrano*, 46 Misc 3d 960, 967-969 [Sup Ct, Bronx County 2014]; *see also* 15 NYCRR 121.2; *see generally Matter of Sulli v Appeals Bd. of Administrative Adjudication Bur.*, 55 AD2d 457, 460-461 [4th Dept 1977]). Inasmuch as the Bureau is not a "court" (CPL 10.10), we conclude that prosecution of the traffic offenses in the Bureau does not trigger double jeopardy under CPL 40.20 (2) (*see Serrano*, 46 Misc 3d at 966-968).

Moreover, we further conclude that the exception set forth in CPL 40.20 (2) (b) applies here. Under that exception, if "[e]ach of the offenses as defined contains an element which is not an element of the other, and the statutory provisions defining such offenses are designed to prevent very different kinds of harm or evil," then prosecution is not barred under CPL 40.20 (2). The first part of the exception is the *Blockburger* test and, as explained earlier, the traffic violations and the DWI charges have different elements. Petitioner argues that the second part of the exception is not met because the two offenses are designed to prevent the *same* kinds of harm, not *different*. We disagree (*see People v Lindsly*, 99 AD2d 99, 101 [2d Dept 1984]). As explained in *Lindsly*, the purpose of the criminal offense of DWI is " 'to reduce human suffering and carnage caused by drinking drivers,' " whereas the purpose of Vehicle and Traffic Law § 600 " 'is to prevent the evasion of civil liability by a motorist who may be liable for negligently causing damage by his leaving the scene of the accident' " (*id.*; *see Matter of Hanavan [Motor Veh. Acc. Indem. Corp.]*, 60 Misc 2d 407, 410 [Sup Ct, Erie County 1969], *affd* 33 AD2d 1100 [4th Dept 1970]; *cf. People v Claud*, 76 NY2d 951, 953 [1990]).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

253

KA 17-00537

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDEN HARDY, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered February 23, 2017. The judgment convicted defendant, upon his plea of guilty, 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 his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]). Contrary to defendant's contention, we conclude that "the waiver of the right to appeal was not rendered invalid based on [Supreme Court's] failure to require defendant to articulate the waiver in his own words" (*People v Scheifla*, 166 AD3d 1531, 1532 [4th Dept 2018], *lv denied* 32 NY3d 1177 [2019] [internal quotation marks omitted]; *see People v Ludlow*, 42 AD3d 941, 942 [4th Dept 2007]).

Defendant's contention that he was denied his statutory right to a speedy trial is foreclosed by his guilty plea (*see People v Hansen*, 95 NY2d 227, 231 n 3 [2000]; *People v Badding*, 107 AD3d 1453, 1454 [4th Dept 2013]; *People v Paduano*, 84 AD3d 1730, 1730 [4th Dept 2011]; *see generally* CPL 30.30) and, in any event, the contention does not survive the valid waiver of his right to appeal (*see Badding*, 107 AD3d at 1454; *Paduano*, 84 AD3d at 1730). Defendant's further contention that the court erred in refusing to suppress his statement to the police is likewise foreclosed by his valid appeal waiver (*see People v Kemp*, 94 NY2d 831, 833 [1999]; *People v Lindsay*, 162 AD3d 1647, 1648 [4th Dept 2018], *lv denied* 32 NY3d 939 [2018]).

Defendant also contends that he was denied his constitutional right to a speedy trial. At the time that defendant entered his plea, however, the court had decided only that part of his speedy trial motion concerning the statutory right. Because defendant pleaded

guilty before the court decided his constitutional speedy trial claim, we conclude that he abandoned that claim. As a consequence, defendant is "foreclosed from pursuing the merits of [it] on appeal" (*People v Alexander*, 82 AD3d 619, 624 [1st Dept 2011], *affd* 19 NY3d 203 [2012]).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

318

CAF 17-01648

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

IN THE MATTER OF JESENIA E. SANTOS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

RASHAD MUHAMMED, RESPONDENT-APPELLANT.

FREDERICK P. LESTER, PITTSFORD, FOR RESPONDENT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (CHELSEA L. PALMISANO OF COUNSEL), FOR PETITIONER-RESPONDENT.

LISA J. MASLOW, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Monroe County (James E. Walsh, Jr., J.), entered June 30, 2017 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner sole custody of the subject children.

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

Memorandum: In this custody proceeding pursuant to Family Court Act article 6, respondent father appeals from an order granting petitioner mother sole custody of the parties' children. At the time the mother filed the petition, the father was incarcerated pending trial on charges of rape in the second degree and predatory sexual assault against a child, which stemmed from the impregnation of the mother's teenage daughter from a previous marriage. When the custody order was entered, the father had been incarcerated for approximately eight months. Shortly thereafter, the father was convicted of those charges and sentenced to an indeterminate prison term of 20 years to life.

Preliminarily, we note that the father's contention that Family Court erred in failing to award him visitation with the children has been rendered moot by a subsequent order that, upon his petition, granted him visitation rights (*see Matter of Jones v Tucker*, 125 AD3d 1273, 1273 [4th Dept 2015]; *Matter of Kirkpatrick v Kirkpatrick*, 117 AD3d 1575, 1576 [4th Dept 2014]). We therefore dismiss the appeal from the instant order insofar as it concerns visitation.

Contrary to the father's further contention that the court erred

in granting the mother sole custody of the children without conducting a hearing, it is well settled that "[n]o hearing is required upon a custody petition when the court possesses sufficient information to make a comprehensive assessment of the best interests of the children" (*Matter of Van Orman v Van Orman*, 19 AD3d 1167, 1168 [4th Dept 2005]; *see Matter of Cierra L.B. v Richard L.R.*, 43 AD3d 1416, 1416 [4th Dept 2007]; *Matter of Stefanie A. v Loral R.H.*, 41 AD3d 1310, 1310 [4th Dept 2007]). Here, the father's incarceration rendered him "incapable of fulfilling the obligations of a custodial parent" (*Van Orman*, 19 AD3d at 1168), and we conclude that the court properly granted the mother sole custody of the children without conducting a hearing (*see Stefanie A.*, 41 AD3d at 1310; *Van Orman*, 19 AD3d at 1168).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

345

CA 18-01878

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

ANNE M. REBER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES REBER, DEFENDANT-APPELLANT.

KAMAN, BERLOVE, MARAFIOTI, JACOBSTEIN & GOLDMAN, LLP, ROCHESTER (RICHARD GLEN CURTIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOAN de R. O'BYRNE, ROCHESTER (MICHAEL STEINBERG OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Gail Donofrio, J.), entered March 28, 2018. The order, insofar as appealed from, denied that part of the motion of defendant seeking an order directing plaintiff to transfer to him the sum of $32,828.35.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in part, and plaintiff is directed to transfer to defendant the sum of $32,828.35.

Memorandum: The parties divorced in 2013, and a stipulation of settlement that was incorporated, but not merged, into their judgment of divorce provided, as relevant to this appeal, that plaintiff was entitled to approximately $71,000 from defendant's 401(k) account, to be transferred as soon as possible after the signing of the judgment of divorce. The parties subsequently executed a qualified domestic relations order (QDRO), which provided that plaintiff would receive $71,167 from defendant's 401(k) account. When defendant's employer fulfilled the QDRO, however, it transferred to plaintiff a total of $103,995.35, which was comprised of the amount set forth in the QDRO, i.e., $71,167, plus the gains that accrued on that amount after the date the divorce action was commenced, i.e., $32,828.35. Thereafter, defendant moved for, inter alia, an order directing plaintiff to transfer to him $32,828.35. Supreme Court denied the motion, and we now reverse the order insofar as appealed from and direct plaintiff to return that amount to defendant.

"A QDRO obtained pursuant to a [stipulation of settlement] 'can convey only those rights which the parties [agreed to] as a basis for the judgment' " (*Duhamel v Duhamel* [appeal No. 2], 4 AD3d 739, 741 [4th Dept 2004]). Thus, "a court errs in granting a domestic relations order encompassing rights not provided in the underlying

stipulation" (*McCoy v Feinman*, 99 NY2d 295, 304 [2002]; *see Santillo v Santillo*, 155 AD3d 1688, 1688 [4th Dept 2017]). A stipulation of settlement that is incorporated, but not merged, into the judgment of divorce " 'is a contract subject to the principles of contract construction and interpretation' " (*Anderson v Anderson*, 120 AD3d 1559, 1560 [4th Dept 2014], *lv denied* 24 NY3d 913 [2015]; *see Walker v Walker*, 42 AD3d 928, 928 [4th Dept 2007], *lv dismissed* 9 NY3d 947 [2007]). If the stipulation of settlement is " 'complete, clear, and unambiguous on its face[, it] must be enforced according to the plain meaning of its terms' " (*Anderson*, 120 AD3d at 1560). Here, the stipulation of settlement clearly and unambiguously made no provision for plaintiff to receive gains or losses on the amount that the stipulation of settlement specified would be transferred to her. Thus, plaintiff is not entitled to any gains on that amount that accrued after the divorce action commenced, and defendant is entitled to the return of the $32,828.35. We therefore reverse the order insofar as appealed from, and grant that part of defendant's motion seeking an order directing plaintiff to transfer to him the sum of $32,828.35.

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

377

CAF 18-00541

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

IN THE MATTER OF JAMIE CULLOP,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JASON MILLER, RESPONDENT-RESPONDENT.

SCOTT T. GODKIN, UTICA, FOR PETITIONER-APPELLANT.

MICHAEL JOHNSON, UTICA, FOR RESPONDENT-RESPONDENT.

PETER J. DIGIORGIO, JR., UTICA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered March 13, 2018 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner mother appeals from an order dismissing her petition seeking permission to relocate with the subject child from Oneida County to Onondaga County where, she proposed, they would live with a registered sex offender who had been convicted of sexually abusing a child. While this appeal was pending, Family Court entered a subsequent order that transferred primary physical residence of the subject child from the mother to respondent father. Inasmuch as the primary physical residence of the subject child is no longer with the mother, "any corrective measures which this Court might have taken with respect to the order appealed from would have no practical effect" (*Matter of Lateesha J.*, 252 AD2d 503, 503 [2d Dept 1998]; *see Matter of Jaxsin L. [Heather L.]*, 124 AD3d 1398, 1399 [4th Dept 2015]; *Matter of Tyler C. [Andrea G.]*, 82 AD3d 1093, 1094 [2d Dept 2011]). We therefore conclude that the subsequent order renders this appeal moot (*see Matter of Warren v Hibbs*, 136 AD3d 1306, 1306 [4th Dept 2016], *lv denied* 27 NY3d 909 [2016]; *Matter of Salo v Salo*, 115 AD3d 1368, 1368 [4th Dept 2014]), and we further conclude that the exception to the mootness doctrine does not apply (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]). Consequently, we dismiss the appeal (*see Matter of Pugh v Richardson*, 138 AD3d 1423, 1423-1424 [4th Dept 2016]; *Jaxsin L.*, 124 AD3d at 1399; *Matter of Alexander M. [Michael M.]*, 83 AD3d 1400, 1401 [4th Dept

2011], *lv denied* 17 NY3d 704 [2011]).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

411

CA 18-02325

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

JARED N. UNDERBERG,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

DRYDEN MUTUAL INSURANCE CO.,
DEFENDANT-RESPONDENT-APPELLANT.

