SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

NOVEMBER 8, 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

HON. TRACEY A. BANNISTER, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED NOVEMBER 8, 2019

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

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KA 16-02103

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SARAH FERGUSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered September 1, 2016. The judgment convicted defendant upon a nonjury verdict of manslaughter in the first degree, assault in the first degree (two counts) and gang assault in the first degree (two counts).

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Oneida County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting her upon a nonjury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]), two counts of assault in the first degree (§ 120.10 [1]), and two counts of gang assault in the first degree (§ 120.07). The conviction stems from the prolonged beatings of two teenage victims that occurred at the Word of Life Christian Church (Word of Life) in New Hartford, New York. Defendant, a member of the Word of Life at the relevant time, is the half-sister of the victims, i.e., decedent Lucas Leonard and his brother, Christopher Leonard. Following a service that concluded at approximately 9:00 p.m. on the night in question, the pastor of the church along with other Word of Life members confronted Lucas and Christopher about accusations that they had sexually abused defendant's children. Defendant and other Word of Life members then began beating Lucas and Christopher with a number of items, including a power cord, periodically over a span of nearly 14 hours. Medical treatment was not sought for Lucas until around noon the following day and, by the time Lucas was taken to a hospital, he was dead. Christopher survived, but sustained swelling and bruises on his face, arms, chest, genitals, and thighs as a result of blunt force trauma to those areas. Christopher also suffered a 50% loss of kidney function, which required treatment at an intensive care unit over a period of two days.

Defendant contends that her conviction of each offense is based

on legally insufficient evidence of intent to cause serious physical injury. Defendant's contention is not preserved for our review inasmuch as her motion for a trial order of dismissal was not " 'specifically directed' at the alleged error" asserted on appeal (*People v Gray*, 86 NY2d 10, 19 [1995]). In any event, defendant's challenge lacks merit because "there is a valid line of reasoning and permissible inferences which could lead a rational person to the same conclusion as the [factfinder]" (*People v Sapp*, 163 AD2d 835, 835 [4th Dept 1990], *lv denied* 76 NY2d 990 [1990]). "It is well settled that [a] defendant may be presumed to intend the natural and probable consequences of his [or her] actions . . . , and [i]ntent may be inferred from the totality of conduct of the accused" (*People v Meacham*, 151 AD3d 1666, 1668 [4th Dept 2017], *lv denied* 30 NY3d 981 [2017] [internal quotation marks omitted]; *see People v Mahoney*, 6 AD3d 1104, 1104 [4th Dept 2004], *lv denied* 3 NY3d 660 [2004]). Here, defendant's intent was "inferable from the nature and fatal outcome of the beating that [s]he inflicted on [Lucas]" (*People v Novak*, 179 AD2d 1053, 1054 [4th Dept 1992], *lv denied* 79 NY2d 922 [1992]), as well as "the surrounding circumstances[] and the medical evidence" relating to both victims (*People v Wise*, 46 AD3d 1397, 1399 [4th Dept 2007], *lv denied* 10 NY3d 872 [2008] [internal quotation marks omitted]; *see People v White*, 216 AD2d 872, 873 [4th Dept 1995], *lv denied* 86 NY2d 805 [1995]). Notably, the evidence established that defendant, and only defendant, struck Lucas and Christopher in their groins, and that she struck them more times overall than anyone else who was involved. Although defendant repeatedly claimed that she did not put "much thought" into what she was doing and that she did not have a "thought process," she also acknowledged that she purposefully struck Lucas and Christopher in their groins specifically because she believed that they had sexually abused her children. Thus, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to support the conviction (*see People v Williams*, 158 AD3d 1170, 1170-1171 [4th Dept 2018], *lv denied* 31 NY3d 1018 [2018]; *People v Nafi*, 132 AD3d 1301, 1302 [4th Dept 2015], *lv denied* 26 NY3d 1147 [2016]). Contrary to defendant's related contention, "the possibility that [her] conduct also might have been deemed consistent with a reckless state of mind" does not establish that her conviction of manslaughter in the first degree is based on legally insufficient evidence because "[t]here is no contradiction in saying that a defendant intended serious physical injury, and was reckless as to whether or not death occurred" (*People v Ramos*, 19 NY3d 133, 136 [2012]; *see People v Trappier*, 87 NY2d 55, 57 [1995]). Furthermore, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We also reject defendant's contention that she was denied effective assistance of counsel. Inasmuch as we have concluded that defendant's contentions regarding the legal sufficiency of the evidence lack merit, it cannot be said that defense counsel's failure to preserve those contentions for review constitutes ineffective

assistance of counsel (*see People v Washington*, 60 AD3d 1454, 1455 [4th Dept 2009], *lv denied* 12 NY3d 922 [2009]; *see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

We similarly reject the contention of defendant that the grand jury proceeding was defective. It is well settled that "[a] grand jury need not be instructed with the same degree of precision that is required when a petit jury is instructed on the law," and "[d]ismissal of an indictment under CPL 210.35 (5) is an exceptional remedy that should . . . be limited to those instances where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the [g]rand [j]ury" (*People v Roblee*, 126 AD3d 1429, 1429 [4th Dept 2015], *lv denied* 27 NY3d 1005 [2016] [internal quotation marks omitted]). Upon our review of the expert testimony presented and the limiting instructions issued during the grand jury proceeding, we conclude that defendant failed to meet her burden of establishing "the existence of defects impairing the integrity of the . . . proceeding and giving rise to the possibility of prejudice" (*People v Wood*, 291 AD2d 824, 824 [4th Dept 2002], *lv denied* 98 NY2d 657 [2002] [internal quotation marks omitted]).

Defendant further contends that this matter should be remitted for a conference or summary hearing to determine what information should be redacted from the presentence report. We agree, and we note that the People do not oppose remittal for that purpose. The record establishes that defendant sent a letter to County Court objecting to certain portions of the report, including references to her failure to cooperate with law enforcement and to her invocation of her right to counsel. At sentencing, the court acknowledged the objections and indicated that it agreed with some, but not all, of them. The court, however, failed to articulate which portions should be redacted. Accordingly, because "defendant was not properly afforded an opportunity to challenge the contents of the presentence report" (*People v James*, 114 AD3d 1312, 1312 [4th Dept 2014]), we hold the case and remit the matter to County Court for further proceedings in accordance with our decision.

To the extent that defendant contends that she is entitled to be resentenced based on the alleged errors in the presentence report, we reject that contention inasmuch as there is no indication that the court relied on the alleged improper information contained in the report in sentencing her (*see People v Gibbons*, 101 AD3d 1615, 1616 [4th Dept 2012]; *People v Paragallo*, 82 AD3d 1508, 1509-1510 [3d Dept 2011]). Contrary to defendant's further contention, the sentence is not unduly harsh or severe. Finally, defendant's contention that the sentence constitutes cruel and unusual punishment is unpreserved for appellate review, and we decline to address it as a matter of discretion in the interest of justice (*see People v Pena*, 28 NY3d 727, 730 [2017]).

Entered: November 8, 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 18-02231

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

DONNA E. WHITE, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF RYAN PATRICK MISENER, DECEASED, PLAINTIFF,

V

MEMORANDUM AND ORDER

LAWRENCE A. CONNORS, ET AL., DEFENDANTS.

LAWRENCE A. CONNORS, ET AL., THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V

DAVID P. GRICE AND KATLYN M. GRICE, THIRD-PARTY DEFENDANTS-APPELLANTS.
(ACTION NO. 1.)

PHILIP CLAYTON, AS ADMINISTRATOR OF THE ESTATE OF JOSEPH CLAYTON, DECEASED, PLAINTIFF-RESPONDENT,

V

LAWRENCE A. CONNORS, DEFENDANT,
DAVID P. GRICE AND KATLYN M. GRICE, DEFENDANTS-APPELLANTS.
(ACTION NO. 2.)

BARTH SULLIVAN BEHR, SYRACUSE (DANIEL CARTWRIGHT OF COUNSEL), FOR THIRD-PARTY DEFENDANTS-APPELLANTS AND DEFENDANTS-APPELLANTS.

LAW OFFICE OF KEITH D. MILLER, LIVERPOOL (KEITH D. MILLER OF COUNSEL), FOR THIRD-PARTY PLAINTIFFS-RESPONDENTS.

STANLEY LAW OFFICES, SYRACUSE (ANNA B. ROBBINS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered November 15, 2018. The order, among other things, denied the motion of defendants and third-party defendants David P. Grice and Katlyn M. Grice for summary judgment.

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

Memorandum: The plaintiff in action No. 2, Philip Clayton (plaintiff), as administrator of the estate of Joseph Clayton (decedent), commenced this negligence action seeking damages following a motor vehicle accident in which decedent and two other individuals, including the decedent of the plaintiff in action No. 1, sustained fatal injuries. On the night of the accident, the vehicle occupied by decedent and the two other individuals had become disabled after it struck a concrete median barrier along the left side of a three-lane highway and came to rest perpendicularly across the left and center lanes. The disabled vehicle, which was owned by Lawrence A. Connors, a defendant-third-party plaintiff in action No. 1, was subsequently broadsided by a vehicle operated by David P. Grice (defendant) and owned by Katlyn M. Grice, third-party defendants in action No. 1 and defendants in action No. 2 (collectively, Grice defendants), while defendant's vehicle was traveling in the left lane. The Grice defendants moved for summary judgment dismissing the complaint against them in action No. 2 and the third-party complaint against them in action No. 1, contending that the emergency doctrine applied and that defendant's actions were reasonable under the circumstances. The Grice defendants now appeal from an order that, inter alia, denied their motion. We affirm.

Under the emergency doctrine, " 'when [a driver] is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the [driver] to be reasonably so disturbed that [he or she] must make a speedy decision without weighing alternative courses of conduct, the [driver] may not be negligent if the actions taken are reasonable and prudent in the emergency context' . . . , provided the [driver] has not created [or contributed to] the emergency" (*Caristo v Sanzone*, 96 NY2d 172, 174 [2001]; *see Lifson v City of Syracuse*, 17 NY3d 492, 497 [2011]; *Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327-328 [1991], *rearg denied* 77 NY2d 990 [1991]). In general, the issues whether a qualifying emergency existed and whether the driver's response thereto was reasonable are for the trier of fact (*see Chwojdak v Schunk*, 164 AD3d 1630, 1631 [4th Dept 2018]). Here, viewing the evidence in the light most favorable to defendants-third-party plaintiffs in action No. 1 and plaintiff and giving them the benefit of every reasonable inference, as we must (*see Esposito v Wright*, 28 AD3d 1142, 1143 [4th Dept 2006]), we conclude that the Grice defendants did not make a prima facie showing of entitlement to judgment as a matter of law based on the emergency doctrine.

Contrary to the Grice defendants' contention, their submissions failed to establish as a matter of law that defendant was confronted with a sudden and unexpected emergency situation to which he did not contribute. Although the accident occurred at night and the disabled vehicle was black and did not have its headlights on, the subject area of the highway was not curved and instead was straight and level with no permanent view obstructions or roadway defects to prevent defendant from perceiving the disabled vehicle. In addition, defendant

testified at his deposition that he could see the "standard distance" with his headlights illuminating the roadway, yet he was unable to provide a reason why he did not observe the disabled vehicle prior to impact (*cf. Kandel v FN; Taxi; Inc.*, 137 AD3d 980, 982 [2d Dept 2016]; *Holtermann v Cochetti*, 295 AD2d 680, 681 [3d Dept 2002]; *see generally Gutierrez v Hoyt Transp. Corp.*, 117 AD3d 420, 420-421 [1st Dept 2014]). The fact that the disabled vehicle was positioned directly ahead of defendant on such an area of the highway with the headlights of defendant's vehicle illuminating the roadway, "considered in light of [defendant's] conceded failure to see anything prior to the impact, and his failure to take any steps to avoid the collision . . . , calls into question [his] testimony concerning the speed of his vehicle and his attentiveness as he drove" (*Spicola v Piracci*, 2 AD3d 1368, 1369 [4th Dept 2003] [internal quotation marks omitted]). Moreover, inasmuch as the Grice defendants' submissions established that the subject area of the highway was not well lit, that it was raining steadily rather than merely precipitating lightly, and that the highway was wet, we conclude that there is an issue of fact whether defendant, who testified that he was driving at the posted speed limit of 65 miles per hour, was nonetheless operating the vehicle at a speed greater than was reasonable and prudent under the conditions (*see* Vehicle and Traffic Law § 1180 [a], [e]; *Cahoon v Frechette*, 86 AD3d 774, 775-776 [3d Dept 2011]; *Aloi v County of Tompkins*, 52 AD3d 1092, 1094 [3d Dept 2008]). "If [a trier of fact] determines that [defendant's] speed was unreasonable under the existing weather and road conditions, [the trier of fact] could also conclude that [defendant's] own unreasonable speed was what deprived him of sufficient time to avoid the collision, thereby preventing him from escaping liability under the emergency doctrine" (*Cahoon*, 86 AD3d at 776).

Contrary to the Grice defendants' further contention, even assuming, arguendo, that defendant was confronted with a qualifying emergency situation, we conclude that " 'there are issues of fact with respect to the appropriateness of the conduct of [defendant] in light of all of the circumstances, including the . . . inclement weather, and thus summary judgment is not appropriate' " (*Phelps v Ranger*, 87 AD3d 1387, 1388 [4th Dept 2011]; *see Aloi*, 52 AD3d at 1094).

The failure of the Grice defendants to meet their initial burden requires denial of their motion regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Entered: November 8, 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 19-00372

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

BENEFICIAL HOMEOWNER SERVICE CORPORATION,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KEYBANK NATIONAL ASSOCIATION, PHYLLIS CROUSE,
DEFENDANTS,
AND ROBERT E. LAKE, DEFENDANT-RESPONDENT.

PHILLIPS LYTLE LLP, ROCHESTER (CHAD W. FLANSBURG OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SCHWERZMANN & WISE, P.C., WATERTOWN (KEITH B. CAUGHLIN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered September 24, 2018. The order, among other things, denied the motion of plaintiff insofar as it sought summary judgment on the complaint against defendant Robert E. Lake.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion with respect to the claim seeking a substitution, nunc pro tunc, of the legal description of the property to correct scrivener's errors and as modified the order is affirmed without costs.

Memorandum: In 2004, defendant Phyllis Crouse obtained a home equity line of credit from and gave a first mortgage on the property to Champion Mortgage (Champion), a division of defendant KeyBank National Association (KeyBank). In 2006 Crouse obtained a gap mortgage from and gave a second mortgage on the property to Champion. On the same date, Crouse executed a Consolidation, Extension and Modification Agreement (CEMA), pursuant to which the first and second mortgages were consolidated into a single mortgage to be held by Champion. Annexed as an exhibit to the CEMA was a consolidated note. Champion thereafter assigned all three mortgages "together with the certain note(s) described therein" to plaintiff by identifying the first mortgage in the body of the document and the second mortgage and CEMA in an exhibit attached to the assignment. The assignment was recorded on October 22, 2007.

Using the identical language and exhibit as in the assignment to plaintiff, plaintiff's "vice[-]president" thereafter executed an assignment of mortgage assigning all three mortgages "together with

the certain note(s) described therein" to KeyBank. On February 13, 2008, KeyBank's "authorized signer" executed a satisfaction of mortgage using the identical language and exhibit to identify the mortgages as used in the earlier assignments and stating that the three mortgages were "paid" and that KeyBank consented to have them discharged. The assignment to KeyBank and the satisfaction were recorded on May 13, 2008. It is undisputed that the mortgages were not actually satisfied, and Crouse continued to make payments on the CEMA for two years after the satisfaction was recorded. Crouse subsequently defaulted on the debt, and Robert E. Lake (defendant) purchased the property from Crouse in 2012. It is also undisputed that defendant never made any payments on the CEMA.

Plaintiff commenced this action on January 5, 2016, seeking, inter alia, "to secure the cancellation and discharge of record" of the allegedly erroneous satisfaction of mortgage, contending that it was recorded "only through error and inadvertence." Plaintiff also sought to correct scrivener's errors in the legal description of the property. After KeyBank and Crouse defaulted, plaintiff moved for, inter alia, summary judgment on the complaint against defendant as well as dismissal of defendant's counterclaim. Supreme Court denied the motion insofar as it sought summary judgment on the complaint against defendant.

Plaintiff contends that the court erred in denying the motion with respect to the claim seeking to expunge the satisfaction of mortgage. We reject that contention. According to plaintiff, the assignment to KeyBank was invalid because it was made in error and, as a result, KeyBank lacked any interest in the mortgages and any authority to execute and record the satisfaction. Therefore, plaintiff contends, the satisfaction is void ab initio and the relevant statute of limitations never began to run. Plaintiff seeks to counter the contention that the action is time-barred on the theory that any error in the recording of the assignment and satisfaction renders the documents voidable and subject to the now-passed six-year statute of limitations found in CPLR 213 (6). We conclude that plaintiff failed to establish as a matter of law that the assignment was invalid or that KeyBank lacked the authority to execute and record the satisfaction so as to avoid application of the statute of limitations.

Although plaintiff retained physical possession of the notes, the assignment to KeyBank specifically provided that the mortgages "together with the certain note(s) described therein" were being assigned. Such language has been held to effectuate an assignment of *both* the note and the mortgage (*see e.g. Goldman Sachs Mtge. Co. v Mares*, 166 AD3d 1126, 1129 [3d Dept 2018]; *Matter of Stralem*, 303 AD2d 120, 122-123 [2d Dept 2003]). Where, as here, there is an effective assignment of *both* the mortgage and the note, physical delivery of the note is not required for the assignee to lawfully take action on the mortgage. "Either a written assignment of the underlying note *or* the physical delivery of the note is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (*U.S. Bank N.A. v Ellis*, 154 AD3d 710, 711 [2d Dept 2017]

[emphasis added]; *see U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 754 [2d Dept 2009]; *cf. Deutsche Bank Natl. Trust Co. v Idarecis*, 133 AD3d 702, 703-704 [2d Dept 2015]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 108-109 [2d Dept 2011]). Plaintiff thus failed to establish that the assignment of the notes and mortgages to KeyBank was invalid.

Plaintiff also failed to establish as a matter of law that the satisfaction was void ab initio on the ground that KeyBank lacked authority to execute and record the satisfaction (*see generally Faison v Lewis*, 25 NY3d 220, 224-225 [2015], *rearg denied* 26 NY3d 946 [2015]). In support of its motion, plaintiff contended that the assignment and satisfaction documents were prepared by KeyBank's "clearing agent" and that plaintiff "had no involvement with and did not direct the execution of the KeyBank [a]ssignment." The assignment to KeyBank, however, was executed by plaintiff's vice-president, and plaintiff failed to establish that its vice-president acted without plaintiff's authority. Inasmuch as plaintiff presented no evidence supporting the contention that the assignment was unauthorized or invalid, plaintiff failed to establish as a matter of law that, at the time KeyBank executed and recorded the satisfaction, KeyBank lacked any interest in the mortgages (*cf. LNV Corp. v Sorrento*, 154 AD3d 840, 841 [2d Dept 2017]; *Bank of N.Y. Mellon Trust Co., N.A. v Claypoole*, 150 AD3d 505, 506 [1st Dept 2017]). Where, as here, a document is filed by mistake as opposed to by forgery or lack of authority, the document is voidable and thus subject to the statute of limitations (*see Faison*, 25 NY3d at 224-225). "The difference in the nature of the two [situations] justifies this different legal status. A [document] containing the title holder's actual signature reflects 'the assent of the will to the use of the paper or the transfer,' although it is assent 'induced by fraud, mistake or misplaced confidence' " (*id.*).

We thus conclude that plaintiff failed to establish as a matter of law that the claim seeking to expunge the satisfaction of mortgage is not barred by the statute of limitations. Plaintiff's contention that this claim is governed by a 10-year statute of limitations is improperly raised for the first time in its reply brief and thus is not properly before us (*see Turner v Canale*, 15 AD3d 960, 961 [4th Dept 2005], *lv denied* 5 NY3d 702 [2005]).

We agree with plaintiff, however, that the court erred in failing to grant the motion with respect to the claim seeking a substitution, nunc pro tunc, of the legal description of the property to correct scrivener's errors, and we therefore modify the order accordingly. Defendant did not oppose the motion to that extent. We conclude that plaintiff established that typographical errors had been made and should be corrected inasmuch "as the amendments sought were not substantive and did not prejudice" defendant (*Bank of N.Y. v Stein*, 130 AD3d 552, 553 [2d Dept 2015]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

789

CA 18-01477

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

NOWELLE B., INDIVIDUALLY, AND AS PARENT AND NATURAL GUARDIAN OF RYAN D.R., II, AN INFANT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HAMILTON MEDICAL, INC., HOLLY PAYNE, RT, CURRINA STONE, RN, ANNA RUSTIN, RN, LINDSEY VALDEZ, RN, EVELYN KHORIATY, M.D., DEFENDANTS-RESPONDENTS, MICHAEL L. KIRSCH, M.D., INDIVIDUALLY, AND AS AGENT, OFFICER AND/OR EMPLOYEE OF OUR LADY OF LOURDES MEMORIAL HOSPITAL, INC., JAMES STOUGHTON, M.D., INDIVIDUALLY, AND AS AGENT, OFFICER AND/OR EMPLOYEE OF OUR LADY OF LOURDES MEMORIAL HOSPITAL, INC., OUR LADY OF LOURDES MEMORIAL HOSPITAL, INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

HINMAN, HOWARD & KATTELL, LLP, BINGHAMTON (JAMES S. GLEASON OF COUNSEL), FOR DEFENDANTS-APPELLANTS MICHAEL L. KIRSCH, M.D., INDIVIDUALLY, AND AS AGENT, OFFICER AND/OR EMPLOYEE OF OUR LADY OF LOURDES MEMORIAL HOSPITAL, INC. AND OUR LADY OF LOURDES MEMORIAL HOSPITAL, INC.

MAURO LILLING NAPARTY LLP, WOODBURY (CARYN L. LILLING OF COUNSEL), FOR DEFENDANT-APPELLANT JAMES STOUGHTON, M.D., INDIVIDUALLY, AND AS AGENT, OFFICER AND/OR EMPLOYEE OF OUR LADY OF LOURDES MEMORIAL HOSPITAL, INC.

CHERUNDOLO LAW FIRM, PLLC, SYRACUSE (PETER C. PAPAYANAKOS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

LANDMAN CORSI BALLAINE & FORD P.C., NEW YORK CITY (JAMES M. WOOLSEY, III, OF COUNSEL), FOR DEFENDANT-RESPONDENT HAMILTON MEDICAL, INC.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JOSEPH M. SPADOLA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS HOLLY PAYNE, RT, CURRINA STONE, RN, ANNA RUSTIN, RN, LINDSEY VALDEZ, RN, AND EVELYN KHORIATY, M.D.

Appeals from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered July 30, 2018. The order denied the motions for summary judgment of defendant James Stoughton, M.D., and defendants Michael L. Kirsch, M.D. and Our Lady of Lourdes Memorial Hospital, Inc.

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

Memorandum: Plaintiff commenced this medical malpractice action for personal injuries sustained by her infant son after he suffered a severe brain injury from bilateral tension pneumothoraxes. Defendants James Stoughton, M.D. (Dr. Stoughton), Our Lady of Lourdes Memorial Hospital, Inc., and Michael L. Kirsch, M.D. (Dr. Kirsch) (collectively, Binghamton defendants) appeal from an order denying their respective motions for summary judgment dismissing the amended complaint against them. We affirm.

"[T]o meet [their] initial burden on [their] summary judgment motion[s] in this medical malpractice action, defendant[s] [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" (*Isensee v Upstate Orthopedics, LLP*, 174 AD3d 1520, 1521 [4th Dept 2019] [internal quotation marks omitted]). We agree with the Binghamton defendants that they satisfied their initial burdens on the motions with respect to both compliance with the accepted standard of care and proximate cause. The burden thus shifted to the nonmoving parties to raise an issue of fact by submitting an expert's affidavit establishing both a departure from the accepted standard of care and that the departure was a proximate cause of the injury (*see id.* at 1522). Here, however, Supreme Court noted in its bench decision that "everyone has conceded" that there are questions of fact regarding the "standard of care and deviation from that standard of care." The Binghamton defendants do not challenge that specific conclusion on appeal.

