SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

AUGUST 20, 2020

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. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

DECISIONS FILED AUGUST 20, 2020

_____	1079	KA 18 01060	PEOPLE V MATTHEW D. RINGROSE
_____	74	TP 19 01636	DANIEL MAVROGIAN V STATE UNIVERSITY OF NEW YORK AT
_____	80	CA 19 01467	AMANDA NORTZ V NEW YORK STATE DEPARTMENT OF MOTOR
_____	82	CA 19 01320	MARY BETH B. V WEST GENESEE CENTRAL SCHOOL DI
_____	105	CA 19 00761	ALEXANDRA R. V ERIC J. KRONE
_____	106	CA 19 00477	JESSICA G. V ERIC J. KRONE
_____	107	CA 19 00478	VANESSA G. V NELSON A.
_____	108	CA 19 00755	NELSON A. V ERIC J. KRONE
_____	112	CA 19 00834	THOMAS E. MCGOVERN V YOLANDA J. MCGOVERN
_____	114	CA 19 00339	CORNELL UNIVERSITY V BOARD OF ASSESSMENT REVIEW
_____	116	CA 19 00118	SURINDER K. VIRK V CAROL A. GUTT
_____	117	CA 19 01550	C & D DESIGN, BUILD, DEVELOPMENT, L V VILLAGE OF ALEXANDER, NEW YORK
_____	154	CA 19 01201	ANTHONY A. SCALZO V CENTRAL CO-OPERATIVE INSURANCE
_____	158	CA 19 01260	CANDY ANDERSON V JACK E. ANDERSON
_____	159	CA 19 00684	ANTHONY FARGONOLI V MARK WARFEL, D.O.
_____	161	CA 19 01616	JEFFREY KRENCIK V OAKGROVE CONSTRUCTION, INC.
_____	189	CA 18 02000	STEPHANIE L. V HOUSE OF THE GOOD SHEPHERD
_____	238	CA 19 01362	MICHAEL MCGRAW V TOWN BOARD OF TOWN OF VILLENOVA
_____	239	CA 19 01689	MICHAEL MAAK V MEDINA PROFESSIONAL FIREFIGHTERS AS
_____	243	CA 19 00713	SEIGFREID BINGHAM, P.C. V AFTERCARE NURSING SERVI
_____	245	CA 19 00464	BUFFALO TEACHERS FEDERATION, INC. In the Matter o BOARD OF EDUCATION OF CITY SCHOOL D ISTRICT OF CIT
_____	247	CA 19 00731	ENERGYMARK LLC V NEW WAVE ENERGY CORP.
_____	262	CA 19 01234	COLOR DYNAMICS, INC. V KEMPER SYSTEM AMERICA, INC
_____	274	CA 19 00260	NEW YORK SCHOOLS INSURANCE RECIPROC V

DEBORAH KALBFLIESH

_____	296	CA 19 01214	JOSIAH SCHUTT V MARK D. BOOKHAGEN
_____	306	CA 19 01088	JULIE E. PASEK V CATHOLIC HEALTH SYSTEM, INC.
_____	309	CA 19 00644	U.S. BANK NATIONAL ASSOCIATION V CHARLES A. BROWN
_____	321	TP 19 00515	SARAH J. CUSHMAN V D. VENETTOZZI
_____	335	CA 19 01236	KRISTYN JOHNSON-NEULAND V NEW YORK MUNICIPAL INSUR
_____	336	CA 19 01506	JAMES MONTANA V DAVID MARKOWITZ METAL CO., INC.
_____	336.1	CA 19 01669	KEITH T. HOLMES V KEVIN D. MCCREA
_____	346	KA 15 01687	PEOPLE V FUZELL ROGERS, III
_____	350	CAF 18 02333	VALERIE J. HONEYFORD V ANDREA LUKE
_____	351	CAF 19 00956	ANDREA LUKE V VALERIE J. HONEYFORD
_____	356	KA 19 01728	PEOPLE V RICHARD L. SCOTT
_____	359	KA 19 01730	PEOPLE V AUSTIN PRATT
_____	360	KA 18 00165	PEOPLE V WAYNE A. BABB, JR.
_____	367	CA 19 01391	LINDA LOUISE GREEN V KATHERINE ANNE REPINE
_____	372	CA 19 01298	KRISTEN DEFISHER V PPZ SUPERMARKETS, INC.
_____	373	CA 19 01578	BRIAN BERMEL V VITAL TECH DENTAL LABS, INC.
_____	376	CA 19 01549	SUSAN COTTRELL V BENDERSON DEVELOPMENT COMPANY, LL
_____	379	KA 19 00864	PEOPLE V WILBERT WILSON, JR.
_____	380	KA 19 00528	PEOPLE V CHESTER J. THOMAS
_____	399	KA 19 00884	PEOPLE V TAYLOR I. BECKSTEAD
_____	400	KA 16 02127	PEOPLE V CHARLENE M. MESS
_____	422	KA 16 00928	PEOPLE V TAQUAN JONES
_____	423	KA 17 01592	PEOPLE V ANTHONY THOMPSON
_____	424	KA 18 00856	PEOPLE V SEAN M. VICKERS
_____	425	KA 19 00815	PEOPLE V ROBERT WASYL
_____	434	CA 19 01505	BRIAN MITCHELL V PO N. LAM, M.D.
_____	447	KA 16 01255	PEOPLE V JERALD J. DAVIS, JR.
_____	448	KA 16 02099	PEOPLE V JERALD J. DAVIS, JR.
_____	449	KA 19 01043	PEOPLE V KEVIN A. DUKES

_____	451	KA 18 00078	PEOPLE V JOSEPH W. SHANTZ
_____	452	KA 19 01732	PEOPLE V HECTOR SERRANO
_____	463	CA 19 01085	DONALD F. PICK V MIDROX INSURANCE COMPANY
_____	465	CA 19 01648	TJJK PROPERTIES, LLC V A.E.Y. ENGINEERING, D.P.C.
_____	466	CA 19 01074	JAMES LUPPINO V JENNIFER G. FLANNERY
_____	468	CA 19 02060	AMY PIZZOLI V NEW HARTFORD CENTRAL SCHOOL DISTRIC
_____	470	CA 19 02130	DEUTSCHE BANK NATIONAL TRUST COMPAN V EDWARD J. LEWIS
_____	471	KA 16 00980	PEOPLE V KHARYE JARVIS
_____	473	KA 19 00977	PEOPLE V GERALD J. ORTIZ
_____	474	KA 19 00548	PEOPLE V CHELLSIE BLUE
_____	477	KA 18 01370	PEOPLE V STEVEN P. KNORR
_____	478	KA 15 00651	PEOPLE V KEION PETERSON
_____	482	CAF 18 01579	MONROE COUNTY CHILD SUPPORT ENFORCE V ROBERT M. HEMMINGER
_____	484	CA 19 00145	JULIANNE RIZZO V NATIONAL MAINTENANCE CONTRACTING
_____	499	KA 19 00487	PEOPLE V JEFFREY T. MILLER
_____	511	CA 19 01263	WILLIAM T. KOREN, JR. V MORGAN RAINTREE, LLC
_____	519	TP 19 01983	ROCHESTER REDEVELOPMENT, LLC V NEW YORK STATE DEPARTMENT OF ENVIRO NMENTAL CONSER
_____	520	KA 18 00658	PEOPLE V MOHAMED JUMALE
_____	521	KA 17 00620	PEOPLE V JUDITH C. KELLEY
_____	539	KA 19 01050	PEOPLE V BRYAN E. GRISWOLD
_____	540	KA 16 01242	PEOPLE V KENITH K. BROWN
_____	593	KA 18 00944	PEOPLE V HILLARD SMITH
_____	593.1	KA 20 00886	PEOPLE V HILLARD SMITH
_____	595	KA 16 02269	PEOPLE V JHON POLANCO
_____	609.1	KA 19 01040	PEOPLE V MICHAEL BRYANT
_____	609.2	KA 18 02407	PEOPLE V TERRENCE LOVE
_____	629	CA 19 00788	JAMES CONARTON V HOLY SMOKE BBQ AND CATERING, LLC
_____	630.1	KA 18 01962	PEOPLE V DESHAUN SOMERS
_____	630.2	KA 19 00068	PEOPLE V DESHAUN SOMERS

_____	630.3	KA 18 02066	PEOPLE V MELVIN WILLIAMS
_____	652	CA 19 01164	PAULA L. GIBBS V STATE FARM FIRE AND CASUALTY COMP
_____	685	KA 18 01289	PEOPLE V BERNARD DORTCH
_____	704	KA 15 00415	PEOPLE V JACOB A. HORN
_____	714.1	CAF 19 00856	Mtr of RAYMOND H., JR.
_____	716	KA 18 00931	PEOPLE V CHARLES M. PELLIS
_____	717	KA 18 01798	PEOPLE V TROY D. JONES
_____	733	CA 18 01355	STATE OF NEW YORK V DONALD G.
_____	735	KA 18 01761	PEOPLE V ROBERT T. BENTLEY
_____	736	KA 18 02274	PEOPLE V JASON CIPOLLA

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

74

TP 19-01636

PRESENT: WHALEN, P.J., CARNI, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF DANIEL MAVROGIAN, PETITIONER,

V MEMORANDUM AND ORDER

STATE UNIVERSITY OF NEW YORK AT BUFFALO,
RESPONDENT.