BURDEN, HAFNER & HANSEN, LLC, BUFFALO (PHYLISS A. HAFNER OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

BARCLAY DAMON, LLP, BUFFALO (ANTHONY J. PIAZZA OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment (denominated order) of the Supreme Court, Erie County (Mark A. Montour, J.), entered June 7, 2018. The judgment denied the motion of defendant for summary judgment, declared that the assault and battery exclusion of defendant's policy does not apply and granted in part and denied in part the amended cross motion of plaintiff for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying plaintiff's amended cross motion in its entirety and vacating the declaration, and as modified the judgment is affirmed without costs.

Memorandum: This action involving an insurance coverage dispute arises from an incident that occurred on November 14, 2008 during which plaintiff sustained injuries when a security guard at a nightclub allegedly assaulted him. The nightclub was owned by 236 Delaware Associates, LLC, doing business as Quote (Quote), and was insured by a policy issued by defendant. On November 13, 2009, plaintiff commenced a personal injury action against Quote and three individual defendants, one of whom he alleges was an employee of Quote and the other two he alleges are not employees but are agents of Quote. On February 17, 2011, defendant disclaimed coverage based on the policy's assault and battery exclusion, Quote's failure to give timely notice of the incident, and Quote's failure to promptly forward lawsuit papers. Plaintiff obtained a default judgment against Quote and two individual defendants and, after a nonjury trial, obtained a judgment against a third individual defendant on the issue of liability. After an inquest on damages, plaintiff obtained a money judgment against Quote and the three individual defendants. Plaintiff served defendant with a demand for payment, but defendant refused to

satisfy the money judgment.

Plaintiff commenced this action seeking a judgment declaring that defendant's disclaimer of coverage was invalid and improper and that defendant was obligated to indemnify Quote and the three individual defendants in the underlying lawsuit and seeking a judgment ordering defendant to pay the full judgment amount in that lawsuit. Defendant moved for summary judgment dismissing the complaint and seeking a judgment declaring that it was not obligated to defend, indemnify, or otherwise compensate anyone in the underlying lawsuit. By his amended cross motion, plaintiff sought a judgment declaring that defendant's disclaimer of coverage was invalid and improper and that defendant was obligated to indemnify Quote and the individual defendants in the underlying lawsuit and pay the related money judgment. Supreme Court denied the motion, granted in part the amended cross motion by declaring that the assault and battery exclusion did not apply, and otherwise denied the amended cross motion. Plaintiff now appeals, and defendant cross-appeals.

We agree with defendant that the court erred in granting plaintiff's amended cross motion in part and declaring that the assault and battery exclusion in the policy did not apply, and we therefore modify the judgment by denying plaintiff's amended cross motion in its entirety and vacating the declaration. Contrary to plaintiff's contention, the language of the policy exclusion is unambiguous (*see U.S. Underwriters Ins. Co. v Val-Blue Corp.*, 85 NY2d 821, 823 [1995]; *Haines v New York Mut. Underwriters*, 30 AD3d 1030, 1030 [4th Dept 2006]), and all of the causes of action in the amended complaint in the underlying lawsuit are based on the assault by the security guard, "without which [plaintiff] would have no cause of action" (*U.S. Underwriters Ins. Co.*, 85 NY2d at 823; *see Mount Vernon Fire Ins. Co. v Creative Hous.*, 88 NY2d 347, 350 [1996]; *Haines*, 30 AD3d at 1030-1031; *Mark McNichol Enters. v First Fin. Ins. Co.*, 284 AD2d 964, 965 [4th Dept 2001]). Inasmuch as "no cause of action would exist 'but for' the assault, it is immaterial whether the assault was committed by the insured or an employee of the insured on the one hand, or by a third party on the other" (*Mount Vernon Fire Ins. Co.*, 88 NY2d at 353).

Defendant, however, is not entitled to its requested declaratory relief at this point inasmuch as we agree with the court that there is a triable issue of fact whether defendant issued a timely disclaimer of coverage. An insurer's reliance upon a policy exclusion to deny coverage of an incident requires a timely disclaimer (*see Matter of Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 188-189 [2000]). Defendant met its initial burden on its motion for summary judgment by submitting the affidavit of its claims manager, who averred that defendant was first notified of the November 14, 2008 incident on February 3, 2011, and it disclaimed coverage two weeks later, which we agree is timely as a matter of law (*see Sirius Am. Ins. Co. v TGC Constr. Corp.*, 37 AD3d 818, 819 [2d Dept 2007]). In opposition to the motion, however, plaintiff raised a triable issue of fact by submitting the affidavit of Matthew Dole, who was one of the

individuals who owned Quote on the day of the incident. Dole averred that he received letters from plaintiff's attorney on November 17 and 25, 2008 regarding the incident and that he forwarded those letters to defendant on or before December 31, 2008. If those averments are true, then defendant's disclaimer of coverage over two years later would be untimely as a matter of law (*see generally Potter v North Country Ins. Co.*, 8 AD3d 1002, 1004 [4th Dept 2004]). Although defendant contends that the "credible evidence" shows that it did not receive notice until February 2011, "[i]t is not the court's function on a motion for summary judgment to assess credibility" (*Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]). Contrary to defendant's contention, Dole's affidavit was not inconsistent with his deposition testimony and was not incredible as a matter of law (*see Chapman-Raponi v Vescio*, 11 AD3d 1042, 1043 [4th Dept 2004]; *cf. Sexstone v Amato*, 8 AD3d 1116, 1117 [4th Dept 2004], *lv denied* 3 NY3d 609 [2004]).

We agree with defendant that Quote failed to comply with the policy condition requiring it to "promptly forward . . . all . . . legal papers received in connection with" the occurrence. "Distinct from notice of an accident, an insurer may also demand that it receive timely notice of a claimant's commencement of litigation" (*American Tr. Ins. Co. v Sartor*, 3 NY3d 71, 75 [2004]). "The purpose of such notice is to provide the insurer with a fair and reasonable opportunity to appear and defend against a claim or exercise its right to settle the matter" (*id.*). The underlying lawsuit was commenced on November 13, 2009, but it was undisputed that defendant did not receive any of the legal papers until February 3, 2011. Nevertheless, we reject defendant's contention that it is entitled to its requested declaratory relief on the ground that Quote failed to give timely notice of the incident and failed to promptly forward the lawsuit papers to it. As explained above, a triable issue of fact exists whether Quote provided notice of the incident to defendant on or before December 31, 2008, and thus there is a triable issue of fact whether Quote gave timely notice of the incident pursuant to the terms of the policy. However, even if Quote failed to provide timely notice, it is well settled that "an injured third party may seek recovery from an insured's carrier despite the failure of the insured to provide timely notice of the accident" (*General Acc. Ins. Group v Cirucci*, 46 NY2d 862, 863-864 [1979]). The injured party has an independent right to provide notice to the insurer (*see* Insurance Law § 3420 [a] [3]; *Lauritano v American Fid. Fire Ins. Co.*, 3 AD2d 564, 568 [1st Dept 1957], *affd* 4 NY2d 1028 [1958]; *Wraight v Exchange Ins. Co.* [appeal No. 2], 234 AD2d 916, 917 [4th Dept 1996], *lv denied* 89 NY2d 813 [1997]). That right includes providing notice of the commencement of litigation (*see American Tr. Ins. Co.*, 3 NY3d at 76).

Here, it is undisputed that plaintiff gave notice to defendant of the incident by sending it a letter dated February 1, 2011 along with the papers from the underlying lawsuit. While defendant contends that plaintiff's notice and forwarding of lawsuit papers was untimely, defendant did not disclaim coverage based on plaintiff's failure to do so, and it is now precluded from relying upon those defenses (*see*

Henner v Everdry Mktg. & Mgt., Inc., 74 AD3d 1776, 1777 [4th Dept 2010]; *Wraight*, 234 AD2d at 918; *see generally General Acc. Ins. Group*, 46 NY2d at 863-864; *Potter*, 8 AD3d at 1004). We reject defendant's contention that it did not need to address plaintiff's late notice in the disclaimer letter. In so arguing, defendant relies upon *Ringel v Blue Ridge Ins. Co.* (293 AD2d 460, 462 [2d Dept 2002]), which determined that, "where the insured is the first to notify the carrier, even if that notice is untimely, any subsequent information provided by the injured party is superfluous for notice purposes and need not be addressed in the notice of disclaimer issued by the insurer." Defendant contends that it received notice of the incident on February 3, 2011 from both plaintiff and Quote's insurance agency, and thus plaintiff failed to establish that he gave notice before Quote's insurance agency. Defendant's contention, however, is based solely on speculation. There was no evidence that Quote ever gave its insurance agency notice of the incident. Rather, plaintiff submitted evidence establishing that he mailed his notice to both defendant and Quote's insurance agency, and thus the only reasonable inference is that the notice defendant received from Quote's insurance agency came from plaintiff, not Quote.

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

412

CAF 18-01364

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

IN THE MATTER OF SAMANTHA R. MONTGOMERY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM P. LIST, RESPONDENT-APPELLANT.

FRANK BERETTA, EAST ROCHESTER, FOR RESPONDENT-APPELLANT.

NEVAREZ AND NEVAREZ, ROCHESTER (JUAN A. NEVAREZ OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Stacey Romeo, J.), entered May 17, 2018 in a proceeding pursuant to Family Court Act article 4. The order, among other things, granted petitioner's written objections to the order of the Support Magistrate.

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

Memorandum: Petitioner mother commenced this proceeding seeking, inter alia, an upward modification of respondent father's child support obligation, which had not been modified for several years despite annual increases in his income. Following a hearing, the Support Magistrate granted the mother's petition insofar as it sought an upward modification, but rejected the mother's request to impute income to the father. The father had voluntarily left a position in New York State and had accepted a position in North Carolina that paid him approximately $13,800 less per year. It was undisputed at the hearing that the motivating factor for the change of employment was the fact that the father's new wife had accepted a position in North Carolina paying $30,000 more per year than her position in New York.

The mother filed objections to the Support Magistrate's order, which had based the child support calculations on the father's actual income. Family Court granted the mother's objections, stating, "It is clear to this [c]ourt that voluntary reduction in income, however reasonable, does not permit a reduction in that parent[']s support obligation." The court therefore imputed income to the father in the amount of his annual salary from his prior job in New York, i.e., $64,819. The father appeals.

In determining the appropriate amount of child support, "the

general rule is that [c]hild support is determined by the parents' ability to provide for their child rather than their current economic situation . . . Trial courts [thus] possess considerable discretion to impute income in fashioning a child support award . . . , and a court is not required to find that a parent deliberately reduced his or her income to avoid a child support obligation before imputing income to that parent" (*Irene v Irene* [appeal No. 2], 41 AD3d 1179, 1180 [4th Dept 2007] [internal quotation marks omitted]; *see Matter of Bashir v Brunner*, 169 AD3d 1382, 1383 [4th Dept 2019]; *Matter of Hurd v Hurd*, 303 AD2d 928, 928 [4th Dept 2003]). Moreover, courts may " 'impute income based upon the party's past income or demonstrated earning potential' " (*Matter of Taylor v Benedict*, 136 AD3d 1295, 1295 [4th Dept 2016]), and a court's discretionary determination to impute income " 'will not be disturbed so long as there is record support for its determination' " (*Matter of Muok v Muok*, 138 AD3d 1458, 1459 [4th Dept 2016]). Nevertheless, courts may decline to impute income when a parent has a voluntary reduction in income and a legitimate and reasonable basis for such a reduction (*see e.g. Matter of Dupree v Dupree*, 62 NY2d 1009, 1011-1012 [1984]*; Martusewicz v Martusewicz*, 217 AD2d 926, 927 [4th Dept 1995], *lv denied* 88 NY2d 801 [1996]). Indeed, the general rule that "a parent who voluntarily quits a job will not be deemed without fault in losing such employment . . . should not be inflexibly applied where a parent quits a job *for a sufficiently compelling reason*" (*Matter of Parmenter v Nash*, 166 AD3d 1475, 1476 [4th Dept 2018], *lv dismissed* — NY3d — [May 2, 2019] [emphasis added]).