We also agree with the Binghamton defendants that plaintiff's two expert submissions failed to raise a triable issue of fact with respect to proximate cause inasmuch as those submissions provide no explanation to support the claim that the alleged delay in transferring the child to Upstate University Hospital contributed to the injuries sustained, i.e., bilateral tension pneumothoraxes (*see Longtemps v Oliva*, 110 AD3d 1316, 1319 [3d Dept 2013]; *Mosezhnik v Berenstein*, 33 AD3d 895, 897 [2d Dept 2006]). We conclude, however, that triable issues of fact were raised with respect to proximate cause by defendants Holly Payne, RT, Currina Stone, RN, Anna Rustin, RN, Lindsey Valdez, RN, and Evelyn Khoriaty, M.D. (collectively, Upstate defendants), who submitted in opposition to the Binghamton defendants' motions, inter alia, an affidavit of an expert pediatric pulmonologist (*see Way v Grantling*, 289 AD2d 790, 792 [3d Dept 2001]). Notably, that expert opined, inter alia, that the Binghamton defendants' delay in recognizing the child's need for immediate critical care was a substantial contributing factor in the development of his bilateral tension pneumothoraxes. "Where, as here, a nonmovant's expert affidavit 'squarely opposes' the affirmation of the moving parties' expert, the result is 'a classic battle of the experts that is properly left to a jury for resolution' " (*Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018]). We similarly reject the

Binghamton defendants' contention that the language used by the Upstate defendants' expert showed that his opinions were speculative and therefore insufficient to raise a question of fact. "The probative force of an opinion is not to be defeated by semantics if it is reasonably apparent that the doctor intends to signify a probability supported by some rational basis" (*Matter of Miller v National Cabinet Co.*, 8 NY2d 277, 282 [1960], *mot to amend remittitur granted* 8 NY2d 1100 [1960]). Contrary to Dr. Stoughton's contention, the Upstate defendants' expert was not required to have practiced the same speciality as Dr. Stoughton, i.e., emergency medicine (*see Diel v Bryan*, 57 AD3d 1493, 1494 [4th Dept 2008]). "The specialized skills of [an] expert as demonstrated through his [or her] board certifications, taken together with the nature of the medical subject matter of th[e] action, are sufficient to support the inference that his [or her] opinion regarding [the] treatment [at issue] was reliable . . . , and any alleged lack of skill or experience goes to the weight to be given to the opinion, not its admissibility" (*Bell v Ellis Hosp.*, 50 AD3d 1240, 1242 [3d Dept 2008]; *see Carter v Tana*, 68 AD3d 1577, 1580 [3d Dept 2009]).

We have reviewed the remaining contention of Dr. Stoughton and conclude that it does not require reversal or modification of the order.

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

796

KA 13-01614

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LACIM NELSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Dennis S. Cohen, A.J.), rendered June 14, 2013. The judgment convicted defendant upon a jury verdict of attempted robbery in the first degree and attempted robbery in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [4]), defendant contends that the evidence is legally insufficient to establish that the victim perceived the "display[]" of a firearm because the victim testified at trial that he believed that the rifle displayed to him by defendant's accomplice during the attempted robbery was a BB gun (§ 160.15 [4]). We reject that contention.

"A person is guilty of robbery in the first degree when he [or she] forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he [or she] or another participant in the crime . . . [d]isplays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm" (*id.*). The statute's "display" element requires not only that the defendant "consciously displayed something that could reasonably be perceived as a firearm," but also that "the victim actually perceived the display" (*People v Lopez*, 73 NY2d 214, 220 [1989]; *see People v Williams*, 100 AD3d 1444, 1445 [4th Dept 2012], *lv denied* 20 NY3d 1015 [2013]).

Contrary to defendant's contention, "a charge of robbery in the first degree under Penal Law § 160.15 (4) does not obligate the People to prove that the object displayed . . . constituted a 'firearm' within the meaning of section 265.00 (3)" (*People v Akinlawon*, 158

AD3d 1245, 1246 [4th Dept 2018], *lv denied* 31 NY3d 1114 [2018]; *see* Penal Law § 265.00). Moreover, we conclude that a BB gun constitutes a "pistol, revolver, rifle, shotgun, machine gun or other firearm" within the meaning of Penal Law § 160.15 (4) (*see generally Akinlawon*, 158 AD3d at 1246-1247). Thus, the victim's testimony at trial regarding the display of what he perceived to be a BB gun satisfied the "display" element.

Viewing the evidence in light of the elements of the crime of attempted robbery in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict with respect to that count is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Contrary to defendant's contention and for the same reason set forth above, the verdict with respect to the element of display is not against the weight of the evidence on the ground that the victim believed that defendant's accomplice displayed a BB gun. With respect to the element of forcible stealing, although defendant testified that he met the victim at the victim's request so that the victim could return defendant's own property, the video evidence, as well as the victim's testimony, belied defendant's version of events. Thus, the jury was entitled to " 'discredit the version of the incident set forth by defendant' " (*People v Gibson*, 173 AD3d 1785, 1786 [4th Dept 2019], *lv denied* 34 NY3d 931 [2019]).

Defendant also contends that the verdict with respect to the attempted robbery in the first degree count is against the weight of the evidence because the .22 caliber rifle that was recovered from a river by law enforcement months after the crime and introduced into evidence by the People at trial was not the weapon displayed to the victim during the attempted robbery. We reject that contention inasmuch as the "People are not required to introduce into evidence the weapon used in the [attempted] robbery" (*People v Padua*, 297 AD2d 536, 539 [1st Dept 2002], *lv denied* 99 NY2d 562 [2002]; *see also People v Howard*, 92 AD3d 176, 181 [1st Dept 2012], *affd* 22 NY3d 388 [2013]). Nevertheless, at trial, the victim identified the rifle recovered by law enforcement as the weapon that defendant's accomplice displayed to him, and video evidence showed defendant's accomplice throwing what appears to be a rifle off of the footbridge where the attempted robbery occurred as he ran from the scene. The trial testimony further established that law enforcement used that video evidence in order to determine an underwater search area within which the rifle was recovered.

Contrary to defendant's further contention, we conclude that the jury's rejection of the affirmative defense under Penal Law § 160.15 (4) is not against the weight of the evidence. Under the statute, "it is an affirmative defense that [the firearm displayed] was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged" (*id.*). Although the rifle was inoperable when it was recovered by law enforcement from the river, defendant failed to meet his burden on the affirmative defense of establishing that the rifle was inoperable at the time of the attempted robbery (*see generally People v Hill*, 300 AD2d 1125,

1125-1126 [4th Dept 2002], *lv denied* 99 NY2d 615 [2003]). The People's evidence supported the conclusion that the rifle was rendered inoperable due to water-related corrosion some time after defendant's accomplice threw it over the bridge. Defendant likewise failed to establish that the rifle was not loaded at the time of the attempted robbery, "particularly since defendant['s accomplice] had an opportunity to discard [the bullet magazine] before the police arrested him" (*People v Brown*, 81 AD3d 499, 500 [1st Dept 2011], *lv denied* 17 NY3d 792 [2011]; *see generally People v Williams*, 15 AD3d 244, 245 [1st Dept 2005], *lv denied* 5 NY3d 771 [2005]).

We note, however, that the certificate of conviction erroneously reflects that defendant was sentenced to three years' postrelease supervision on the attempted robbery in the first degree count and five years' postrelease supervision on the attempted robbery in the second degree count (Penal Law §§ 110.00, 160.10 [1]). The certificate of conviction must therefore be amended to reflect that defendant was sentenced to five years' postrelease supervision on the attempted robbery in the first degree count and three years' postrelease supervision on the attempted robbery in the second degree count.

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

806

CA 19-00475

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

KELLY D., AS PARENT AND NATURAL GUARDIAN OF S.H.,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

NIAGARA FRONTIER TRANSIT AUTHORITY AND NFTA POLICE DEPARTMENT, AND THEIR AGENTS, SERVANTS, AND EMPLOYEES, DEFENDANTS-RESPONDENTS-APPELLANTS.

NELSON S. TORRE, BUFFALO, FOR PLAINTIFF-APPELLANT-RESPONDENT.

DAVID J. STATE, GENERAL COUNSEL, BUFFALO, GOLDBERG SEGALLA LLP (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered August 31, 2018. The order, among other things, dismissed all of plaintiff's causes of action except for plaintiff's cause of action for assault and battery and granted that part of defendants' motion seeking a protective order.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of the motion seeking a protective order with respect to defendants' surveillance video and seeking to dismiss the causes of action for unlawful imprisonment, false arrest and malicious prosecution and reinstating those causes of action, and ordering defendants to redact and resubmit all medical records in accordance with 22 NYCRR 202.5 (e) (1) (ii) and (iii), and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for personal injuries allegedly sustained by her infant daughter when the daughter was arrested by officers from defendant NFTA Police Department following a physical altercation between the daughter and another high school student at a rail station. In her complaint, plaintiff asserted causes of action for assault and battery, false arrest and unlawful imprisonment, and malicious prosecution. Before discovery was completed, defendants moved, inter alia, to dismiss the complaint, for a protective order directing that any surveillance video provided to plaintiff by defendants be reviewed in court by plaintiff's counsel and not be disseminated to others, and for a conditional order of preclusion regarding a cell phone video of the incident. Plaintiff cross-moved for, inter alia, an order compelling disclosure of any video defendants had of the incident and sealing the daughter's medical records, which had been publicly filed by defendants in an exhibit to their motion.

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

848

CAF 18-00611

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

IN THE MATTER OF JOSHUA N. DEVORE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DHANAIAH M. O'HARRA-GARDNER,
RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Steuben County (Philip J. Roche, J.), entered March 26, 2018 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner custody 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 modified the parties' prior order of custody and visitation by, inter alia, granting petitioner father custody of the subject child. We affirm.

Initially, we reject the mother's contention that Family Court erred in denying her motion to dismiss the petition, which was made following the close of the father's proof (*see generally Matter of William EE. v Christy FF.*, 151 AD3d 1196, 1197 [3d Dept 2017]). The father presented evidence during his case-in-chief that the mother failed to follow the visitation provisions of the court's order and that she had frustrated his telephonic access to the child. We conclude that this evidence, viewed in the light most favorable to the father, demonstrated a change in circumstances that, if established, would warrant an inquiry into whether modification of the order would be in the child's best interests, and thus the court properly denied the motion (*see id.*; *Matter of Dubiel v Schaefer*, 108 AD3d 1093, 1093-1094 [4th Dept 2013]).

We agree with the mother that the court failed to satisfy its obligation to make an express finding whether the father, in support of his petition to modify the prior custody and visitation order, established the requisite change in circumstances before it analyzed whether an order granting custody to the father was in the child's best interests. We remind the court that "alteration of an established custody arrangement will be ordered *only* upon a showing of

a change in circumstances which reflects a real need for change to ensure the best interest[s] of the child" (*Matter of Irwin v Neyland*, 213 AD2d 773, 773 [3d Dept 1995] [emphasis added]; *see Matter of Austin v Wright*, 151 AD3d 1861, 1862 [4th Dept 2017]; *Matter of McClinton v Kirkman*, 132 AD3d 1245, 1245-1246 [4th Dept 2015]).

Although the court did not expressly determine that there was a sufficient change in circumstances to warrant an inquiry into whether the best interests of the child would be served by a change in custody, this Court may " 'independently review the record' to ascertain whether the requisite change in circumstances existed" (*Matter of Curry v Reese*, 145 AD3d 1475, 1475 [4th Dept 2016]). Our review of the record reveals "extensive findings of fact, placed on the record by [the court], which demonstrate unequivocally that a significant change in circumstances occurred since the entry of the consent custody order" (*Matter of Aronica v Aronica*, 151 AD3d 1605, 1605 [4th Dept 2017] [internal quotation marks omitted]; *see Matter of Morrissey v Morrissey*, 124 AD3d 1367, 1367 [4th Dept 2015], *lv denied* 25 NY3d 902 [2015]). Specifically, we note evidence in the record that the child was performing poorly in school, that his attendance there was flagging, and that the mother was alienating the child from the father (*see Matter of Brewer v Soles*, 111 AD3d 1403, 1403-1404 [4th Dept 2013]; *Dubiel*, 108 AD3d at 1093-1094).

We further conclude that, contrary to the mother's contention, the court did not err in awarding custody of the subject child to the father. It is well settled that "a court's determination regarding custody . . . , 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 Nevin H. [Stephanie H.]* [appeal No. 1], 164 AD3d 1090, 1093 [4th Dept 2018] [internal quotation marks omitted]; *see Matter of Krug v Krug*, 55 AD3d 1373, 1374 [4th Dept 2008]), i.e., it is not "supported by a sound and substantial basis in the record" (*Krug*, 55 AD3d at 1374 [internal quotation marks omitted]). Here, we see no basis to disturb the court's credibility assessment and factual findings, and we conclude that its custody determination is supported by a sound and substantial basis in the record.

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

860

CA 18-01904

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

MICHAEL KULIGOWSKI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ONE NIAGARA, LLC, R.B. U'REN EQUIPMENT RENTAL, INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

COSTELLO, COONEY & FEARON, PLLC, CAMILLUS (MAUREEN G. FATCHERIC OF COUNSEL), FOR DEFENDANT-APPELLANT ONE NIAGARA, LLC.

VARVARO, COTTER & BENDER, WHITE PLAINS (LISA L. GOLLIHUE OF COUNSEL), FOR DEFENDANT-APPELLANT R.B. U'REN EQUIPMENT RENTAL, INC.

COLLINS & COLLINS ATTORNEYS, LLC, BUFFALO (MICHAEL T. SZCZYGIEL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Niagara County (Sara Sheldon, A.J.), entered October 2, 2018. The order, among other things, denied in part the motion of One Niagara, LLC and the cross motion of defendant R.B. U'Ren Equipment Rental, Inc. seeking summary judgment.

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

Memorandum: Plaintiff commenced this Labor Law §§ 200, 241 (6), and common-law negligence action seeking damages for injuries he allegedly sustained when he picked up a loose piece of duct work for an industrial air conditioner. The piece of duct work, which had been removed from its original pallet and placed, unsecured, atop another pallet, fell from a forklift that was transporting the material to the loading dock of premises owned by defendant One Niagara, LLC (One Niagara) and managed by plaintiff's employer on behalf of One Niagara's tenant. One Niagara moved for, inter alia, summary judgment dismissing the complaint against it. Defendant R.B. U'Ren Equipment Rental, Inc. (RB), which provided one of the forklifts used in the operation, cross-moved for, inter alia, summary judgment dismissing the complaint against it.

In its order, Supreme Court, inter alia, denied One Niagara's motion and RB's cross motion to the extent that they sought summary judgment dismissing the complaint against them on the ground that plaintiff's actions were the superseding cause of the accident and

summary judgment dismissing the Labor Law § 241 (6) cause of action against them insofar as it is predicated on alleged violations of 12 NYCRR 23-9.8 (e), (h), and (j). The court also denied that part of RB's cross motion with respect to the Labor Law § 200 and common law negligence cause of action. One Niagara and RB (defendants) separately appeal, and we affirm.

We reject the contentions of One Niagara and RB on their respective appeals that the court erred in denying those parts of their respective motion and cross motion seeking summary judgment dismissing the complaint on the ground that plaintiff's own conduct, rather than any negligence on the part of defendants, proximately caused the accident. It is well settled that "[w]hen a question of proximate cause involves an intervening act, liability turns upon whether the intervening act is a *normal and foreseeable consequence* of the situation created by the defendant[s'] negligence" (*Hain v Jamison*, 28 NY3d 524, 529 [2016] [internal quotation marks omitted]; *see Mazella v Beals*, 27 NY3d 694, 706 [2016]). Thus, "[i]t is only where the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant[s'] conduct, [that it] may . . . possibly break[ ] the causal nexus" (*Hain*, 28 NY3d at 529 [internal quotation marks omitted]).

Here, we conclude that defendants did not establish, as a matter of law, that it was unforeseeable that plaintiff would pick up the piece of duct work that fell to the ground. Plaintiff's deposition testimony, which defendants submitted in support of their respective motion and cross motion, established that his job on the day of the accident was to supervise the transport of the air conditioner and its components to the area where that equipment was to be installed and that he picked the piece of duct work up to avoid creating a dangerous situation on the public roadway onto which it had fallen. Given that plaintiff's job required him to ensure that the transport of the materials was done safely and efficiently, it was reasonably foreseeable that he would take it upon himself to pick up a loose piece of duct work that had fallen to the ground (*see Gardner v Perrine*, 101 AD3d 1587, 1587-1588 [4th Dept 2012]; *Williams v Tennien*, 294 AD2d 841, 842 [4th Dept 2002]).

We also reject defendants' contentions on their respective appeals that the court erred in denying their respective motion and cross motion to the extent that they sought dismissal of the Labor Law § 241 (6) cause of action insofar as that cause of action is predicated on alleged violations of 12 NYCRR 23-9.8 (e), (h), and (j). Contrary to defendants' contentions, we conclude that those Industrial Code provisions are sufficiently specific to support a Labor Law § 241 (6) cause of action (*see e.g. Oakes v Wal-Mart Real Estate Bus. Trust*, 99 AD3d 31, 40 [3d Dept 2012]; *Fisher v WNY Bus Parts, Inc.*, 12 AD3d 1138, 1140-1141 [4th Dept 2004]; *Dreher v City of New York*, 2012 NY Slip Op 32498[U] [Sup Ct, NY County 2012], *appeal withdrawn* 115 AD3d 585 [1st Dept 2014]). Furthermore, we conclude that defendants failed to meet their initial burden on their respective motion and cross motion inasmuch as their own submissions raised issues of fact whether

those Industrial Code provisions were violated and whether they applied to the facts of this case (*see Winters v Uniland Dev. Corp.*, 174 AD3d 1293, 1295 [4th Dept 2019]). Evidence in the record suggests that the forklift may have been operated on an uneven surface, causing the loose piece of duct work to fall (*see* 12 NYCRR 23-9.8 [e]; *see generally Lane v Texas Roadhouse Holdings, LLC*, 96 AD3d 1364, 1364-1365 [4th Dept 2012]). Similarly, the operation of the forklift over an allegedly uneven surface may have caused the piece of duct work to fall by preventing the loaded pallet from remaining level at all times (*see* 12 NYCRR 23-9.8 [h]). Finally, defendants failed to show that 12 NYCRR 23-9.8 (j) was not violated given evidence that the forklift's forks were raised two to three feet and given the dearth of evidence justifying that positioning (*see generally Morris v Parvarini Constr.*, 9 NY3d 47, 51 [2007]). We note that RB's contention that it cannot be liable under Labor Law § 241 (6) because it was not the "agent" of an owner or contractor was raised for the first time on appeal and therefore is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

Finally, we reject RB's contention on its appeal that the court erred in denying the cross motion with respect to the Labor Law § 200 and common-law negligence claims asserted against RB because RB's own submissions raised a question of fact regarding the identity of the forklift driver who was operating the forklift at the time of the accident. In support of its cross motion, RB relied on plaintiff's deposition testimony, in which plaintiff testified that the forklift was provided by RB and was operated by a driver employed by that company. RB also relied on the deposition testimony of its forklift driver, who testified that he did not use the RB forklift to transport any duct work. This conflict presents a triable issue of fact whether RB controlled the injury-producing activity, i.e., whether it was involved in loading and transporting the piece of duct work that caused plaintiff's injury (*see Wellington v Christa Constr. LLC*, 161 AD3d 1278, 1279-1280 [3d Dept 2018]; *Hall v Queensbury Union Free Sch. Dist.*, 147 AD3d 1249, 1252 [3d Dept 2017]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

901

CA 19-00373

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

MARLO PAYNE AND DANIEL PAYNE,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ROME MEMORIAL HOSPITAL, BY AND THROUGH ITS
AGENTS, OFFICERS AND/OR EMPLOYEES,
DEFENDANT-RESPONDENT.

CHERUNDOLO LAW FIRM, PLLC, SYRACUSE (JOHN C. CHERUNDOLO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BURKE, SCOLAMIERO & HURD, LLP, ALBANY (JEFFREY HURD OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered August 21, 2018. The order granted the motion of defendant for summary judgment and dismissed the complaint.

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 insofar as the complaint, as amplified by the second amended bill of particulars, asserts a claim for negligence based on the "danger invites rescue" doctrine and a derivative cause of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for personal injuries allegedly sustained by Marlo Payne (plaintiff) when she attempted to prevent a patient, whom plaintiff had accompanied from another facility to defendant hospital, from falling. Plaintiffs alleged that one of defendant's employees attempted to transfer the patient from a wheelchair to a bed using an apparatus known as a Hoyer lift without the required assistance and that plaintiff injured her back while supporting the patient when the lift began to tip over. Plaintiffs now appeal from an order granting defendant's motion for summary judgment dismissing the complaint.

Contrary to plaintiffs' contention, Supreme Court properly granted defendant's motion insofar as the complaint asserted a claim for medical malpractice. It is well settled that "liability for medical malpractice may not be imposed absent a physician-patient relationship, either express or implied, because 'there is no legal duty in the absence of such a relationship' " (*Cygan v Kaleida Health*, 51 AD3d 1373, 1375 [4th Dept 2008]; *see Kingsley v Price*, 163 AD3d

157, 160-161 [4th Dept 2018]; *Gedon v Bry-Lin Hosps.*, 286 AD2d 892, 893-894 [4th Dept 2001], *lv denied* 98 NY2d 601 [2002]). Here, defendant met its initial burden on the motion with respect to the claim for medical malpractice by establishing that plaintiff had no such relationship with defendant, and plaintiffs failed to raise a triable issue of fact in response (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

We agree with plaintiffs, however, that the court erred in granting the motion with respect to the claim for negligence based on the "danger invites rescue" doctrine (rescue doctrine) (*see generally Provenzo v Sam*, 23 NY2d 256, 260 [1968]), and we therefore modify the order accordingly. That "doctrine imposes liability upon a party who, 'by his [or her] culpable act has placed another person in a position of imminent peril which invites a third person, the rescuing plaintiff, to come to his [or her] aid' " (*Matter of Encompass Indem. Co. v Rich*, 131 AD3d 476, 478 [2d Dept 2015], quoting *Provenzo*, 23 NY2d at 260), on the ground that "[t]he wrong that imperils life is a wrong to the imperilled victim . . . [and] also to his [or her] rescuer" (*Wagner v International Ry. Co.*, 232 NY 176, 180 [1921]; *see Gifford v Haller*, 273 AD2d 751, 752 [3d Dept 2000]). For the rescue doctrine to apply, "it is sufficient that [the] plaintiff held a reasonable belief of imminent peril of serious injury to another, and it matters not that the peril feared did not materialize" (*O'Connor v Syracuse Univ.*, 66 AD3d 1187, 1191 [3d Dept 2009], *lv dismissed* 14 NY3d 766 [2010]).

Here, in support of its motion, defendant submitted, inter alia, plaintiff's deposition testimony wherein she testified that she informed defendant's employee that two people were needed to move the patient onto the bed using the Hoyer lift, but the employee insisted on using the lift alone and did so in a manner that caused the lift to tilt which, in turn, caused the patient to begin to fall off of it. We conclude that the evidence submitted by defendant in support of its motion failed to establish that "plaintiff's rescue efforts were unreasonable as a matter of law or that plaintiff's actions were 'so rash under the circumstances as to constitute an intervening and superseding cause' of [her] alleged injuries" (*Hughes v Murnane Bldg. Contrs., Inc.*, 89 AD3d 1507, 1509 [4th Dept 2011]; *cf. Ha-Sidi v South Country Cent. School Dist.*, 148 AD2d 580, 582 [2d Dept 1989]). Thus, defendant failed to establish as a matter of law that its employee's acts were not a proximate cause of plaintiff's injuries under the rescue doctrine.

We have considered plaintiffs' remaining contention, and we conclude that it does not require further modification or reversal of the order.

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

910

KA 18-01888

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERMAINE HABEEB, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

RIORDAN & SCALIONE, AMHERST (SCOTT F. RIORDAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered June 17, 2015. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), arising from a traffic stop during which defendant, a passenger in the vehicle, pulled a .40 caliber handgun from his waistband and threw it across the street. In appeal No. 2, defendant appeals from a judgment convicting him, upon the same jury verdict, of, inter alia, criminal possession of a weapon in the second degree (§ 265.03 [3]), arising from a separate incident in which police officers observed him throwing an object, which was subsequently identified as a 9 millimeter semi-automatic pistol, over a fence.

We reject defendant's contention in appeal No. 1 that Supreme Court erred in refusing to suppress the .40 caliber handgun seized following the stop of the vehicle in which defendant was a passenger. The officers' observation that the vehicle's license plate lamp was unlit, an equipment violation, provided a lawful basis to stop the vehicle (*see People v Gibbs*, 167 AD3d 1580, 1580 [4th Dept 2018], *lv denied* 33 NY3d 976 [2019]), and the officers were authorized to detain defendant for the purpose of issuing a traffic summons based on defendant's failure to wear a seatbelt (*see People v Simms*, 25 AD3d 425, 425 [1st Dept 2006], *lv denied* 6 NY3d 838 [2006]). Defendant's act of discarding the handgun during the lawful traffic stop was an

independent act that involved a calculated risk and was not prompted by any unlawful police conduct (*see People v Isidro*, 6 AD3d 1234, 1235 [4th Dept 2004], *lv denied* 3 NY3d 659 [2004]), and defendant thus had no right to object to the seizure of the handgun by the police (*see People v Brown*, 148 AD3d 1562, 1564 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017]).