CIMASI LAW OFFICE, AMHERST (MICHAEL CHARLES CIMASI OF COUNSEL), AND LIPPES & LIPPES, BUFFALO, FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [John F. O'Donnell, J.], entered September 3, 2019) to annul a determination of respondent. The determination found petitioner responsible for violations of respondent's student code of conduct.

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

Memorandum: In this CPLR article 78 proceeding transferred to this Court pursuant to CPLR 7804 (g), petitioner, a student at respondent, seeks to annul a determination finding him responsible for violations of respondent's student code of conduct arising from incidents of hazing. Following an administrative hearing and administrative appeal, respondent suspended petitioner for three years and placed a notation on petitioner's transcript.

Contrary to petitioner's contention, we conclude that respondent substantially adhered to its procedural rules during the disciplinary proceeding, and that the purported violations of those rules did not deny petitioner "the full panoply of due process guarantees to which he was entitled or render[ ] the finding of responsibility or the sanction imposed arbitrary or capricious" (*Matter of Sharma v State Univ. of N.Y. at Buffalo*, 170 AD3d 1565, 1566 [4th Dept 2019] [internal quotation marks omitted]; *see Matter of Budd v State Univ. of N.Y. at Geneseo*, 133 AD3d 1341, 1342-1343 [4th Dept 2015], *lv denied* 26 NY3d 919 [2016]; *Matter of Nawaz v State Univ. of N.Y. Univ. at Buffalo School of Dental Medicine*, 295 AD2d 944, 944 [4th Dept 2002]).

Specifically, we reject petitioner's contention that respondent denied him due process by allegedly failing to provide him certain documents during prehearing discovery. Indeed, "[i]n a disciplinary proceeding at a public institution of higher education, due process entitles a student accused of misconduct to a statement detailing the factual findings and the evidence relied upon by the decision-maker in reaching the determination of guilt" (*Budd*, 133 AD3d at 1343 [internal quotation marks omitted]), and here the record reflects that petitioner was provided with the documents that were relied on by respondent (*see Matter of Brucato v State Univ. of N.Y. at Buffalo*, 175 AD3d 977, 979 [4th Dept 2019]; *see generally Budd*, 133 AD3d at 1343). We also reject petitioner's contention that he was denied the assistance of counsel at his hearing in violation of his right to due process inasmuch as he was, as authorized by respondent's administrative hearing procedures, assisted by an attorney advisor throughout the disciplinary process, including at the hearing (*see Brucato*, 175 AD3d at 978-979; *Sharma*, 170 AD3d at 1566-1567). Nor was petitioner denied due process by respondent's alleged failure to call live witnesses or to accept questions to be asked of such live witnesses (*see Matter of Jacobson v Blaise*, 157 AD3d 1072, 1076 [3d Dept 2018]; *Budd*, 133 AD3d at 1343-1344).

We likewise reject petitioner's contention that respondent failed to provide an unbiased finder of fact (*see generally Matter of Agudio v State Univ. of N.Y.*, 164 AD3d 986, 991-992 [3d Dept 2018]; *Matter of Weber v State Univ. of N.Y., Coll. at Cortland*, 150 AD3d 1429, 1433-1434 [3d Dept 2017]; *Budd*, 133 AD3d at 1343). Contrary to petitioner's further contention, respondent's written determinations did not violate petitioner's right to due process inasmuch as they contained sufficient detail "to permit [petitioner] to effectively challenge the determination in administrative appeals and in the courts and to ensure that the decision was based on evidence in the record" (*Budd*, 133 AD3d at 1343 [internal quotation marks omitted]). Further, the record before us does not support petitioner's contention that the determination of the administrative appeal was based on matters outside of the record.

Although petitioner contends that respondent failed to provide him with certain materials prior to the preliminary suspension hearing, he did not raise that contention on his administrative appeal. He thus failed to exhaust his administrative remedies with respect to that contention, and we have no discretionary power to reach it (*see generally Matter of Inesti v Rizzo*, 155 AD3d 1581, 1582 [4th Dept 2017]; *Matter of Mirenberg v Lynbrook Union Free School Dist. Bd. of Educ.*, 63 AD3d 943, 943-944 [2d Dept 2009]). Petitioner failed to preserve his contention that he should have been supplied with a transcript or recording of the administrative hearing inasmuch as he submitted his administrative appeal without objection to the lack of a transcript or recording, thus failing to raise that issue at a time when it could have been corrected (*see Brucato*, 175 AD3d at 979; *see generally Matter of Edmonson v Coombe*, 227 AD2d 975, 975 [4th Dept 1996], *lv denied* 88 NY2d 815 [1996]). Petitioner failed to raise his remaining procedural contentions during the administrative proceedings or administrative appeal, and thus they are not properly

before us (*see Sharma*, 170 AD3d at 1567; *Matter of Lampert v State Univ. of N.Y. at Albany*, 116 AD3d 1292, 1294 [3d Dept 2014], *lv denied* 23 NY3d 908 [2014]).

We further conclude that, contrary to petitioner's contention, respondent's determination is supported by substantial evidence. The evidence considered by respondent constituted " 'such relevant proof as a reasonable mind may accept as adequate to support [the] conclusion' " that petitioner violated respondent's student code as charged by respondent (*Sharma*, 170 AD3d at 1567, quoting *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). Further, the alleged inconsistencies or conflict in the evidence "presented credibility issues that were within the sole province of respondent to determine," and we perceive no basis to disturb respondent's findings (*Lampert*, 116 AD3d at 1294). Lastly, petitioner's contention that respondent's student code unconstitutionally restricts petitioner's First Amendment freedom of association is not properly raised in this proceeding pursuant to CPLR article 78 (*see generally* CPLR 7803).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

80

CA 19-01467

PRESENT: WHALEN, P.J., CARNI, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF AMANDA NORTZ,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES
APPEALS BOARD, RESPONDENT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENT-APPELLANT.

LEONARD CRIMINAL DEFENSE GROUP, ROME (JOHN G. LEONARD OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), dated January 31, 2019 in a proceeding pursuant to CPLR article 78. The judgment granted the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and the petition is dismissed.

Memorandum: Petitioner's driver's license was revoked in 2016 as a result of alcohol-related driving convictions. In 2018, she applied for a new license. The application was denied on the ground that petitioner had three alcohol-related driving convictions within the statutory 25-year look-back period, and thus she was subject to an additional five-year waiting period following the revocation period imposed pursuant to the Vehicle and Traffic Law and presumptively ineligible for a new license until 2022 (*see* 15 NYCRR 136.5 [b] [3]). Petitioner thereafter requested reconsideration of her application, seeking a hardship exception from her presumptive ineligibility date due to "unusual, extenuating and compelling circumstances" (15 NYCRR 136.5 [d]). That request was also denied. On administrative appeal, respondent affirmed the denial of petitioner's application. Petitioner commenced this CPLR article 78 proceeding seeking to annul respondent's determination. Supreme Court granted the petition, concluding that the determination denying the application was arbitrary and capricious. Respondent appeals, and we reverse.

"[J]udicial review of an administrative determination is limited to whether the administrative action is arbitrary and capricious or lacks a rational basis" (*Matter of Green Thumb Lawn Care, Inc. v*

Iwanowicz, 107 AD3d 1402, 1403 [4th Dept 2013], *lv denied* 22 NY3d 866 [2014]; *see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 [1974]), and thus such a determination is entitled to great deference (*see Matter of Walker v State Univ. of N.Y. [Upstate Med. Univ.]*, 19 AD3d 1058, 1059 [4th Dept 2005], *lv denied* 5 NY3d 713 [2005]). A determination is arbitrary and capricious when it is made " 'without sound basis in reason or regard to the facts' " (*Matter of Thompson v Jefferson County Sheriff John P. Burns*, 118 AD3d 1276, 1277 [4th Dept 2014], quoting *Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]). A court must "sustain the determination even if the court concludes that it would have reached a different result," so long as the determination is "supported by a rational basis" (*Peckham*, 12 NY3d at 431).