We thus agree with the father that the court erred when it stated that it was not *permitted* to reduce the father's child support obligation even if his decision to take a lower-paying job was reasonable. It is well settled that a court's failure to exercise the discretion it possesses is, in itself, an abuse of discretion (*see generally Cardinal Chemical Co. v Morton Intl., Inc.*, 508 US 83, 103 [1993, Scalia and Souter, JJ., concurring]). We need not reverse, however, because "[t]his [C]ourt's discretion to make findings of fact from the record is as broad as that of the trial court" (*Franz v Franz*, 107 AD2d 1060, 1061 [4th Dept 1985], citing *Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]). In addition, this Court "may substitute a discretionary determination for that of the [Family] Court so long as it sets forth the factors it considered and the reasons for its decision" (*Wagner v Wagner*, 175 AD2d 391, 392 [3d Dept 1991]).

We thus choose to exercise our discretion and make our own determination to impute to the father a total income of $64,819. The record establishes that for the three years before he left his position in New York, the father earned $66,048, $62,240, and $64,819. The record thus establishes that the father has demonstrated the potential to earn $64,819. Moreover, we conclude that, under the circumstances of this case, we may also consider a portion of the salary of the father's wife as income of the father (*see* Family Ct Act § 413 [1] [b] [5] [iv]). It was undisputed that the entire reason the father left his higher-paying job in New York was so that his wife

could accept a higher-salaried position in North Carolina, which resulted in a net increase in the income of his new family unit. Inasmuch as the father's voluntary decision to leave his lucrative position for a lesser-paying position "unquestionably improved [his overall] financial condition" (*Chisholm v Chisholm*, 138 AD2d 829, 830 [3d Dept 1988]), we conclude that we may impute some portion of the wife's higher salary to the father (*see Matter of Deshotel v Mandile*, 151 AD3d 1811, 1812 [4th Dept 2017]; *Matter of Emery v Bond*, 269 AD2d 832, 832 [4th Dept 2000]; *cf. Matter of Weber v Coffey*, 230 AD2d 865, 865 [2d Dept 1996]).

We therefore affirm the order insofar as setting the father's income at $64,819 per year for purposes of calculating his child support obligation and direct that the money that was paid into an escrow account during the pendency of this appeal be paid to the mother within 10 days after service of the order of this Court with notice of entry.

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

414

CA 18-02192

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

JAMES WICK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID C. O'NEIL, M.D., Ph.D., ET AL.,
DEFENDANTS,
MARY L. TURKIEWICZ, M.D., MARY L.
TURKIEWICZ, M.D., P.C., AND SOUTHTOWNS
RADIOLOGY ASSOCIATES, LLC,
DEFENDANTS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MARK SPITLER 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, Erie County (Frederick J. Marshall, J.), entered May 3, 2018. The order, insofar as appealed from, denied the motion of defendants Mary L. Turkiewicz, M.D., Mary L. Turkiewicz, M.D., P.C., and Southtowns Radiology Associates, LLC, for summary judgment dismissing the complaint against them.

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

Memorandum: Plaintiff commenced this medical malpractice action against defendants-appellants (defendants) and others seeking damages for injuries he allegedly sustained as a result of their negligent diagnosis, care, and treatment of his Charcot foot. Defendants appeal from an order insofar as it denied their motion for summary judgment dismissing the complaint against them. We affirm.

After experiencing pain in his left foot, plaintiff went to defendant Southtowns Radiology Associates, LLC for an X ray of his left foot and ankle. On the same day, defendant Mary L. Turkiewicz, M.D., reviewed the X ray, determined that plaintiff had "Charcot joint at the forefoot" of his left foot, and conveyed those findings to plaintiff's primary care physician. Several days later, plaintiff saw his primary care physician, who noted in plaintiff's record "Charcots arthritis" and recommended that plaintiff lose weight. Eight days after that appointment, plaintiff underwent a bone scan, after which his primary care physician prescribed a walking boot for plaintiff. A week later, plaintiff sought a second opinion from an orthopaedic

surgeon, who diagnosed plaintiff with Charcot foot and immediately treated plaintiff with a total contact cast and directed plaintiff not to bear weight on his left foot. Plaintiff's foot worsened and, almost four months after he obtained the second opinion, he underwent a below-the-knee amputation.

We reject defendants' contention that Supreme Court erred in denying their motion. Preliminarily, there is no dispute that defendants met their initial burden on their motion by submitting the affidavit of Turkiewicz, in which she addressed each of the factual allegations of negligence raised in plaintiff's bill of particulars (*see Groff v Kaleida Health*, 161 AD3d 1518, 1520 [4th Dept 2018]) and established that she did not deviate from the applicable standard of care (*see Occhino v Fan*, 151 AD3d 1870, 1871 [4th Dept 2017]; *Bagley v Rochester Gen. Hosp.*, 124 AD3d 1272, 1273 [4th Dept 2015]).

Contrary to defendants' contention, however, plaintiff raised a triable issue of fact sufficient to defeat the motion by submitting his experts' affidavits, which established "both that defendants deviated from the applicable standard of care and that such deviation was a proximate cause of plaintiff's injuries" (*Occhino*, 151 AD3d at 1871; *see Blendowski v Wiese* [appeal No. 2], 158 AD3d 1284, 1286 [4th Dept 2018]; *see also Chillis v Brundin*, 150 AD3d 1649, 1650 [4th Dept 2017]). At the outset, we reject defendants' contention that plaintiff's orthopaedic expert failed to offer an adequate foundation for his opinions regarding how Turkiewicz deviated from the standard of care. "It is well recognized that a plaintiff's expert need not have practiced in the same speciality as the defendants" (*Payne v Buffalo Gen. Hosp.*, 96 AD3d 1628, 1629 [4th Dept 2012]), and we conclude that plaintiff's orthopaedic expert laid an adequate foundation to support the reliability of his opinion (*see generally id.* at 1629-1630).

Additionally, plaintiff's orthopaedic expert opined that Turkiewicz had misdiagnosed plaintiff's Charcot foot as "chronic" rather than "acute" and that Turkiewicz's diagnosis of plaintiff therefore deviated from the standard of care. Thus, because that opinion squarely conflicts with the opinion in Turkiewicz's affidavit that she had properly diagnosed plaintiff and exceeded the standard of care, the affidavits present a "classic 'battle of the experts' that is properly left to a jury for resolution" (*Blendowski*, 158 AD3d at 1286).

Plaintiff also submitted the affidavit of a primary care expert, who opined that plaintiff's primary care physician had deviated from the acceptable standard of care by, inter alia, failing to immediately refer plaintiff to an orthopaedic specialist for an urgent consultation and that the deviation proximately caused plaintiff's injuries. Plaintiff, however, also submitted the affidavit of his primary care physician, wherein the primary care physician averred that, in treating plaintiff, he had relied on Turkiewicz's report, which he read as diagnosing plaintiff with a chronic condition and thus led him to treat plaintiff's condition rather than referring him

for an urgent consultation. We therefore conclude that plaintiff also raised a triable issue of fact whether Turkiewicz's alleged misdiagnosis of plaintiff was a proximate cause of plaintiff's injuries.

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

463

CA 18-02234

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

TERESSA CHAPLIN AND GABRIELLE CHAPLIN,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TIM N. TOMPKINS, DEFENDANT,
AND WEST MAIN STREET PARTNERS, L.P.,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

ATHARI & ASSOCIATES, LLC, NEW HARTFORD (MO ATHARI OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

NIXON PEABODY LLP, NEW YORK CITY (JONATHAN SABLONE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered June 22, 2018. The order granted the motion of defendant West Main Street Partners, L.P. to dismiss the complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint against defendant West Main Street Partners, L.P. except insofar as it asserts claims for patent injuries arising from plaintiffs' exposure to lead paint, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action to recover damages for injuries allegedly caused by their childhood exposure to lead paint in two apartments, one owned by defendant Tim N. Tompkins and another owned by defendant West Main Street Partners, L.P. (West Main). In appeal No. 1, plaintiffs appeal from an order granting West Main's motion to dismiss the complaint against it as time-barred (*see generally* CPLR 3211 [a] [5]). In appeal No. 2, plaintiffs appeal from that part of an order granting Tompkins's motion to dismiss the complaint against him as time-barred (*see generally id.*).

In moving to dismiss the complaint on statute of limitations grounds, each defendant had "the initial burden of establishing prima facie that the time in which to sue ha[d] expired . . . and thus was required to establish, inter alia, when the plaintiff[s'] cause of action accrued" (*Larkin v Rochester Hous. Auth.*, 81 AD3d 1354, 1355 [4th Dept 2011] [internal quotation marks omitted]). Here, neither

defendant established the relevant accrual date of plaintiffs' claims for injury caused by the latent effects of lead paint exposure and, in the absence of such evidence, neither defendant made a prima facie showing that the applicable limitations period had expired on those claims (*see id.*). Supreme Court thus erred in granting defendants' respective motions to that extent. We note that, at oral argument in these appeals, plaintiffs conceded that their claims for patent injuries arising from such exposure were properly dismissed as time-barred.

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

464

CA 18-02257

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

TERESSA CHAPLIN AND GABRIELLE CHAPLIN,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TIM N. TOMPKINS, DEFENDANT-RESPONDENT,
AND WEST MAIN STREET PARTNERS, L.P., DEFENDANT.
(APPEAL NO. 2.)

ATHARI & ASSOCIATES, LLC, NEW HARTFORD (MO ATHARI OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

ECKERT SEAMANS CHERIN & MELLOTT, LLC, WHITE PLAINS (SARAH H. MORRISSEY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered September 6, 2018. The order granted the motion of defendant Tim N. Tompkins to dismiss the complaint against him.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint against defendant Tim N. Tompkins except insofar as it asserts claims for patent injuries arising from plaintiffs' exposure to lead paint, and as modified the order is affirmed without costs.

Same memorandum as in *Chaplin v Tompkins* ([appeal No. 1], — AD3d — [June 7, 2019] [4th Dept 2019]).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

493

CA 18-02338

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

NICHOLAS DUNKLE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PAVEL VAKOULICH, AND K.A.M. TRUCKING, INC.,
DEFENDANTS-APPELLANTS.

CARTAFALSA, TURPIN & LENOFF, NEW YORK CITY (BRIAN P. MINEHAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DAVID W. POLAK, ATTORNEY AT LAW, P.C., WEST SENECA (DAVID W. POLAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered June 26, 2018. The order denied the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries he sustained when the tractor-trailer he was operating struck a tractor-trailer operated by defendant Pavel Vakoulich and owned by defendant K.A.M. Trucking, Inc. Supreme Court denied defendants' motion for summary judgment dismissing the complaint. We affirm.