We reject defendant's further contention in appeal No. 1 that the verdict convicting him of criminal possession of a weapon in the second degree is inconsistent because he was acquitted of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [5]) and criminal possession of a controlled substance in the seventh degree (§ 220.03). Defendant's acquittal of the drug possession counts did not necessarily negate an essential element of the weapon possession count (*see People v Goodfriend*, 64 NY2d 695, 697 [1984]; *People v Strauss*, 147 AD3d 1426, 1426-1427 [4th Dept 2017], *lv denied* 29 NY3d 1087 [2017], *reconsideration denied* 30 NY3d 953 [2017]), and thus the verdict, "when viewed in light of the elements of each crime as charged to the jury," is not inherently inconsistent (*People v Tucker*, 55 NY2d 1, 4 [1981], *rearg denied* 55 NY2d 1039 [1982]; *see People v Putt*, 303 AD2d 992, 992 [4th Dept 2003]). Moreover, viewing the evidence in light of the elements of the crime of criminal possession of a weapon in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict in appeal No. 1 is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Two police officers testified that they observed defendant remove from his waistband a black semi-automatic handgun and then throw it across the street. The loaded .40 caliber handgun was collected by the police and test-fired by a firearms examiner, who subsequently determined that the handgun was operable, and a DNA expert testified that defendant's DNA profile matched a DNA profile obtained from the handgun. In contrast, the evidence of defendant's possession of a controlled substance was entirely circumstantial, and the jury could have reasonably concluded from the evidence that the officer's discovery of a vial of cocaine on the ground near defendant's person was insufficient to establish that he knowingly and unlawfully possessed the cocaine (*see People v Delancy*, 81 AD3d 1446, 1446 [4th Dept 2011], *lv denied* 17 NY3d 794 [2011]).

We reject defendant's contention in appeal No. 2 that the court erred in refusing to suppress the pistol that defendant allegedly discarded while being pursued by the police. An officer approached defendant on the basis of information provided by a person present at the scene of a fight to which several officers were responding, and the People established the reliability of the unnamed citizen informant by establishing that the officer obtained the information from her during a face-to-face encounter (*see People v Rios*, 11 AD3d 641, 642 [2d Dept 2004], *lv denied* 4 NY3d 747 [2004]). That information did not constitute an anonymous tip (*see People v McCutcheon*, 125 AD2d 603, 603-604 [2d Dept 1986], *lv denied* 70 NY2d 651 [1987]), and the officer was justified in acting on the information provided by the citizen in approaching defendant (*see*

People v Dixon, 289 AD2d 937, 937-938 [4th Dept 2001], *lv denied* 98 NY2d 637 [2002]). Furthermore, "a defendant's flight in response to an approach by the police . . . may give rise to reasonable suspicion" when accompanied by additional information suggestive of criminal activity (*People v Sierra*, 83 NY2d 928, 929 [1994]). Here, defendant's actions in retreating from the officer after she addressed him and in jumping over a fence elevated the officer's level of suspicion and provided the predicate necessary to justify the pursuit of defendant (*see People v Hillard*, 79 AD3d 1757, 1758 [4th Dept 2010], *lv denied* 17 NY3d 796 [2011]; *see generally People v Holmes*, 81 NY2d 1056, 1058 [1993]), and defendant's abandonment of the pistol in the course of the pursuit provided probable cause for his arrest (*see People v Daniels*, 147 AD3d 1392, 1393 [4th Dept 2017], *lv denied* 29 NY3d 1077 [2017]). The recovery of the disassembled components of the abandoned pistol was lawful inasmuch as the officer's pursuit of defendant was lawful (*see People v Gayden*, 126 AD3d 1518, 1519 [4th Dept 2015], *affd* 28 NY3d 1035 [2016]).

Defendant further contends in appeal No. 2 that the evidence is legally insufficient to establish the operability of the pistol and that the verdict is against the weight of the evidence. We reject those contentions. Viewing the evidence in the light most favorable to the People (*see People v Conway*, 6 NY3d 869, 872 [2006]), we conclude that the evidence is legally sufficient to establish that the pistol was both loaded (*see* Penal Law §§ 265.00 [15]; 265.03 [3]) and operable (*see People v Cruz*, 272 AD2d 922, 922 [4th Dept 2000], *affd* 96 NY2d 857 [2001]; *People v Longshore*, 86 NY2d 851, 852 [1995]). Although the pistol became disassembled when it struck the ground and the magazine and ammunition scattered upon impact, it is well settled that a weapon rendered temporarily inoperable, by disassembly or otherwise, may constitute an operable firearm (*see People v Solomon*, 78 AD3d 1426, 1428 [3d Dept 2010], *lv denied* 16 NY3d 899 [2011]; *People v Velez*, 278 AD2d 53, 53 [1st Dept 2000], *lv denied* 96 NY2d 808 [2001]; *People v Lugo*, 161 AD2d 122, 123 [1st Dept 1990], *lv denied* 76 NY2d 860 [1990]).

Viewing the evidence in light of the elements of the crime of criminal possession of a weapon in the second degree as charged to the jury (*see Danielson*, 9 NY3d at 349), we further conclude that the verdict in appeal No. 2 is not against the weight of the evidence with respect to that count (*see generally Bleakley*, 69 NY2d at 495). In addition to the testimony of the eyewitnesses who either observed defendant throw a black object over the fence or observed the pistol fly over the fence and land near their feet, the People presented evidence that a DNA sample taken from the pistol was consistent with defendant's DNA profile, which supports an inference that defendant had physically possessed the pistol (*see People v Ward*, 104 AD3d 1323, 1324 [4th Dept 2013], *lv denied* 21 NY3d 1011 [2013]; *People v Robinson*, 72 AD3d 1277, 1278 [3d Dept 2010], *lv denied* 15 NY3d 809 [2010]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

911

KA 18-01889

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERMAINE HABEEB, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

RIORDAN & SCALIONE, AMHERST (SCOTT F. RIORDAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered June 17, 2015. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree and bail jumping in the second degree.

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

Same memorandum as in *People v Habeeb* ([appeal No. 1] — AD3d — [Nov. 8, 2019] [4th Dept 2019]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

914

CAF 18-01461

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

IN THE MATTER OF ANN GONZALEZ,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BRENDEN BEBEE, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Wayne County (Richard M. Healy, J.), entered June 6, 2018 in a proceeding pursuant to Family Court Act article 4. The order, inter alia, sentenced respondent to jail for contempt of court.

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, Wayne County, for further proceedings in accordance with the following memorandum: Respondent father appeals from an order that, in effect, confirmed the determination of the Support Magistrate, upon the father's purported default, that he willfully violated a prior child support order and directed that he be incarcerated.

Initially, we agree with the father that, although he has presumably completed serving his term of incarceration, his appeal is not moot "because of the 'enduring consequences [that] potentially flow from an order adjudicating a party in civil contempt' " (*Matter of Jordan v Reed*, 175 AD3d 1006, 1007 [4th Dept 2019]).

We further agree with the father that the Support Magistrate erred in allowing the father's attorney to withdraw as counsel and in proceeding with the hearing in the father's absence. "An attorney may withdraw as counsel of record only upon a showing of good and sufficient cause and upon reasonable notice to the client . . . [, and a] purported withdrawal without proof that reasonable notice was given is ineffective" (*Matter of Williams v Lewis*, 258 AD2d 974, 974 [4th Dept 1999]; *see* CPLR 321 [b] [2]; *Matter of La'Derrick W.*, 63 AD3d 1538, 1539 [4th Dept 2009]). Here, the father's attorney did not make a written motion to withdraw; rather, counsel merely agreed when the Support Magistrate, after noting the father's failure to appear for the hearing, offered to relieve her of the assignment. The absence of evidence that the father was provided notice of his counsel's decision to withdraw in accordance with CPLR 321 (b) (2) renders the Support Magistrate's finding of default improper (*see La'Derrick W.*, 63 AD3d

at 1539), and Family Court thus erred in confirming those findings (*see Matter of Manning v Sobotka*, 107 AD3d 1638, 1638-1639 [4th Dept 2013]). We therefore reverse the order and remit the matter to Family Court for the assignment of new counsel and a new hearing on the violation petition of petitioner mother.

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

916

CAF 18-02286

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

IN THE MATTER OF RAFAEL ADORNO,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

YAIMEL VAILLANT, RESPONDENT-APPELLANT.

DEBORAH J. SCINTA, ORCHARD PARK, FOR RESPONDENT-APPELLANT.

EMILY A. VELLA, SPRINGVILLE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered October 23, 2018 in a proceeding pursuant to Family Court Act article 6. The order, among other things, designated petitioner as the primary residential parent 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 appeals from an order that, inter alia, granted after a hearing the petition of petitioner father seeking to modify a prior stipulated order of joint custody by designating him as the primary residential parent of the subject child.

The mother contends that Family Court improperly admitted and relied on inadmissible hearsay evidence that a bump on the child's forehead was caused by the mother striking the child with a hairbrush, that the child was falling behind in school and not completing her homework assignments, and that the child exhibited poor hygiene. Initially, we note that the mother failed to preserve that contention for our review inasmuch as she did not object to the admission of such testimony (*see Matter of Nicole J.R. v Jason M.R.*, 81 AD3d 1450, 1452 [4th Dept 2011], *lv denied* 17 NY3d 701 [2011]). In any event, the hearsay statement of the child that the mother struck her with a hairbrush was corroborated by observations of the child by the principal of the child's school, who testified at the hearing and was deemed by the court to be credible (*see Matter of Derek J.*, 56 AD3d 558, 558-559 [2d Dept 2008]; *Matter of Bartlett v Jackson*, 47 AD3d 1076, 1077-1078 [3d Dept 2008], *lv denied* 10 NY3d 707 [2008]). Thus, that statement was admissible pursuant to Family Court Act § 1046 (a) (vi) (*see Matter of Montalbano v Babcock*, 155 AD3d 1636, 1637 [4th Dept 2017], *lv denied* 31 NY3d 912 [2018]). The testimony of the principal that the child was falling behind in school and failing to

complete her homework assignments was corroborated by school records, and we therefore conclude that any error in admitting such testimony is harmless because the result reached by the court would have been the same even had such testimony been excluded (*see Matter of Cyle F. [Alexander F.]*, 155 AD3d 1626, 1626-1627 [4th Dept 2017], *lv denied* 30 NY3d 911 [2018]; *Matter of Clark v Hawkins*, 140 AD3d 1753, 1754-1755 [4th Dept 2016]). Finally, with respect to the alleged hearsay testimony concerning the child's poor hygiene, "[t]here is no indication that the court considered, credited, or relied upon [that testimony] in reaching its determination" (*Matter of Merle C.C.*, 222 AD2d 1061, 1062 [4th Dept 1995], *lv denied* 88 NY2d 802 [1996]; *see Matter of Liza C. v Noel C.*, 207 AD2d 974, 974 [4th Dept 1994]).

We further conclude, for reasons stated in the decision at Family Court, that the court properly granted the father's petition.

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

924

CA 19-00099

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

MARK J. DZIADASZEK AND DEBRA J. DZIADASZEK,
INDIVIDUALLY AND AS HUSBAND AND WIFE,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

LEGACY STRATFORD, LLC, FAC DOWNTOWN, LLC, ALGECO SCOTSMAN, LLC, WILLIAMS SCOTSMAN, INC., LEGACY BUILDING CO., LLC, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

JOSEPH E. DIETRICH, III, WILLIAMSVILLE, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (SHARON ANGELINO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Emilio L. Colaiacovo, J.), entered July 17, 2018. The order, insofar as appealed from, granted the motion of defendants Legacy Stratford, LLC, FAC Downtown, LLC, and Legacy Building Co., LLC, and the cross motion of defendants Algeco Scotsman, LLC, and Williams Scotsman, Inc., for summary judgment and denied the cross motion of plaintiffs for, inter alia, sanctions for spoliation.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying in part the motion of defendants Legacy Stratford, LLC, FAC Downtown, LLC, and Legacy Building Co., LLC and the cross motion of defendants Algeco Scotsman, LLC and Williams Scotsman, Inc., and reinstating the Labor Law §§ 200 and 240 (1) and common-law negligence claims against those defendants, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Mark J. Dziadaszek (plaintiff) when he fell to the ground after opening and exiting the door of a construction trailer in an attempt to stop a coworker from performing improper work. The exterior door that plaintiff exited was one of two doors on the trailer and did not have stairs attached. Legacy Stratford, LLC owned the construction site at issue, FAC Downtown, LLC is a member of Legacy Stratford, LLC and Legacy Building Co., LLC (Legacy Development) was the general contractor for the project (collectively, Legacy defendants). Algeco Scotsman, LLC and Williams Scotsman, Inc. (collectively, Scotsman defendants) leased the construction trailer to

Legacy Development. In their amended complaint, plaintiffs asserted claims for common-law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6).

The Legacy defendants moved and the Scotsman defendants cross-moved for, inter alia, summary judgment dismissing the amended complaint against them on the ground that plaintiff was the sole proximate cause of his injuries. Plaintiffs cross-moved for, inter alia, spoliation sanctions against the Legacy defendants. Supreme Court granted the respective motion and cross motion of the Legacy defendants and the Scotsman defendants (collectively, defendants) and denied plaintiffs' cross motion.

We note at the outset that plaintiffs have abandoned any contention with respect to the propriety of the court's dismissal of the Labor Law § 241 (6) claim (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

We agree with plaintiffs that the court erred in granting defendants' motion and cross motion with respect to the Labor Law § 240 (1) claim, and we therefore modify the order accordingly. Defendants failed to establish as a matter of law that plaintiff's actions were the sole proximate cause of the accident, i.e., that there was a staircase by which plaintiff could have exited the trailer, that he knew that a staircase was available and that he was expected to use it, that he chose for "no good reason" not to use it and that, if he had not made that choice, he would not have been injured (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]; *see also Lopez v Fahs Constr. Group, Inc.*, 129 AD3d 1478, 1479 [4th Dept 2015]). For the same reason, we conclude that the court erred in granting defendants' motion and cross motion with respect to the claims under Labor Law § 200 and common-law negligence (*cf. Dos Anjos v Palagonia*, 165 AD3d 626, 627 [2d Dept 2018]; *Miller v Webb of Buffalo, LLC*, 126 AD3d 1477, 1478 [4th Dept 2015], *lv denied* 26 NY3d 903 [2015]; *Kerrigan v TDX Constr. Corp.*, 108 AD3d 468, 471 [1st Dept 2013], *lv denied* 22 NY3d 862 [2014]). We therefore further modify the order accordingly.

We reject plaintiffs' contention, however, that the court erred in denying that part of their cross motion seeking spoliation sanctions against the Legacy defendants. As the moving parties, plaintiffs had the burden of establishing "that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a 'culpable state of mind,' and 'that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense' " (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [2015]). "In the absence of pending litigation or notice of a specific claim, a defendant should not be sanctioned for discarding items in good faith and pursuant to its normal business practices" (*Sanders v 210 N. 12th St., LLC*, 171 AD3d 966, 968 [2d Dept 2019]). Here, we conclude that plaintiffs failed to establish that the Legacy defendants intentionally or negligently disposed of the evidence at

issue, i.e., the video footage from the construction trailer. The record conclusively establishes that the footage was automatically overwritten within 17 days of the accident and several months before plaintiffs commenced the action. Additionally, the record does not show that plaintiffs made an affirmative request for any video footage until nearly two and a half years after the accident. Under these circumstances, the court did not abuse its discretion in declining to impose a spoliation sanction (*see Bill's Feed Serv., LLC v Adams*, 132 AD3d 1400, 1401 [4th Dept 2015]; *see also Sanders*, 171 AD3d at 968). We similarly reject plaintiffs' contention that remittal for a hearing on that issue is necessary (*cf. Saeed v City of New York*, 156 AD3d 735, 736-737 [2d Dept 2017]).

Finally, plaintiffs' request to strike the Legacy defendants' affirmative defense regarding workers' compensation exclusivity is not properly before us inasmuch as it was raised for the first time on appeal (*see Ciesinski*, 202 AD2d at 985).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

925

CA 19-00522

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

ANN MCFEELY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MERCY HOSPITAL OF BUFFALO AND CATHOLIC HEALTH SYSTEM, INC., DEFENDANTS-APPELLANTS.

STILLWELL MIDGLEY, PLLC, BUFFALO (DAVID M. STILLWELL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

JOSEPH E. DIETRICH, III, WILLIAMSVILLE, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered December 21, 2018. The order, insofar as appealed from, denied defendants' motion for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when she fell while walking down a stairway located on premises owned by defendants. Defendants appeal from an order that, inter alia, denied their motion for summary judgment dismissing the complaint. We reverse the order insofar as appealed from.

"[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case" (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997] [internal quotation marks omitted]). "Although the issue whether a certain condition qualifies as dangerous or defective is usually a question of fact for the jury to decide . . . , summary judgment in favor of a defendant is appropriate where a plaintiff fails to submit any evidence that a particular condition is actually defective or dangerous" (*Langgood v Carrols, LLC*, 148 AD3d 1734, 1734-1735 [4th Dept 2017] [internal quotation marks omitted]; *see Slattery v Tops Mkts., LLC*, 147 AD3d 1504, 1504 [4th Dept 2017]; *Przybyszewski v Wonder Works Constr.*, 303 AD2d 482, 483 [2d Dept 2003]).

Here, defendants established their entitlement to judgment as a matter of law by submitting plaintiff's deposition testimony, video

and photographs of the stairway, and a surveillance video of the accident, which showed that the stairway was not in a dangerous or defective condition at the time of the accident (*see Langgood*, 148 AD3d at 1735; *Barakos v Old Heidelberg Corp.*, 145 AD3d 562, 563 [1st Dept 2016]; *see generally Smith v South Bay Home Assn., Inc.*, 102 AD3d 668, 669-670 [2d Dept 2013]).

We further conclude that, in opposition, plaintiff failed to raise a triable issue of fact regarding the existence of a dangerous or defective condition because the record does not support her contention that she fell due to "optical confusion" created by the stairway (*Smith*, 102 AD3d at 669). The surveillance video shows that the stairway was reasonably well lit when plaintiff fell, that plaintiff was aware of the stairway, and that she used a handrail while walking down the stairs, all of which controvert her contention that she was under the illusion that she was traversing a flat surface at the time she fell. Furthermore, plaintiff's testimony that the stairs were the same or similar in color and "blended in together" is insufficient by itself to raise a triable issue of fact whether a dangerous or defective condition existed (*see id.*; *Schwartz v Hersh*, 50 AD3d 1011, 1011-1012 [2d Dept 2008]; *Murray v Dockside 500 Mar., Inc.*, 32 AD3d 832, 833 [2d Dept 2006]). Regardless, the surveillance video shows that a black mat was also laid on the floor at the end of the stairway and clearly demarcated the beginning of the floor from the end of the stairway.

Contrary to plaintiff's further contention, we conclude that the alleged defects identified by her "expert in his report were not relevant, as they were not the conditions alleged by . . . plaintiff to have caused her accident" (*Jackson v Michel*, 142 AD3d 535, 536 [2d Dept 2016]; *see Murray*, 32 AD3d at 833). Finally, plaintiff's reliance on allegedly similar accidents in the stairwell did not raise an issue of fact because she "failed to show a similarity between the subject accident and the previous accidents" (*D'Alfonso v County of Oswego*, 198 AD2d 802, 803 [4th Dept 1993]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

929

KA 16-00660

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL J. RICHARDS, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO 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 April 13, 2016. The judgment convicted defendant upon a jury verdict of attemped arson in the second degree and aggravated harassment in the second degree.

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

Memorandum: Defendant appeals from a judgment that convicted him upon a jury verdict of, inter alia, attempted arson in the second degree (*see* Penal Law §§ 110.00, 150.15). Defendant failed to preserve for our review his contention that County Court erred in failing to discharge a sworn juror (*see People v Dennis*, 91 AD3d 1277, 1279 [4th Dept 2012], *lv denied* 19 NY3d 995 [2012]; *see generally People v Clark*, 28 AD3d 1190, 1190 [4th Dept 2006]). Contrary to defendant's further contention, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to support the conviction (*see People v Williams [James]*, 100 AD3d 1444, 1444 [4th Dept 2012], *lv denied* 20 NY3d 1066 [2013]; *see generally People v Adams*, 222 AD2d 1124, 1124 [4th Dept 1995], *lv denied* 87 NY2d 1016 [1996]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see People v Bennett*, 94 AD3d 1570, 1571-1572 [4th Dept 2012], *lv denied* 19 NY3d 994 [2012], *reconsideration denied* 19 NY3d 1101 [2012]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We also reject defendant's contention that he was denied effective assistance of counsel. Defendant's assertion that defense counsel was ineffective in failing to retain a fire expert is

unavailing because "defendant has not established that such expert testimony was available, that it would have assisted the jury in its determination or that he was prejudiced by its absence" (*People v Graham*, 125 AD3d 1496, 1497 [4th Dept 2015], *lv denied* 26 NY3d 1008 [2015] [internal quotation marks omitted]). We likewise reject defendant's assertion that defense counsel was ineffective in waiving opening and closing statements at the suppression hearing. The omnibus motion set forth a cogent theory for suppression of the evidence, and defense counsel effectively cross-examined the People's witnesses at the hearing (*see People v Harris*, 147 AD3d 1354, 1356-1357 [4th Dept 2017], *lv denied* 29 NY3d 1032 [2017]). Also contrary to defendant's contention, defense counsel was not ineffective in failing to object with respect to the alleged bias of a sworn juror based on comments made by the court, after the People rested, in which the court acknowledged that it had known the juror personally. Defendant failed to demonstrate "the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*People v Swank*, 109 AD3d 1089, 1090 [4th Dept 2013], *lv denied* 23 NY3d 968 [2014] [internal quotation marks omitted]), particularly given that the record does not support defendant's allegation of juror bias. Defendant's further contention that trial counsel was ineffective in failing to adequately explain to defendant his right to testify is based primarily on matters outside the record and must be raised pursuant to a CPL 440.10 motion (*see generally People v Streeter*, 118 AD3d 1287, 1289 [4th Dept 2014], *lv denied* 23 NY3d 1068 [2014], *reconsideration denied* 24 NY3d 1047 [2014]).

Defendant also contends that he was deprived of his right to testify at trial. Insofar as defendant contends that the court had an obligation to ensure that he knowingly waived his right to testify, defendant's contention lacks merit. "The trial court has no obligation to inform a defendant of his or her right to testify or ascertain if the failure to testify was a voluntary and intelligent waiver of his or her right to do so" (*People v Cosby*, 82 AD3d 63, 66 [4th Dept 2011], *lv denied* 16 NY3d 857 [2011]). In any event, the record establishes that the court made an inquiry regarding defendant's decision not to testify and that defendant stated that the decision was his own. To the extent that defendant contends that conversations with defense counsel otherwise deprived him of his right to testify, that contention is, as with defendant's related ineffective assistance claim, based primarily on matters outside the record and must be raised pursuant to a CPL 440.10 motion (*see generally Streeter*, 118 AD3d at 1289).

Contrary to defendant's further contention, he was not deprived of a fair trial based on the court's limited questioning of witnesses. A trial court " 'is entitled to question witnesses to clarify testimony and to facilitate the progress of the trial,' " and there is no indication in the record that the court was biased against defendant (*People v Williams*, 107 AD3d 1516, 1517 [4th Dept 2013], *lv denied* 21 NY3d 1047 [2013], quoting *People v Yut Wai Tom*, 53 NY2d 44, 55 [1981]).

Finally, the sentence is not unduly harsh or severe.

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

932

KA 16-01594

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TAMMY HINES, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DIANNE C. RUSSELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KAITLYN M. GUPTILL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered June 3, 2016. The judgment convicted defendant, upon a jury verdict, of grand larceny in the fourth degree.

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

Memorandum: On appeal from a judgment convicting her, upon a jury verdict, of grand larceny in the fourth degree (Penal Law § 155.30 [1]), defendant contends that she was denied effective assistance of counsel. We reject that contention. Defense counsel's failure to request a *Huntley* hearing, without more, does not constitute a basis for finding ineffectiveness (*see People v Williams*, 140 AD2d 969, 970 [4th Dept 1988]; *see also People v Brown*, 122 AD2d 546, 546 [4th Dept 1986], *lv denied* 68 NY2d 810 [1986]). In addition, defendant was not deprived of effective assistance of counsel based on defense counsel's failure to pursue a *Wade* hearing. Defendant failed to "demonstrate the absence of strategic or other legitimate explanations for [that] failure" (*People v Rivera*, 71 NY2d 705, 709 [1988]), particularly inasmuch as defendant's identity was established at trial directly through video surveillance evidence and, moreover, there is no indication in the record that defendant was identified in a pretrial identification arranged by the police (*see People v Pace*, 70 AD3d 1364, 1366 [4th Dept 2010], *lv denied* 14 NY3d 891 [2010]).

Although we agree with defendant that there is no basis in the record to conclude that the loss prevention officers who gave testimony identifying defendant as an individual depicted in the surveillance video were more likely to correctly identify defendant from the video than the jury (*cf. People v Brown*, 145 AD3d 1549, 1549 [4th Dept 2016], *lv denied* 29 NY3d 947 [2017]; *People v Sampson*, 289

AD2d 1022, 1023 [4th Dept 2001], *lv denied* 97 NY2d 733 [2002]), we further conclude that defendant failed to "demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcoming[]" in failing to object to the admission of that testimony (*People v Hogan*, 26 NY3d 779, 785 [2016] [internal quotation marks omitted]; *see People v Benevento*, 91 NY2d 708, 712 [1998]).

Finally, with respect to defendant's remaining allegations of ineffective assistance of counsel, we note that the constitutional right to effective assistance of counsel "does not guarantee a perfect trial, but assures the defendant a fair trial" (*People v Flores*, 84 NY2d 184, 187 [1994]; *see People v Ford*, 86 NY2d 397, 404 [1995]). Having examined the record before us, we conclude that "the evidence, the law, and the circumstances of [this] particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

939

CA 18-02371

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

IN THE MATTER OF CITY OF ROCHESTER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS C. TURNER AND KINGSLEY STANARD,
RESPONDENTS-APPELLANTS.