Here, petitioner alleged that she had established unusual, extenuating and compelling circumstances because both she and her child were disabled and needed to travel to various medical providers, she could not access public transportation and she had complied with her alcohol treatment program. Even assuming, arguendo, that petitioner established the existence of such circumstances, we agree with respondent that the denial of her application was not arbitrary, irrational or an abuse of discretion in light of petitioner's history of recidivism and her risk to others (*see Matter of Nicholson v Appeals Bd. of Admin. Adjudication Bur.*, 135 AD3d 1224, 1225 [3d Dept 2017]; *cf. Matter of Gurnsey v Sampson*, 151 AD3d 1928, 1930 [4th Dept 2017], *lv denied* 30 NY3d 906 [2017]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

82

CA 19-01320

PRESENT: WHALEN, P.J., CARNI, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF MARY BETH B., AS MOTHER AND NATURAL GUARDIAN OF J.B., CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

WEST GENESEE CENTRAL SCHOOL DISTRICT, RESPONDENT-APPELLANT.

THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (CHARLES C. SPAGNOLI OF COUNSEL), FOR RESPONDENT-APPELLANT.

COZEN O'CONNOR, NEW YORK CITY (CHRISTOPHER C. FALLON, JR., OF COUNSEL), AND CHERUNDOLO LAW FIRM, SYRACUSE, FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered May 9, 2019. The order, insofar as appealed from, granted in part claimant's application for leave to serve a late notice of claim.

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

Memorandum: Respondent appeals from that part of an order that granted claimant's application for leave to serve a late notice of claim with respect to those claims asserted on behalf of her child following a March 2016 assault of the child by another student. We agree with respondent that Supreme Court abused its discretion in granting that part of the application (*see Dalton v Akron Cent. Schools*, 107 AD3d 1517, 1518 [4th Dept 2013], *affd* 22 NY3d 1000 [2013]). We therefore reverse the order insofar as appealed from and deny the application in its entirety.

" 'In determining whether to grant such leave, the court must consider, inter alia, whether the claimant has shown a reasonable excuse for the delay, whether the municipality had actual knowledge of the facts surrounding the claim within 90 days of its accrual, and whether the delay would cause substantial prejudice to the municipality' " (*Tate v State Univ. Constr. Fund*, 151 AD3d 1865, 1865 [4th Dept 2017]; *see Matter of Friend v Town of W. Seneca*, 71 AD3d 1406, 1407 [4th Dept 2010]; *see generally* General Municipal Law § 50-e [5]). Initially, claimant failed to establish a reasonable excuse for her failure to serve a timely notice of claim (*see Folmar v Lewiston-Porter Cent. School Dist.*, 85 AD3d 1644, 1645 [4th Dept 2011]). Even

if claimant was " 'initially unaware of the severity of [her child's] injuries' " (*Kennedy v Oswego City Sch. Dist.*, 148 AD3d 1790, 1791 [4th Dept 2017]), as claimant argued in her application, she conceded in her reply affidavit that the child's neurologist directed that the child be homeschooled as a result of seizures and blackouts in November 2016. Claimant "did not seek leave to serve a late notice of claim until [two years after that diagnosis] . . . , and [s]he failed to offer a reasonable excuse for the [post-diagnosis] delay" (*id.*). Further, claimant failed to submit "supporting medical evidence explaining why the possible permanent effects of the injury took so long to become apparent and be diagnosed" (*Diez v Lewiston-Porter Cent. Sch. Dist.*, 140 AD3d 1665, 1666 [4th Dept 2016] [internal quotation marks omitted]). There is also "no evidence in the record that [the child's] infancy made it more difficult to diagnose the possible permanence of her injury" (*Matter of Felice v Eastport/South Manor Cent. School Dist.*, 50 AD3d 138, 151 [2d Dept 2008]).

A claimant's failure to demonstrate a reasonable excuse for the delay "is not fatal where . . . actual notice was had and there is no compelling showing of prejudice to [respondent]" (*Shaul v Hamburg Cent. Sch. Dist.*, 128 AD3d 1389, 1389 [4th Dept 2015] [internal quotation marks omitted]). However, a respondent's "knowledge of the accident and the injury, without more, does not constitute actual knowledge of the essential facts constituting the claim" (*Folmar*, 85 AD3d at 1645 [internal quotation marks omitted]; *see Kennedy*, 148 AD3d at 1791; *Diez*, 140 AD3d at 1666). Here, claimant described the assault on her child as "unprovoked," and the accident report prepared contemporaneously by a school nurse, which claimant submitted with her reply affidavit, describes a single punch resulting only in a headache and swollen face. Inasmuch as "an injury caused by the impulsive, unanticipated act of a fellow student ordinarily will not give rise to a finding of negligence absent proof of prior conduct that would have put a reasonable person on notice to protect against the injury-causing act" (*Mirand v City of New York*, 84 NY2d 44, 49 [1994]; *see Hale v Holley Cent. Sch. Dist.*, 159 AD3d 1509, 1510 [4th Dept 2018], *lv denied* 31 NY3d 913 [2018]), we agree with respondent that the known facts failed to give "reasonable notice from which it could be inferred that a potentially actionable wrong had been committed by [respondent]" (*Matter of Lavender v Garden City Union Free School Dist.*, 93 AD3d 670, 671 [2d Dept 2012]; *see Brown v City of Buffalo*, 100 AD3d 1439, 1440 [4th Dept 2012]).

Finally, with respect to the remaining factor, substantial prejudice, "the burden initially rests on the [claimant] to show that the late notice will not substantially prejudice the public corporation. Such a showing need not be extensive, but the [claimant] must present some evidence or plausible argument that supports a finding of no substantial prejudice" (*Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 466 [2016], *rearg denied* 29 NY3d 963 [2017]). Although claimant's assertion that the child was interviewed by the school resource officer and examined by a school nurse could constitute a "plausible argument that supports a finding of no substantial prejudice" (*id.*), that assertion was made for the

first time in claimant's reply papers. Claimant's initial submission contained only a conclusory allegation, unsupported by any factual detail, that respondent conducted an investigation. Inasmuch as claimant could not meet her initial burden by relying on evidence submitted for the first time in her reply papers (*see GJF Constr. Corp. v Cosmopolitan Decorating Co., Inc.*, 35 AD3d 535, 535 [2d Dept 2006]), the burden never shifted to respondent to show substantial prejudice.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

105

CA 19-00761

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

ALEXANDRA R., ALEXIS R., SR., AS PARENT AND NATURAL GUARDIAN OF ALEXIS R., JR. AND YAMARIS R., AND AS ADMINISTRATOR OF THE ESTATE OF CHRISTIEANN G., AND DEMARIS M., AS GUARDIAN OF JAICOB G. AND JAIDEN G., AND AS ADMINISTRATOR OF THE ESTATE OF LUIS A., JR., DECEASED, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ERIC J. KRONE, DEFENDANT-APPELLANT, ET AL., DEFENDANTS. (APPEAL NO. 1.)

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered February 1, 2019. The judgment, insofar as appealed from, adjudged that defendant Eric J. Krone acted with reckless disregard for the safety of others and that he is 35% liable for the subject collision.

It is hereby ORDERED that the judgment insofar as appealed from is reversed on the law without costs and the amended complaint is dismissed against defendant Eric J. Krone.

Memorandum: On a morning in April 2013, a minivan carrying 10 occupants on the New York State Thruway drifted from the left travel lane to the shoulder and collided with the back of a dump truck operated by Eric J. Krone (defendant), a New York State Thruway Authority (Thruway Authority) employee, who had parked the truck on the shoulder during a cleanup operation in which two other employees were picking up debris in the median. Three of the occupants died, and the remaining occupants, as well as defendant, sustained injuries. Plaintiffs, consisting of the occupants and their representatives, commenced these actions alleging, inter alia, that the collision was caused by defendant's recklessness. In these consolidated appeals, defendant appeals from judgments entered upon a nonjury verdict finding him partially liable for the collision on the ground that he acted with reckless disregard for the safety of others.

In each appeal, defendant challenges the verdict on the ground that Supreme Court's finding that he acted with reckless disregard for the safety of others is against the weight of the evidence. As a preliminary matter, we conclude that defendant was not required to preserve his contention that the nonjury verdict is contrary to the weight of the evidence by making a postverdict motion. Such a requirement is inconsistent with the principle that, "[f]ollowing a nonjury trial, the Appellate Division has 'authority . . . as broad as that of the trial court . . . and . . . may render the judgment it finds warranted by the facts' " (*Sweetman v Suhr*, 159 AD3d 1614, 1615 [4th Dept 2018], *lv denied* 31 NY3d 913 [2018], quoting *Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]; *see Baba-Ali v State of New York*, 19 NY3d 627, 640 [2012]). To the extent that any of our prior decisions suggest otherwise, they should no longer be followed (*see e.g. Gaiter v City of Buffalo Bd. of Educ.*, 125 AD3d 1388, 1389 [4th Dept 2015], *lv dismissed* 25 NY3d 1036 [2015]).