It is well established that "[a] rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle, and imposes a duty on the operator of the moving vehicle to come forward with an adequate, [nonnegligent] explanation for the accident" (*Borowski v Ptak*, 107 AD3d 1498, 1498 [4th Dept 2013] [internal quotation marks omitted]; *see Johnson v Yarussi Constr., Inc.*, 74 AD3d 1772, 1772-1773 [4th Dept 2010]). Here, we conclude that defendants failed to meet their initial burden on the motion. Defendants' own submissions provide a nonnegligent explanation for the accident on the part of plaintiff and raise triable issues of fact whether Vakoulich was negligent—i.e., whether he stopped the tractor-trailer partially in the lane of travel in violation of Vehicle and Traffic Law § 1201 (a) or was otherwise negligent in that regard and whether he failed to turn on the hazard lights—and, if so, whether his negligence was a proximate cause of the accident (*see Ortiz v New York City Tr. Auth.*, 138 AD3d 809, 810 [2d Dept 2016]; *Richardson v Kempney Trucking*,

12 AD3d 1099, 1099-1100 [4th Dept 2004]). "The fact that [plaintiff] may have also been negligent does not absolve [defendants] of liability inasmuch as an accident may have more than one proximate cause" (*Zbock v Gietz*, 145 AD3d 1521, 1522-1523 [4th Dept 2016]). Finally, to the extent that defendants contend that they established their entitlement to the benefit of the emergency doctrine as a matter of law, we reject that contention inasmuch as their "own submissions raise triable issues of fact whether [Vakoulich] was faced with an emergency and whether he acted reasonably under the circumstances" (*Guzek v B & L Wholesale Supply, Inc.*, 126 AD3d 1506, 1507 [4th Dept 2015]).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

504

KA 17-00287

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EWAN REID, DEFENDANT-APPELLANT.

JOHN A. HERBOWY, ROME, FOR DEFENDANT-APPELLANT.

JEFFREY S. CARPENTER, DISTRICT ATTORNEY, HERKIMER (MICHELLE K. FASSETT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Herkimer County Court (John J. Brennan, A.J.), rendered May 10, 2012. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by directing that the sentences imposed run concurrently with each other and consecutive to the sentence imposed in Oneida County Court, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), arising from two separate incidents in which defendant sold crack cocaine to confidential informants. Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence inasmuch as his "motion for a trial order of dismissal was not specifically directed at the alleged errors asserted on appeal" (*People v Streeter*, 166 AD3d 1509, 1510 [4th Dept 2018], *lv denied* 32 NY3d 1210 [2019]; *see People v Pittman*, 109 AD3d 1080, 1081-1082 [4th Dept 2013], *lv denied* 22 NY3d 1043 [2013]; *see generally People v Gray*, 86 NY2d 10, 19 [1995]).

In any event, we reject that challenge. Contrary to defendant's contention, the testimony of the two confidential informants was not incredible as a matter of law, i.e., their testimony was not "manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Ponzo*, 111 AD3d 1347, 1348 [4th Dept 2013] [internal quotation marks omitted]; *see People v Tuff*, 156 AD3d 1372, 1374 [4th Dept 2017], *lv denied* 31 NY3d 1018 [2018]). "Where, as here, witness credibility is of paramount importance to the determination of guilt or innocence, [we] must give '[g]reat deference . . . [to the] fact-finder's opportunity to view the witnesses, hear

the testimony and observe demeanor' " (*People v Harris*, 15 AD3d 966, 967 [4th Dept 2005], *lv denied* 4 NY3d 831 [2005], quoting *People v Bleakley*, 69 NY2d 490, 495 [1987]), and we perceive no reason to disturb the jury's credibility determinations (*see id.*). In addition, the People introduced audio recordings of the transactions, the testimony of the law enforcement officers who supervised the controlled purchases, monitored the transactions, and made the audio recordings of the events, and expert testimony establishing that the substances sold contained cocaine. Thus, viewing the evidence in the light most favorable to the People (*see People v Gordon*, 23 NY3d 643, 649 [2014]), we conclude that the evidence is legally sufficient to support the conviction (*see generally Bleakley*, 69 NY2d at 495). Furthermore, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant contends that County Court erred in admitting in evidence the audio recordings of the subject transactions. We reject that contention. "It is well settled that the determination whether to permit the admission of a recording in evidence lies in the sound discretion of the trial court" (*People v Dalton*, 164 AD3d 1645, 1645 [4th Dept 2018], *lv denied* 32 NY3d 1170 [2019]; *see People v Cleveland*, 273 AD2d 787, 788 [4th Dept 2000], *lv denied* 95 NY2d 864 [2000]), and a "recording must be excluded from evidence only if it is so inaudible and indistinct that the jury would have to speculate concerning its contents" (*Cleveland*, 273 AD2d at 788; *see People v Lopez*, 119 AD3d 1426, 1428 [4th Dept 2014], *lv denied* 25 NY3d 990 [2015]; *see also People v Bennett*, 94 AD3d 1570, 1570 [4th Dept 2012], *lv denied* 19 NY3d 994 [2012], *reconsideration denied* 19 NY3d 1101 [2012]). Here, defendant does not contend that the recordings are inaudible and, contrary to his contention, a chain of custody is "not a requirement [for the admission of audio] recordings" (*People v Ely*, 68 NY2d 520, 527-528 [1986]). Consequently, we conclude that the court did not abuse its discretion in admitting the recordings in evidence.

We reject defendant's contention that he was denied effective assistance of counsel based on, inter alia, his attorneys' failure to move to suppress the audio recordings of the transactions on audibility grounds. "There can be no denial of effective assistance of . . . counsel arising from [defense] counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005], quoting *People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]), and our review of the record, including listening to the recordings, establishes that such a motion had little or no chance of success. 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]). Defendant's further challenges to the assistance provided by defense counsel are based on matters outside the record, therefore

they " 'must be raised by way of a motion pursuant to CPL 440.10' " (*People v Weaver*, 118 AD3d 1270, 1272 [4th Dept 2014], *lv denied* 24 NY3d 965 [2014]).

Defendant further contends that the sentence is unduly harsh and severe. It is well settled that this Court's "sentence-review power may be exercised, if the interest of justice warrants, without deference to the sentencing court" (*People v Delgado*, 80 NY2d 780, 783 [1992]), and that "we may 'substitute our own discretion for that of a trial court which has not abused its discretion in the imposition of a sentence' " (*People v Johnson*, 136 AD3d 1417, 1418 [4th Dept 2016], *lv denied* 27 NY3d 1134 [2016]). Here, the record establishes that defendant was 35 years old at the time of these events, and that his only prior record consisted of misdemeanor offenses. He was convicted in Oneida County Court of a similar offense to these crimes, arising from an incident that occurred contemporaneously with these crimes, and he was sentenced to a determinate term of two years' incarceration plus two years' postrelease supervision on that conviction. The crimes at issue involved sales of small amounts of cocaine, and the record contains no indication that defendant is a large-scale drug dealer. Although prior to trial the court had agreed that, if defendant pleaded guilty, it would impose a sentence of four years' incarceration on each count to run concurrent with each other and the Oneida County sentence, after the trial the court imposed determinate terms of seven years' incarceration plus two years' postrelease supervision on each count, to run consecutively to each other. Under the circumstances, we conclude that the sentence imposed is unduly harsh and severe. We therefore modify the judgment as a matter of discretion in the interest of justice by directing that the sentences run concurrently with each other but consecutive to the prior sentence imposed in Oneida County (*see* CPL 470.15 [6] [b]).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

524

KA 17-00748

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GABRIELE BALLOWE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered December 20, 2016. The judgment convicted defendant, upon her plea of guilty, of leaving the scene of an incident resulting in serious injury without reporting.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting her, upon her plea of guilty, of leaving the scene of an incident resulting in serious injury without reporting (Vehicle and Traffic Law § 600 [2] [a], [c] [i]), defendant contends that Supreme Court (Wolfgang, J.) erred in granting the People leave to re-present the case to a second grand jury. We reject that contention. The relevant accident occurred in December 2013 and, in May 2014, a grand jury returned a "no bill." In May 2016, the People sought to re-present the charges to a new grand jury on the ground that a witness, who had offered false testimony before the first grand jury, had recently agreed to cooperate with the People and testify truthfully. CPL 190.75 (3) provides that where, as here, charges have been dismissed by the grand jury, they "may not again be submitted to a grand jury unless the court in its discretion authorizes or directs the [P]eople to resubmit such charge[s] to the same or another grand jury." "Leave may be granted only once, and the [People are] required to justify resubmission" (*People v Montanez*, 90 NY2d 690, 693 [1997]; *see People v Washington*, 125 AD2d 967, 968-969 [4th Dept 1986], *lv denied* 69 NY2d 887 [1987]). "[T]here should not be a resubmission unless it appears, for example, that new evidence has been discovered since the former submission; that the [g]rand [j]ury failed to give the case a complete and impartial investigation; or that there is a basis for believing that the [g]rand [j]ury otherwise acted in an irregular manner" (*People v Dykes*, 86 AD2d 191, 195 [2d Dept 1982]; *see People v Tomaino*, 248 AD2d 944, 945-946 [4th

Dept 1998]). Here, the court properly granted the People's application to re-present the charges to a second grand jury based upon "the availability of a witness who would provide new evidence," i.e., truthful testimony (*People v Morris*, 248 AD2d 169, 170 [1st Dept 1998], *affd* 93 NY2d 908 [1999]).

We agree with defendant, however, that the court (Burns, J.) failed to rule on that part of her omnibus motion seeking to have the court compare the evidence from the two grand jury proceedings "to determine whether the prosecutor ha[d], in fact, presented the promised new evidence" to the second grand jury (*People v Martin*, 71 AD2d 928, 929 [2d Dept 1979]; *see Dykes*, 86 AD2d at 195). Inasmuch as "[w]e have no power to review issues either decided in an appellant's favor, or not ruled upon, by the trial court" (*People v Coles*, 105 AD3d 1360, 1363 [4th Dept 2013] [internal quotation marks omitted]; *see* CPL 470.15 [1]; *People v Concepcion*, 17 NY3d 192, 195 [2011]; *People v Rainey*, 110 AD3d 1464, 1466 [4th Dept 2013]), "we cannot deem the court's failure to rule on [that part of] the . . . motion as a denial thereof" (*People v Hymes*, 160 AD3d 1386, 1387 [4th Dept 2018] [internal quotation marks omitted]; *see People v White*, 134 AD3d 1414, 1415 [4th Dept 2015]). We therefore hold the case, reserve decision, and remit the matter to Supreme Court for a determination whether the People, in fact, presented new evidence to the second grand jury and, if not, whether dismissal of the indictment is warranted on that ground (*see Martin*, 71 AD2d at 929; *see also* CPL 210.40 [1]; *see generally Hymes*, 160 AD3d at 1387-1388; *People v Moore*, 147 AD3d 1548, 1549 [4th Dept 2017]; *White*, 134 AD3d at 1415).

Additionally, defendant contends that she was denied due process based on preindictment delay. Upon our review of the relevant factors (*see People v Taranovich*, 37 NY2d 442, 445 [1975]), we reject that contention. "It is well established that 'a determination made in good faith to defer commencement of the prosecution for further investigation[,] or for other sufficient reasons, will not deprive the defendant of due process of law even though the delay may cause some prejudice to the defense' " (*People v Gang*, 145 AD3d 1566, 1566 [4th Dept 2016], *lv denied* 29 NY3d 997 [2017], quoting *People v Singer*, 44 NY2d 241, 254 [1978]; *see People v Wiggins*, 31 NY3d 1, 13 [2018]; *see also People v Decker*, 13 NY3d 12, 14 [2009]). We conclude that the People's decision to re-present the charges to a second grand jury nearly two years after the first grand jury dismissed the charges " 'was not an abuse of the significant amount of discretion that the People must of necessity have, and there is no indication that the decision was made in anything other than good faith' " (*People v Rogers*, 103 AD3d 1150, 1151 [4th Dept 2013], *lv denied* 21 NY3d 946 [2013], quoting *Decker*, 13 NY3d at 15; *see People v Metellus*, 157 AD3d 821, 822-823 [2d Dept 2018], *lv denied* 31 NY3d 1084 [2018]). Finally, contrary to defendant's further contention, there was no need for a *Singer* hearing inasmuch as the record provided the court with "a sufficient basis to determine whether the delay was justified"

(*Rogers*, 103 AD3d at 1151).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

530

CAF 17-01596

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

IN THE MATTER OF LENNOX M.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SARAH M.-S., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR RESPONDENT-APPELLANT.