SANTIAGO BURGER LLP, PITTSFORD (MICHAEL A. BURGER OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

TIMOTHY R. CURTIN, CORPORATION COUNSEL, ROCHESTER (JOHN M. CAMPOLIETO OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Monroe County Court (Douglas A. Randall, J.), entered May 24, 2018. The order reversed an order of the Rochester City Court discontinuing the action without prejudice.

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

Memorandum: Petitioner commenced this special proceeding in City Court seeking, inter alia, abatement of certain property code violations and an order compelling respondents to allow an interior inspection of the property. In a prior order, City Court rendered a summary determination that, inter alia, ordered respondents to vacate the property pending issuance of a certificate of occupancy for the premises. On appeal, County Court reversed and remitted to City Court. Thereafter, City Court issued, and County Court on appeal reversed, two additional orders addressing petitioner's request for an interior inspection of the property.

Upon remittal to City Court following the third appeal to County Court, petitioner abandoned its request for all relief in the petition except for abatement of a property code violation related to gutters. Although respondents contended that City Court should dismiss the petition in its entirety with prejudice, City Court suggested, and petitioner agreed to accept, an order of discontinuance without prejudice pursuant to CPLR 3217 (b). Respondents appealed from that order to County Court, which held that because the issue regarding the alleged gutter violation had already been submitted to City Court to decide, City Court could not discontinue the action pursuant to CPLR 3217 (b) without respondents' consent. County Court further held that the issue regarding the alleged property code violation was still

pending and therefore rejected respondents' contention that the petition should be dismissed in its entirety. County Court thus reversed City Court's order of discontinuance and remitted the matter to City Court to determine, among other things, whether petitioner would proceed with its petition insofar as it sought abatement of the alleged property code violation regarding gutters on the subject property. Respondents now appeal from that order, contending that County Court erred in failing to dismiss the petition in its entirety with prejudice. We affirm.

Contrary to respondents' contention, City Court has jurisdiction over petitioner's special proceeding to abate property code violations (*see* UCCA 203 [a] [2], [6]; 400 [1]; Municipal Code of the City of Rochester § 52-3 [B]). Moreover, County Court did not, in its prior order, determine that City Court lacked such jurisdiction; rather, it "agree[d] with [City Court] that it does have subject matter jurisdiction and equity jurisdiction to abate a continued violation[.]"

We reject respondents' contention that the order on appeal violated their right to due process by allowing petitioner to seek relief with respect to a violation that was not pleaded in the petition. The petition here alleged that there were "approximately ten (10) code violations (both interior and exterior), some extending as far back as 2004, . . . outstanding" and included as an attachment a copy of an amended Notice and Order citing a violation for missing or defective gutters.

We likewise reject respondents' contention that petitioner failed to preserve its request for relief regarding the gutter violation by failing to address the issue on certain prior appeals by respondents to County Court. The record reflects that those appeals were limited to the distinct issue of petitioner's request for an interior inspection and that it was always contemplated by City Court that it would address the alleged property code violations after it resolved the issue regarding the interior inspection. For the same reason, we reject respondents' contention that County Court erred in remitting the matter to City Court for consideration of matters outside the scope of County Court's prior remittal.

We also reject respondents' contention that the petition must be dismissed because petitioner has not, at this stage, conclusively established the alleged violation through admissible evidence. In this special proceeding, City Court has not yet decided the issue of the alleged violation. Thus, even assuming, arguendo, that petitioner has not conclusively established the violation at this stage, the remedy would be a trial pursuant to CPLR 410, not dismissal (*see generally Matter of Peters*, 132 AD3d 1250, 1251-1252 [4th Dept 2015]).

Finally, we note that the record before us does not reflect that the alleged gutter violation has been finally determined in any of City Court's prior orders, and thus respondents' contention that the alleged gutter violation no longer exists or that petitioner has otherwise received all relief sought in the petition is not properly

before us inasmuch as that contention relies on material outside the record on appeal (*see generally Sanders v Tim Hortons*, 57 AD3d 1419, 1420 [4th Dept 2008]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

942

CA 19-00123

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

ALICIA S. CALAGIOVANNI, PUBLIC ADMINISTRATOR OF ONONDAGA COUNTY, AS ADMINISTRATOR OF THE ESTATE OF SUMMER A. RUPERT-WOZNICZKA, ALSO KNOWN AS SUMMER A. RUPERT, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

VINCENT T. CARELLO, HAYLEE E. COVELL, DEFENDANTS-RESPONDENTS, JAKE HAFNER'S TAVERN, INC., AND JAKE HAFNER'S RESTAURANT & TAVERN, DEFENDANTS-APPELLANTS.

BARCLAY DAMON LLP, SYRACUSE (MATTHEW J. LARKIN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DEFRANCISCO & FALGIATANO, LLP, EAST SYRACUSE (JEAN MARIE WESTLAKE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

OSBORN, REED & BURKE, LLP, UTICA (BRIDGET M. TALERICO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered January 7, 2019. The order denied the motion of defendants Jake Hafner's Tavern, Inc. and Jake Hafner's Restaurant & Tavern for summary judgment.

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

Memorandum: Plaintiff commenced this action as the Public Administrator of the estate of decedent, who was struck and killed by a vehicle driven by defendant Vincent T. Carello. Throughout the evening preceding the accident and into the early morning hours of the day of the accident, Carello consumed alcohol and nonalcoholic energy drinks, and he smoked marihuana. Carello and his companions arrived at a tavern owned by defendants-appellants (defendants) after midnight, and he was served alcohol at that tavern. After the tavern closed, Carello fell asleep in a parked vehicle owned by defendant Haylee E. Covell. Although Carello drove home hours later without incident, he left in the vehicle a few minutes later and shortly thereafter struck and killed decedent. Plaintiff commenced this action, alleging, among other things, that defendants were responsible for decedent's injuries and death inasmuch as they sold or provided

alcohol to Carello while he was visibly intoxicated, in violation of General Obligations Law § 11-101 and Alcoholic Beverage Control Law § 65.

Supreme Court properly denied that part of defendants' motion seeking summary judgment dismissing the causes of action against them based on alleged violations of those two statutes. Contrary to defendants' contention, they failed to meet their initial burden on their motion by establishing that Carello was not visibly intoxicated at the time he was served at the tavern. In support of their motion, defendants submitted the deposition testimony of various eyewitnesses who observed Carello in a visibly intoxicated state shortly after being served his last drink. It is well established that visible intoxication may be established through circumstantial evidence (*see Romano v Stanley*, 90 NY2d 444, 450 [1997]; *Sheehan v Gilray*, 152 AD3d 1179, 1180 [4th Dept 2017]; *Kish v Farley*, 24 AD3d 1198, 1200 [4th Dept 2005]), and the eyewitnesses' testimony was sufficient in this case to raise a triable issue of fact with respect to whether Carello was visibly intoxicated at the time he was served (*see Adamy v Ziriakus*, 92 NY2d 396, 402-403 [1998]; *Conklin v Travers*, 129 AD3d 765, 766 [2d Dept 2015]).

Contrary to their further contention, defendants failed to meet their initial burden by establishing that the alleged violations of General Obligations Law § 11-101 and Alcoholic Beverage Control Law § 65 were not related to decedent's injuries and death (*see Oursler v Brennan*, 67 AD3d 36, 43 [4th Dept 2009]; *Van Valkenburgh v Koehler*, 164 AD2d 971, 972 [4th Dept 1990]), i.e., that Carello was not intoxicated at the time he struck and killed decedent. In support of their motion, defendants submitted the deposition testimony of a person who resided with Carello on the date of the accident and that of a police officer; those witnesses, respectively, observed Carello in an intoxicated state immediately before and immediately after the accident. That testimony was sufficient to raise a triable issue of fact with respect to Carello's intoxication at the time of the accident notwithstanding the fact that his blood alcohol content was measured at .05% approximately two and one-half hours after the accident (*see Renzo v Tops Friendly Mkts.*, 136 AD2d 952, 953 [4th Dept 1988]; *see also* Vehicle and Traffic Law § 1195 [2] [a]).

Because defendants failed to meet their initial burden on the motion, there is no need to consider the sufficiency of plaintiff's submissions in opposition thereto (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Were we to review plaintiff's submissions, particularly the affidavit of plaintiff's expert, we would conclude that they were sufficient to raise triable issues of fact with respect to Carello's visible intoxication at the time he was served (*see Sheehan*, 152 AD3d at 1180; *Kish*, 24 AD3d at 1200) as well as his intoxication at the time of the accident.

Inasmuch as defendants failed to establish that they were free of liability, the court properly denied that part of their motion seeking dismissal of the cross claim asserted against them for contribution (*see Oursler*, 67 AD3d at 45; *O'Gara v Alacci*, 67 AD3d 54, 59 [2d Dept

2009]) and common-law indemnification (*see Reynolds v Studley*, 217 AD2d 1000, 1000 [4th Dept 1995]). Contrary to defendants' final contention, the court properly denied that part of their motion seeking dismissal of plaintiff's wrongful death cause of action against them (*see* General Obligations Law § 11-101 [2]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

945.1

CA 19-01589

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

CRYSTAL MORROW, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

METLIFE INVESTORS INSURANCE COMPANY, ET AL.,
DEFENDANTS,
AND JUAN "JIN" ZHOU, FINANCIAL SERVICES
REPRESENTATIVE AND INVESTMENT ADVISOR,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

WOOD SMITH HENNING & BERMAN LLP, NEW YORK CITY (CHRISTOPHER J. SEUSING OF COUNSEL), FOR DEFENDANT-APPELLANT.

LOUIS ROSADO, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered January 22, 2019. The order, insofar as appealed from, denied those parts of the motion of defendants MetLife Investors Insurance Company and Juan "Jin" Zhou to dismiss the first, second, sixth, eighth, and ninth causes of action against defendant Juan "Jin" Zhou, Financial Services Representative and Investment Advisor.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and those parts of the motion seeking to dismiss the first, second, sixth, eighth, and ninth causes of action against defendant Juan "Jin" Zhou, Financial Services Representative and Investment Advisor, are granted.

Memorandum: In appeal No. 1, Juan "Jin" Zhou, Financial Services Representative and Investment Advisor (defendant), appeals from an order that, inter alia, denied in part the motion of defendant and MetLife Investors Insurance Company (collectively, defendants) seeking to dismiss the complaint against them on statute of limitations grounds. Following entry of that order, plaintiff filed an amended complaint. In appeal No. 2, defendant appeals from a separate order that, inter alia, denied those parts of the motion of defendants seeking to dismiss the first, second, sixth, eighth, and ninth causes of action in the amended complaint against him.

We dismiss the appeal from the order in appeal No. 1 as moot inasmuch as the amended complaint superseded the original complaint and became the only complaint in this case (*see Aikens Constr. of Rome*

v Simons, 284 AD2d 946, 947 [4th Dept 2001]; *see generally St. Lawrence Explosives Corp. v Law Bros. Contr. Corp.*, 170 AD2d 957, 957 [4th Dept 1991]).

With respect to appeal No. 2, we agree with defendant that Supreme Court erred in denying the motion with respect to the first, second, sixth, eighth, and ninth causes of action against defendant. We thus reverse the order insofar as appealed from.

Although defendant contends that the first and second causes of action are barred by the statute of limitations, that contention is not properly before us inasmuch as defendant did not raise it in the motion (*see Lots 4 Less Stores, Inc. v Integrated Props., Inc.*, 152 AD3d 1181, 1182 [4th Dept 2017]). We agree with defendant, however, that the court erred in denying that part of the motion seeking to dismiss the first, second, and ninth causes of action, for negligence and gross negligence, against him because each of those causes of action depends on allegations of intentional conduct that cannot form the basis of a claim founded on negligence (*see Dunn v Brown*, 261 AD2d 432, 432-433 [2d Dept 1999]; *Mihalakis v Cabrini Med. Ctr. [CMC]*, 151 AD2d 345, 347 [1st Dept 1989], *lv dismissed in part and denied in part* 75 NY2d 790 [1990]; *see generally New York State Workers' Compensation Bd. v SGRisk, LLC*, 116 AD3d 1148, 1151 [3d Dept 2014]).

We likewise agree with defendant that the court erred in denying that part of the motion seeking to dismiss the sixth cause of action, for conversion, against him. "A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). Plaintiff failed to state a cause of action for conversion inasmuch as the conduct alleged to have been committed by defendant did not show that defendant assumed or exercised control over personal property belonging to plaintiff (*see Ehrenkranz v 58 MHR, LLC*, 127 AD3d 918, 919 [2d Dept 2015]).

We also agree with defendant that the court erred in denying that part of the motion seeking to dismiss the eighth cause of action, for fraud, against him. "The elements of a cause of action for fraud require a material misrepresentation of fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *see Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 488 [2007]; *Gallagher v Ruzzine*, 147 AD3d 1456, 1457 [4th Dept 2017], *lv denied* 29 NY3d 919 [2017]). The amended complaint failed to allege a misrepresentation made by defendant, an intent on defendant's part to induce plaintiff's reliance, or reliance by plaintiff on such a misrepresentation (*see Flandera v AFA Am., Inc.*, 78 AD3d 1639, 1641 [4th Dept 2010]; *Citipostal, Inc. v Unistar Leasing*, 283 AD2d 916, 918-919 [4th Dept 2001]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

945

CA 18-02027

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

CRYSTAL MORROW, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

METLIFE INVESTORS INSURANCE COMPANY, ET AL.,
DEFENDANTS,
AND JUAN "JIN" ZHOU, FINANCIAL SERVICES
REPRESENTATIVE AND INVESTMENT ADVISOR,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

WOOD SMITH HENNING & BERMAN LLP, NEW YORK CITY (CHRISTOPHER J. SEUSING OF COUNSEL), FOR DEFENDANT-APPELLANT.

LOUIS ROSADO, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered April 19, 2018. The order, among other things, denied in part the motion of defendants MetLife Investors Insurance Company and Juan "Jin" Zhou to dismiss plaintiff's complaint against them.

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

Same memorandum as in *Morrow v MetLife Investors Ins. Co.* ([appeal No. 1] — AD3d — [Nov. 8, 2019] [4th Dept 2019]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

947

CA 18-02114

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

DAVID SCHEER,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

ELAM SAND & GRAVEL CORP.,
DEFENDANT-RESPONDENT-APPELLANT.

BOYLAN CODE, LLP, ROCHESTER (ROBERT MARKS OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

WOODS OVIATT GILMAN LLP, ROCHESTER (F. MICHAEL OSTRANDER OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Wayne County (Matthew A. Rosenbaum, J.), entered October 17, 2018. The order granted that part of defendant's motion seeking to dismiss plaintiff's complaint and denied that part of defendant's motion seeking to recover legal fees, costs and disbursements associated with this action.

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

Memorandum: In this action for breach of contract, plaintiff appeals and defendant cross-appeals from an order that, inter alia, granted that part of defendant's motion seeking dismissal of the complaint pursuant to CPLR 3211 (a) (1) and denied that part seeking costs and attorney's fees.

Plaintiff leased land to defendant, a mining company, for a term of 20 years, subject to defendant's right to terminate the lease on six months' written notice "should [it] determine that there are insufficient recoverable [m]inerals from the [p]remises to permit [it] to make a profit." The lease also contained a provision allowing the prevailing party in any dispute to recover costs and attorney's fees. Defendant terminated the lease approximately 16 months after it was executed, claiming that there were insufficient recoverable minerals for it to make a profit. Plaintiff requested documentation supporting defendant's profitability determination. In response, defendant sent plaintiff a "resource evaluation" and the opinion of an accountant, both dated after defendant's termination notice. Plaintiff thereafter

commenced this action asserting a single cause of action based on a breach of the implied covenant of good faith and fair dealing. Plaintiff alleged that the minerals were sufficient for defendant to make a profit, that defendant made its decision to terminate the lease before obtaining an expert analysis, and that defendant's experts ignored the presence of recoverable minerals on the premises.

Plaintiff contends on appeal that Supreme Court erred in granting that part of the motion seeking to dismiss the complaint pursuant to CPLR 3211 (a) (1). We agree, and we therefore modify the order accordingly. "A motion to dismiss pursuant to CPLR 3211 (a) (1) will be granted if the documentary evidence 'resolves all factual issues as a matter of law, and conclusively disposes of the [plaintiff's] claim[s]' " (*Baumann Realtors, Inc. v First Columbia Century-30, LLC*, 113 AD3d 1091, 1092 [4th Dept 2014]). "Although a lease may constitute documentary evidence for purposes of CPLR 3211 (a) (1)," we conclude that the termination clause in the lease submitted by defendant in support of its motion failed to "utterly refute . . . plaintiff's allegations or conclusively establish a defense as a matter of law" (*Lots 4 Less Stores, Inc. v Integrated Props., Inc.*, 152 AD3d 1181, 1182-1183 [4th Dept 2017] [internal quotation marks omitted]).

Although a party has an absolute right to terminate a contract pursuant to an unconditional termination clause (*see Big Apple Car v City of New York*, 204 AD2d 109, 111 [1st Dept 1994]; *see also Center Green v Boehm*, 247 AD2d 869, 869 [4th Dept 1998]), the termination clause here was conditional inasmuch as defendant had the discretion to terminate the lease only if it made a determination prior to termination that there were insufficient minerals for it to make a profit. Because the lease contemplated an exercise of discretion, the implied covenant of good faith and fair dealing included a promise to exercise that discretion in good faith, not arbitrarily (*see Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]; *1-10 Indus. Assoc. v Trim Corp. of Am.*, 297 AD2d 630, 631-632 [2d Dept 2002]). The documentary evidence submitted by defendant did not conclusively establish that it acted in good faith when it terminated the lease.

We are mindful that the implied covenant of good faith and fair dealing "is not without limits, and no obligation can be implied that 'would be inconsistent with other terms of the contractual relationship' " (*Dalton*, 87 NY2d at 389). Contrary to the court's conclusion, however, defendant's obligation to make a good faith profitability determination before terminating the lease is entirely consistent with the express language of the lease. The court accurately stated and defendant correctly asserts that the lease neither requires defendant to "justify its profitability determination" nor gives plaintiff the right to "assess that determination and veto it." Nevertheless, the contract does require that defendant make a profitability determination in the first instance, which is consistent with an implied requirement that defendant make that determination in good faith.

Defendant's alternate contention that the court should have granted the motion insofar as it sought to dismiss the complaint pursuant to CPLR 3211 (a) (7) is not properly before us because defendant raised it for the first time in its reply brief (*see Murnane Bldg. Contrs., LLC v Cameron Hill Constr., LLC*, 159 AD3d 1602, 1605 [4th Dept 2018]).

Because defendant is not a prevailing party on its motion to dismiss, we reject its contention on its cross appeal that it is entitled to recover costs and attorney's fees under the lease at this juncture of the litigation (*see Chainani v Lucchino*, 94 AD3d 1492, 1494 [4th Dept 2012]; *see generally The Wharton Assoc., Inc. v Continental Indus. Capital LLC*, 137 AD3d 1753, 1755 [4th Dept 2016]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

957

KA 17-00050

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD D. STEINMETZ, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (J. SCOTT PORTER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered October 24, 2016. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree (five counts), criminal possession of marihuana in the second degree, and criminal possession of a weapon in the fourth degree (four counts).

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of, inter alia, one count of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), two counts of criminal possession of a weapon in the third degree related to his possession of two assault weapons (§ 265.02 [7]), and one count of criminal possession of marihuana in the second degree (§ 221.25). Contrary to defendant's contention, the evidence is legally sufficient to support the conviction of the two counts of criminal possession of a weapon in the third degree related to his possession of assault weapons. Although no witness testified that the two semi-automatic rifles at issue had the ability to accept a detachable magazine and also had at least one of the characteristics listed in Penal Law § 265.00 (22) (a), the rifles and photographs of the rifles were admitted in evidence, thereby establishing that the rifles met the statutory definition of an assault weapon (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Contrary to defendant's further contention regarding the sufficiency of the evidence supporting those two counts, the People were not required to establish that defendant knew the rifles met the statutory criteria of an assault weapon but, rather, only that he knowingly possessed the rifles (*see generally People v Parrilla*, 27 NY3d 400, 404-405 [2016]).

Defendant contends that the search warrant that provided the basis for the search of his residence was not issued upon probable cause. We reject that contention. Having reviewed the transcript from the *Darden* hearing, we conclude that "the confidential informant's basis of knowledge was sufficiently established at the in camera *Darden* hearing" (*People v Mitchum*, 130 AD3d 1466, 1468 [4th Dept 2015]) inasmuch as "the information from the informant, in its totality, 'provided ample basis to conclude that the informant had a basis for his or her knowledge that defendant was in possession of' [drugs]" (*People v Knight*, 94 AD3d 1527, 1529 [4th Dept 2012], *lv denied* 19 NY3d 998 [2012], quoting *People v Lowe*, 50 AD3d 516, 516 [1st Dept 2008], *affd* 12 NY3d 768 [2009]). We further conclude that the testimony at the *Darden* hearing established that "the hearsay information supplied in the search warrant application satisfied the two prongs of the *Aguilar-Spinelli* test and that the search warrant was issued upon probable cause" (*Mitchum*, 130 AD3d at 1468).

Defendant contends that he was denied a fair trial when Supreme Court permitted the People to introduce evidence of prior bad acts, as well as evidence that defendant invoked his right to counsel and evidence that law enforcement officers were looking for both guns and drugs even though the search warrant made no reference to weapons. Inasmuch as defendant made no objection to the testimony regarding the invocation of the right to counsel or the expanded scope of the officers' search, his contentions related thereto are not preserved for our review (*see People v Vrooman*, 115 AD3d 1189, 1190 [4th Dept 2014], *lv denied* 23 NY3d 969 [2014]; *see generally People v Howard*, 167 AD3d 1499, 1501 [4th Dept 2018], *lv denied* 32 NY3d 1205 [2019]). In any event, we conclude that, even if we were to exercise our power to address the unpreserved contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), reversal would not be required.

Contrary to defendant's contention, the alleged evidence of prior bad acts, which consisted of, inter alia, evidence that an inoperable gun, a scale and a large quantity of cash were also found in the house during the search, was admissible inasmuch as such evidence completed the narrative of events and explained the actions of the officers as they searched the residence (*see People v Brown*, 277 AD2d 974, 974 [4th Dept 2000], *lv denied* 96 NY2d 756 [2001]; *see also People v Casado*, 99 AD3d 1208, 1211 [4th Dept 2012], *lv denied* 20 NY3d 985 [2012]). Although the People contend that such evidence did not constitute *Molineux* evidence inasmuch as possession of those items is not illegal or unlawful (*see People v Thomas*, 26 AD3d 188, 188 [1st Dept 2006], *lv denied* 7 NY3d 795 [2006]; *People v Hucks*, 292 AD2d 833, 833 [4th Dept 2002], *lv denied* 98 NY2d 697 [2002]; *Brown*, 277 AD2d at 974), that contention was not raised at trial and, therefore, is not preserved for our review (*see generally People v Jones*, 85 NY2d 998, 999 [1995]).

Even assuming, arguendo, that the admission of some of the challenged evidence was improper (*see People v Daniels*, 115 AD3d 1364, 1365 [4th Dept 2014], *lv denied* 23 NY3d 1019 [2014]), any error is

harmless. The evidence of defendant's guilt is overwhelming (*see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]) and "there is no significant probability that the jury would have acquitted defendant if the allegedly improper *Molineux* evidence had been excluded" (*Casado*, 99 AD3d at 1212). Moreover, there is no reasonable possibility that the error regarding defendant's invocation of the right to counsel might have contributed to his conviction (*see Vrooman*, 115 AD3d at 1190; *Daniels*, 115 AD3d at 1365).

With respect to the sentence, we conclude that defendant's contention that he was penalized for asserting his right to trial is not preserved for our review (*see People v Huddleston*, 160 AD3d 1359, 1362 [4th Dept 2018], *lv denied* 31 NY3d 1149 [2018]) and, in any event, lacks merit (*see People v Garner*, 136 AD3d 1374, 1374-1375 [4th Dept 2016], *lv denied* 27 NY3d 997 [2016]). The sentence imposed is not unduly harsh or severe.

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

962

CA 19-00337

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

ANN MASON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ERIC D. CARUANA, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

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

DAVIDSON FINK LLP, ROCHESTER (RICHARD N. FRANCO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered November 21, 2018. The order denied the motion of defendant Eric D. Caruana for partial summary judgment.

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

Memorandum: Plaintiff commenced this action seeking to foreclose on a purchase money mortgage. The original note and mortgage was between plaintiff's now-deceased husband (decedent) and Eric D. Caruana (defendant), but decedent assigned those instruments to himself and plaintiff, jointly. It is undisputed that decedent operated a gas station on the property for decades before he sold it to defendant and, at the time the property was sold, decedent was in the process of remediating the property from contamination caused by the underground tanks. Decedent and defendant executed a "completion agreement," which provided, in pertinent part, that decedent's "responsibility to take remedial action as concerns Spill #0170200 . . . shall terminate at such time as the [New York State Department of Environmental Conservation (DEC)] determines that no further continuation of action as set forth in the Corrective Action Plan is necessary." It is undisputed that a "no further . . . action" letter was issued by the DEC in April 2007.