Upon our review of the record, we conclude that the weight of the evidence does not support the court's determination that defendant acted with reckless disregard for the safety of others as required to impose liability against him under Vehicle and Traffic Law § 1103 (b), the applicability of which is not disputed by the parties. "[T]he unambiguous language of Vehicle and Traffic Law § 1103 (b), as further supported by its legislative history, [makes] clear that the statute exempts from the rules of the road all vehicles . . . which are 'actually engaged in work on a highway' . . . , and imposes on such vehicles a recklessness standard of care" (*Deleon v New York City Sanitation Dept.*, 25 NY3d 1102, 1105 [2015]). The imposition of liability under the recklessness standard, which the Court of Appeals has described as a "minimum standard of care" (*id.* at 1106 [internal quotation marks omitted]; *see Riley v County of Broome*, 95 NY2d 455, 466 [2000]), "demands more than a showing of a lack of 'due care under the circumstances'—the showing typically associated with ordinary negligence claims" (*Saarinen v Kerr*, 84 NY2d 494, 501 [1994]). Rather, "liability under [the recklessness] standard is established upon a showing that the covered vehicle's operator has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome" (*Deleon*, 25 NY3d at 1105 [internal quotation marks omitted]; *see Riley*, 95 NY2d at 466).

Here, at the time of the collision, defendant had parked the truck entirely outside of the travel lane approximately 18 inches to the left of the yellow fog line on or near the rumble strips located on the shoulder. Defendant had also activated multiple hazard lights on the truck, which consisted of regular flashers, two amber lights on the tailgate, beacon lights, and four flashing caution lights on the arrow board. Moreover, the undisputed evidence established that there were no weather, road, or lighting conditions creating visibility or control issues for motorists on the morning of the incident. Even if, as the court found, defendant knew or should have known that vehicles

occasionally leave the roadway at a high rate of speed due to motorists being tired, distracted, or inattentive, we conclude that, here, it cannot be said that defendant's actions were of an "unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and . . . done . . . with conscious indifference to the outcome" (*Deleon*, 25 NY3d at 1105 [internal quotation marks omitted]), given the favorable weather and road conditions for motorists, as well as the safety precautions taken by defendant in positioning the truck completely off of the travel lane and activating various hazard lights (*see Sullivan v Town of Vestal*, 301 AD2d 824, 825 [3d Dept 2003]; *Green v Covington*, 299 AD2d 636, 637-638 [3d Dept 2002]; *see also* Vehicle and Traffic Law former § 1144-a [b]; *see generally Roberts v Anderson*, 133 AD3d 1384, 1385 [4th Dept 2015]).

Plaintiffs nonetheless contend, and the court agreed, that defendant was reckless because Thruway Authority safety regulations require vehicles parked on the shoulder to be positioned "as far from traffic as feasible," and defendant could and should have parked the truck farther to the left on the grassy median and his positioning also rendered the rumble strips useless. We reject plaintiffs' contention and the court's conclusion. Even if defendant, despite his belief that he was in compliance with the regulation by positioning the truck as far from traffic as feasible without getting stuck in wet ground on the median, could have positioned the truck even farther to the left and off of the rumble strips, that failing establishes, at most, a lack of due care under the circumstances, which is insufficient to impose liability under the recklessness standard (*see Green*, 299 AD2d at 638; *Mitchell v State of New York*, 108 AD2d 1033, 1034-1035 [3d Dept 1985], *lv denied* 64 NY2d 611 [1985], *appeal dismissed and lv denied* 64 NY2d 1128 [1985]).

Based on the foregoing, we reverse, insofar as appealed from, the judgments in appeal Nos. 1, 2, and 3 and reverse the judgment in appeal No. 4.

All concur except NEMOYER and CURRAN, JJ., who dissent and vote to affirm in the following memorandum: We agree with the majority that defendant-appellant (defendant) was not required to preserve his challenge to the weight of the evidence underlying Supreme Court's nonjury verdict (*see Evans v New York City Tr. Auth.*, 179 AD3d 105, 108-111 [2d Dept 2019]). We cannot, however, join the majority in holding the verdict to be against the weight of the evidence in light of the significant proof supporting the trial judge's conclusions. We therefore respectfully dissent and vote to affirm the judgment in each appeal.

We recognize, of course, that we should "set aside the trial court's findings if they are contrary to the weight of the evidence and [thereupon] render the judgment we deem warranted by the facts" (*Mosley v State of New York*, 150 AD3d 1659, 1660 [4th Dept 2017] [internal quotation marks omitted]; *see e.g. Sweetman v Suhr*, 159 AD3d 1614, 1615 [4th Dept 2018], *lv denied* 31 NY3d 913 [2018]). When conducting our factual review power in a "close case," however, the

Court of Appeals has instructed us to "tak[e] into account . . . 'the fact that the trial judge had the advantage of seeing the witnesses' " (*Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]). It has also been held that we should "view[ ] the evidence in the light most favorable to sustain the judgment" (*A&M Global Mgt. Corp. v Northtown Urology Assoc., P.C.*, 115 AD3d 1283, 1287 [4th Dept 2014]), and that a civil bench verdict should be upheld "unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence" (*Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992], *rearg denied* 81 NY2d 835 [1993] [internal quotation marks omitted]).

In this case, the trial court found that defendant's "operation of the . . . truck on the shoulder of the road only 18 inches from high-speed traffic was intentional, unreasonable and in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow" and that defendant's "parking of the truck on the shoulder was done with a conscious indifference to the possibility that the truck would pose a hazard to oncoming traffic." To support that conclusion, the trial court found that, at the time of the accident, defendant had parked his vehicle "approximately 18 inches from the yellow fog line"; that the regulations of the Thruway Authority "provide that a vehicle engaged in cleanup operations, such as [the vehicle involved here], should be parked as far from traffic as feasible"; that defendant "could have operated and parked his vehicle further left on the grassy median, which would have avoided the collision . . . according to uncontroverted expert testimony"; that, despite defendant's "testimony to the contrary, meteorological, photographic and testimonial evidence [demonstrates] that the grassy area to the left of the shoulder was dry enough to accommodate [defendant's] truck as it proceeded along and intermittently stopped during the cleanup operation"; that defendant's truck "was parked either on, or so near the rumble strips located on the left shoulder, that this safety feature was rendered useless" and, "[i]f the . . . vehicle [that collided with the truck] had engaged the rumble strips[,] it is more likely than not that the accident would not have occurred"; and that defendant "did not use any signs or channeling devices to alert traffic that work on the median and the shoulder close to the highway was being conducted."

As the majority correctly states, the contested issue is whether defendant acted with reckless disregard for the safety of others. For these purposes, a person acts recklessly when he or she "consciously—and, thus, with general intentionality, not necessarily with intent to cause particular injury—disregard[s] known serious risks of harm" (*Campbell v City of Elmira*, 84 NY2d 505, 511 [1994]). In our view, the trial court correctly found that defendant acted with the requisite reckless disregard.

At trial, plaintiffs presented two expert witnesses who opined that defendant's conduct recklessly disregarded the safety of others. First, a retired State Trooper and accident reconstructionist testified that, had defendant followed his stated practice of driving outside of the delineators and on the grassy median, there would have

been no collision. That expert also testified that, had the truck been positioned 5 feet 3.6 inches farther left, there would not have been a collision and that, if it had been positioned only 3.6 feet to the left of the fog line, the collision would have only been a sideswipe that would have resulted in much less damage. That expert opined, without objection, that situating the truck 18 inches from the fog line was reckless and violated the Thruway Authority's Traffic Safety Manual.

Plaintiffs' second expert, a civil engineer and former Department of Transportation employee, was also an accident reconstructionist. He testified that it is well known that vehicles run off the road for various reasons, that rumble strips were installed to decrease the occurrence of run-off-the-road incidents, and that the very purpose of defendant and his truck on the day in question was to protect two laborers from vehicles running off or drifting off the road. The second expert testified that, if defendant believed that the ground was wet and that his truck might get stuck, he should have come back another day when that area was firm and dry, particularly given that the work being performed by the laborers on the day in question was not urgent. Like the first expert, the second expert testified that defendant's actions violated the Thruway Authority's Traffic Safety Manual. Most importantly, and without objection, the second expert opined that defendant's conduct in parking approximately 18 inches from the fog line without the necessary safety measures created known and obvious risks to anyone driving on the Thruway and was thus reckless.

The testimony of the foregoing experts is, in our view, compelling proof that the trial court correctly found that defendant acted recklessly in this case (*see generally Spalla v Village of Brockport*, 295 AD2d 900, 900-901 [4th Dept 2002]; *Allen v Town of Amherst*, 294 AD2d 828, 829 [4th Dept 2002], *lv denied* 3 NY3d 609 [2004]). The trial court also properly considered the divergence between defendant's actions on the day in question and his usual practices and behavior, his employer's policies, and departmental rules as relevant factors in finding recklessness on this record (*see e.g. Bliss v State of New York*, 95 NY2d 911, 913 [2000]; *Freitag v Village of Potsdam*, 155 AD3d 1227, 1231 [3d Dept 2017]; *Ruiz v Cope*, 119 AD3d 1333, 1334 [4th Dept 2014]; *Allen*, 294 AD2d at 829).