AMY C. KELLER, BATH, FOR PETITIONER-RESPONDENT.

CHRISTINE F. REDFIELD, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Steuben County (Marianne Furfure, A.J.), entered July 3, 2017 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

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

Memorandum: Respondent mother appeals from orders that, inter alia, terminated her parental rights with respect to two of her children pursuant to Social Services Law § 384-b on the ground of permanent neglect.

We reject the mother's contention that Family Court erred in determining that she permanently neglected the children. Contrary to the mother's contention, we conclude that petitioner met its burden of establishing "by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the [mother] and [the children]" by providing services that were specifically tailored to the mother's needs (*Matter of Jayveon S. [Timothy S.]*, 158 AD3d 1283, 1283 [4th Dept 2018], *lv denied* 31 NY3d 908 [2018] [internal quotation marks omitted]). Prior to the mother's incarceration, petitioner made referrals for the mother to participate in mental health and substance abuse treatment and parenting assistance. Petitioner facilitated visitation and conducted service plan reviews with the mother. Petitioner also attempted to assist her in finding housing, but the mother was uncooperative. Contrary to the mother's contention, the court properly determined that she failed to meaningfully participate in the recommended services. Despite the

mother's participation in substance abuse treatment, she continued to test positive for drugs and was ultimately discharged from both mental health and substance abuse treatment without meeting her goals.

After the mother was incarcerated, petitioner continued to make diligent efforts by facilitating visitation, providing her with permanency hearing reports and service plan reviews, and investigating the possibility of placing the children with the people suggested by the mother (*see Matter of Hailey ZZ. [Ricky ZZ.]*, 19 NY3d 422, 430 [2012]; *Matter of Caidence M. [Francis W.M.]*, 162 AD3d 1539, 1539 [4th Dept 2018], *lv denied* 32 NY3d 905 [2018]; *Matter of Christian C.-B. [Christopher V.B.]*, 148 AD3d 1775, 1776 [4th Dept 2017], *lv denied* 29 NY3d 917 [2017]). Thus, the court properly determined that she permanently neglected the children inasmuch as she "failed substantially and continuously or repeatedly to . . . plan for the future of the child[ren] although . . . able to do so" (*Matter of Star Leslie W.*, 63 NY2d 136, 142 [1984]). Indeed, the mother failed to "provide any realistic and feasible alternative to having the children remain in foster care until [her] release from prison" (*Matter of Skye N. [Carl N.]*, 148 AD3d 1542, 1544 [4th Dept 2017] [internal quotation marks omitted]).

Finally, contrary to the mother's contention, the court did not abuse its discretion in terminating her parental rights rather than granting a suspended judgment (*see Matter of Mirabella H. [Angela I.]*, 162 AD3d 1733, 1734-1735 [4th Dept 2018], *lv denied* 32 NY3d 909 [2018]; *Matter of Dahmani M. [Jana M.]*, 104 AD3d 1245, 1246 [4th Dept 2013]). The record reflects that the mother had custody of the older of the two subject children for only a few weeks after his birth and never had custody of the younger child; that the children had been in foster care for several years by the time of the dispositional hearing; and that even if the mother were to be released from incarceration in the near future, she would still need to address the issues that led to the children's removal in the first instance. The record therefore supports the court's determination that termination of the mother's parental rights is in the best interests of the children.

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

531

CAF 17-01597

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

IN THE MATTER OF LYLE M.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SARAH M.-S., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR RESPONDENT-APPELLANT.

AMY C. KELLER, BATH, FOR PETITIONER-RESPONDENT.

CHRISTINE F. REDFIELD, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Steuben County (Marianne Furfure, A.J.), entered July 3, 2017 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

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

Same memorandum as in *Matter of Lennox M.* ([appeal No. 1] — AD3d — [June 7, 2019] [4th Dept 2019]).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

535

CA 18-02063

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

RODNEY BARBER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES SORCE, ET AL., DEFENDANTS,
AND VICTOR J. ANZIANO, DEFENDANT-APPELLANT.

KNYCH & WHRITENOUR, LLC, SYRACUSE (MATTHEW E. WHRITENOUR OF COUNSEL), FOR DEFENDANT-APPELLANT.

LOTEMPIO P.C. LAW GROUP, BUFFALO (BRIAN D. KNAUTH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Emilio L. Colaiacovo, J.), entered January 31, 2018. The order, insofar as appealed from, denied in part the motion of defendant Victor J. Anziano for summary judgment dismissing the complaint against him.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion seeking dismissal of the complaint against defendant Victor J. Anziano to the extent that the complaint, as amplified by the bill of particulars, alleges that he created or exacerbated the allegedly dangerous condition or had actual notice of it and as modified the order is affirmed without costs.

Memorandum: In this negligence action, Victor J. Anziano (defendant) appeals from an order that, inter alia, denied his motion for summary judgment dismissing the complaint against him with respect to plaintiff's accident on March 4, 2013. On that day, at approximately 10:30 p.m., plaintiff slipped and fell on an icy driveway on premises owned by defendant. Contrary to defendant's contention, the storm in progress doctrine does not absolve him of liability for plaintiff's accident. The storm in progress rule does not apply where " 'the storm has passed and precipitation has tailed off to such an extent that there is no longer any appreciable accumulation' " (*Patricola v General Motors Corp.*, 170 AD3d 1506, 1506 [4th Dept 2019]). Here, defendant submitted the expert affidavit of a meteorologist, which indicated that there had not been any precipitation for more than four hours prior to the time of the accident.

We reject defendant's contention that Supreme Court erred in denying his motion with respect to the allegation that he had

constructive notice of the allegedly dangerous condition. Defendant failed to establish as a matter of law that the condition was not visible and apparent or that it had not existed for a sufficient length of time before the accident to permit him to discover and remedy it (*see Chamberlain v Church of the Holy Family*, 160 AD3d 1399, 1401 [4th Dept 2018]; *see also Fuller v Armor Volunteer Fire Co., Inc.*, 169 AD3d 1471, 1472 [4th Dept 2019]). We note, however, that plaintiff conceded at oral argument that he is alleging constructive notice only. Therefore, we modify the order by granting that part of defendant's motion seeking dismissal of the complaint against him to the extent that the complaint, as amplified by the bill of particulars, alleges that he created or exacerbated the allegedly dangerous condition or had actual notice of it.

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

537

CA 18-01754

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

FRANCIS E. FURCH, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CAROL A. KLINGLER, DEFENDANT-RESPONDENT.

DEMPSEY & DEMPSEY, BUFFALO (PATRICK J. MALONEY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (NELSON E. SCHULE, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Renee Forgensi Minarik, A.J.), entered March 4, 2018. The judgment dismissed the complaint upon a jury verdict.

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

Memorandum: Plaintiff commenced this negligence action seeking damages for injuries he sustained in a motor vehicle accident when defendant's vehicle struck plaintiff's vehicle from behind while plaintiff's vehicle was stopped at a stop light. Plaintiff now appeals from a judgment that, inter alia, dismissed the complaint upon a jury verdict in defendant's favor. We affirm.

At trial, plaintiff and defendant gave different versions of the accident. Plaintiff's version was that his vehicle was struck twice, i.e., first, there was a hard impact when defendant's vehicle struck his vehicle from behind and, second, there was a lesser impact when a third party's vehicle struck defendant's vehicle from behind and then defendant's vehicle struck plaintiff's vehicle again. Defendant's version was that her vehicle had come to a complete stop behind plaintiff's vehicle, and her vehicle struck plaintiff's vehicle only after the third party's vehicle struck her vehicle from behind. The jury returned a verdict finding that defendant was negligent, but that her negligence was not a substantial factor in causing the accident.

We reject plaintiff's contention that Supreme Court erred in denying his motion to set aside the verdict as against the weight of the evidence. "It is well established that [a] verdict rendered in favor of a defendant may be successfully challenged as against the weight of the evidence only when the evidence so preponderated in favor of the plaintiff that it could not have been reached on any fair

interpretation of the evidence" (*Kurtz v Poirier*, 128 AD3d 1491, 1492 [4th Dept 2015] [internal quotation marks omitted]). " 'A verdict is not against the weight of the evidence merely because a jury finds a defendant negligent but determines that his or her negligence is not a proximate cause of the accident' " (*Berner v Little*, 137 AD3d 1675, 1676 [4th Dept 2016]). We reject plaintiff's contention that the issues of negligence and proximate cause were " 'so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause' " (*id.*). There was a fair interpretation of the evidence supporting the jury's determination that defendant was negligent in the operation of her vehicle, but that the third party was the sole proximate cause of the accident.

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

549

KA 15-01196

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON WEST, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON 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 (Victoria M. Argento, J.), rendered March 19, 2015. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon 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 criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Defendant correctly concedes that he failed to preserve for our review his further contention that the prosecutor's reference to a codefendant's statement violated the Confrontation Clause (*see People v Dennis*, 91 AD3d 1277, 1278 [4th Dept 2012], *lv denied* 19 NY3d 995 [2012]). In any event, that contention lacks merit. Although the statement was testimonial, it was not offered for the truth of the matters asserted therein, but was instead offered to provide context for defendant's response to that statement (*see People v Lewis*, 11 AD3d 954, 955 [4th Dept 2004], *lv denied* 3 NY3d 758 [2004]; *see generally People v Garcia*, 25 NY3d 77, 85-86 [2015]). Contrary to defendant's contention, defense counsel was not ineffective in failing to object to the reference to the codefendant's statement because any such objection would have had "little or no chance of success" (*People v Harris*, 147 AD3d 1328, 1330 [4th Dept 2017] [internal quotation marks omitted]).

The sentence is not unduly harsh or severe. We have reviewed

defendant’s remaining contentions and conclude that none warrants modification or reversal of the judgment.

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

554

CAF 17-01418

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

IN THE MATTER OF JAMES HILTON AND ETHEL HILTON,
PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

KYLE HILTON, RESPONDENT-RESPONDENT,
AND COURTNEY CIRELLO, RESPONDENT-APPELLANT.

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

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

JOHN W. SPRING, JR., PHOENIX, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oswego County (Thomas Benedetto, R.), entered July 27, 2017 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioners shared legal custody of the subject child with respondent Courtney Cirello and granted petitioners physical custody of the subject child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Oswego County, for a hearing on the petition filed July 13, 2016.

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that, among other things, granted the petition of the nonparent petitioners by awarding shared legal custody of the subject child to petitioners and the mother and granting physical custody of the child to petitioners. Petitioners are the parents of the child's putative father. They sought custody of the subject child, alleging that the mother no longer resided in New York and had left the child with them for nearly a year without significant contact. The mother returned to New York and was incarcerated here shortly after the petition was filed. Thereafter, Family Court issued a temporary custody order on the mother's consent, granting temporary physical custody of the child to petitioners. After the mother's release from prison, the order was amended to grant the mother supervised visitation with the child. At a subsequent court appearance scheduled to address the status of that visitation as well as a pending paternity petition, which the mother

failed to attend, the court found the mother in default and granted the custody petition over the objection of the mother's counsel.