Years later, when defendant sought to sell the property, he learned that there was still contamination on the property that needed to be remediated. Defendant ceased making payments on the mortgage in order to use that money for "site investigation and remediation." After plaintiff commenced this action, defendant answered and asserted various counterclaims against plaintiff, including counterclaims under the Oil Spill Law (Navigation Law article 12). Defendant thereafter

moved for partial summary judgment under the Navigation Law counterclaims, contending that plaintiff was liable as both an owner and a discharger. Supreme Court denied the motion, and we now affirm.

We agree with defendant that plaintiff, as the assignee of a mortgagee, stands in the shoes of decedent and took the mortgage " 'subject to the equities attending the original transaction' " (*Whitney Lane Holdings, LLC v Don Realty, LLC*, 130 AD3d 1218, 1219 [3d Dept 2015]; *see Deutsche Bank Trust Co. Ams. v Vitellas*, 131 AD3d 52, 63-64 [2d Dept 2015]; *Losner v Cashline, L.P.*, 303 AD2d 647, 648 [2d Dept 2003]). Plaintiff, as assignee, cannot stand in any better position than decedent, as assignor (*see Durham Commercial Capital Corp. v Wadsworth Golf Constr. Co. of the Midwest, Inc.*, 160 AD3d 1442, 1444 [4th Dept 2018], *lv denied* 32 NY3d 907 [2018]). Contrary to plaintiff's contention, decedent's role as owner/discharger cannot be distinguished from his role as lender (*see generally Davis v Weg*, 104 AD2d 617, 618-620 [2d Dept 1984]; *Kelly v Lamontague*, 71 AD2d 1016, 1016 [2d Dept 1979]; *Umansky v Seaboard Indus.*, 45 AD2d 1051, 1052 [2d Dept 1974]; *Granick v Mobach*, 13 AD2d 534 [2d Dept 1961], *revg* 208 NYS2d 698 [Sup Ct, Westchester County 1960]), and we therefore reject plaintiff's contention that she is the assignee only with respect to decedent's role as a lender. We thus conclude that plaintiff, as the assignee of a discharger, cannot assert the innocent lender exemption to liability established in Navigation Law § 181 (4) (b) (i) (*see* § 181 [4] [c]), and we agree with defendant that he can assert any defenses and claims against plaintiff that he could have asserted against decedent, but only as an "offset to the amount of [plaintiff's foreclosure] demand" (*Granick*, 13 AD2d at 534; *see Davis*, 104 AD2d at 620).

We nevertheless conclude that the court properly denied defendant's motion inasmuch as there are triable issues of fact whether his Navigation Law counterclaims against plaintiff, as assignee of decedent, are precluded by the completion agreement. It is well settled that parties may allocate responsibility and liability for environmental conditions on a property between themselves (*see 101 Fleet Place Assoc. v New York Tel. Co.*, 197 AD2d 27, 30 [1st Dept 1994], *appeal dismissed* 83 NY2d 962 [1994]), but the language of such an agreement must be strictly construed and must evidence a " 'clear and unmistakable intent' " to release that liability (*Olin Corp. v Consolidated Aluminum Corp.*, 5 F3d 10, 16 [2d Cir 1993]; *see Buffalo Color Corp. v AlliedSignal, Inc.*, 139 F Supp 2d 409, 420 [WD NY 2001]; *see also Umbra U.S.A. v Niagara Frontier Transp. Auth.*, 262 AD2d 980, 981 [4th Dept 1999]). Defendant, as movant, failed to establish as a matter of law that, by executing the completion agreement, he did not release decedent, and plaintiff as decedent's assignee, "from any and all obligations and liability arising from . . . environmental conditions on the property," or that he did not "waive[] any and all future claims relating to the . . . environmental conditions on the property, including those claims . . . pursuant to Navigation Law §[] 181" (*Marist Coll. v Chazen Envtl. Servs., Inc.*, 84 AD3d 1180, 1181 [2d Dept 2011]; *see also Umbra U.S.A.*, 262 AD2d at 981).

Contrary to defendant's contention, we conclude that the court did not abuse its discretion in accepting plaintiff's late responding papers in the absence of any prejudice to defendant (*see Associates First Capital v Crabill*, 51 AD3d 1186, 1188 [3d Dept 2008], *lv denied* 11 NY3d 702 [2008]). We do not consider defendant's contention, raised for the first time in his reply brief, that the mortgage foreclosure proceeding should be dismissed because plaintiff allegedly failed to comply with the Fair Debt Collection Practices Act (*see generally Turner v Canale*, 15 AD3d 960, 961 [4th Dept 2005], *lv denied* 5 NY3d 702 [2005]). Furthermore, based on our determination, we do not address defendant's remaining contentions.

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

965

CA 19-00417

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

CAROL L. JONES, AS EXECUTOR OF THE ESTATE OF
DONALD J. JONES, DECEASED, CAROL L. JONES,
JONES-CARROLL, INC., PLAINTIFFS-RESPONDENTS,
AND SEALAND WASTE LLC,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF CARROLL AND TOWN BOARD OF TOWN OF CARROLL,
DEFENDANTS-APPELLANTS-RESPONDENTS.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (PAUL V. WEBB, JR., OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered July 26, 2018. The order denied the motion of plaintiff Sealand Waste LLC for summary judgment and denied in part the cross motion of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the cross motion for summary judgment dismissing the first and second causes of action in the complaint of plaintiff Sealand Waste LLC and by denying that part of the cross motion for summary judgment dismissing the claim of plaintiff Sealand Waste LLC based on alleged ethical violations by members of defendant Town Board of the Town of Carroll and reinstating that claim, and as modified the order is affirmed without costs.

Memorandum: The facts of this case are fully set forth in our decisions on the prior appeals (*Jones v Town of Carroll*, 32 AD3d 1216 [4th Dept 2006], *lv dismissed* 12 NY3d 880 [2009]; *Jones v Town of Carroll* [appeal No. 1], 57 AD3d 1376 [4th Dept 2008], *revd* 15 NY3d 139 [2010], *rearg denied* 15 NY3d 820 [2010] [*Jones I*]; *Jones v Town of Carroll* [appeal No. 2], 57 AD3d 1379 [4th Dept 2008] [*Jones II*]; *Jones v Town of Carroll*, 122 AD3d 1234 [4th Dept 2014], *lv denied* 25 NY3d 910 [2015] [*Jones III*]; *Jones v Town of Carroll*, 158 AD3d 1325, 1326 [4th Dept 2018], *lv dismissed* 31 NY3d 1064 [2018] [*Jones IV*]). Here, defendants appeal and plaintiff Sealand Waste LLC (Sealand) cross-appeals from an order that denied Sealand's motion for summary

judgment seeking, inter alia, a declaration that Local Law No. 1 of 2007 (2007 Law) is illegal and null and void, and denied in part and granted in part defendants' cross motion for summary judgment dismissing Sealand's complaint.

Defendants contend on their appeal that the doctrine of estoppel against inconsistent positions, i.e., judicial estoppel, precludes plaintiffs from contending that the three remaining causes of action in the amended complaint of plaintiff Carol L. Jones, individually and as executor of the estate of Donald J. Jones, and plaintiff Jones-Carroll, Inc. (Jones plaintiffs) and the three causes of action in Sealand's complaint are still pending because, when the Jones plaintiffs were seeking leave to appeal our determination in *Jones III* to the Court of Appeals, they took the position that those causes of action had been finally determined. That contention lacks merit. "The doctrine of judicial estoppel provides that where a party assumes a position in a legal proceeding and succeeds in maintaining that position, that party may not subsequently assume a contrary position because [the party's] interests have changed" (*Reynolds v Krebs*, 143 AD3d 1256, 1256 [4th Dept 2016] [internal quotation marks omitted]). Here, although the Jones plaintiffs previously took the position that the causes of action had already been finally determined, that position did not prevail, as evinced by our determination in *Jones IV* (158 AD3d at 1327-1328), and thus "all of the elements of judicial estoppel are not present" (*Grove v Cornell Univ.*, 151 AD3d 1813, 1817 [4th Dept 2017]).

We agree with defendants, however, that Supreme Court erred in denying that part of their cross motion for summary judgment dismissing the first cause of action in Sealand's complaint, which is based on allegations of a violation of substantive due process. We therefore modify the order accordingly. "[I]n order to establish a substantive due process violation in the land-use context, a party must establish both 'deprivation of a vested property interest' and that the challenged governmental action was 'wholly without legal justification' " (*Jones III*, 122 AD3d at 1239, quoting *Glacial Aggregates LLC v Town of Yorkshire*, 14 NY3d 127, 136 [2010]). Here, while the Court of Appeals has determined that the *Jones plaintiffs* have "a vested right to use their 50-acre parcel as a landfill for construction and demolition debris" (*Jones I*, 15 NY3d at 142), that is not true of Sealand. Instead, we conclude that, in their cross motion, defendants established as a matter of law that Sealand lacks the requisite vested property interest (*see Schlossin v Town of Marilla*, 48 AD3d 1118, 1120 [4th Dept 2008]). Sealand does not yet own the property at issue; instead, it is a potential buyer that has an agreement with the Jones plaintiffs providing access to the property to test the suitability thereof for expansion of the landfill on the entire parcel and expressing an intention to enter into contract negotiations contingent upon the success of the testing and permitting processes (*see generally Bower Assoc. v Town of Pleasant Val.*, 2 NY3d 617, 630 [2004]).

For similar reasons, we also agree with defendants that the court erred in denying that part of their cross motion for summary judgment

dismissing the second cause of action in Sealand's complaint, which alleges a taking of property without just compensation. We therefore further modify the order accordingly. "[A] property interest must exist before it may be 'taken' " (*Matter of Gazza v New York State Dept. of Envtl. Conservation*, 89 NY2d 603, 613 [1997], *cert denied* 522 US 803 [1997]). "Where, as here, there is nothing more than an expectancy interest, there is an insufficient basis upon which to find a takings clause violation" (*Matter of Novara v Cantor Fitzgerald, LP*, 20 AD3d 103, 108 [3d Dept 2005], *lv denied* 5 NY3d 710 [2005]; *see generally Preble Aggregate v Town of Preble*, 263 AD2d 849, 852 [3d Dept 1999], *lv denied* 94 NY2d 760 [2000]).

Sealand contends on its cross appeal that the court erred in granting that part of defendants' cross motion seeking summary judgment dismissing its claim that the 2007 Law is arbitrary and capricious based on alleged ethical violations by members of defendant Town Board of the Town of Carroll that occurred during the enactment of the law. We agree, and we therefore further modify the order accordingly. The subject claim is timely under the applicable statute of limitations period (*see* CPLR 217 [1]; *see generally Matter of Save the Pine Bush v City of Albany*, 70 NY2d 193, 202-203 [1987]) inasmuch as it relates back to the Jones plaintiffs' original complaint (*see Fazio Masonry, Inc. v Barry, Bette & Led Duke, Inc.*, 23 AD3d 748, 749 [3d Dept 2005]; *see generally* CPLR 203 [f]; *Matter of Greater N.Y. Health Care Facilities Assn. v DeBuono*, 91 NY2d 716, 721 [1998]).

We have considered the remaining contentions raised by the parties in their briefs, and we conclude that none requires further modification or reversal of the order.

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

966

CA 19-00453

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

JOSHUA GANG, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 127939.)

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (J. David Sampson, J.), entered September 10, 2018. The order granted defendant's cross motion for summary judgment dismissing the claim and denied claimant's motion to dismiss defendant's 3rd through 13th affirmative defenses and for leave to amend the claim.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the cross motion is denied and the claim is reinstated, and the motion is granted and the 3rd through 13th affirmative defenses are dismissed, and claimant is granted leave to amend the claim upon condition that claimant shall serve the amended claim within 30 days of service of the order of this Court with notice of entry.

Memorandum: Claimant commenced this action seeking damages for injuries that he sustained as a result of defendant's alleged medical malpractice while claimant was an inmate in a correctional facility. In his notice of intention to file a claim ([notice of intent] *see* Court of Claims Act § 10 [3]), which was filed and served on August 22, 2014, claimant alleged that he sustained an injury to his "left hip" as a result of numerous acts of medical malpractice "on or about May 28, 2014 at Collins Correctional Facility located on Middle Road, Collins, New York." Claimant alleged that, following hip replacement surgery, he developed a severe infection at the location of the incision site and that defendant's agents committed malpractice in failing to treat his infection properly while monitoring that incision site during follow-up appointments. Claimant contends that, as a result of the alleged malpractice, he was forced to undergo numerous surgical procedures to irrigate the site and remove the "purulent, infected tissue."

In his claim, filed and served on May 12, 2016, claimant reiterated the various allegations of malpractice but instead stated that the malpractice "occurred commencing on or about May 20, 2014 . . . and continued for several days and/or weeks thereafter." He also alleged that the malpractice involved his "right hip."

Defendant answered, raising affirmative defenses that the Court of Claims lacked personal and subject matter jurisdiction due to the fact that the claim asserted different dates and different injuries from the notice of intent. Claimant thereafter filed a motion seeking to dismiss 11 of the 13 affirmative defenses and for leave to amend the claim to correct the location of the injury, contending that the injury was to his left hip. With respect to the inconsistent accrual dates, claimant contended in his motion that defendant's medical records established that the malpractice occurred prior to May 21, 2014. He also contended that, due to defendant's continuous treatment for the injuries, his "claims of malpractice would relate back to the first date of treatment" for the hip "or at the very latest, May 21, 2014." Alternatively, claimant sought leave to amend the claim to reflect the same onset date as the notice of intent.

Defendant cross-moved for summary judgment dismissing the claim, contending that, if the accrual date was May 20 or May 21, 2014, then the notice of intent filed on August 22, 2014, was untimely (*see* Court of Claims Act § 10 [3]) and did not provide the Court of Claims with personal or subject matter jurisdiction. Defendant further contended that the notice of intent was jurisdictionally defective because it set forth an incorrect accrual date in violation of Court of Claims Act § 11 (b). In reply, claimant contended that the accrual date listed in the notice of intent was the correct accrual date and that the erroneous date set forth in the claim did not retroactively render the notice of intent jurisdictionally defective. He thus sought permission to amend the claim to allege an accrual date of May 28, 2014. The court denied claimant's motion, granted defendant's cross motion and dismissed the claim. We now reverse.

Inasmuch as "suits against the State are allowed only by the State's waiver of sovereign immunity and in derogation of the common law, statutory requirements conditioning suit must be strictly construed" (*Dreger v New York State Thruway Auth.*, 81 NY2d 721, 724 [1992]; *see Lichtenstein v State of New York*, 93 NY2d 911, 912-913 [1999]; *Matter of DeMairo v State of New York*, 172 AD3d 856, 857 [2d Dept 2019]). Thus, the failure to comply with either Court of Claims Act § 10 (3), concerning the timing of a notice of intent or a claim, or section 11 (b), concerning the essential elements of a notice of intent or a claim, deprives a court of subject matter jurisdiction requiring dismissal of the claim (*see Lepkowski v State of New York*, 1 NY3d 201, 209 [2003]; *Torres v State of New York*, 107 AD3d 1471, 1471 [4th Dept 2013]; *Hatzfeld v State of New York*, 104 AD3d 1165, 1166 [4th Dept 2013]). A jurisdictionally defective notice of intent or claim "may not be cured by amendment" (*DeMairo*, 172 AD3d at 857; *see Hogan v State of New York*, 59 AD3d 754, 755 [3d Dept 2009]). The overriding purpose of sections 10 and 11 is to enable "the State to conduct a prompt investigation of a possible claim in order to

ascertain the existence and extent of the State's liability" (*Schmidt v State of New York*, 279 AD2d 62, 66 [4th Dept 2000]; *see generally Lepkowski*, 1 NY3d at 207).

Addressing first the timeliness of the notice of intent, we agree with claimant that the notice of intent complied with Court of Claims Act § 10 (3), which provides that a notice of intent or claim must be filed and served "within ninety days after the accrual of such claim." Absent "legislative action to the contrary," the determination of when a claim accrued is a legal determination to be made by the courts (*B.F. v Reproductive Medicine Assoc. of N.Y., LLP*, 30 NY3d 608, 613 [2017], *rearg denied* 31 NY3d 991 [2018]). Generally, a medical malpractice claim accrues on the date of the alleged malpractice, but the statute of limitations is tolled "until the end of the course of continuous treatment" (*Kelly v State of New York*, 110 AD2d 1062, 1062 [4th Dept 1985]; *see generally* CPLR 214-a; *Borgia v City of New York*, 12 NY2d 151, 155 [1962]). That toll likewise applies to the time periods contained in Court of Claims Act § 10 (3) (*see e.g. Garofolo v State of New York*, 80 AD3d 858, 859-860 [3d Dept 2011]; *Matter of Robinson v State of New York*, 35 AD3d 948, 949 [3d Dept 2006]). Here, the record establishes that claimant was receiving ongoing treatment for his left hip replacement during postoperative follow-up visits through June 12, 2014, when he was transported to a hospital for treatment of the infection that developed at the incision site, which had not been diagnosed during those follow-up visits. We thus conclude that the notice of intent, filed and served on August 22, 2012, was timely inasmuch as it was filed and served within ninety days of the accrual of the claim. The fact that the claim listed a different date of the alleged injury than the notice of intent is a matter related to the contents of the documents, not their timeliness.

We recognize that, generally, the failure to treat a condition is not considered continuous treatment so as to toll the statute of limitations (*see Gasparro v State of New York*, 163 AD3d 1227, 1228 [3d Dept 2018]; *Toxey v State of New York*, 279 AD2d 927, 928 [3d Dept 2001], *lv denied* 96 NY2d 711 [2001]; *see generally Nykorchuck v Henriques*, 78 NY2d 255, 258-259 [1991]). In such cases, however, there is a lack of awareness of a need for further treatment and thus no concern relating to the interruption of corrective medical treatment (*see generally Young v New York City Health & Hosps. Corp.*, 91 NY2d 291, 296 [1998]). Here, claimant was already being treated for the surgical incision that eventually became infected and, therefore, "further treatment [was] explicitly anticipated by both [defendant's medical staff] and [claimant,] as manifested in the form of . . . regularly scheduled appointment[s]" to monitor the incision and remove staples (*Richardson v Orentreich*, 64 NY2d 896, 898-899 [1985]). Moreover, this is not truly a failure-to-treat case inasmuch as defendant's employees did, in fact, attempt to treat the incision area by applying ointment and dressing the area.

Addressing next the contents of the notice of intent and the claim, we conclude that the statements contained in those documents were "made with sufficient definiteness to enable [defendant] to be able to investigate the claim promptly and to ascertain its liability

under the circumstances" (*Mosley v State of New York*, 117 AD3d 1417, 1418 [4th Dept 2014] [internal quotation marks omitted]; *see Snickles v State of New York*, 159 AD3d 1522, 1524 [4th Dept 2018], *appeal dismissed* 31 NY3d 1130 [2018], *lv denied* 32 NY3d 911 [2018]; *Deep v State of New York*, 56 AD3d 1260, 1260-1261 [4th Dept 2008]). Although there is a different date of the alleged injury and a slightly different alleged injury in the claim as opposed to the notice of intent, we nevertheless conclude that the allegations in each were sufficient to allow "the State to conduct a prompt investigation of a possible claim in order to ascertain the existence and extent of the State's liability" (*Schmidt*, 279 AD2d at 66; *cf. Lepkowski*, 1 NY3d at 207).

Court of Claims Act § 11 (b) requires that the notice of intent and claim state, inter alia, when the claim "arose," as opposed to when it accrued (*compare* § 10 [3], *with* § 11 [b]), as well as the injuries claimed to have been sustained. With respect to the date the claim arose or accrued, the notice of intent stated that claimant "sustained injury . . . on or about May 28, 2014," but the claim stated that the "negligence, careless[ness], recklessness, and/or malpractice occurred commencing on or about May 20, 2014 . . . and continued for several days and/or weeks thereafter." The date alleged in the notice of intent falls within the time frame alleged in the claim and, inasmuch as the notice of intent "need not meet the more stringent requirements imposed upon the [claim]" (*Epps v State of New York*, 199 AD2d 914, 914 [3d Dept 1993]; *see Sommer v State of New York*, 131 AD3d 757, 758 [3d Dept 2015]), we conclude that, despite the slight variation in dates, the contents of the notice of intent and claim with respect to when the claim arose or accrued did not " 'mislead, deceive or prejudice the rights of [defendant]' " and thus did not violate section 11 (b) (*Rodriguez v State of New York*, 8 AD3d 647, 647 [2d Dept 2004]).

Notably, this is not a situation where claimant failed to allege any date at all (*cf. Kolnacki v State of New York*, 8 NY3d 277, 280 [2007], *rearg denied* 8 NY3d 994 [2007]; *Lepkowski*, 1 NY3d at 207) or where defendant was required to " 'ferret out' " information that should have been in the notice of intent or claim (*Matter of Geneva Foundry Litig.*, 173 AD3d 1812, 1813 [4th Dept 2019]; *cf. Hargrove v State of New York*, 138 AD3d 777, 778 [2d Dept 2016]). This is also not a case where "[n]either the notice of intention to file a claim nor the claim correctly stated the time when the . . . claim arose" (*DeMairo*, 172 AD3d at 857).

With respect to the inconsistency regarding the nature of the injuries, we note that one of defendant's own medical records regarding claimant's treatment states that claimant's injury was to his "® hip," or right hip, as opposed to the left hip. The notice of intent alleged the correct injury and, inasmuch as the main goal of Court of Claims Act § 11 (b) is to allow defendant to investigate the claim promptly and to ascertain its liability, we conclude that the error in the subsequent claim, occasioned in part by defendant's own mistakes in its records, is a mistake that did not cause any prejudice to defendant (*see generally Mosley*, 117 AD3d at 1418). As a result,

the "literal requirements" of Court of Claims Act § 11 (b) were met (*Lichtenstein*, 93 NY2d at 913), and the documents "adequately allege" all of the essential elements required by section 11 (b) (*Kolnacki*, 8 NY3d at 280). Contrary to defendant's contention, this is not a case where the claim expanded the allegations of malpractice committed by defendant or the injuries sustained by claimant (*cf. Legall v State of New York*, 10 Misc 3d 800, 803-804 [Ct Cl 2005]). We thus conclude that neither the notice of intent nor the claim violated section 11 (b), and therefore neither the notice of intent nor the claim are jurisdictionally defective.

Contrary to defendant's contention, the allegations made in a separate, pro se notice of intent filed by claimant related to a separate incident and injury that occurred months before this incident, and they do not render either the notice of intent or the claim jurisdictionally defective.

Based on the foregoing, we conclude that the court erred in granting defendant's cross motion for summary judgment dismissing the claim inasmuch as the notice of intent was timely and the notice of intent and the claim are not jurisdictionally defective, and that the court erred in denying that part of claimant's motion seeking leave to amend the claim pursuant to Court of Claims Act § 9 (8) to correct a nonjurisdictional defect (*see Cannon v State of New York*, 163 Misc 2d 623, 626 [Ct Cl 1994]). We also conclude that the court erred in denying that part of claimant's motion that sought dismissal of those affirmative defenses that were based on the alleged jurisdictional issues or the unrelated pro se notice of intent, to wit: the 3rd through 8th, 12th and 13th affirmative defenses. We further conclude that the court erred in denying that part of claimant's motion that sought dismissal of the 9th through 11th affirmative defenses inasmuch as the claim adequately particularized defendant's conduct (*see Matter of O'Shea v State of New York*, 36 AD3d 706, 706-707 [2d Dept 2007]; *Browne v State of New York*, 16 Misc 3d 902, 904 [Ct Cl 2007]), the location where the claim arose (*see e.g. Mosley*, 117 AD3d at 1418; *Rhodes v State of New York*, 245 AD2d 791, 792 [3d Dept 1997]), and the nature of the claim (*see O'Shea*, 36 AD3d at 706-707; *Browne*, 16 Misc 3d at 904).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

967

CA 19-00541

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

BEACON ESTATES, LLC, AND THE ESTATE OF
DANIEL P. CAPPA, SR., PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ANGELO INGRASSIA, 1612 RIDGE ROAD, LLC,
L.A. FITNESS INTERNATIONAL, LLC, AGREE
ROCHESTER NY, LLC, AND COUNTY OF MONROE
INDUSTRIAL DEVELOPMENT CORPORATION,
DEFENDANTS-RESPONDENTS.

MICHAEL STEINBERG, ROCHESTER, FOR PLAINTIFFS-APPELLANTS.

LECLAIR KORONA COLE LLP, ROCHESTER (JEREMY M. SHER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS ANGELO INGRASSIA AND 1612 RIDGE ROAD, LLC.

CULLEN AND DYKMAN LLP, GARDEN CITY (SCOTT D. GREENSPAN OF COUNSEL), FOR DEFENDANT-RESPONDENT L.A. FITNESS INTERNATIONAL, LLC.

GOLDBERG SEGALLA LLP, BUFFALO (MARC W. BROWN OF COUNSEL), FOR DEFENDANT-RESPONDENT AGREE ROCHESTER NY, LLC.