From a broader perspective, we ought not to inadvertently conflate the criminal recklessness standard with the civil recklessness standard. Yes, the majority is correct that this situation "demands more than a showing of lack of 'due care under the circumstances'—the showing typically associated with ordinary negligence claims" (*Saarinen v Kerr*, 84 NY2d 494, 501 [1994]). But in defining civil recklessness, the courts have never required that the defendant's conduct be committed with a depraved heart, or for the purpose of bringing about a particular injury. For example, in *Deleon v New York City Sanitation Dept.* (25 NY3d 1102, 1107 [2015]), the Court of Appeals held that, "[i]f a factfinder concludes that the driver could, but failed to, take evasive action to avoid a forceful collision, a reasonable jury could find that this conduct rises to the

recklessness standard." Likewise, in *Ruiz* (119 AD3d at 1333-1334), we affirmed a nonjury finding of liability despite "conflicting accounts whether [the] defendant slowed down or came to a near stop prior to entering the intersection." And we have frequently held that the reasonableness of a defendant's excuse or explanation for his or her conduct is a question best left to the trier of fact (*see e.g. Chase v Marsh*, 162 AD3d 1589, 1590 [4th Dept 2018]; *Gawron v Town of Cheektowaga*, 117 AD3d 1410, 1413 [4th Dept 2014]; *Ham v City of Syracuse*, 37 AD3d 1050, 1051-1052 [4th Dept 2007], *lv dismissed* 8 NY3d 976 [2007]; *Haist v Town of Newstead*, 27 AD3d 1133, 1134 [4th Dept 2006]). In our view, the record in this case supports the trial court's finding that defendant acted with reckless disregard for the safety of others and, therefore, the verdict is not against the weight of the evidence and the judgment in each appeal should be affirmed.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

106

CA 19-00477

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

JESSICA G., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ERIC J. KRONE, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.
(APPEAL NO. 2.)

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

MARTIN J. ZUFFRANIERI, WILLIAMSVILLE, FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered February 20, 2019. The judgment, insofar as appealed from, adjudged that defendant Eric J. Krone acted with reckless disregard for the safety of others and that he is 35% liable for the subject collision.

It is hereby ORDERED that the judgment insofar as appealed from is reversed on the law without costs and the complaint is dismissed against defendant Eric J. Krone.

Same memorandum as in *Alexandra R. v Krone* ([appeal No. 1] — AD3d — [Aug. 20, 2020] [4th Dept 2020]).

All concur except NEMOYER and CURRAN, JJ., who dissent and vote to affirm in the same dissenting memorandum as in *Alexandra R. v Krone* ([appeal No. 1] — AD3d — [Aug. 20, 2020] [4th Dept 2020]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

107

CA 19-00478

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

VANESSA G., AS PARENT AND NATURAL GUARDIAN OF
ADRIANNA A., AN INFANT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NELSON A., AS ADMINISTRATOR OF THE ESTATE OF
LUIS A. A.-S., DECEASED,
ET AL., DEFENDANTS,
AND ERIC J. KRONE, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

VANDETTE PENBERTHY LLP, BUFFALO (JAMES M. VANDETTE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered February 27, 2019. The judgment, insofar as appealed from, adjudged that defendant Eric J. Krone acted with reckless disregard for the safety of others and that he is 35% liable for the subject collision.

It is hereby ORDERED that the judgment insofar as appealed from is reversed on the law without costs and the complaint is dismissed against defendant Eric J. Krone.

Same memorandum as in *Alexandra R. v Krone* ([appeal No. 1] — AD3d — [Aug. 20, 2020] [4th Dept 2020]).

All concur except NEMOYER and CURRAN, JJ., who dissent and vote to affirm in the same dissenting memorandum as in *Alexandra R. v Krone* ([appeal No. 1] — AD3d — [Aug. 20, 2020] [4th Dept 2020]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

108

CA 19-00755

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

NELSON A., AS ADMINISTRATOR OF THE ESTATE OF
LUIS A. A.-S., ALSO KNOWN AS LUIS A., SR.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ERIC J. KRONE, DEFENDANT-APPELLANT.
(APPEAL NO. 4.)

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

SCHNITTER CICCARELLI MILLS, PLLC, WILLIAMSVILLE (RYAN J. MILLS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered April 4, 2019. The judgment adjudged that defendant acted with reckless disregard for the safety of others and that he is 35% liable for the subject collision.

It is hereby ORDERED that the judgment so appealed from is reversed on the law without costs and the complaint is dismissed.

Same memorandum as in *Alexandra R. v Krone* ([appeal No. 1] — AD3d — [Aug. 20, 2020] [4th Dept 2020]).

All concur except NEMOYER and CURRAN, JJ., who dissent and vote to affirm in the same dissenting memorandum as in *Alexandra R. v Krone* ([appeal No. 1] — AD3d — [Aug. 20, 2020] [4th Dept 2020]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

112

CA 19-00834

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

THOMAS E. MCGOVERN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

YOLANDA J. MCGOVERN, DEFENDANT-APPELLANT.

DAVID SCOTT HEIER, CANANDAIGUA, FOR DEFENDANT-APPELLANT.

TERESA M. PARE, CANANDAIGUA, FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Ontario County (William F. Kocher, A.J.), entered October 24, 2018 in a divorce action. The judgment, among other things, dissolved the marriage between the parties and equitably distributed the marital property.

It is hereby ORDERED that the judgment so appealed from is modified on the law by vacating the 2nd through 11th decretal paragraphs, and as modified the judgment is affirmed without costs and the matter is remitted to Supreme Court, Ontario County, for further proceedings in accordance with the following memorandum: Plaintiff husband commenced this action in 2015 seeking a divorce. In 2017, the parties placed on the record an oral stipulation of settlement that, inter alia, provided for the distribution of the marital property. Although the oral stipulation contemplated the signing of a postnuptial agreement, defendant wife refused to sign such an agreement. Nevertheless, Supreme Court issued a judgment that acknowledged that the parties had placed on the record in open court an oral stipulation resolving all disputed issues, and that provided, inter alia, that the oral stipulation was incorporated but not merged into the judgment. Defendant appeals.

We agree with defendant that the oral stipulation rendered in open court did not satisfy the requirements of Domestic Relations Law § 236 (B) (3), and it is therefore invalid and unenforceable. "In matrimonial actions . . . an open court stipulation is unenforceable absent a writing that complies with the requirements for marital settlement agreements" (*Keegan v Keegan*, 147 AD3d 1417, 1418 [4th Dept 2017]). "More particularly, to be valid and enforceable, marital settlement agreements must be 'in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded' (§ 236 [B] [3])" (*id.*; *see also Lewis v Lewis*, 70 AD3d 1432, 1433 [4th Dept 2010]; *Tomei v Tomei*, 39 AD3d 1149, 1150 [4th Dept 2007]; *Sorge v Sorge*, 238 AD2d 890, 890 [4th Dept 1997]; *Conti v Conti*, 199 AD2d 985, 985-986 [4th Dept 1993]).

Here, inasmuch as there was no acknowledgment simultaneously executed with the oral stipulation (*cf. Ashcroft v Ashcroft* [appeal No. 2], 195 AD2d 963, 964 [4th Dept 1993]), we agree with defendant that she is entitled to the relief she is seeking on appeal, i.e., vacatur of the judgment of divorce except to the extent that the judgment granted the divorce itself, granted defendant the corresponding right to resume the use of a prior surname, and provided for service of the judgment upon defendant. We therefore modify the judgment accordingly, and we remit the matter to Supreme Court for a new determination, following a hearing if necessary (*see Keegan*, 147 AD3d at 1418; *Lewis*, 70 AD3d at 1433).

We disagree with our dissenting colleague's conclusion that dismissal of this appeal is required because "defendant is not aggrieved by that to which she stipulated." Defendant is aggrieved because the oral stipulation rendered in open court, which was incorporated but not merged into the judgment of divorce, did not satisfy the requirements of Domestic Relations Law § 236 (B) (3), and thus it is invalid and unenforceable. None of the cases cited by our dissenting colleague involve these circumstances, and defendant was not required to move to vacate the stipulation. Our case law, which is not addressed by the dissent, allows the defendant in such circumstances to seek to invalidate the oral stipulation on direct appeal from the judgment (*see Lewis*, 70 AD3d at 1433; *Conti*, 199 AD2d at 985-986).