Initially, we agree with the mother that the court erred in entering a final custody order upon the mother's "default" based on her failure to attend the scheduled appearance to review visitation and the pending paternity proceeding. Where, as here, "a party fails to appear [in court on a scheduled date] but is represented by counsel, the order is not one entered upon the default of the aggrieved party and appeal is not precluded" (*Matter of Pollard v Pollard*, 63 AD3d 1628, 1628 [4th Dept 2009] [internal quotation marks omitted]; *see Matter of David A.A. v Maryann A.*, 41 AD3d 1300, 1300 [4th Dept 2007]; *Matter of Sales v Gisendaner*, 272 AD2d 997, 997 [4th Dept 2000]). We further agree with the mother that the court erred in granting the petition without holding a hearing to determine whether petitioners have established the existence of extraordinary circumstances and, if so, to evaluate the child's best interests. "A parent's right to be heard on a matter of child custody is fundamental and 'not to be disregarded absent a convincing showing of waiver' " (*Sales*, 272 AD2d at 997; *see generally Matter of Kendra M.*, 175 AD2d 657, 658 [4th Dept 1991]). Moreover, "[i]t is well established that, as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances" (*Matter of Katherine D. v Lawrence D.*, 32 AD3d 1350, 1351 [4th Dept 2006], *lv denied* 7 NY3d 717 [2006] [internal quotation marks omitted]) and further establishes that an award of custody to the nonparent is in the best interests of the child (*see Matter of Griffin v Griffin*, 117 AD3d 1570, 1570-1571 [4th Dept 2014]). "The burden of proving extraordinary circumstances rests on the nonparent, and the mere existence of a prior consent order of custody in favor of the nonparent is not sufficient to demonstrate extraordinary circumstances" (*Matter of Mercado v Mercado*, 64 AD3d 951, 952 [3d Dept 2009]). Inasmuch as the court erred in depriving the mother of custody without conducting the requisite evidentiary hearing (*see Griffin*, 117 AD3d at 1571), we reverse and remit the matter to Family Court for a hearing on the custody petition. We note that, pending determination of the petition, the order entered October 25, 2016, granting temporary custody of the child to petitioners, as amended by the order entered May 18, 2017, remains in effect.

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

555

CAF 18-00418

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

IN THE MATTER OF APRIL L.S., ON BEHALF OF
CHASE F., PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA F., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

MICHAEL G. CIANFARANO, OSWEGO, FOR PETITIONER-RESPONDENT.

WALTER J. BURKARD, MANLIUS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered January 4, 2018 in a proceeding pursuant to Family Court Act article 8. The order granted the petition for an order of protection.

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

Memorandum: In appeal No. 1, respondent father appeals from an order of protection directing him to stay away from the subject child, except for periods of court-ordered supervised visitation, for a period of five years. In appeal No. 3, the father appeals from an order that, inter alia, granted petitioner mother's custody petition by awarding her sole legal and physical custody of the child with one hour of supervised visitation biweekly to the father. We affirm in both appeals.

Contrary to the father's contention in appeal No. 1, Family Court did not err in issuing an order of protection with a duration of five years based upon its finding of "aggravating circumstances" arising from the father's repeated violation of a prior order of protection (Family Ct Act § 842; *see* § 827 [a] [vii]; *Matter of White v Byrd-McGuire*, 163 AD3d 1413, 1414 [4th Dept 2018]).

We reject the father's contention in appeal No. 3 that the court erred in limiting the father's visitation to one hour every other week. It is well settled that "visitation issues are determined based on the best interests of the child[ ] . . . and . . . trial courts have broad discretion in fashioning a visitation schedule" (*D'Ambra v*

D'Ambra [appeal No. 2], 94 AD3d 1532, 1534 [4th Dept 2012] [internal quotation marks omitted]; *see Matter of Terramiggi v Tarolli*, 151 AD3d 1670, 1672 [4th Dept 2017]). Furthermore, "a court's determination regarding . . . visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record" (*Matter of Guillermo v Agramonte*, 137 AD3d 1767, 1769 [4th Dept 2016] [internal quotation marks omitted]). In making that determination, and "in providing for visitation that will be meaningful, the frequency, regularity[,] and quality of the visits must be considered [and] [e]xpanded visitation is generally favorable absent proof that such visitation is inimical to a child's welfare" (*Matter of Fish v Fish*, 112 AD3d 1161, 1162 [3d Dept 2013] [internal quotation marks omitted]; *see Matter of Nathaniel T.*, 97 AD2d 973, 974 [4th Dept 1983]). Nevertheless, although "both the child[ ] and [a] noncustodial parent have a right to meaningful visitation" (*Fish*, 112 AD3d at 1162; *see Matter of Tropea v Tropea*, 87 NY2d 727, 738 [1996]; *Szemansco v Szemansco*, 296 AD2d 686, 687 [3d Dept 2002]), we conclude here that "there is a sound and substantial basis in the record to support the court's determination that it was in the child's best interests" to restrict the father's visitation (*Matter of Brewer v Soles*, 111 AD3d 1403, 1404 [4th Dept 2013]; *see Matter of Noble v Gigon*, 165 AD3d 1640, 1640-1641 [4th Dept 2018]). The father further contends in appeal No. 3 that he was improperly denied visitation while incarcerated in state prison. Assuming, arguendo, that the father's contention is preserved for our review by his attorney's request for such visitation during closing arguments with respect to the mother's custody petition, that contention is moot inasmuch as the father is no longer incarcerated (*see generally Matter of Ryan M.B. v Mary R.*, 43 AD3d 1304, 1304 [4th Dept 2007]; *Matter of Demetrius B.*, 28 AD3d 1249, 1250 [4th Dept 2006], *lv denied* 7 NY3d 707 [2006]).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

556

CAF 18-00419

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

IN THE MATTER OF APRIL L.S.,
PETITIONER-RESPONDENT,

V ORDER

JOSHUA F., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

MICHAEL G. CIANFARANO, OSWEGO, FOR PETITIONER-RESPONDENT.

WALTER J. BURKARD, MANLIUS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered January 4, 2018 in a proceeding pursuant to Family Court Act article 8. The order granted the petition for an order of protection.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Trombley v Payne*, 144 AD3d 1551, 1552 [4th Dept 2016]).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

557

CAF 18-00420

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

IN THE MATTER OF APRIL L.S.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA F., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

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

MICHAEL G. CIANFARANO, OSWEGO, FOR PETITIONER-RESPONDENT.

WALTER J. BURKARD, MANLIUS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered January 4, 2018 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner sole legal and physical custody of the subject child.

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

Same memorandum as in *Matter of April L.S. v Joshua F.* ([appeal No. 1] — AD3d — [June 7, 2019] [4th Dept 2019]).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

558

CAF 18-00421

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

IN THE MATTER OF JOSHUA F.,
PETITIONER-APPELLANT,

V ORDER

APRIL L.S., RESPONDENT-RESPONDENT.
(APPEAL NO. 4.)

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

MICHAEL G. CIANFARANO, OSWEGO, FOR RESPONDENT-RESPONDENT.

WALTER J. BURKARD, MANLIUS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered January 4, 2018 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for custody.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Trombley v Payne*, 144 AD3d 1551, 1552 [4th Dept 2016]).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

561

CA 18-02397

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

SHIRLEY PATCHIN AND DONALD PATCHIN,
PLAINTIFFS-RESPONDENTS,

V ORDER

DOLLAR TREE STORES, INC., DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, ROCHESTER (NICHOLAS B. DAVIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

FARACI LANGE LLP, ROCHESTER (JOHN A. FALK OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered June 21, 2018. The order denied the motion of defendant for summary judgment dismissing the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 23 and May 14, 2019,

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

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

575

TP 19-00276

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

IN THE MATTER OF DAVIDE COGGINS, PETITIONER,

V ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered February 11, 2019) 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 said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996, 996 [4th Dept 1996]).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

583

KA 18-00175

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA M. THIBAULT, DEFENDANT-APPELLANT.

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

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered June 6, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree, menacing a police officer or peace officer, unlawful imprisonment in the second degree, harassment in the second 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 his plea of guilty of, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant's contention that his guilty plea was not knowing, voluntary, and intelligent is not preserved for our review because he did not move to withdraw his plea or to vacate the judgment of conviction (*see People v Rojas*, 147 AD3d 1535, 1536 [4th Dept 2017], *lv denied* 29 NY3d 1036 [2017]). Defendant likewise failed to preserve for our review his contention that the plea allocution is factually insufficient (*see People v Abdallah*, 23 AD3d 1116, 1116 [4th Dept 2005], *lv denied* 6 NY3d 845 [2006]). Contrary to defendant's further contention, "this case does not fall within the rare exception to the preservation requirement because nothing in the plea allocution calls into question the voluntariness of the plea or casts 'significant doubt' upon his guilt" (*People v Robinson*, 112 AD3d 1349, 1349 [4th Dept 2013], *lv denied* 23 NY3d 1042 [2014], quoting *People v Lopez*, 71 NY2d 662, 666 [1988]). We decline to exercise our power to review defendant's contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]; *People v Dixon*, 147 AD3d 1518, 1519 [4th Dept 2017], *lv denied* 29 NY3d 1078 [2017]).

Finally, we reject defendant's contention that the period of postrelease supervision imposed is unduly harsh and severe (*see People v Osteen*, 145 AD3d 1515, 1517 [4th Dept 2016], *lv denied* 29 NY3d 951 [2017]).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

590

CA 18-02317

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

HELEN M. NAZARETH AND MICHAEL NAZARETH,
PLAINTIFFS-RESPONDENTS,

V ORDER

JEFFREY J. BULL AND ROBERTS ROOFING &
SIDING CO., INC., DEFENDANTS-APPELLANTS.

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

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (BRENDAN H. LITTLE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered June 26, 2018. The order, insofar as appealed from, granted the motion of plaintiffs for partial summary judgment on the issue of serious injury.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 6, 2019,

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

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

592

CA 18-02276

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

GULF COAST BANK & TRUST COMPANY,
PLAINTIFF-RESPONDENT,

V ORDER

BRAND CONSULTING GROUP, INC., AND
LEIGH A. BRAND, DEFENDANTS-APPELLANTS.

DANIELS, PORCO AND LUSARDI, LLP, CARMEL (ROBERT C. LUSARDI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ALTABET LAW LLC, NEW YORK CITY (EDWARD D. ALTABET OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered June 4, 2018. The order and judgment, among other things, granted plaintiff's motion for summary judgment and denied defendants' cross motion to compel arbitration.

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

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

596

KA 17-00109

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DWIGHT J. NEWTON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN, FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (James P. McClusky, J.), rendered October 28, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: In appeal No. 1, 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]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of forgery in the second degree (§ 170.10 [1]). The pleas were taken during one proceeding, during which defendant waived his right to appeal. Before sentencing, defendant was arrested for another offense, and County Court imposed enhanced sentences on these two convictions, which defendant now contends are unduly harsh and severe. Even assuming, arguendo, that the waiver of the right to appeal is valid, we conclude that it does not encompass defendant's contention inasmuch as the court failed to advise defendant prior to his waiver "of the potential period of incarceration that could be imposed for an enhanced sentence" (*People v Tyo*, 140 AD3d 1697, 1699 [4th Dept 2016], *lv denied* 28 NY3d 1127 [2016] [internal quotation marks omitted]; *see People v Scott*, 101 AD3d 1773, 1774 [4th Dept 2012], *lv denied* 21 NY3d 1019 [2013]). We conclude, however, that the sentences are not unduly harsh or severe.