HARRIS BEACH PLLC, PITTSFORD (ANNA PATTON OF COUNSEL), FOR DEFENDANT-RESPONDENT COUNTY OF MONROE INDUSTRIAL DEVELOPMENT CORPORATION.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered November 7, 2018. The order and judgment, among other things, granted the motions of defendants Angelo Ingrassia, 1612 Ridge Road, LLC, L.A. Fitness International, LLC, and Agree Rochester NY, LLC, to dismiss plaintiffs' amended complaint and dismissed the amended complaint in its entirety.

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

Memorandum: Plaintiffs commenced this action seeking damages and declaratory relief associated with an agreement entered into in 2007 between decedent Daniel P. Cappa, Sr., as the sole member of plaintiff Beacon Estates, LLC (Beacon), and defendant Angelo Ingrassia, as the sole member of defendant 1612 Ridge Road, LLC. The instant action was commenced in 2017, and the amended complaint asserted causes of action sounding in, inter alia, breach of contract and fraud. Of particular

importance on this appeal, the fraud causes of action were based on, inter alia, the execution of a document in 2007 between Cappa and Ingrassia whereby a permanent easement that allowed access to Beacon's property by ingress and egress over property owned by 1612 Ridge Road, LLC was extinguished and replaced by a temporary easement. Plaintiffs alleged that Ingrassia misrepresented the contents of the 2007 document and exploited a personal relationship with Cappa to induce him into signing the 2007 document. Plaintiffs further alleged that, in October 2012, one of Cappa's sons accompanied Cappa to a meeting with Ingrassia, during which Ingrassia indicated that Cappa's easement was abandoned. Cappa questioned why the easement was abandoned, and Ingrassia told Cappa not to do anything until Ingrassia completed the sale of the property owned by 1612 Ridge Road, LLC. In 2013, 1612 Ridge Road, LLC sold its property to defendant Agree Rochester NY, LLC. Defendant L.A. Fitness International, LLC is a lessee of that property and operates a business thereon.

In separate motions, Ingrassia and 1612 Ridge Road, LLC, L.A. Fitness International, LLC, and Agree Rochester NY, LLC (collectively, defendants) moved to dismiss the amended complaint against them contending, inter alia, that it was time-barred (*see* CPLR 3211 [a] [5]). As limited by their brief, plaintiffs appeal from an order and judgment insofar as it granted defendants' motions with respect to the second, fourth, and fifth causes of action in the amended complaint, sounding in breach of contract and fraud. We affirm.

Contrary to plaintiffs' contention, Supreme Court properly granted defendants' motions with respect to the fraud causes of action. The statute of limitations for fraud is "the greater of six years from the date the cause of action accrued or two years from the time the plaintiff[s] . . . discovered the fraud, or could with reasonable diligence have discovered it" (CPLR 213 [8]; *see Boardman v Kennedy*, 105 AD3d 1375, 1376 [4th Dept 2013]; *Rite Aid Corp. v Grass*, 48 AD3d 363, 364 [1st Dept 2008]). Here, defendants established that the action was commenced more than six years from the dates of the alleged acts of fraud, thus "shifting the burden to plaintiffs to show that the two-year discovery exception applies" (*Brooks v AXA Advisors, LLC* [appeal No. 2], 104 AD3d 1178, 1180 [4th Dept 2013], *lv denied* 21 NY3d 858 [2013]). We conclude that the court properly determined that plaintiffs "possessed knowledge of facts from which they reasonably could have discovered the alleged fraud soon after it occurred, and in any event more than two years prior to the commencement of the action" (*id.*; *see CIFG Assur. N. Am., Inc. v Credit Suisse Sec. [USA] LLC*, 128 AD3d 607, 608 [1st Dept 2015], *lv denied* 27 NY3d 906 [2016]; *Boardman*, 105 AD3d at 1376).

We similarly reject plaintiffs' contention that the court erred in granting defendants' motions with respect to the breach of contract cause of action. That cause of action "accrued upon the alleged breach of contract by defendants, which occurred more than six years prior to the commencement of the action, regardless of whether the damage to plaintiffs was sustained later and plaintiffs were unaware of the breach at the time it occurred" (*Brooks*, 104 AD3d at 1180; *see* CPLR 213 [2]).

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

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

968

CA 19-00720

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

MATTHEW BALDAUF AND ERIN BALDAUF,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MICHAEL GAMBINO, DEFENDANT-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (CORY J. WEBER OF COUNSEL), FOR DEFENDANT-APPELLANT.

CONNORS LLP, BUFFALO (NICHOLAS A. ROMANO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered February 22, 2019. The order denied defendant's motion for summary judgment and granted plaintiffs' cross motion for partial summary judgment on the issue of negligence.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the cross motion and granting the motion in part and dismissing the complaint, as amplified by the amended bill of particulars, with respect to the 90/180-day category of serious injury within the meaning of Insurance Law § 5102 (d), and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Matthew Baldauf (plaintiff) when the vehicle that he was driving was rear-ended by a vehicle driven by defendant. In their complaint, as amplified by the amended bill of particulars, plaintiffs alleged that plaintiff sustained a serious injury within the meaning of Insurance Law § 5102 (d) under the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories. Defendant appeals from an order that denied his motion for summary judgment dismissing the complaint and granted plaintiffs' cross motion for partial summary judgment on the issue of negligence.

Initially, with respect to the 90/180-day category of serious injury, we conclude that defendant met his initial burden on his motion for summary judgment. "To qualify as a serious injury under the 90/180[-day] category, there must be objective evidence of a medically determined injury or impairment of a non-permanent nature . . . as well as evidence that plaintiff's activities were curtailed to a great extent" (*Zeigler v Ramadhan*, 5 AD3d 1080, 1081 [4th Dept 2004]

[internal quotation marks omitted]; *see Licari v Elliott*, 57 NY2d 230, 236 [1982]). Here, defendant properly relied on plaintiff's deposition testimony, which showed that plaintiff's daily activities were not significantly curtailed during the relevant time frame. Indeed, plaintiff testified that he did not miss any work due to the accident, and that after the accident his job duties did not change and his doctors did not recommend stopping work (*see Licari*, 57 NY2d at 233-234; *Kracker v O'Connor*, 158 AD3d 1324, 1325 [4th Dept 2018]; *Ehlers v Byrnes*, 147 AD3d 1465, 1466 [4th Dept 2017]). In response, plaintiffs did not raise an issue of fact (*see Pastuszynski v Lofaso*, 140 AD3d 1710, 1711 [4th Dept 2016]). We therefore modify the order accordingly.

We reject defendant's contention that Supreme Court erred in denying his motion with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury. In support of his motion, defendant submitted affirmed reports of medical experts who examined MRI scans of plaintiff's lumbar spine and detected the presence of degenerative disc disease. Inasmuch as defendant's medical experts "fail[ed] to account for evidence that plaintiff had no complaints of pain prior to the accident" (*Crane v Glover*, 151 AD3d 1841, 1842 [4th Dept 2017] [internal quotation marks omitted]; *see Thomas v Huh*, 115 AD3d 1225, 1226 [4th Dept 2014]; *Ashquabe v McConnell*, 46 AD3d 1419, 1419 [4th Dept 2007]), those reports did not satisfy defendant's initial burden with respect to causation because they did not establish that plaintiff's alleged injuries were preexisting (*see generally Clark v Perry*, 21 AD3d 1373, 1374 [4th Dept 2005]).

We also conclude that defendant failed to meet his initial burden with respect to the permanent consequential limitation of use and significant limitation of use categories because his own submissions in support of his motion raise triable issues of fact with respect to whether plaintiff's "alleged limitations and injuries are significant or consequential" (*Cuyler v Allstate Ins. Co.*, 175 AD3d 1053, 1054 [4th Dept 2019] [internal quotation marks omitted]; *see Monterro v Klein*, 160 AD3d 1459, 1460 [4th Dept 2018]; *Crane*, 151 AD3d at 1841-1842). In light of defendant's failure to meet his initial burden on the motion with respect to those categories of serious injury, there is no need to consider the sufficiency of plaintiffs' opposition to the motion on those issues (*see Summers v Spada*, 109 AD3d 1192, 1193 [4th Dept 2013]).

We reject defendant's contention that the court erred in denying his motion with respect to the issue of negligence, but we agree with defendant that the court should have denied plaintiffs' cross motion for partial summary judgment on that issue. We therefore further modify the order accordingly. Generally, "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" (*Barron v Northtown World Auto*, 137 AD3d 1708, 1709 [4th Dept 2016] [internal

quotation marks omitted]). However, the common-law emergency doctrine "recognizes that when an actor is faced with a sudden and unexpected circumstance . . . , the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context provided the actor has not created the emergency" (*Caristo v Sanzone*, 96 NY2d 172, 174 [2001] [internal quotation marks omitted]). "The existence of an emergency and the reasonableness of a driver's response thereto generally constitute issues of fact" (*Dalton v Lucas*, 96 AD3d 1648, 1649 [4th Dept 2012]).

Here, neither defendant nor plaintiffs are entitled to summary judgment on the issue of negligence because their own submissions "raised an issue of fact whether defendant was confronted with a sudden unanticipated and unforeseeable icing of the [road] surface which placed him in an emergency situation" (*id.*). There was conflicting deposition testimony about the road conditions and the weather on the day in question—i.e., whether the presence of black ice constituted a sudden and unexpected situation and whether defendant responded reasonably to that emergency. Ultimately, it is for the "jury to determine, inter alia, whether . . . defendant was faced with a sudden and unforseen emergency not of his own making" (*Youssef v Siringo*, 151 AD3d 911, 912 [2d Dept 2017]), and the reasonableness of defendant's response thereto (*see Dalton*, 96 AD3d at 1649-1650).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

976

TP 19-00995

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

IN THE MATTER OF JAMES LAGO, 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 May 21, 2019) to review a determination of respondent. The determination found after a tier III hearing that petitioner violated various inmate rules.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by annulling that part of the determination finding that petitioner violated inmate rule 102.10 (7 NYCRR 270.2 [B] [3] [i]) and as modified the determination is confirmed without costs and respondent is directed to expunge from petitioner's institutional record all references to the violation of that inmate rule.

Memorandum: Petitioner commenced this CPLR article 78 proceeding, transferred to this Court pursuant to CPLR 7804 (g), seeking to annul a determination, following a tier III disciplinary hearing, that he violated inmate rules 102.10 (7 NYCRR 270.2 [B] [3] [i] [threats]), 103.10 (7 NYCRR 270.2 [B] [4] [i] [extortion]), and 107.20 (7 NYCRR 270.2 [B] [8] [iii] [false statement]). As respondent correctly concedes, the determination that petitioner violated inmate rule 102.10 is not supported by substantial evidence. We therefore modify the determination by granting the petition in part and annulling that part of the determination finding that petitioner violated that rule, and we direct respondent to expunge from petitioner's institutional record all references thereto (*see Matter of Washington v Annucci*, 150 AD3d 1700, 1700-1701 [4th Dept 2017]). Inasmuch as petitioner has already served the penalty and there was no recommended loss of good time, there is no need to remit the matter to

respondent for reconsideration of the penalty (*see id.* at 1701). Contrary to petitioner's contention, the determination finding that he violated rules 103.10 and 107.20 is supported by substantial evidence (*see generally Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]; *People ex rel. Vega v Smith*, 66 NY2d 130, 139 [1985]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

977

KA 18-01555

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JASON M. CHILCOTE, DEFENDANT-APPELLANT.

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

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (LAURA T. JORDAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered July 2, 2018. The judgment convicted defendant, upon his plea of guilty, of petit larceny.

It is hereby ORDERED that said appeal is unanimously dismissed as moot (*see People v Griffin*, 239 AD2d 936, 936 [4th Dept 1997]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

979

KA 17-00967

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JAVON P., DEFENDANT-APPELLANT.

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

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

Appeal from an adjudication of the Onondaga County Court (Thomas J. Miller, J.), rendered March 6, 2017. Defendant was adjudicated a youthful offender upon his plea of guilty to burglary in the second degree (two counts).

It is hereby ORDERED that said appeal is unanimously dismissed as moot (*see People v Griffin*, 239 AD2d 936, 936 [4th Dept 1997]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

980

KA 17-00612

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARCUS ST DENIS, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Ontario County (Craig J. Doran, J.), rendered December 5, 2016. The judgment convicted defendant upon his plea of guilty of attempted assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea and waiver of indictment are vacated, the superior court information is dismissed, and the matter is remitted to Supreme Court, Ontario County, for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [7]), defendant contends that his waiver of indictment is jurisdictionally defective because it does not contain the "approximate time" of the offense (CPL 195.20). We agree. A jurisdictionally valid waiver of indictment must contain, inter alia, the "approximate time" of each offense charged in the superior court information (SCI) (*id.*; *see People v Vaughn*, 173 AD3d 1260, 1261 [3d Dept 2019]; *People v Busch-Scardino*, 166 AD3d 1314, 1315-1316 [3d Dept 2018]; *see also People v Edwards*, 171 AD3d 1402, 1403 [3d Dept 2019]). That requirement is strictly enforced (*see People v Colon-Colon*, 169 AD3d 187, 192 [4th Dept 2019], *lv denied* 33 NY3d 975 [2019]). " '[S]ubstantial compliance will not be tolerated' " (*id.* at 191). Here, the waiver of indictment does not contain the approximate time of the offense (*see Vaughn*, 173 AD3d at 1261). Inasmuch as the SCI also does not contain that information, we need not consider whether to adopt the so-called "single document" rule (*Busch-Scardino*, 166 AD3d at 1315; *see generally People v Lamoni*, 230 AD2d 628, 629 [1st Dept 1996], *lv denied* 89 NY2d 925 [1996]). We therefore reverse the judgment, vacate the plea and waiver of indictment, and dismiss the

SCI (*see Colon-Colon*, 169 AD3d at 193-194).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

981

KA 18-00444

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered October 25, 2017. 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 third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, that part of the omnibus motion seeking to suppress physical evidence and statements relating to the third and fourth counts of the indictment is granted, the third and fourth counts of the indictment are dismissed, and the matter is remitted to Erie County Court 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]) and criminal possession of a controlled substance in the third degree (§ 220.16 [12]). The conviction of criminal possession of a weapon in the second degree arises from a police encounter during which an officer received information from an anonymous 911 call that drugs were being sold out of a vehicle. The officer arrived on the scene and observed a legally parked vehicle matching the description given by the anonymous caller and further observed defendant in a fully reclined position in the driver's seat. The officer parked his patrol car alongside defendant's vehicle in such a manner as to prevent defendant from driving away and, as the People stipulated in their post-hearing memorandum, the officer thereby effectively seized the vehicle. We agree with defendant that the police lacked reasonable suspicion to justify the initial seizure, and thus County Court erred in refusing to suppress both the tangible property seized, i.e., the weapon and marihuana found in the vehicle, and the statements defendant made to the police at the time of his arrest (*see People v Jennings*, 45 NY2d 998, 999 [1978]; *People v Suttles*, 171 AD3d 1454,

1455 [4th Dept 2019]; *People v Layou*, 71 AD3d 1382, 1383 [4th Dept 2010]; *cf. People v Cintron*, 125 AD3d 1333, 1334 [4th Dept 2015], *lv denied* 25 NY3d 1071 [2015]). Based on the anonymous tip and defendant's otherwise innocuous behavior (*see generally People v De Bour*, 40 NY2d 210, 216 [1976]; *People v Riddick*, 70 AD3d 1421, 1422 [4th Dept 2010], *lv denied* 14 NY3d 844 [2010]), the officer had, at most, a "founded suspicion that criminal activity [was] afoot," which permitted him to approach the vehicle and make a common-law inquiry of its occupants (*People v Moore*, 6 NY3d 496, 498 [2006]). The officer did not make any "confirmatory observations" of the criminal behavior reported by the 911 caller (*People v Argyris*, 24 NY3d 1138, 1140 [2014], *rearg denied* 24 NY3d 1211 [2015], *cert denied* — US —, 136 S Ct 793 [2016]) and therefore did not have "a reasonable suspicion that [defendant] was involved in a felony or misdemeanor" to justify the seizure (*Moore*, 6 NY3d at 499; *see also Layou*, 71 AD3d at 1383-1384). "[B]ecause our determination results in the suppression of all evidence in support of the crimes charged" in counts three and four of the indictment, those counts must be dismissed (*People v Lee*, 110 AD3d 1482, 1484 [4th Dept 2013] [internal quotation marks omitted]; *see People v Tisdale*, 140 AD3d 1759, 1761 [4th Dept 2016]; *see generally People v Finch*, 137 AD3d 1653, 1655 [4th Dept 2016]). Further, although defendant's conviction of criminal possession of a controlled substance in the third degree arises from a separate search of defendant's home, the validity of which is not challenged on appeal, his plea of guilty "was expressly conditioned on the negotiated agreement that [he] would receive concurrent sentences on the separate counts to which he pleaded," and thus the plea must be vacated in its entirety (*People v Clark*, 45 NY2d 432, 440 [1978], *rearg denied* 45 NY2d 839 [1978]; *see People v Massey* [appeal No. 1], 112 AD2d 731, 731 [4th Dept 1985]). We therefore reverse the judgment, vacate the plea, grant that part of defendant's omnibus motion seeking to suppress the weapon, marihuana, and defendant's statements relating to the third and fourth counts of the indictment, dismiss the third and fourth counts, and remit the matter to County Court for further proceedings on the remaining counts.

Defendant's challenge to the purported agreement to forfeit the $787 recovered during the search of his vehicle is not properly before this Court because "the record does not establish that the forfeiture agreement was made a part of the judgment of conviction" (*People v Anderson*, 138 AD3d 876, 876 [2d Dept 2016]; *see People v Abruzzese*, 30 AD3d 219, 220 [1st Dept 2006], *lv denied* 7 NY3d 784 [2006]; *cf. People v Detres-Perez*, 127 AD3d 535, 535-536 [1st Dept 2015], *lv denied* 25 NY3d 1162 [2015]; *see generally* Penal Law § 60.30). Instead, any forfeiture "was based on an attempted settlement of a potential, separate civil proceeding, which would be governed by the CPLR" (*Anderson*, 138 AD3d at 876; *see* CPLR 1311 [1]; *see generally Matter of James v Cattaraugus County*, 101 AD3d 1674, 1674-1675 [4th Dept 2012]).

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

remaining contentions.

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

982

CAF 18-01204

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

IN THE MATTER OF DESTINY S., ASHLEY L.W.W., AND ADAM M.W.

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

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

AMY W., RESPONDENT-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR RESPONDENT-APPELLANT.

STEPHEN J. RILEY, OLEAN, FOR PETITIONER-RESPONDENT.

AUDREY ROSE HERMAN, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Cattaraugus County (Michael J. Sullivan, A.J.), entered June 7, 2018 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: Respondent mother appeals from an order terminating her parental rights with respect to the three subject children on the grounds of mental illness and intellectual disability (*see* Social Services Law § 384-b [4] [c]). Although the petitions here did not allege mental illness as a ground for termination of the mother's parental rights, the mother "did not object to the evidence relating to that ground" (*Matter of Tiffany M. [Jolanda M.]*, 88 AD3d 1299, 1299 [4th Dept 2011], *lv denied* 18 NY3d 803 [2012]), and we thus conclude that, contrary to the mother's contention, Family Court did not err in sua sponte conforming the petitions to the proof (*see Matter of Angel L.H. [Melissa H.]*, 85 AD3d 1637, 1637 [4th Dept 2011], *lv denied* 17 NY3d 711 [2011]; *Matter of A.G.*, 253 AD2d 318, 320-321 [1st Dept 1999]; *see also Tiffany M.*, 88 AD3d at 1299; *see generally* Family Ct Act § 1051 [b]).

We have reviewed the mother's remaining contentions and conclude that none warrants modification or reversal of the order.

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

984

CAF 18-00723

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

IN THE MATTER OF HEATHER SHELLEY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

VINCENT TESTA, RESPONDENT-RESPONDENT,
AND LISA BELL, RESPONDENT-APPELLANT.

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

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER (CHRISTOPHER J. LATTUCA OF COUNSEL), FOR PETITIONER-RESPONDENT.

BETH A. LOCKHART, NORTH SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Salvatore Pavone, R.), entered March 30, 2018 in a proceeding pursuant to Family Court Act article 6. The order 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.

Memorandum: Respondents are the biological parents of a child, and petitioner is the father's ex-girlfriend. Petitioner commenced this proceeding seeking custody of respondents' child. Family Court granted the petition and awarded the mother supervised visitation. The mother appeals. We affirm.

Contrary to the mother's contention, petitioner established the "extraordinary circumstances" necessary to warrant an inquiry into whether an award of custody to a nonparent was in the child's best interests (*Matter of Howard v McLoughlin*, 64 AD3d 1147, 1147 [4th Dept 2009]; *see also Matter of Debra SS. v Brian TT.*, 163 AD3d 1199, 1200-1202 [3d Dept 2018]; *Matter of Komenda v Dininny*, 115 AD3d 1349, 1350 [4th Dept 2014]; *Matter of Barnes v Evans*, 79 AD3d 1723, 1723-1724 [4th Dept 2010], *lv denied* 16 NY3d 711 [2011]). Contrary to the mother's further contention, the court properly determined that the child's best interests were served by awarding petitioner custody (*see Matter of Evelyn EE. v Ayesha FF.*, 143 AD3d 1120, 1128 [3d Dept 2016], *lv denied* 28 NY3d 913 [2017]; *Matter of Wilson v Hayward*, 128 AD3d 1475, 1477 [4th Dept 2015], *lv denied* 26 NY3d 909 [2015]; *see also Matter of Tennant v Philpot*, 77 AD3d 1086, 1089 [3d Dept 2010]).

Finally, although the better practice here would have been to set a specific and definitive schedule for the supervised visitation between the mother and child (*see Matter of Edmonds v Lewis*, 175 AD3d 1040, 1043 [4th Dept 2019]), we decline to remit the matter to Family Court to fashion such a schedule given the unique circumstances of this case, which include the mother's abandonment of a subsequent petition and her failure to avail herself of the visitation afforded her.

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

985

CAF 18-01905

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

IN THE MATTER OF TATYANA SOKOL SHILO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

LEONID SHILO, RESPONDENT-RESPONDENT.

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

C. LOUIS ABELOVE, UTICA, FOR RESPONDENT-RESPONDENT.

JESSICA REYNOLDS-AMUSO, CLINTON, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Oneida County (Julia M. Brouillette, R.), entered August 20, 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 Family Court Act article 6 proceeding, petitioner appeals from an order dismissing her petition seeking permission to relocate to South Carolina with the subject children. While this appeal was pending, Family Court entered an order upon consent of the parties that modified the custody and visitation arrangement. That order renders the appeal moot, and the exception to the mootness doctrine does not apply (*see Matter of Thomas v Thomas*, 151 AD3d 1919, 1920 [4th Dept 2017]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

987

CAF 18-01012

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

IN THE MATTER OF DESIRAE C. HEINSLER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ROSEMARIE SERO, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

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

JACQUELINE M. GRASSO, BATAVIA, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered May 24, 2018 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is reinstated, and the matter is remitted to Family Court, Genesee County, for further proceedings in accordance with the following memorandum: In these consolidated appeals, petitioner mother appeals from two orders that dismissed her petitions seeking to modify a prior stipulated order granting respondent great aunt custody of the mother's three children. Inasmuch as there has been a prior judicial determination of extraordinary circumstances supporting the award of custody to respondent, "the appropriate standard in addressing the possible modification of the prior order is whether there has been a change of circumstances" warranting an inquiry whether modification of custody or visitation is in the best interests of the children (*Matter of Guinta v Doxtator*, 20 AD3d 47, 51 [4th Dept 2005]). We agree with the mother that Family Court erred in granting respondent's motion to dismiss the petitions at the close of the mother's case on the ground that the mother failed to establish a sufficient change in circumstances since entry of the stipulated order (*see Matter of McClinton v Kirkman*, 132 AD3d 1245, 1245-1246 [4th Dept 2015]; *cf. Matter of Mathewson v Sessler*, 94 AD3d 1487, 1489 [4th Dept 2012], *lv denied* 19 NY3d 815 [2012]; *see also Matter of Amy L.M. v Kevin M.M.*, 31 AD3d 1224, 1225 [4th Dept 2006]). At the time the prior order of custody and visitation was entered, the mother did not have a vehicle or employment, and she lived with a man who was prohibited by court order from having any contact with the subject children. The mother established that, at the time of the hearing, she owned a car, worked full-time, and no longer lived with or had a relationship with the aforementioned man. Indeed, in its oral decision dismissing the

petitions, the court noted that the mother had "improved" herself and that it was "impressed" with her progress. Based on the foregoing, we conclude that the mother "met [her] burden of demonstrating a sufficient change in circumstances to require consideration of the welfare of the child[en]" (*McClinton*, 132 AD3d at 1246 [internal quotation marks omitted]).

Where the record is sufficient to make our own best interests determination, this Court "will do so in 'the interests of judicial economy and the well-being of the child[ren]' " (*Matter of Cole v Nofri*, 107 AD3d 1510, 1512 [4th Dept 2013], *appeal dismissed* 22 NY3d 1083 [2014]). Here, however, the court dismissed the petitions before respondent testified or offered any evidence and, thus, we do not have "an adequate record upon which to make our own determination in the interest of judicial economy" (*McClinton*, 132 AD3d at 1246; *cf. Matter of Maher v Maher*, 1 AD3d 987, 988 [4th Dept 2003]; *see generally Matter of Austin v Austin*, 254 AD2d 703, 703-704 [4th Dept 1998]). We therefore reverse the orders, reinstate the petitions and remit the matters to Family Court for a new hearing to determine whether the modifications sought by the mother in her petitions are in the children's best interests.