All concur except CURRAN, J., who dissents and votes to dismiss the appeal in the following memorandum: I respectfully dissent because I conclude that this appeal must be dismissed. Inasmuch as defendant's contentions with respect to the judgment were resolved by the parties' oral stipulation that was incorporated but not merged into the judgment of divorce, dismissal of this appeal is required because defendant is not aggrieved by that to which she stipulated (*see Dumond v New York Cent. Mut. Fire Ins. Co.*, 166 AD3d 1554, 1555 [4th Dept 2018]; *see generally* CPLR 5511; *Adams v Genie Indus., Inc.*, 14 NY3d 535, 540-541 [2010]; *Koziol v Koziol*, 60 AD3d 1433, 1434 [4th Dept 2009], *appeal dismissed* 13 NY3d 763 [2009]). Defendant's proper remedy was to move to vacate the stipulation and appeal from the ensuing order, assuming that Supreme Court denied her motion (*see generally Matter of Annabella B.C. [Sandra L.C.]*, 136 AD3d 1364, 1365 [4th Dept 2016]; *Matter of Maria J. [Peter J.]*, 129 AD3d 1660, 1661 [4th Dept 2015]; *Koziol*, 60 AD3d at 1434). In my view, the cases relied upon by the majority do not address the fundamental requirement that, for there to be a justiciable controversy, the appellant must be aggrieved.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

114

CA 19-00339

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

IN THE MATTER OF CORNELL UNIVERSITY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BOARD OF ASSESSMENT REVIEW AND SHANA JO HILTON,
AS ASSESSOR OF TOWN OF SENECA,
RESPONDENTS-APPELLANTS.

CHALIFOUX LAW, P.C., PITTSFORD (SHEILA M. CHALIFOUX OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

JARED M. PITTMAN, ITHACA, FOR PETITIONER-RESPONDENT.

HODGSON RUSS LLP, BUFFALO (HENRY A. ZOMERFELD OF COUNSEL), FOR DYNAMIC ENERGY SOLUTIONS, LLC, AMICUS CURIAE.

Appeal from a judgment and order (one paper) of the Supreme Court, Ontario County (John J. Ark, J.), entered January 28, 2019 in proceedings pursuant to RPTL article 7. The judgment and order granted the petitions by, inter alia, directing the removal of a tax parcel from the tax rolls of the Town of Seneca.

It is hereby ORDERED that the judgment and order so appealed from is unanimously reversed on the law without costs and the petitions are dismissed.

Memorandum: Petitioner, an educational institution, commenced these proceedings pursuant to, inter alia, RPTL article 7, challenging tax assessments on a solar photovoltaic electrical system (system) that is located on its land in the Town of Seneca. Petitioner and nonparty for-profit corporation Argos Solar, LLC (Argos) had entered into an agreement pursuant to which petitioner granted Argos an exclusive license to use certain agricultural research land owned by petitioner "for the sole purpose of constructing, installing, owning, operating and maintaining the [s]ystem." The agreement obligated petitioner to purchase from Argos the energy output generated by the system. The initial term of the agreement was 20 years, and the agreement further provided Argos with the option to extend the term for as many as two additional 5-year periods, and then allowed petitioner to continue making payments for energy output beyond the 30-year anniversary of the agreement, thereby extending it on a month-to-month basis. In addition, Argos was obligated to remove the system following termination of the agreement unless petitioner exercised its

option to purchase the system, and the agreement also provided for removal of the system as an available remedy in the event of termination resulting from the default of either party.

Petitioner subsequently applied to renew its real property tax exemption pursuant to RPTL 420-a, and although the land itself indisputably remained tax exempt thereunder, respondent Shana Jo Hilton, as Assessor of Town of Seneca, created a separate tax parcel to assess taxes on the newly constructed system located on the land. As relevant here, taxes were assessed on the system each year over a three-year period, and respondent Board of Assessment Review denied petitioner's complaints challenging each of those assessments.

After petitioner commenced these proceedings, Supreme Court determined that the tax assessments were not lawful inasmuch as the system did not constitute real property and, even if it did, it would be exempt on the basis of petitioner's beneficial ownership thereof. Respondents appeal from a judgment and order granting petitioner's petitions by, inter alia, removing the tax parcel from the rolls and cancelling the taxes assessed thereunder for each of the subject years. We agree with respondents that the court erred in granting the petitions.

We note at the outset that the petitions must be dismissed insofar as they seek relief pursuant to CPLR article 78, because the proper vehicle for seeking the instant relief is a certiorari proceeding pursuant to RPTL article 7 (*see Matter of Crouse Health Sys., Inc. v City of Syracuse*, 126 AD3d 1336, 1336 [4th Dept 2015]; *Matter of ViaHealth of Wayne v VanPatten*, 90 AD3d 1700, 1701 [4th Dept 2011]).

Respondents contend that the system constitutes taxable real property under RPTL 102 (12) (b). We agree. Pursuant to that statute, taxable real property is defined as "[b]uildings and other articles and structures, substructures and superstructures erected upon, under or above the land, or affixed thereto" (*id.*). "The common law relating to fixtures provides guidance in determining whether particular items fall within [that] statutory definition" (*Matter of Maines v Board of Assessors of Town of Lafayette*, 125 AD2d 951, 951-952 [4th Dept 1986]; *see Matter of Metromedia, Inc. [Foster & Kleiser Div.] v Tax Commn. of City of N.Y.*, 60 NY2d 85, 90 [1983]; *Matter of Consolidated Edison Co. of N.Y. v City of New York*, 44 NY2d 536, 541-542 [1978]). "To meet the common-law definition of fixture, the personalty in question must: (1) be actually annexed to real property or something appurtenant thereto; (2) be applied to the use or purpose to which that part of the realty with which it is connected is appropriated; and, (3) be intended by the parties as a permanent accession to the freehold" (*Metromedia, Inc.*, 60 NY2d at 90).

First, with respect to annexation, petitioner's own submissions show that the system consists of nearly 1,600 piles driven directly into the ground and nearly 400 piles set on footings of concrete poured into tube forms in the ground, bolted on top of which is a racking system housing the solar panels that are attached thereto by

nuts and bolts, as well as an inverter and associated equipment installed on a poured concrete slab. We conclude that those characteristics establish that the system is annexed to real property or something appurtenant thereto (*see id.* at 88-90).

Second, we conclude that the system applies to the purpose of the land to which it is connected inasmuch as petitioner devoted the land to generating solar energy as part of its sustainability efforts and in furtherance of its educational mission (*see id.* at 90; *Maines*, 125 AD2d at 952).

Third, contrary to petitioner's assertion and the court's determination, the purported ease of physical removal is not determinative in evaluating permanency (*see Metromedia, Inc.*, 60 NY2d at 89-91; *Maines*, 125 AD2d at 952). It has long been settled law that "[t]he permanency of the attachment does not depend so much upon the degree of physical force with which the thing is attached as upon the motive and intention of the party in attaching it" (*McRea v Central Natl. Bank of Troy*, 66 NY 489, 495 [1876]; *see Matter of City of New York [Kaiser Woodcraft Corp.]*, 11 NY3d 353, 360 [2008], *rearg denied* 11 NY3d 903 [2009]; *Consolidated Edison Co. of N.Y.*, 44 NY2d at 542-543). Here, in view of the purpose and duration of the agreement, the options to extend afforded to both Argos and petitioner, and the terms permitting removal of the system upon termination, we conclude that the record establishes that petitioner and Argos "intended the [system] to be 'permanent' over the life of the . . . agreement" (*Metromedia, Inc.*, 60 NY2d at 91; *see Matter of T-Mobile Northeast, LLC v DeBellis*, 143 AD3d 992, 995-996 [2d Dept 2016], *affd on other grounds* 32 NY3d 594 [2018], *rearg denied* 32 NY3d 1197 [2019]; *Consolidated Edison Co. of N.Y.*, 44 NY2d at 542-543).

Based on the foregoing, we conclude that the system constitutes taxable real property under RPTL 102 (12) (b), and we therefore need not address respondents' remaining contentions on that issue (*see T-Mobile Northeast, LLC*, 32 NY3d at 610).

Respondents further contend that the court erred in holding that the system, even if it constituted taxable real property, would be tax exempt on the ground that petitioner is the beneficial owner of the system. We agree. RPTL 420-a (1) (a) provides, in relevant part, that "[r]eal property owned by a corporation or association organized or conducted exclusively for . . . educational . . . purposes, and used exclusively for carrying out thereupon . . . such purposes . . . shall be exempt from taxation." "Land and [structures] are separately defined as taxable forms of real property (*see* RPTL 102 [12] [a], [b]), and [parties to an agreement] may agree to their separate ownership" (*Matter of United Health Servs. Hosps., Inc. v Assessor of the Town of Vestal*, 122 AD3d 1177, 1178 [3d Dept 2014], *lv denied* 25 NY3d 909 [2015]; *see Metromedia, Inc.*, 60 NY2d at 91; *Matter of National Cold Stor. Co. v Boyland*, 16 AD2d 267, 268-269 [1st Dept 1962], *affd* 12 NY2d 808 [1962]). "Although the parties' labeling of one as owner is not enough to create a taxable interest, a finding of such an interest is justified where that party exercises dominion and

control over the property" (*Metromedia, Inc.*, 60 NY2d at 91; *see Matter of Colleges of the Seneca v City of Geneva*, 94 NY2d 713, 716-717 [2000]; *United Health Servs. Hosps., Inc.*, 122 AD3d at 1178-1179).