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

597

KA 17-00110

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DWIGHT J. NEWTON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN, FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (James P. McClusky, J.), rendered October 28, 2016. The judgment convicted defendant, upon his plea of guilty, of forgery in the second degree.

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

Same memorandum as in *People v Newton* ([appeal No. 1] — AD3d — [June 7, 2019] [4th Dept 2019]).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

598

KA 18-00525

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAYMOND O. FOX, JR., DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered November 30, 2017. The judgment convicted defendant, upon his plea of guilty, of failure to register and/or verify his status as a sex offender by failing to personally appear for an updated photograph.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of failure to register and/or verify his status as a sex offender by failing to personally appear for an updated photograph (Correction Law §§ 168-f [2] [c-1]; 168-t). While we agree with defendant that the written waiver of the right to appeal does not establish a valid waiver because it was not executed until sentencing (*see People v Brown*, 148 AD3d 1562, 1562-1563 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017]; *People v Sims*, 129 AD3d 1509, 1510 [4th Dept 2015], *lv denied* 26 NY3d 935 [2015]; *People v Pieper*, 104 AD3d 1225, 1225 [4th Dept 2013]), we nonetheless conclude that defendant validly waived his right to appeal inasmuch as the record of the plea proceeding establishes that County Court engaged defendant in "an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Suttles*, 107 AD3d 1467, 1468 [4th Dept 2013], *lv denied* 21 NY3d 1046 [2013] [internal quotation marks omitted]; *see People v Lopez*, 6 NY3d 248, 256 [2006]). The court "made clear that the waiver of the right to appeal was a condition of [the] plea, not a consequence thereof, and the record reflects that defendant understood that the waiver of the right to appeal was 'separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Graham*, 77 AD3d 1439, 1439 [4th Dept 2010], *lv denied* 15 NY3d 920 [2010], quoting *Lopez*, 6 NY3d at 256; *see People v Alfiere*, 156 AD3d 1446, 1446 [4th Dept

2017], *lv denied* 31 NY3d 980 [2018]). "Although defendant's release to parole supervision does not render his challenge to the severity of the sentence moot because he remains under the control of the Parole Board until his sentence has terminated" (*People v Williams*, 160 AD3d 1470, 1471 [4th Dept 2018] [internal quotation marks omitted]), the valid waiver of the right to appeal with respect to both the conviction and sentence forecloses defendant's challenge to the severity of his sentence (*see Lopez*, 6 NY3d at 255-256; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

599

KA 16-02362

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS MURPHY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered December 5, 2016. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree and arson in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]) and arson in the second degree (§ 150.15). Contrary to defendant's contention, we conclude that " '[t]he plea colloquy and the written waiver of the right to appeal signed [and acknowledged in County Court] by defendant demonstrate that [he] knowingly, intelligently and voluntarily waived the right to appeal, including the right to appeal the severity of the sentence' " (*People v Weber*, 169 AD3d 1372, 1372-1373 [4th Dept 2019], *lv denied* — NY3d — [Apr. 30, 2019]). Defendant's valid waiver of the right to appeal forecloses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255 [2006]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]). We note that the certificate of conviction incorrectly reflects that defendant was convicted of manslaughter in the first degree under Penal Law § 120.20 (1), and it must therefore be amended to reflect that he was convicted under Penal Law § 125.20 (1) (*see People v Saxton*, 32 AD3d 1286, 1286-1287 [4th Dept 2006]).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

601

KA 18-00218

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LEROY FAVORS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), entered September 18, 2017. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

607

CAF 18-00189

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

IN THE MATTER OF CHASE W.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

DANIEL W., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

NICHOLAS G. LOCICERO, BUFFALO, FOR PETITIONER-RESPONDENT.

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered January 17, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated the parental rights of respondent with respect to the subject child.

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

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

608

CAF 18-00190

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

IN THE MATTER OF MAYCI W.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

DANIEL W., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

NICHOLAS G. LOCICERO, BUFFALO, FOR PETITIONER-RESPONDENT.

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered January 17, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated the parental rights of respondent with respect to the subject child.

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

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

614

CA 18-01960

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

IN THE MATTER OF THE FORECLOSURE OF TAX LIENS
BY PROCEEDING IN REM PURSUANT TO ARTICLE 11 OF
THE REAL PROPERTY TAX LAW BY COUNTY OF SENECA,
PETITIONER-RESPONDENT; ORDER

MAXIM DEVELOPMENT GROUP, RESPONDENT-APPELLANT.

COUGHLIN & GERHART, LLP, ITHACA (DIRK A. GALBRAITH OF COUNSEL), FOR RESPONDENT-APPELLANT.

DAVID K. ETTMAN, COUNTY ATTORNEY, WATERLOO, FOR PETITIONER-RESPONDENT.

Appeal from an amended order of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), entered March 23, 2018. The amended order denied respondent's motion for summary judgment dismissing the petition.

It is hereby ORDERED that the amended order so appealed from is unanimously affirmed with costs for reasons stated in the decision at Supreme Court.

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

615

CA 19-00117

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

JEFFREY L. YOUNG, PLAINTIFF-RESPONDENT,

V ORDER

MICHAEL P. CARTER AND GYPSUM EXPRESS, LTD.,
DEFENDANTS-APPELLANTS.

BARCLAY DAMON LLP, ROCHESTER (ROY Z. ROTENBERG OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered June 18, 2018. The order, insofar as appealed from, denied in part the motion of defendants for summary judgment.

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

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

621

KA 18-02297

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MATTHEW LOUIS LOMAGLIO, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Joanne M. Winslow, J.), entered May 24, 2017. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

625

KA 19-00031

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ARTHUR LEWIS, DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (ERIN MCCAMPBELL PARIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered May 7, 2018. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed for reasons stated in the decision at suppression court.

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

630

KAH 18-01819

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
NANCY ENOKSEN, PETITIONER-APPELLANT,

V ORDER

S. SQUIRES, SUPERINTENDENT, ALBION CORRECTIONAL
FACILITY, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

NANCY ENOKSEN, PETITIONER-APPELLANT PRO SE.

Appeal from a judgment (denominated order) of the Supreme Court, Orleans County (Michael M. Mohun, A.J.), entered August 7, 2018 in a habeas corpus proceeding. The judgment denied the petition.

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

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

631

KAH 18-01820

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
NANCY ENOKSEN, PETITIONER-APPELLANT,

V ORDER

S. SQUIRES, SUPERINDENTENT, ALBION CORRECTIONAL
FACILITY, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

NANCY ENOKSEN, PETITIONER-APPELLANT PRO SE.

Appeal from an order of the Supreme Court, Orleans County (Michael M. Mohun, A.J.), entered August 17, 2018. The order denied the motion of petitioner seeking leave to renew or reargue her petition for a writ of habeas corpus.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]) and the order is affirmed without costs for the reasons stated in the decision at Supreme Court.

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

636

CA 18-02342

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

IN THE MATTER OF TOWN OF LERAY,
PETITIONER-PLAINTIFF-APPELLANT,

V ORDER

VILLAGE OF EVANS MILLS AND VILLAGE OF EVANS MILLS PLANNING BOARD,
RESPONDENTS-DEFENDANTS-RESPONDENTS.

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

BOND, SCHOENECK & KING, PLLC, SYRACUSE (BRODY D. SMITH OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Jefferson County (James P. McClusky, J.), entered May 23, 2018 in a CPLR article 78 proceeding and declaratory judgment action. The judgment, among other things, determined that the zoning laws of respondent-defendant Village of Evans Mills apply to the construction of a new entrance from Willow Street.

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

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

644

TP 19-00190

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

IN THE MATTER OF JULIO SMITH, PETITIONER,

V MEMORANDUM AND ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER.

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 January 30, 2019) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated an inmate rule.

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

Memorandum: Petitioner commenced this proceeding seeking to annul a determination, following a tier III disciplinary hearing, that he violated a certain inmate rule. After Supreme Court transferred the proceeding to this Court pursuant to CPLR 7804 (g), respondent issued an administrative order reversing the determination and directing that all references to the disciplinary proceeding be expunged from petitioner's record. Because petitioner has obtained the relief that he could be granted in this proceeding, the proceeding is dismissed as moot (*see Matter of Davis v Annucci*, 169 AD3d 1352, 1352 [4th Dept 2019]; *Matter of Free v Coombe*, 234 AD2d 996, 996 [4th Dept 1996]).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

646

KA 18-00521

PRESENT: SMITH, J.P., CARNI, DEJOSEPH, TROUTMAN, AND WINSLOW, 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 revoked defendant's sentence of probation and imposed a sentence of incarceration.

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

Memorandum: Defendant appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of burglary in the third degree (Penal Law § 140.20) and imposing an indeterminate term of incarceration of 2⅓ to 7 years. Defendant failed to preserve for our review his challenge to the voluntariness of his admission to the violation of probation because he "did not move on that ground either to withdraw his admission . . . or to vacate the judgment revoking his sentence of probation" (*People v Spangenberg*, 118 AD3d 1444, 1444 [4th Dept 2014], *lv denied* 24 NY3d 965 [2014]; *see People v Williams*, 166 AD3d 1596, 1597 [4th Dept 2018], *lv denied* 32 NY3d 1211 [2019]). The rare exception to the preservation rule does not apply here because defendant said nothing during the admission colloquy that cast "significant doubt upon [his] guilt or otherwise call[ed] into question the voluntariness of the [admission]" (*People v Lopez*, 71 NY2d 662, 666 [1988]; *see Williams*, 166 AD3d at 1597). Contrary to defendant's further contention, the sentence is not unduly harsh or severe.

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

653

CAF 18-00744

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

IN THE MATTER OF ARTHUR D. WALLS, JR.,
PETITIONER-RESPONDENT,

V ORDER

JOHANNA L. RODRIGUEZ, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

TIMOTHY R. LOVALLO, BUFFALO, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered March 19, 2018 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted the petition and designated petitioner as the primary residential parent with respect to the subject child.

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

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

654

CAF 18-00827

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

IN THE MATTER OF ARTHUR D. WALLS, JR.,
PETITIONER-RESPONDENT,

V ORDER

JOHANNA L. RODRIGUEZ, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

TIMOTHY R. LOVALLO, BUFFALO, FOR RESPONDENT-APPELLANT.

Appeal from an amended order of the Family Court, Erie County (Mary G. Carney, J.), entered April 6, 2018 in a proceeding pursuant to Family Court Act article 6. The amended order, among other things, granted the petition and designated petitioner as the primary residential parent with respect to the subject child.