Based on our determination, we do not address the mother's remaining contention regarding custody and visitation.

The mother further contends that she established that respondent had violated the prior order of custody and visitation. That contention is " 'beyond our review' " inasmuch as the mother did not appeal from the order dismissing the violation petitions (*Matter of Carroll v Chugg*, 141 AD3d 1106, 1106 [4th Dept 2016]). In any event, the mother stipulated to the order dismissing those petitions, and it is well settled that "no appeal lies from an order entered upon the parties' consent" (*Matter of Fox v Coleman*, 93 AD3d 1187, 1187 [4th Dept 2012]; *see Matter of Adney v Morton*, 68 AD3d 1742, 1742 [4th Dept 2009]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

988

CAF 18-01013

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

IN THE MATTER OF DESIRAE C. HEINSLER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ROSEMARIE SERO, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

JACQUELINE M. GRASSO, BATAVIA, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered May 24, 2018 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is reinstated, and the matter is remitted to Family Court, Genesee County, for further proceedings in accordance with the same memorandum as in *Matter of Heinsler v Sero* ([appeal No. 1] — AD3d — [Nov. 8, 2019] [4th Dept 2019]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

990

TP 19-00835

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

IN THE MATTER OF DENISE CHILSON-CLINE, PETITIONER,

V MEMORANDUM AND ORDER

SHEILA J. POOLE, ACTING COMMISSIONER, NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, AND EILEEN TIBERIO, COMMISSIONER, ONTARIO COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENTS.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (PATRICK A. WOODS OF COUNSEL), FOR RESPONDENT SHEILA J. POOLE, ACTING COMMISSIONER, NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES.

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, Ontario County [Craig J. Doran, J.], dated May 1, 2019) to review a determination of the New York State Office of Children and Family Services. The determination denied petitioner's request that an indicated report maintained in the New York State Central Register of Child Abuse and Maltreatment be amended to unfounded.

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 to annul a determination, made after a fair hearing, denying her request to amend to unfounded an indicated report of child maltreatment and to seal that report. Contrary to petitioner's contention, the determination that she maltreated the subject children and that such maltreatment was relevant and reasonably related to employment in the childcare field is rational (*see Matter of Natasha W. v New York State Off. of Children & Family Servs.*, 32 NY3d 982, 984 [2018]) and supported by substantial evidence (*see Matter of Lauren v New York State Off. of Children & Family Servs.*, 147 AD3d 1322, 1322-1323 [4th Dept 2017]). We therefore confirm the determination and dismiss the petition.

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

994

CA 19-00268

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

ALLISON JACOBSON, PLAINTIFF-APPELLANT,

V ORDER

EDWARD C. PURDUE, NEW SOUTH INSURANCE COMPANY
AND NATIONAL GENERAL INSURANCE,
DEFENDANTS-RESPONDENTS.

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

ROE & ASSOCIATES, WILLIAMSVILLE (ROBERT E. GALLAGHER, JR., OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Ontario County (Craig J. Doran, J.), entered August 23, 2018. The order and judgment, insofar as appealed from, denied plaintiff's claim for damages resulting from the diminution in value of her vehicle.

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

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

996

CA 19-00921

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

THOMAS H. O'NEILL, JR., PLAINTIFF-RESPONDENT,

V ORDER

ROSE R. O'NEILL, DEFENDANT-APPELLANT.

REICH/EMERSON LLP, BUFFALO (SHARI JO REICH OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES P. RENDA, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered March 19, 2019 in a divorce action. The order denied defendant's motion to enlarge the record on appeal.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 11, 2019,

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

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1001

KA 18-01410

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEREMIAH MANN, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (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: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). To the extent that defendant contends that County Court erred in assessing points under risk factor three (number of victims), risk factor five (age of victim), and risk factor seven (relationship with victim), we reject that contention. The People established by the requisite clear and convincing evidence that defendant's crime involved three or more victims, that the victims were aged 10 and under, and that defendant was a stranger to the victims, and accordingly the court properly assessed defendant points under those risk factors (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 10-12 [2006] [Guidelines]; *People v Johnson*, 11 NY3d 416, 419 [2008]; *see generally* Correction Law § 168-n [3]).

We also reject defendant's contention that the court erred in denying his request for a downward departure to a level one risk. Defendant failed to prove, by a preponderance of the evidence, a "mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines" (Guidelines at 4; *see generally People v Loughlin*, 145 AD3d 1426, 1428 [4th Dept 2016], *lv denied* 29 NY3d 906 [2017]; *People v Wooten*, 136 AD3d 1305, 1306 [4th Dept 2016]). Contrary to defendant's contention, his acceptance of responsibility, lack of criminal history, and engagement in sex

offender treatment were adequately taken into account in assessing his presumptive risk level (*see People v Davis*, 170 AD3d 1519, 1519-1520 [4th Dept 2019], *lv denied* 33 NY3d 907 [2019]; *see also People v Jewell*, 119 AD3d 1446, 1448-1449 [4th Dept 2014], *lv denied* 24 NY3d 905 [2014]). Although an offender's response to sex offender treatment, if exceptional, may provide a basis for a downward departure (*see People v Rivera*, 144 AD3d 1595, 1596 [4th Dept 2016], *lv denied* 28 NY3d 915 [2017]), defendant failed to meet his burden of proving by a preponderance of the evidence that his response to treatment was exceptional.

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1002

KA 19-00082

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL D. COUTURIER, DEFENDANT-APPELLANT.

CHARLES A. MARANGOLA, MORAVIA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered November 27, 2018. The judgment convicted defendant upon his plea of guilty of arson in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of arson in the fourth degree (Penal Law § 150.05 [1]), defendant contends that County Court erred in failing to warn defendant during the plea proceeding that it could impose an enhanced sentence if he was arrested on new charges while awaiting sentencing. Defendant failed to move to withdraw the plea or to vacate the judgment of conviction on that ground and thus has failed to preserve his contention for our review (*see People v Fortner*, 23 AD3d 1058, 1058 [4th Dept 2005]; *People v Sundown*, 305 AD2d 1075, 1076 [4th Dept 2003]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). We further conclude that the court did not abuse its discretion in refusing to grant defendant youthful offender status, and we decline to exercise our interest of justice jurisdiction to adjudicate defendant a youthful offender (*see People v Quinones*, 160 AD3d 1441, 1441 [4th Dept 2018], *lv denied* 31 NY3d 1152 [2018]; *People v Parmelee*, 184 AD2d 534, 535 [2d Dept 1992]). Contrary to defendant's remaining contention, the enhanced sentence is not unduly harsh or severe.

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1004

KA 17-01203

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESSICA D. HUBER, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON 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 May 2, 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.

Memorandum: Defendant appeals from an order determining that she is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). We reject defendant's contention that County Court abused its discretion in granting the People's request for an upward departure to a level two risk. "It is well settled that a court may grant an upward departure from a sex offender's presumptive risk level when the People establish, by clear and convincing evidence . . . , the existence of an aggravating . . . factor of a kind, or to a degree, that is otherwise not adequately taken into account by the [risk assessment] guidelines" (*People v Cardinale*, 160 AD3d 1490, 1490-1491 [4th Dept 2018] [internal quotation marks omitted]). Here, we conclude that the court properly granted the People's request for an upward departure based on clear and convincing evidence of certain aggravating factors, including that defendant has mental health issues that are causally related to her risk of recidivism (*see People v Collins*, 104 AD3d 1220, 1221 [4th Dept 2013], *lv denied* 21 NY3d 855 [2013]; *People v Abraham*, 39 AD3d 1208, 1209 [4th Dept 2007]; *cf. People v Robinson*, 160 AD3d 1441, 1442 [4th Dept 2018]), particularly her diagnosis of hypersexuality (*see Collins*, 104 AD3d at 1221; *see also People v Tatner*, 149 AD3d 1595, 1595 [4th Dept 2017], *lv denied* 21 NY3d 916 [2017]). We have considered defendant's remaining contention and conclude that it does

not require reversal or modification of the order.

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1009

CA 19-00579

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

IN THE MATTER OF ARBITRATION BETWEEN ZAIR FISHKIN, M.D., AS ASSIGNEE OF TROY HODGE, PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

ALLSTATE INSURANCE COMPANY, RESPONDENT-APPELLANT.

LAW OFFICE OF PETER C. MERANI, P.C., NEW YORK CITY (KAREN MCCLOSKEY OF COUNSEL), FOR RESPONDENT-APPELLANT.

THE WRIGHT LAW FIRM, LLC, ROCHESTER (RON F. WRIGHT OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered November 27, 2018 in a proceeding pursuant to CPLR article 75. The order, inter alia, granted the petition to vacate the award of the master arbitrator.

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

Memorandum: This case arises from injuries that Troy Hodge sustained when a motor vehicle struck him while he rode a bicycle. Petitioner thereafter performed surgery on Hodge, who assigned his no-fault insurance claims to petitioner. Respondent, Hodge's no-fault insurance carrier, denied petitioner's claims for the cost of the surgery on the ground that the surgery was not medically necessary. Petitioner subsequently submitted the matter for arbitration. An initial arbitrator rendered an award in favor of petitioner, but respondent sought review from a master arbitrator, who vacated the award of the initial arbitrator and issued an award in favor of respondent. In this CPLR article 75 proceeding to review the determination of the master arbitrator, respondent appeals from an order that granted the petition, vacated the award of the master arbitrator, confirmed the award of the initial arbitrator, and denied the cross petition to confirm the master arbitrator's award. We affirm.

It is well settled that "[t]he 'role of the master arbitrator is to review the determination of the arbitrator to assure that the arbitrator reached his [or her] decision in a rational manner, that the decision was not arbitrary and capricious . . . , incorrect as a matter of law . . . , in excess of the policy limits . . . or in

conflict with other designated no-fault arbitration proceedings' (*Matter of Petrofsky [Allstate Ins. Co.]*, 54 NY2d 207, 212 [1981]). This power 'does not include the power to review, de novo, the matter originally presented to the arbitrator' " (*Matter of Progressive Cas. Ins. Co. [Elite Med. Supply of N.Y., LLC]*, 162 AD3d 1471, 1472 [4th Dept 2018]). Here, we agree with petitioner that the master arbitrator impermissibly performed a de novo review of the medical evidence, and thus clearly exceeded his powers. The initial arbitrator concluded that respondent failed to meet its burden of submitting a peer review report setting forth a medical rationale for denying the claim, inasmuch as the peer review report submitted by respondent was conclusory, failed to set forth appropriate medical standards and failed to address the specifics of the case. Contrary to respondent's contention, the master arbitrator did not conclude that the arbitrator's determination was incorrect as a matter of law. To the contrary, the master arbitrator reviewed the evidence de novo and concluded that the peer review report submitted by respondent "appears rational." Thus, contrary to respondent's contention, Supreme Court properly determined that the master arbitrator exceeded his authority (*see generally Matter of Allstate Ins. Co. v Keegan*, 201 AD2d 724, 725 [2d Dept 1994]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1015

KA 17-01057

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERICA DAVIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered April 7, 2017. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree, criminal possession of a weapon in the second degree, assault in the first degree and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her, following a jury trial, of robbery in the first degree (Penal Law § 160.15 [4]), criminal possession of a weapon in the second degree (§ 265.03 [3]), assault in the first degree (§ 120.10 [4]), and assault in the second degree (§ 120.05 [6]), under a theory of accomplice liability (*see* § 20.00). Defendant contends that Supreme Court erred in admitting evidence of a jail telephone call defendant received from her codefendant during which defendant and the codefendant said "I love you" to each other. Initially, we note that the phone call does not constitute a prior bad act or a prior uncharged crime and thus is not *Molineux* evidence (*see generally People v Flowers*, 166 AD3d 1492, 1494 [4th Dept 2018], *lv denied* 32 NY3d 1125 [2018]; *People v Failing*, 129 AD3d 1677, 1678 [4th Dept 2015], *lv denied* 26 NY3d 967 [2015]). Moreover, the court properly exercised its discretion in admitting the evidence, which was relevant because it "tended to establish that defendant and the codefendant were acquaintances, since persons are more likely to commit crimes with acquaintances than strangers" (*People v Scarver*, 121 AD3d 1539, 1541 [4th Dept 2014], *lv denied* 24 NY3d 1123 [2015] [internal quotation marks omitted]; *see People v Berry*, 267 AD2d 102, 102 [1st Dept 1999], *lv denied* 95 NY2d 793 [2000]; *see also People v Martinez*, 95 AD3d 677, 678 [1st Dept 2012], *affd* 22 NY3d 551 [2014]).

Defendant further contends that the evidence is legally insufficient to support the conviction because the People failed to establish that she acted with the requisite intent for accomplice liability. We reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Whether an accessory shares the intent of a principal actor may be established by circumstantial evidence (*see People v Ozarowski*, 38 NY2d 481, 489 [1976]*; People v Zuhlke*, 67 AD3d 1341, 1341 [4th Dept 2009], *lv denied* 14 NY3d 774 [2010]). Here, the evidence at trial established that defendant arranged to purchase $300 worth of marihuana from one of the victims, whom she had known for 10 years. She arrived at the agreed-upon location for the sale without enough money to complete the sale. As she entered the victim's car to inspect the marihuana, defendant appeared to be talking on her phone to someone who could get her the necessary funds, but cell phone records admitted in evidence at trial indicated that she had not actually been talking to anyone during that purported call. The codefendant entered the car shortly thereafter and pointed a gun at the victims. The codefendant never pointed the gun at defendant; moreover, he permitted defendant to leave the vehicle with the marihuana. The codefendant shot both victims as he and one of the victims struggled over the gun. Prior to trial, the victims identified the codefendant as the shooter from Facebook photographs obtained from defendant's Facebook page; they also identified the codefendant at trial. Recorded jail telephone calls establish that defendant and the codefendant were in contact after the robbery and were acquaintances. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to establish defendant's liability as an accomplice inasmuch as there is " 'a valid line of reasoning and permissible inferences from which a rational jury' " could have found that defendant intentionally aided another in the conduct constituting the offenses while acting with the mental culpability required for the commission of the crimes (*People v Danielson*, 9 NY3d 342, 349 [2007]; *see* Penal Law § 20.00; *see generally Bleakley*, 69 NY2d at 495).

Finally, to the extent that defendant contends that the verdict is against the weight of the evidence, viewing the evidence in light of the elements of the crimes as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that, although an acquittal would not have been unreasonable, the verdict is not against the weight of the evidence (*see Bleakley*, 69 NY2d at 495).

Entered: November 8, 2019 Mark W. Bennett
Clerk of the Court

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

1020

KA 18-01032

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KIM BRADLEY, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (THERESA L. PREZIOSO OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (MARY-JEAN BOWMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara Sheldon, J.), rendered July 6, 2016. The judgment convicted defendant, upon his plea of guilty, of assault 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 assault in the second degree (Penal Law § 120.05 [2]), defendant contends that his waiver of the right to appeal is not valid, and he challenges the severity of the sentence. While defendant's written waiver of the right to appeal does not establish a valid waiver because County Court "did not inquire of defendant whether he understood the written waiver or whether he had even read the waiver before signing it" (*People v Bradshaw*, 18 NY3d 257, 262 [2011]; *see People v Grucza*, 145 AD3d 1505, 1506 [4th Dept 2016]), we nonetheless conclude that defendant validly waived his right to appeal inasmuch as the record establishes that the 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 Rodriguez*, 93 AD3d 1334, 1335 [4th Dept 2012], *lv denied* 19 NY3d 966 [2012] [internal quotation marks omitted]; *see People v Lopez*, 6 NY3d 248, 256 [2006]). Defendant's valid waiver of the right to appeal does not encompass the challenge to the severity of the sentence, however, because the court did not advise defendant, at the time of his plea, of the potential term of incarceration that he would face if he were sentenced as a youthful offender (*see People v Leiser*, 124 AD3d 1349, 1350 [4th Dept 2015]; *People v Eron*, 79 AD3d 1774, 1775 [4th Dept 2010]). Nevertheless, on the merits, we conclude that the sentence is not unduly harsh or severe. We further note that "[t]he valid waiver of the right to appeal . . . forecloses review of defendant's request that we exercise our interest of justice jurisdiction to adjudicate

him a youthful offender" (*People v Allen*, 174 AD3d 1456, 1458 [4th Dept 2019]; *see People v Torres*, 110 AD3d 1119, 1119 [3d Dept 2013], *lv denied* 22 NY3d 1044 [2013]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1021

KA 17-01347

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN JIMENEZ, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ERIN P. KULESUS 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 30, 2017. The judgment convicted defendant upon his plea of guilty of attempted arson in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted arson in the second degree (Penal Law §§ 110.00, 150.15), defendant contends that his waiver of the right to appeal is invalid. We reject that contention. The colloquy established that defendant knowingly, intelligently, and voluntarily waived his right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]; *People v Ripley*, 94 AD3d 1554, 1554 [4th Dept 2012], *lv denied* 19 NY3d 976 [2012]; *People v Richards*, 93 AD3d 1240, 1240 [4th Dept 2012], *lv denied* 20 NY3d 1014 [2013]), and the record belies his contention that, although aided by an interpreter, he was unable to understand the proceedings (*see generally People v Brown*, 151 AD3d 1951, 1952 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017]). Defendant's valid waiver of the right to appeal forecloses his challenge to the severity of his sentence (*see People v Carr*, 147 AD3d 1506, 1506 [4th Dept 2017], *lv denied* 29 NY3d 1030 [2017]; *People v Bryan*, 78 AD3d 1692, 1693 [4th Dept 2010], *lv denied* 16 NY3d 829 [2011]).

Defendant failed to preserve for our review his further contention that his plea was not voluntarily, knowingly, or intelligently entered inasmuch as he did not move to withdraw his plea or to vacate the judgment of conviction pursuant to CPL article 440 (*see People v Sheppard*, 149 AD3d 1569, 1569 [4th Dept 2017], *lv denied* 29 NY3d 1133 [2017]; *People v Nieves*, 299 AD2d 888, 888-889 [4th Dept

2002], *lv denied* 99 NY2d 631 [2003]). Contrary to defendant's contention, this case does not fall within the rare exception to the preservation doctrine inasmuch as defendant made no statement during the plea colloquy or at sentencing that "cast[] significant doubt upon [his] guilt or otherwise call[ed] into question the voluntariness of the plea" (*People v Lopez*, 71 NY2d 662, 666 [1988]; *see People v Stutzman*, 158 AD3d 1294, 1295 [4th Dept 2018], *lv denied* 31 NY3d 1122 [2018]). To the extent that defendant concedes that he did not make such a statement and instead contends that County Court erred in failing sua sponte to inquire into a possible defense to the crime, that contention is "actually a challenge to the factual sufficiency of the plea allocution, and it is well settled that defendant's valid waiver of the right to appeal encompasses that challenge" (*People v Arney*, 120 AD3d 949, 949-950 [4th Dept 2014]; *see People v Zimmerman*, 100 AD3d 1360, 1361 [4th Dept 2012], *lv denied* 20 NY3d 1015 [2013]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1022

KAH 18-01879

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
BARRY ARKIM, ALSO KNOWN AS EDWARD MASON,
PETITIONER-APPELLANT,

V ORDER

JOSEPH NOETH, SUPERINTENDENT, ATTICA CORRECTIONAL
FACILITY, RESPONDENT-RESPONDENT.

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

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (M. William Boller, A.J.), entered July 31, 2018 in a habeas corpus proceeding. The judgment, inter alia, denied the petition.

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

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1023

KAH 17-01859

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
JAMES PEARCE, PETITIONER-APPELLANT,

V ORDER

STEWART T. ECKERT, SUPERINTENDENT, WENDE
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

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

JAMES PEARCE, PETITIONER-APPELLANT PRO SE.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), entered July 19, 2017 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 (*see People ex rel. Williams v Sheahan*, 145 AD3d 1517, 1517-1518 [4th Dept 2016], *lv denied* 29 NY3d 908 [2017]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1027

CA 19-00959

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

ALLY FINANCIAL INC., PLAINTIFF-RESPONDENT,

V ORDER

KEIRSHAE A. PENNICK, DEFENDANT-APPELLANT.

WESTERN NEW YORK LAW CENTER, BUFFALO (MATTHEW A. PARHAM OF COUNSEL), FOR DEFENDANT-APPELLANT.

KIRSCHENBAUM & PHILLIPS, LLP, FARMINGDALE (LOVE AHUJA OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Erie County Court (Michael F. Pietruszka, J.), dated August 22, 2018. The order affirmed a judgment of the Buffalo City Court.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on June 25, 2019,

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

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1028

CA 19-00828

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

DANIELLE H., INDIVIDUALLY, AND AS PARENT AND
NATURAL GUARDIAN OF C.H., AN INFANT,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOSEPH MANNARINO, DEFENDANT,
ANTIQUE WORLD & FLEA MARKET, ANTIQUE WORLD, LLC,
AND KELLY SCHULTZ, DEFENDANTS-RESPONDENTS.

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

GERBER CIANO KELLY BRADY LLP, BUFFALO (BRIAN R. BIGGIE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered April 29, 2019. The order granted the motion of defendants Antique World & Flea Market, Antique World, LLC, and Kelly Schultz for summary judgment dismissing the complaint against them.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries sustained by her son when he was struck by a vehicle at a flea market owned and operated by defendants-respondents (defendants). Plaintiff appeals from an order granting defendants' motion for summary judgment dismissing the complaint against them on the ground that their conduct was not, as a matter of law, a proximate cause of the accident. We reverse.

Even assuming, arguendo, that defendants met their initial burden on the motion, we agree with plaintiff that she raised a triable issue of fact with respect to proximate cause, specifically whether defendants' alleged failure to enforce their policy regarding the authorized proximity of goods for sale to the roadway or defendants' alleged failure to deploy orange cones to prevent vehicles from entering the roadway constituted a proximate cause of the accident (*see Pineiro v Rush*, 163 AD3d 1097, 1098-1099 [3d Dept 2018]; *see generally Turturro v City of New York*, 28 NY3d 469, 483-484 [2016]). We do not address plaintiff's contentions regarding the potential

existence and breach of defendants' duty of care because defendants never sought summary judgment on those grounds (*see generally McSorley v Tripoli*, 284 AD2d 900, 901 [4th Dept 2001]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1030

TP 19-01000

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

IN THE MATTER OF ANDRE BURKE, 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 May 21, 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 as moot (*see Matter of Free v Coombe*, 234 AD2d 996, 996 [4th Dept 1996]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1032

KA 18-02050

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL P. SOLACK, JR., DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (THERESA L. PREZIOSO OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (LAURA T. JORDAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered June 22, 2018. The judgment convicted defendant upon his plea of guilty of course of sexual conduct against a child 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 course of sexual conduct against a child in the second degree (Penal Law § 130.80 [1] [b]), defendant contends that his waiver of the right to appeal was not knowingly, intelligently and voluntarily entered. We reject that contention (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]). Defendant's valid waiver of the right to appeal does not, however, preclude him from challenging the severity of the sentence because "the record establishes that defendant waived his right to appeal before [Supreme Court] advised him of the potential periods of [postrelease supervision] that could be imposed" (*People v Mingo*, 38 AD3d 1270, 1271 [4th Dept 2007]; *see People v Fraisar*, 151 AD3d 1757, 1757 [4th Dept 2017], *lv denied* 29 NY3d 1127 [2017]; *see generally People v Lococo*, 92 NY2d 825, 827 [1998]). Still, we conclude that the sentence is not unduly harsh or severe.

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1033

KA 18-01036

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW BILES, DEFENDANT-APPELLANT.

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

MATTHEW BILES, DEFENDANT-APPELLANT PRO SE.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (LAURA T. JORDAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered July 14, 2017. The judgment convicted defendant upon a plea of guilty of attempted robbery 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 plea of guilty of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [1]). Contrary to defendant's contentions in his main and pro se supplemental briefs, his valid waiver of the right to appeal forecloses any challenge by him to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]; *People v Lococo*, 92 NY2d 825, 827 [1998]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1034

KA 18-01544

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALEX D. BROWN, DEFENDANT-APPELLANT.

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

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (LAURA T. JORDAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered July 9, 2018. The judgment convicted defendant, upon a plea of guilty, of attempted 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 attempted arson in the second degree (Penal Law §§ 110.00, 150.15). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]). That valid waiver forecloses defendant's challenge to the severity of his sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1039

CAF 18-00844

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

IN THE MATTER OF SHATARA BROOKS,
PETITIONER-RESPONDENT,

V ORDER

JERMEL R. BROOKS, RESPONDENT-APPELLANT.