Here, it is undisputed that petitioner is a qualifying corporation, but Argos is not, and that the system is used for a qualifying purpose; therefore, whether the system is tax exempt depends on its ownership. The agreement separates ownership of the system from the land and designates Argos as the owner of the system. While that fact must be considered, "the question of ownership turns on whether the . . . agreement confers incidents of ownership upon [Argos] or whether [petitioner] retains such dominion and control over the property that it must be deemed the beneficial owner for tax purposes" (*United Health Servs. Hosps., Inc.*, 122 AD3d at 1179). We conclude for the reasons that follow that the agreement confers incidents of ownership upon Argos to justify a finding—consistent with the designation in the agreement—that Argos, not petitioner, is the owner of the system.

Unless petitioner exercises its option to purchase the system from Argos, the agreement obligates Argos to remove the system and all assets thereto whether buried or above ground from the land following termination of the agreement at its sole cost and expense (*see Metromedia, Inc.*, 60 NY2d at 91; *United Health Servs. Hosps., Inc.*, 122 AD3d at 1179). In addition, Argos is responsible for all taxes associated with ownership of the system, Argos bears the risk of any damage to the system and is entitled to all insurance proceeds, and petitioner has the option to purchase the system from Argos upon termination of the agreement at a price to be determined in accordance with the provisions thereof (*see Colleges of the Seneca*, 94 NY2d at 718; *Metromedia, Inc.*, 60 NY2d at 91; *United Health Servs. Hosps., Inc.*, 122 AD3d at 1179; *Matter of Spectapark Assoc. v City of Albany Dept. of Assessment & Taxation*, 12 AD3d 800, 801-802 [3d Dept 2004], *lv denied* 4 NY3d 705 [2005]). Although the agreement provides petitioner with some minor incidents of ownership, we conclude that the agreement does not confer to petitioner "such dominion and control over the property that it must be deemed the beneficial owner for tax purposes" (*United Health Servs. Hosps., Inc.*, 122 AD3d at 1179; *see Colleges of the Seneca*, 94 NY2d at 718; *Metromedia, Inc.*, 60 NY2d at 91). Therefore, respondents correctly determined that the system is real property that is not tax exempt under RPTL 420-a.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

116

CA 19-00118

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

SURINDER K. VIRK AND AMARJIT S. VIRK,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CAROL A. GUTT, DEFENDANT-APPELLANT.

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

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (GERALD T. WALSH OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered January 16, 2019. The order, insofar as appealed from, denied the motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the complaint, as amplified by the 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: Amarjit S. Virk (plaintiff) was injured in a motor vehicle accident when his vehicle collided with a vehicle driven by defendant. Plaintiff and his wife (collectively, plaintiffs) commenced this action alleging, inter alia, that plaintiff sustained a serious injury within the meaning of Insurance Law § 5102 (d) under the significant limitation of use, permanent consequential limitation of use, and 90/180-day categories. Defendant appeals from an order that, insofar as appealed from, denied her motion for summary judgment dismissing the complaint.

Contrary to defendant's contention, we conclude that Supreme Court properly denied the motion with respect to the permanent consequential limitation of use and significant limitation of use categories inasmuch as defendant failed to meet her initial burden with respect to those categories. In support of her motion, defendant submitted the affirmed report of an expert physician who examined plaintiff on defendant's behalf. The expert physician averred that he reviewed plaintiff's medical records and imaging studies from before and after the subject accident and concluded that there was no

objective evidence demonstrating that plaintiff, who had suffered two prior injuries to his neck and back, sustained a new cervical or lumbar disc herniation, or permanent injury to his nervous system or spine as a result of the accident. The expert physician, however, failed to perform a comparison of plaintiff's pre- and post-accident imaging studies and, therefore, was unable to aver, without engaging in speculation, that he observed no relevant change or difference in plaintiff's spine caused by the accident (*cf. Roger v Soos*, 175 AD3d 937, 938 [4th Dept 2019]; *Heatter v Dmowski*, 115 AD3d 1325, 1326 [4th Dept 2014]). Further, although defendant's expert physician opined that plaintiff had suffered no new injuries, there were observable changes between plaintiff's pre- and post-accident MRI scans, and defendant's expert physician noted that plaintiff had a decreased range of motion and increased pain after the accident. Despite those changes, defendant's expert physician concluded that plaintiff's spinal condition was purely degenerative in nature, and yet failed to explain the basis for that conclusion (*see Jean v New York City Tr. Auth.*, 85 AD3d 972, 974 [2d Dept 2011]).

We agree with defendant, however, that the court erred in denying the motion with respect to the 90/180-day category, and we therefore modify the order accordingly. Defendant met her initial burden with respect to that category by submitting plaintiff's deposition testimony, wherein he testified that, one week after the subject accident, he resumed working 60 to 70 hours per week as an anesthesiologist. He also testified that, one week after the accident, he was able to dress, bathe, and groom himself without assistance, and that in the first three months after the accident, he was able to perform numerous household chores (*see Baldauf v Gambino*, 177 AD3d 1307, 1308 [4th Dept 2019]; *McIntyre v Salluzzo*, 159 AD3d 1547, 1547-1548 [4th Dept 2018]). Plaintiffs failed to raise an issue of fact in opposition. They failed to demonstrate that plaintiff's physician placed plaintiff on formal work restrictions, notwithstanding that his physician advised him not to lift heavy items (*see LaBeef v Baitsell*, 104 AD3d 1191, 1192 [4th Dept 2013]), and plaintiffs' assertions that plaintiff could not play golf or garden during the relevant time period after the accident are similarly unavailing (*see McIntyre*, 159 AD3d at 1548).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

117

CA 19-01550

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

C & D DESIGN, BUILD, DEVELOPMENT, LLC,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

VILLAGE OF ALEXANDER, NEW YORK,
AND DANIEL J. LANG (AS BUILDING INSPECTOR),
DEFENDANTS-RESPONDENTS.

MARCUS & CINELLI, LLP, WILLIAMSVILLE (DAVID P. MARCUS OF COUNSEL), AND ANDREOZZI BLUESTEIN, LLP, CLARENCE, FOR PLAINTIFF-APPELLANT.

DADD, NELSON, WILKINSON & WUJCIK, ATTICA (JAMES M. WUJCIK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Genesee County (Emilio L. Colaiacovo, J.), entered January 22, 2019. The order, among other things, converted defendants' motion to dismiss the amended complaint to a motion for summary judgment, granted that motion and dismissed the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the first ordering paragraph and reinstating the amended complaint, and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Genesee County, for further proceedings in accordance with the following memorandum: Plaintiff commenced this action seeking, inter alia, money damages and declaratory relief pursuant to 42 USC § 1983 in connection with the condemnation by defendants of certain property owned by plaintiff. Defendants moved to dismiss the amended complaint pursuant to, inter alia, CPLR 3211 (a) (1), (5) and (7), and plaintiff moved for an order, inter alia, reinstating its certificate of occupancy for the property. Supreme Court converted defendants' motion to a motion for summary judgment under CPLR 3212, granted that motion, and denied plaintiff's motion. Plaintiff now appeals.

Initially, we agree with plaintiff that the court erred in converting defendants' motion to dismiss to one for summary judgment. The court did not provide "adequate notice to the parties" that it was doing so (CPLR 3211 [c]), nor did defendants and plaintiff otherwise receive adequate notice by "submitting facts and arguments clearly indicating that they were deliberately charting a summary judgment course" (*Matter of Town of Geneva v City of Geneva*, 63 AD3d 1544, 1544 [4th Dept 2009] [internal quotation marks omitted]).