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: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

666

KA 18-01567

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN J. FOERSTER, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS 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 (Stephen T. Miller, A.J.), entered April 12, 2018. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court erred in assessing 20 points under risk factor 7 for conduct directed at a stranger. We reject that contention. The People established that defendant's computer contained more than 10,000 images of child pornography, including images of at least 392 separate children, that he told the police that he stumbled onto those images on the internet, and that he thought that they depicted children who were 13 to 14 years old despite the fact that at least one of the images depicted a victim who was a toddler still wearing a diaper. The Court of Appeals has made clear that "the plain terms of factor 7 authorize the assessment of points based on a child pornography offender's stranger relationship with the children featured in his or her child pornography files, and thus points can be properly assessed under that factor due to an offender's lack of prior acquaintance with the children depicted in the files" (*People v Gillotti*, 23 NY3d 841, 854 [2014]). Based on the facts noted above, we reject defendant's contention that the People failed to establish that the children depicted in the videos were strangers to him. We conclude that "[d]efendant's crime was unquestionably 'directed at . . . stranger[s]' " (*People v Johnson*, 11 NY3d 416, 420 [2008]), and thus "[t]he People provided clear and convincing evidence of risk factor[] . . . 7" (*People v Scheifla*, 125 AD3d 1399, 1399 [4th Dept 2015], *lv*

denied 25 NY3d 908 [2015]). Consequently, the court properly assessed 20 points under that factor.

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

677

CAF 18-01118

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

IN THE MATTER OF VALOREE A. FRUMUSA,
PETITIONER-RESPONDENT,

V ORDER

LAWRENCE FRUMUSA, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Wayne County (Richard M. Healy, J.), entered April 2, 2018 in a proceeding pursuant to Family Court Act article 4. The order, insofar as appealed from, denied objections of respondent to the order of the Support Magistrate.

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

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

678

CAF 18-00030

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

IN THE MATTER OF OLIVIA G., DELILAH G., AND ISABEL G.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

OLIVAR I.-G., RESPONDENT-APPELLANT.

JOSEPH P. MILLER, CUBA, FOR RESPONDENT-APPELLANT.

ERIC M. FIRKEL, COUNTY ATTORNEY, LITTLE VALLEY (WENDY G. PETERSON OF COUNSEL), FOR PETITIONER-RESPONDENT.

BERT R. DOHL, SALAMANCA, ATTORNEY FOR THE CHILD.

MARY S. HAJDU, LAKEWOOD, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Cattaraugus County (Terrence M. Parker, A.J.), entered December 5, 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, inter alia, terminated his parental rights with respect to the subject children on the ground of permanent neglect and freed the children for adoption.

The father contends that Family Court erred in failing to ensure that the interpreters who were present with him while he appeared via video conference due to his out-of-state incarceration were qualified. The father, who was represented by counsel, failed to preserve that contention for our review inasmuch as he did not request that the court inquire into the qualifications of his interpreters or provide him with different interpreters (*see generally Matter of Nadya S. [Brauna S.]*, 133 AD3d 1243, 1244 [4th Dept 2015], *lv denied* 26 NY3d 919 [2016]). The father also failed to preserve for our review his contention that his ability to understand the proceedings was limited by inadequate services of the interpreters and, in any event, that contention lacks merit inasmuch as the record establishes that the father confirmed that he was comfortable with the services provided by the interpreters and that he understood the proceedings (*see Nadya S.*,

133 AD3d at 1244; *Matter of Catholic Guardian Socy. of Diocese of Brooklyn v Elba V.*, 216 AD2d 558, 559-560 [2d Dept 1995]).

Contrary to the father's only challenge to petitioner's showing of diligent efforts to encourage and strengthen the father's relationships with his children, the record establishes that petitioner sufficiently investigated the suitability of placing the children with his out-of-state relatives, but the relatives failed to respond to the entity that would approve such an interstate placement (*see Matter of Britiny U. [Tara S.]*, 124 AD3d 964, 966 [3d Dept 2015]).

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

686

CA 18-02005

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

ATIYA B. WEEKS, PLAINTIFF-RESPONDENT-APPELLANT,

V ORDER

SHARON L. ANDERSON, DEFENDANT-APPELLANT-RESPONDENT.
(APPEAL NO. 1.)

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

ROSENTHAL, KOOSHOIAN & LENNON, LLP, BUFFALO (J. PATRICK LENNON OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered May 30, 2018. The order, among other things, granted defendant's motion for leave to reargue her opposition to plaintiff's motion for summary judgment on the issue of negligence and, upon reargument, vacated the prior order granting plaintiff's motion.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on May 13, 2019, and filed in the Erie County Clerk's Office on May 23, 2019,

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

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

687

CA 18-02246

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

ATIYA B. WEEKS, PLAINTIFF-RESPONDENT,

V ORDER

SHARON L. ANDERSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

ROSENTHAL, KOOSHOIAN & LENNON, LLP, BUFFALO (J. PATRICK LENNON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered November 30, 2017. The order granted plaintiff's motion for summary judgment on the issue of negligence.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on May 13, 2019, and filed in the Erie County Clerk's Office on May 23, 2019,

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

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

688.1

KA 12-01527

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MATTHEW V. NOCE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered July 25, 2012. The appeal was held by this Court by order entered December 23, 2016, decision was reserved and the matter was remitted to Monroe County Court for further proceedings (145 AD3d 1456 [4th Dept 2016]). The proceedings were held and completed.

Now, upon reading and filing the stipulation of discontinuance signed by the defendant on April 2, 2019, and the attorneys for the parties on April 2 and 4, 2019,

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

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

693

KA 14-02218

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DAVID STEINMETZ, JR., DEFENDANT-APPELLANT.

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

Appeal from an order of the Steuben County Court (Joseph W. Latham, J.), entered July 3, 2014. The order denied the petition of defendant for modification of his risk assessment pursuant to the Sex Offender Registration Act.

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

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

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

708

CA 19-00199

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

CHRISTINA P. AND CHRISTINA P.,
FOR THE BENEFIT OF ARIANA P.,
PLAINTIFF-APPELLANT,

V ORDER

CORY HUNTER, ET AL., DEFENDANTS,
GERTRUDE GIFFORD, LLC, AND RESURGENT
PROPERTIES, LLC, DEFENDANTS-RESPONDENTS.

STANLEY LAW OFFICE, SYRACUSE (ROBERT A. QUATTROCCI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SANTACROSE & FRARY, ALBANY (JUSTIN P. HARMON OF COUNSEL), FOR DEFENDANT-RESPONDENT GERTRUDE GIFFORD, LLC.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered September 14, 2018. The order, insofar as appealed from, granted the motion of defendant Gertrude Gifford, LLC for summary judgment dismissing the complaint against it.

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

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

MOTION NO. (164/05) KA 01-01500. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BENJAMIN SWITZER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: PERADOTTO, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND WINSLOW, JJ. (Filed June 7, 2019.)

MOTION NO. (1342/05) KA 00-02077. -- THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V FOUED ABDALLAH, ALSO KNOWN AS TOM CRUISE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, CARNI, CURRAN, AND WINSLOW, JJ. (Filed June 7, 2019.)

MOTION NO. (221/11) KA 09-01583. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ORLANDO O. OCASIO, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, AND CURRAN, JJ. (Filed June 7, 2019.)

MOTION NO. (796/12) KA 11-00972. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MIGUEL A. JARAMILLO, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, AND LINDLEY, JJ. (Filed June 7, 2019.)

MOTION NO. (972/17) KA 13-01697. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DARIUS L. BURSEY, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., DEJOSEPH, CURRAN, TROUTMAN, AND WINSLOW, JJ. (Filed June 7, 2019.)

MOTION NO. (1058/17) KA 15-00214. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DANTE TAYLOR, DEFENDANT-APPELLANT. -- Motion for reargument dismissed as untimely, and the motion for writ of error coram nobis denied. PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed June 7, 2019.)

MOTION NO. (1082/18) KAH 16-00564. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. RICHARD GLOSS, PETITIONER-APPELLANT, V SUSAN KICKBUSH, SUPERINTENDENT, GOWANDA CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, PERADOTTO, DEJOSEPH, AND TROUTMAN, JJ. (Filed June 7, 2019.)

MOTION NO. (1193/18) KA 15-02111. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SPARTACUS BROWN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, CENTRA, NEMOYER, AND CURRAN, JJ. (Filed June 7, 2019.)

MOTION NO. (1224/18) CA 18-00066. -- IN THE MATTER OF THE FORECLOSURE OF TAX LIENS BY PROCEEDING IN REM PURSUANT TO ARTICLE 11 OF THE REAL PROPERTY TAX LAW BY THE COUNTY OF WAYNE RELATING TO THE 2015 TOWN AND COUNTY TAX. COUNTY OF WAYNE, PETITIONER-APPELLANT; PAUL J. SCHENK, JR., PAUL J. SCHENK, SR., AND SHIREEN SCHENK, RESPONDENTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P.,

PERADOTTO, CARNI, LINDLEY, AND NEMOYER, JJ. (Filed June 7, 2019.)

MOTION NOS. (1232-1233/18) CA 18-00380 AND CA 18-00381. -- WILLIS WOOD, PLAINTIFF-RESPONDENT-APPELLANT, V ARTIFACT PROPERTIES, LLC, AND DAVID PERKINS, DEFENDANTS-APPELLANTS-RESPONDENTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND NEMOYER, JJ. (Filed June 7, 2019.)

MOTION NO. (1262/18) KA 18-00126. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANDREW D. FITCH, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: WHALEN, P.J., PERADOTTO, NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed June 7, 2019.)

MOTION NO. (1304/18) CA 18-01339. -- NASIR MUZAID OMAR, PLAINTIFF-RESPONDENT, V MICHAEL MOORE, II, DEFENDANT, NU-ERA HOME IMPROVEMENT AND SADEQ AHMED, ALSO KNOWN AS SADEQ AHMED ALSHAMARI, DEFENDANTS-APPELLANTS. -- Motion for reargument denied. PRESENT: WHALEN, P.J., PERADOTTO, CARNI, NEMOYER, AND WINSLOW, JJ. (Filed June 7, 2019.)

MOTION NOS. (1407-1408/18) CAF 17-00126. -- IN THE MATTER OF CORY MORENO, PETITIONER-RESPONDENT, V JAN ELLIOTT, RESPONDENT-APPELLANT. (APPEAL NO. 1.) CAF 17-01138. -- IN THE MATTER OF JAN M. ELLIOTT, PETITIONER-APPELLANT, V CORY A. MORENO, RESPONDENT-RESPONDENT. (APPEAL NO.

2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, CURRAN, AND WINSLOW, JJ. (Filed June 7, 2019.)

MOTION NO. (1444/18) CA 18-00322. -- DEBORAH A. CARR-HOAGLAND AND JAMES L. HOAGLAND, PLAINTIFFS-APPELLANTS, V JOHN L. PATTERSON, AS EXECUTOR OF THE ESTATE OF JOHN J. PATTERSON, DECEASED, AND CHERYL A. PATTERSON, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.) -- Motion for reargument or resettlement denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, CURRAN, AND TROUTMAN, JJ. (Filed June 7, 2019.)

MOTION NO. (177/19) KAH 18-00368. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. THEODORE PRICE, PETITIONER-APPELLANT, V HAROLD GRAHAM, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT. -- Motion for reargument denied. PRESENT: WHALEN, P.J., SMITH, CARNI, DEJOSEPH, AND CURRAN, JJ. (Filed June 7, 2019.)

KA 18-00524. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V STEPHEN P. DROZ, DEFENDANT-APPELLANT. Motion to withdraw as counsel granted, and the appeal is dismissed and the matter is remitted to Oneida County Court to vacate the judgment of conviction (*see People v Matteson*, 75 NY2d 745 [1989]). PRESENT: WHALEN, P.J., SMITH, CENTRA, PERADOTTO, AND CARNI, JJ. (Filed June 7, 2019.)