TIMOTHY R. LOVALLO, BUFFALO, FOR RESPONDENT-APPELLANT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (RICHARD L. SULLIVAN OF COUNSEL), ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered March 29, 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 (*see* CPLR 5511; *Matter of Carol YY. v James OO.*, 68 AD3d 1463, 1463 [3d Dept 2009]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1046

CA 19-01063

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

OPTION ONE MORTGAGE CORPORATION,
PLAINTIFF-RESPONDENT,

V ORDER

KATHY L. BRUNNER, THOMAS E. BRUNNER,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

WESTERN NEW YORK LAW CENTER, INC., BUFFALO (KEISHA A. WILLIAMS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

FEIN, SUCH & CRANE, LLP, ROCHESTER, D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Erie County Court (Sheila A. DiTullio, J.), entered January 18, 2019. The order denied the motion of defendants Kathy L. Brunner and Thomas E. Brunner to vacate a prior order.

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

Mark W. Bennett

Entered: November 8, 2019

Clerk of the Court

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

1047

CA 18-01597

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

IN THE MATTER OF SUSAN DAVIS AND SANDRA GIRAGE,
PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

ZONING BOARD OF APPEALS OF CITY OF BUFFALO,
PLANNING BOARD OF CITY OF BUFFALO, AND AFFINITY
ELMWOOD GATEWAY PROPERTIES, LLC,
RESPONDENTS-RESPONDENTS.

LIPPES & LIPPES, BUFFALO (RICHARD J. LIPPES OF COUNSEL), FOR PETITIONERS-APPELLANTS.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (JESSICA M. LAZARIN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS ZONING BOARD OF APPEALS OF CITY OF BUFFALO AND PLANNING BOARD OF CITY OF BUFFALO.

BOND SCHOENECK & KING PLLC, BUFFALO (STEVEN J. RICCA OF COUNSEL), FOR RESPONDENT-RESPONDENT AFFINITY ELMWOOD GATEWAY PROPERTIES, LLC.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered November 20, 2017 in a proceeding pursuant to CPLR article 78. The judgment denied and dismissed the amended petition.

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

Memorandum: Respondent Affinity Elmwood Gateway Properties, LLC (Affinity) proposed to construct a mixed-use, four-story building at the corner of Elmwood Avenue and Forest Avenue in the City of Buffalo. The project called for the demolition of 14 existing structures within a district listed on the National Register of Historic Places. Respondent Zoning Board of Appeals of City of Buffalo (ZBA) granted eight variances for the project. Respondent Planning Board of City of Buffalo (Planning Board) was the lead agency for purposes of the State Environmental Quality Review Act (SEQRA) and, after determining that the project was in compliance with SEQRA's mandates, it granted site plan and minor subdivision approval for the project. Petitioners commenced this CPLR article 78 proceeding seeking to annul the determinations of the ZBA and the Planning Board. Supreme Court denied and dismissed the amended petition, and we now affirm.

Contrary to petitioners' contention, the notices of the public

hearings held by the ZBA were adequate (*see* General City Law § 81-a [7]). The notices listed the dates and times of the hearings; indicated that they were for "variances" or "variance applications" regarding the construction of a "mixed use building" at the relevant property address; and listed a website address, telephone number, and email address for the public to obtain further information. The notices were thus sufficient to "fairly apprise[] the public" of the variances sought by Affinity (*Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 678 [1996]; *see Dawley v Town of Tyre*, 43 Misc 3d 1222[A], 2014 NY Slip Op 50752[U], *5 [Sup Ct, Seneca County 2014]). Also contrary to petitioners' contention, the ZBA provided an adequate opportunity to members of the public to express their opinions during those hearings. Because the hearings were heavily attended, the ZBA imposed a three-minute time limit per speaker, and it closed one hearing before every member of the public was able to speak. Nevertheless, the ZBA indicated that it would accept all written comments. We conclude that those restrictions were reasonable in nature and allowed the public an opportunity to be heard (*see generally* § 81-a [7]).

Petitioners further contend that the ZBA did not comply with General City Law § 81-b (4) in granting the variances. "[T]he determination whether to grant or deny an application for an area variance is committed to the broad discretion of the applicable local zoning board" (*Matter of People, Inc. v City of Tonawanda Zoning Bd. of Appeals*, 126 AD3d 1334, 1335 [4th Dept 2015]). Here, the ZBA's determination to grant the variances has a rational basis and is supported by substantial evidence, and it is not illegal, arbitrary, or an abuse of discretion (*see generally id.*). The ZBA "rendered its determination after considering the appropriate factors and properly weigh[ed] the benefit to [the applicant] against the detriment to the health, safety and welfare of the neighborhood or community if the variances were granted" (*Matter of DeGroote v Town of Greece Bd. of Zoning Appeals*, 35 AD3d 1177, 1178 [4th Dept 2006]; *see* § 81-b [4] [b]).

Petitioners next contend that the Planning Board did not comply with the substantive requirements of SEQRA inasmuch as it neither took the requisite hard look at identified historic resources as an area of environmental concern nor provided a reasoned elaboration for its determination. We reject that contention. It is well settled that "[j]udicial review of an agency determination under SEQRA is limited to whether the 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 Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 231-232 [2007] [internal quotation marks omitted]; *see Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986]). The record establishes that the Planning Board complied with those requirements (*see Matter of Eisenhauer v County of Jefferson*, 122 AD3d 1312, 1313 [4th Dept 2014]). The Planning Board initially issued a positive declaration pursuant to SEQRA inasmuch as the project "has the potential to result in a substantial impact on the neighborhood character." The Planning Board informed the New York State Office of

Parks, Recreation and Historic Preservation (SHPO) of the project as an interested agency. SHPO responded and noted that the project involves, inter alia, the demolition of various structures, and it recommended that the "impacts to important historic resources be considered in your review." SHPO also subsequently responded that the project would "significantly and negatively alter[] the character of the surrounding historic districts." The Planning Board prepared a final environmental impact statement and addressed the concerns raised by SHPO, but ultimately disagreed with that agency and concluded that the demolition of the structures would not have a significant adverse impact on the historic resources on or adjacent to the site. The record reflects that the Planning Board conducted a lengthy and detailed review of the project, including its evaluation of the potential impacts to historic resources, and its written findings demonstrate that it provided a reasoned elaboration for its determination. Its determination must be upheld inasmuch as it is not arbitrary, capricious, or unsupported by substantial evidence (*see Jackson*, 67 NY2d at 417).

We have considered petitioners' remaining contentions and conclude that none warrants reversal or modification of the judgment.

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1048

CA 19-00683

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

CHARLENE DROZ, PLAINTIFF-RESPONDENT,

V ORDER

FAYEZ CHAHFE, M.D., FAYEZ F. CHAHFE, M.D.,
DOING BUSINESS AS THE CHAHFE CENTER, CHAHFE
MEDICAL PROFESSIONAL RECRUITMENT, L.L.C.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

FAYEZ CHAHFE, M.D., FAYEZ F. CHAHFE, M.D.,
DOING BUSINESS AS THE CHAHFE CENTER AND CHAHFE
MEDICAL PROFESSIONAL RECRUITMENT L.L.C.,
THIRD-PARTY PLAINTIFFS-APPELLANTS,

V

MEDTRONIC XOMED, INC., THIRD-PARTY DEFENDANT.

GALE GALE & HUNT, LLC, SYRACUSE (KEVIN T. HUNT OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND THIRD-PARTY PLAINTIFFS-APPELLANTS.

LAFAVE, WEIN & FRAMENT, PLLC, GUILDERLAND (MATTHEW T. FAHRENKOPF OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Charles C. Merrell, J.), entered January 22, 2019. The order, insofar as appealed from, granted that part of the motion of plaintiff seeking to sever the third-party action.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 17, 2019,

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

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1053

TP 18-02340

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

IN THE MATTER OF ADAM HAMILTON, PETITIONER,

V ORDER

STEWART ECKERT, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY, RESPONDENT.

ADAM HAMILTON, PETITIONER PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET 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 [John L. Michalski, A.J.], entered December 11, 2018) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

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

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1054

KA 17-00568

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID MOREY, DEFENDANT-APPELLANT.

ANTHONY F. BRIGANO, UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered January 9, 2017. The judgment convicted defendant upon his plea of guilty of assault in the second degree (two counts).

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 two counts of assault in the second degree (Penal Law § 120.05 [2]), defendant contends only that his sentence is unduly harsh and severe. Defendant's unrestricted waiver of the right to appeal encompasses that contention (*see People v Lopez*, 6 NY3d 248, 255 [2006]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1056

KA 17-02216

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAUNDRA ADAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered November 6, 2017. The judgment convicted defendant, upon her plea of guilty, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her, upon her plea of guilty, of manslaughter in the first degree (Penal Law § 125.20 [1]). We reject defendant's contention that her waiver of the right to appeal is invalid. Supreme Court advised defendant of the maximum sentence that could be imposed upon her conviction (*see People v Lococo*, 92 NY2d 825, 827 [1998]), and the oral plea colloquy, together with the written waiver of the right to appeal executed by defendant, establishes that she knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]). That valid waiver forecloses defendant's challenge to the severity of her sentence (*see People v Harris* [appeal No. 4], 147 AD3d 1375, 1376 [4th Dept 2017], *lv denied* 29 NY3d 998 [2017]; *see generally People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1057

KA 18-00983

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANCK A. KOUAO, DEFENDANT-APPELLANT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (BRIAN SHIFFRIN 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 (Sam L. Valleriani, J.), rendered March 22, 2018. The judgment convicted defendant, after a nonjury trial, of sexual abuse in the first degree.

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

Memorandum: On appeal from a judgment convicting him, after a nonjury trial, of sexual abuse in the first degree (Penal Law § 130.65 [1]), defendant contends that the evidence is not legally sufficient to support the conviction and that the verdict is against the weight of the evidence with respect to the sexual contact element of that crime. Viewing the evidence in the light most favorable to the People, as we must on a sufficiency challenge (*see People v Delamota*, 18 NY3d 107, 113 [2011]), we conclude that the evidence is legally sufficient (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The victim testified that she felt defendant's penis pressing against her through her clothing as he lay on top of her, which is sufficient to establish that element of the crime (*see generally People v Clark*, 181 AD2d 1028, 1029 [4th Dept 1992], *lv denied* 80 NY2d 895 [1992]; *People v Boykin*, 127 AD2d 1004, 1004 [4th Dept 1987], *lv denied* 69 NY2d 1001 [1987]). Furthermore, viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence with respect to the element of sexual contact (*see generally Bleakley*, 69 NY2d at 495). " 'In a bench trial, no less than a jury trial, the resolution of credibility issues by the trier of fact and its determination of the weight to be accorded the evidence presented are entitled to great deference' " (*People v McCoy*, 100 AD3d 1422, 1422 [4th Dept 2012]; *see People v Hutchings*, 142 AD3d 1292, 1293 [4th Dept 2016], *lv denied* 28 NY3d 1124 [2016]).

The sentence is not unduly harsh or severe. We have reviewed defendant's remaining contention and we conclude that it does not require reversal or modification of the judgment.

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1062

KA 17-02140

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN G. HARDER, DEFENDANT-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR DEFENDANT-APPELLANT.

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (VINCENT A. HEMMING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered September 21, 2017. The judgment convicted defendant, upon his plea of guilty, of attempted course of sexual conduct against a child in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted course of sexual conduct against a child in the second degree (Penal Law §§ 110.00, 130.80). Contrary to defendant's contention, the record establishes that he validly waived his right to appeal. 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]), 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]). In addition, defendant's oral waiver of the right to appeal was accompanied by a written waiver stating that he understood that he was waiving "all rights to appeal from [his] judgment of conviction and [his] sentence" (*see People v Ramos*, 7 NY3d 737, 738 [2006]; *People v Eaton*, 151 AD3d 1950, 1951 [4th Dept 2017]).

Defendant's valid waiver of the right to appeal with respect to both the conviction and sentence forecloses his challenge to the severity of his sentence (*see Lopez*, 6 NY3d at 255-256; *cf. People v*

Maracle, 19 NY3d 925, 928 [2012]).

Defendant further contends that the court erred in issuing a permanent order of protection in favor of his younger daughter, who was not the victim of the crime. As a preliminary matter, and as the People correctly concede, "the waiver by defendant of the right to appeal does not encompass his contentions concerning the order[] of protection" (*People v Victor*, 20 AD3d 927, 928 [4th Dept 2005], *lv denied* 5 NY3d 833 [2005], *reconsideration denied* 5 NY3d 885 [2005]; *see generally People v Tate*, 83 AD3d 1467, 1467 [4th Dept 2011]). Nevertheless, defendant's contention lacks merit. Defendant was convicted of sexually abusing his older daughter, and CPL 530.12 (5) (a) provides that, upon sentencing on a conviction for any crime between a parent and child, a court may issue an order of protection directing defendant to "stay away from the home, school, business or place of employment of . . . any witness designated by the court." Here, the court concluded that the younger daughter was scheduled to be a witness at defendant's trial, and thus the court properly granted the order of protection on that ground. We have considered defendant's remaining contention and conclude that it does not require reversal or modification of the judgment.

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1065

CAF 18-00963

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

IN THE MATTER OF TRACY A. RIGGINS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CLINTON J. DOWNING, RESPONDENT-APPELLANT.

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

CHRISTINE F. REDFIELD, ROCHESTER, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (James A. Vazzana, J.), entered October 25, 2017 in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to stay away from petitioner.

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

Memorandum: Respondent appeals from an order of protection issued upon a finding that he committed the family offense of harassment in the second degree under Penal Law § 240.26 (1). We affirm. Contrary to respondent's contention, petitioner established by a fair preponderance of the evidence that respondent committed harassment in the second degree (*see Matter of Joan WW. v Peter WW.*, 173 AD3d 1380, 1381-1382 [3d Dept 2019]; *cf. Matter of Shephard v Ray*, 137 AD3d 1715, 1716 [4th Dept 2016]). We have considered respondent's remaining contentions and conclude that none warrants reversal or modification of the order of protection.

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1071

CA 19-00960

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

TREVOR L. WARMACK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SCOTT M. BLUM, DEFENDANT-RESPONDENT,
AND KARISSA A. YANKOWSKI, DEFENDANT-APPELLANT.

LAW OFFICE OF JENNIFER S. ADAMS, YONKERS (JOSEPH GOERGEN OF COUNSEL), FOR DEFENDANT-APPELLANT.

BRINDISI, MURAD & BRINDISI PEARLMAN, LLP, UTICA (ANTHONY A. MURAD OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Erin P. Gall, J.), entered February 14, 2019. The order denied the motion of defendant Karissa A. Yankowski for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when his vehicle was rear-ended by a vehicle driven by Karissa A. Yankowski (defendant). Supreme Court denied defendant's motion for summary judgment dismissing the complaint and any cross claims against her. We affirm. Defendant failed to meet her initial burden on the motion because her own submissions in support thereof raise triable issues of fact regarding the extent to which her conduct contributed to the accident (*see e.g. Dunkle v Vakoulich*, 173 AD3d 1662, 1663 [4th Dept 2019]; *Luttrell v Vega*, 162 AD3d 1637, 1637-1638 [4th Dept 2018]; *Zbock v Gietz*, 145 AD3d 1521, 1522-1523 [4th Dept 2016]). Thus, the court properly denied defendant's motion regardless of the sufficiency of plaintiff's opposing papers (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1073

KA 18-01869

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERALD L. PERKINS, JR., DEFENDANT-APPELLANT.

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

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (LAURA T. JORDAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered June 21, 2018. The judgment convicted defendant upon his plea of guilty of promoting a sexual performance by a child (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of promoting a sexual performance by a child as a sexually motivated felony (Penal Law §§ 130.91, 263.15). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived, both orally and in writing, the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]). That valid waiver forecloses his challenge to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1074

KA 18-00870

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES ERNST, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered August 3, 2017. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of criminal sexual act in the first degree (Penal Law § 130.50 [4]). We agree with defendant that his waiver of the right to appeal does not encompass his challenge to the severity of his sentence (*see People v Fraisar*, 151 AD3d 1757, 1757 [4th Dept 2017], *lv denied* 29 NY3d 1127 [2017]). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1075

KA 17-02142

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHANE STEVENSON, DEFENDANT-APPELLANT.

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

SHANE STEVENSON, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered May 3, 2017. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of two counts of murder in the second degree (Penal Law § 125.25 [1]) arising from the fatal strangulation of his girlfriend and her 7-year-old son. We reject defendant's contention in his main and pro se supplemental briefs that his waiver of the right to appeal is invalid. During the plea colloquy, Supreme Court provided defendant with "an extensive and detailed description of the proposed waiver of the right to appeal before securing his consent thereto" (*People v Thomas*, 158 AD3d 1191, 1191 [4th Dept 2018], *lv denied* 31 NY3d 1088 [2018]), and we conclude that "the record establishes that defendant understood that he was waiving his right to appeal both the conviction and the sentence" (*People v Williams*, 160 AD3d 1470, 1471 [4th Dept 2018]; *see People v Watson*, 174 AD3d 1541, 1541 [4th Dept 2019]). Although defendant did not know the specific sentence that would be imposed at the time of the waiver, the court advised him of the maximum sentence that could be imposed (*see People v Lococo*, 92 NY2d 825, 827 [1998]). We thus conclude that defendant's waiver of the right to appeal was knowing, intelligent, and voluntary (*see generally People v Bradshaw*, 18 NY3d 257, 264 [2011]; *People v Lopez*, 6 NY3d 248, 256 [2006]). That valid waiver of the right to appeal encompasses defendant's challenge in his main and pro se supplemental briefs to the severity of the sentence (*see Lococo*, 92

NY2d at 827; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

We reject defendant's further contention in his pro se supplemental brief that the imposition of consecutive sentences was illegal. Although that contention survives the valid waiver of the right to appeal (*see People v McLellan*, 82 AD3d 1668, 1669 [4th Dept 2011]), the imposition of consecutive sentences was permissible here because defendant committed two separate and distinct homicidal acts (*see generally People v McKnight*, 16 NY3d 43, 48-50 [2010]).

We have considered the remaining contention in defendant's pro se supplemental brief and conclude that it does not require reversal or modification of the judgment.

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1076

KA 18-00666

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY STEWARD, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Susan M. Eagan, J.), rendered January 19, 2018. The judgment convicted defendant upon his plea of guilty of attempted murder in the second degree, assault in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), assault in the first degree (§ 120.10 [1]), and criminal possession of a weapon in the second degree (§ 265.03 [3]), defendant contends that his waiver of the right to appeal was invalid. We reject that contention and conclude that the record establishes that defendant's waiver of the right to appeal was knowing, intelligent, and voluntary (*see People v Bryant*, 28 NY3d 1094, 1096 [2016]; *People v Colon*, 122 AD3d 1309, 1309 [4th Dept 2014], *lv denied* 25 NY3d 1200 [2015]). Defendant's valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 256 [2006]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1094

CA 18-01880

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

IN THE MATTER OF BROTHERS OF MERCY MONTABAUR APARTMENT COMPLEX, INC., PETITIONER-APPELLANT,

V ORDER

TOWN OF CLARENCE, ASSESSOR OF THE TOWN OF CLARENCE, AND CLARENCE BOARD OF ASSESSMENT REVIEW, RESPONDENTS-RESPONDENTS.

CLARENCE CENTRAL SCHOOL DISTRICT AND COUNTY OF ERIE, INTERVENORS-RESPONDENTS.

THE COPPOLA FIRM, AMHERST (LISA A. COPPOLA OF COUNSEL), FOR PETITIONER-APPELLANT.

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

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (MARGARET A. HURLEY OF COUNSEL), FOR INTERVENOR-RESPONDENT COUNTY OF ERIE.

HODGSON RUSS LLP, BUFFALO (MICHAEL B. RISMAN OF COUNSEL), FOR INTERVENOR-RESPONDENT CLARENCE CENTRAL SCHOOL DISTRICT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Henry J. Nowak, Jr., J.), entered August 16, 2018 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 for reasons stated in the decision at Supreme Court.

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1096

KA 19-00018

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DALE R. RIGBY, DEFENDANT-APPELLANT.

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered April 10, 2018. The judgment revoked a sentence of probation and imposed a sentence of imprisonment.

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

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1101

CAF 18-00439

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

IN THE MATTER OF SKYLER B.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CRYSTAL M.B., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

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

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered February 27, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, 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.

Memorandum: In these four appeals, respondent mother appeals from respective orders revoking a suspended judgment and terminating her parental rights with respect to the four subject children. We affirm in each appeal.

Less than three months after entry of the suspended judgment, which Family Court had granted for a period of 12 months, petitioner moved to revoke it based on the mother's alleged failure to comply with numerous conditions of the suspended judgment. Inasmuch as petitioner was not required to wait 12 months until the suspended judgment expired before filing its motion (*see Matter of Jenna D. [Paula D.]*, 165 AD3d 1617, 1618 [4th Dept 2018], *lv denied* 32 NY3d 912 [2019]), we reject the mother's contention that the court should have granted her additional time to demonstrate compliance with the suspended judgment. Contrary to the mother's further contention, there is a sound and substantial basis in the record to support the court's determination that the mother failed to comply with the terms of the suspended judgment and that it is in the children's best interests to terminate her parental rights (*see Matter of Aiden T. [Melissa S.]*, 164 AD3d 1663, 1664 [4th Dept 2018], *lv denied* 32 NY3d 917 [2019]; *Matter of Amanda M. [George M.]*, 140 AD3d 1677, 1678 [4th Dept 2016]; *Matter of Jhanelle B. [Eliza P.]*, 93 AD3d 1201, 1201-1202

[4th Dept 2012], *lv denied* 19 NY3d 805 [2012]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1102

CAF 18-00441

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

IN THE MATTER OF CALEB B.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CRYSTAL M.B., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

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

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered February 27, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, 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.

Same memorandum as in *Matter of Skyler B. (Crystal M.B.)* ([appeal No. 1] — AD3d — [Nov. 8, 2019] [4th Dept 2019]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1103

CAF 18-00442

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

IN THE MATTER OF FAITH B.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CRYSTAL M.B., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

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

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

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered February 27, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, 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.

Same memorandum as in *Matter of Skyler B. (Crystal M.B.)* ([appeal No. 1] — AD3d — [Nov. 8, 2019] [4th Dept 2019]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1104

CAF 18-00443

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

IN THE MATTER OF ISAAC B.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CRYSTAL M.B., RESPONDENT-APPELLANT.
(APPEAL NO. 4.)

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

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

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered February 27, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, 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.

Same memorandum as in *Matter of Skyler B. (Crystal M.B.)* ([appeal No. 1] — AD3d — [Nov. 8, 2019] [4th Dept 2019]).

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1110

CA 19-00705

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

BUSH INDUSTRIES, INC., PLAINTIFF-RESPONDENT,

V ORDER

SLONE MELHUISH & CO., ET AL., DEFENDANTS,
AND WILLIS OF NEW YORK, INC., AS SUCCESSOR
BY MERGER TO KALVIN-MILLER HOLDINGS, LLC,
AS SUCCESSOR BY MERGER TO HILB ROGAL & HOBBS
OF UPSTATE NEW YORK, LLC, FORMERLY KNOWN AS
HILB ROGAL AND HAMILTON COMPANY OF UPSTATE
NEW YORK, LLC, AS SUCCESSOR BY MERGER TO HILB
ROGAL AND HAMILTON COMPANY OF UPSTATE NEW
YORK, INC., DEFENDANT-APPELLANT.

STROOCK & STROOCK & LAVAN LLP, NEW YORK CITY (CHARLES G. MOERDLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

DUKE HOLZMAN PHOTIADIS & GRESENS LLP, BUFFALO (THOMAS D. LYONS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered April 10, 2019. The order denied the motion of defendant-appellant to dismiss plaintiff's second amended complaint against it.

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

Entered: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1111

CA 19-00232

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

TVT CAPITAL, LLC, PLAINTIFF-RESPONDENT,

V ORDER

LEGEND VENTURES, DOING BUSINESS AS SOLAR MODERN ENERGY/LEGEND MARKETING/LEGEND MOTOR SPORTS/SHAMROCK EMPIRE LLC/QUANTUM PRODIGY INC./THE PERK LLC/SMPS CONSULTING, LLC, AND MATHEW SHANE PERKINS, DEFENDANTS-APPELLANTS.

WHITE AND WILLIAMS LLP, NEW YORK CITY (SHANE R. HESKIN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

RACHEL SCHULMAN, ESQ. PLLC, GREAT NECK (RACHEL SCHULMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Daniel J. Doyle, J.), entered July 18, 2018. The order denied the motion of defendants to vacate a confession of judgment.

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: November 8, 2019

Mark W. Bennett
Clerk of the Court

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

1137

CAF 18-01906

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

IN THE MATTER OF CONRAD A. BOTTORFF,
PETITIONER-APPELLANT,

V ORDER

JENNIFER L. BOTTORFF, RESPONDENT-RESPONDENT.

IN THE MATTER OF JENNIFER L. BOTTORFF,
PETITIONER-RESPONDENT,

V

CONRAD A. BOTTORFF, RESPONDENT-APPELLANT.

HAGE & HAGE LLC, UTICA (MICHAEL JOHNSON OF COUNSEL), FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

SUSAN B. MARRIS, MANLIUS, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered September 4, 2018 in proceedings pursuant to Family Court Act article 6. The order, inter alia, granted the parties joint custody with Jennifer L. Bottorff having primary physical custody of the subject children.

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: November 8, 2019

Mark W. Bennett
Clerk of the Court