Furthermore, we conclude that defendants are not entitled to dismissal of the amended complaint under CPLR 3211 (a) (5) on statute of limitations grounds. We agree with plaintiff that, under these circumstances, a CPLR article 78 proceeding is not its exclusive remedy (*see Acquest Wehrle, LLC v Town of Amherst*, 129 AD3d 1644, 1646 [4th Dept 2015], *appeal dismissed* 26 NY3d 1020 [2015]). " 'In the land-use context, 42 USC § 1983 protects against municipal actions that violate a property owner's rights to due process, equal protection of the laws and just compensation for the taking of property under the Fifth and Fourteenth Amendments to the United States Constitution' " (*Sonne v Board of Trustees of Vil. of Suffern*, 67 AD3d 192, 200 [2d Dept 2009], quoting *Bower Assoc. v Town of Pleasant Val.*, 2 NY3d 617, 626 [2004]; *see Town of Orangetown v Magee*, 88 NY2d 41, 49 [1996]). Here, plaintiff's first three causes of action are based on 42 USC § 1983 and allege constitutional violations of procedural due process, substantive due process and equal protection, and the fourth cause of action seeks, inter alia, declaratory relief based on those alleged violations. That relief is appropriately sought via an action based on 42 USC § 1983, and therefore the four-month statute of limitations applicable to CPLR article 78 proceedings does not apply here (*see Sonne*, 67 AD3d at 202-203; *see also Matter of Karamalla v Devine*, 159 AD3d 1368, 1369 [4th Dept 2018]; *Mulcahy v New York City Dept. of Educ.*, 99 AD3d 535, 536 [1st Dept 2012]). We decline, however, to consider the remaining grounds raised by defendants in their motion inasmuch as the court improperly converted that motion to one for summary judgment, and therefore never addressed those grounds using the CPLR 3211 standard (*see generally Matter of South Blossom Ventures, LLC v Town of Elma*, 46 AD3d 1337, 1338 [4th Dept 2007], *lv dismissed* 10 NY3d 852 [2008]; *Fleiss v South Buffalo Ry. Co.*, 280 AD2d 1004, 1005 [4th Dept 2001]).

Contrary to plaintiff's further contention, we conclude that the court properly denied its motion inasmuch as plaintiff failed to establish that it is entitled as a matter of law to the relief sought therein, i.e., the removal of the placard designating the subject structure as condemned and reinstatement of the certificate of occupancy (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

We therefore modify the order by vacating the first ordering paragraph and reinstating the amended complaint, and we remit the matter to Supreme Court for further proceedings consistent with our decision.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

154

CA 19-01201

PRESENT: WHALEN, P.J., CURRAN, TROUTMAN, WINSLOW, AND BANNISTER, JJ.

ANTHONY A. SCALZO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CENTRAL CO-OPERATIVE INSURANCE COMPANY,
DEFENDANT-APPELLANT,
AND ROBERT J. SALERNO, DEFENDANT-RESPONDENT.

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

LAW OFFICES OF RICARDO J. MAURO, P.C., UTICA (RICARDO J. MAURO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

FELT EVANS, LLP, CLINTON (JAY G. WILLIAMS, III, OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (David A. Murad, J.), entered December 3, 2018. The order and judgment, insofar as appealed from, granted in part the motion of plaintiff seeking, inter alia, a declaratory judgment, and denied the cross motion of defendant Central Co-Operative Insurance Company seeking, inter alia, summary judgment.

It is hereby ORDERED that the order and judgment insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in its entirety, the cross motion is granted insofar as it seeks summary judgment and judgment is granted in favor of defendant Central Co-Operative Insurance Company as follows:

> It is ADJUDGED AND DECLARED that defendant Central Co-Operative Insurance Company is not obligated to defend or indemnify plaintiff in the underlying action.

Memorandum: Defendant Central Co-Operative Insurance Company (Central) appeals from an order and judgment that, inter alia, granted that part of plaintiff's motion for summary judgment seeking a declaration that Central had a duty to defend plaintiff in an underlying tort action and denied Central's cross motion seeking, among other things, summary judgment declaring that Central did not have a duty to defend or indemnify plaintiff. We reverse the order and judgment insofar as appealed from, deny plaintiff's motion in its entirety, grant Central's cross motion insofar as it seeks summary judgment, and grant judgment in favor of Central.

The underlying tort action arose from an incident in which plaintiff, allegedly in defense of his wife, struck his neighbor, defendant Robert J. Salerno, once or twice with his fist. The incident occurred on or near plaintiff's property and, although criminal charges against plaintiff were dismissed, Salerno commenced the underlying tort action against plaintiff. The first cause of action in the underlying tort action alleged that plaintiff "assault[ed] [Salerno] by seizing him, striking him and punching him in the face and in particular the left eye, among other areas of the body" and that those actions were "willful, intentional, unwarranted and without just cause or provocation." The second cause of action alleged that plaintiff "negligently struck [Salerno] so as to sustain serious injury" and that plaintiff "acted in a reckless, careless and negligent manner toward [Salerno]." Plaintiff sought coverage from Central under his homeowners' insurance policy, but Central denied coverage based on an exclusion providing that the policy did not apply to "liability . . . caused intentionally by or at the direction of any insured." Plaintiff subsequently commenced this action seeking a declaration that Central was obligated to defend and indemnify him in the underlying tort action.

We agree with Central that it established that the policy exclusion for intentional actions is applicable and that it therefore has no duty to defend or indemnify plaintiff in the underlying tort action. "It is well settled that an insurance company's duty to defend is broader than its duty to indemnify" (*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006]). "Indeed, the duty to defend is exceedingly broad, and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest . . . a reasonable possibility of coverage" (*id.* [internal quotation marks omitted]). "When an insurer seeks to disclaim coverage on the . . . basis of [a policy] exclusion, . . . the insurer will be required to provide a defense unless it can demonstrate that the allegations of the complaint cast the pleading solely and entirely within the policy exclusions, and, further, that the allegations, *in toto*, are subject to no other interpretation" (*id.* [internal quotation marks omitted]).

In assessing whether a policy exclusion for injuries " 'intentionally caused' " by the insured applies, a court must look to the pleadings in the underlying action and "limit [its] examination to the nature of the conduct [of the insured] as it is there described" (*Allstate Ins. Co. v Mugavero*, 79 NY2d 153, 159 [1992]). The "analysis depends on the facts which are pleaded, not conclusory assertions" (*id.* at 162). When a complaint alleges in a conclusory manner that an assault was committed negligently, an insurer has no duty to defend where the insured does not provide "evidentiary support for the conclusory characterization of [the] conduct as negligent or provide an explanation of how the intrinsically intentional act[] of assault . . . could be negligently performed" (*id.* at 163; *see Pennsylvania Millers Mut. Ins. Co. v Rigo*, 256 AD2d 769, 771 [3d Dept 1998]; *Monter v CNA Ins. Cos.*, 202 AD2d 405, 406 [2d Dept 1994]). An insured may not "exalt form over substance by labeling [an underlying tort] action as one to recover damages for negligence" where the conduct is inherently intentional (*State Farm Fire & Cas. Co. v Joseph*

M., 106 AD3d 806, 808 [2d Dept 2013] [internal quotation marks omitted]).

Here, the second cause of action in the Salerno complaint contains no more than a conclusory characterization of plaintiff's conduct as negligent without any supporting factual allegations. Thus, the complaint in the underlying action does not contain sufficient allegations of negligence to avoid the policy exclusion (*see Allstate Ins. Co.*, 79 NY2d at 162-163; *cf. Automobile Ins. Co. of Hartford*, 7 NY3d at 135-138). Further, plaintiff failed to provide "evidentiary support for the conclusory characterization of [his] conduct as negligent" or "an explanation of how the intrinsically intentional act[] of assault . . . could be negligently performed" (*Allstate Ins. Co.*, 79 NY2d at 163). Moreover, even assuming, arguendo, that plaintiff intended only to punch Salerno but not to injure him, the injuries were intentionally caused inasmuch as harm was inherent in the nature of the acts alleged (*see id.* at 160).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

158

CA 19-01260

PRESENT: WHALEN, P.J., CURRAN, TROUTMAN, WINSLOW, AND BANNISTER, JJ.

CANDY ANDERSON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JACK E. ANDERSON, DEFENDANT-RESPONDENT.

LAW OFFICE OF BARBARA A. KILBRIDGE, BUFFALO (BARBARA A. KILBRIDGE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Chautauqua County (Stephen W. Cass, A.J.), entered December 19, 2018. The order, insofar as appealed from, denied that part of the motion of plaintiff seeking summary judgment on the complaint.

It is hereby ORDERED that the order insofar as appealed from is reversed on the law without costs and the motion is granted insofar as it sought summary judgment on the complaint.

Memorandum: Plaintiff commenced this action, which is ancillary to pending divorce actions commenced by plaintiff and defendant, seeking to set aside a nuptial agreement. Plaintiff alleged that the nuptial agreement is invalid and unenforceable because defendant's signature on the agreement was not acknowledged contemporaneously and, at the time when defendant's signature was eventually acknowledged, the parties did not mutually reaffirm the agreement. The litigation arises from the parties' marriage in August 2011. One month after the marriage, plaintiff signed and acknowledged a document titled "Prenuptial Agreement" (agreement). The parties dispute whether defendant also signed the agreement at that time, but there is no dispute that defendant's signature was not acknowledged before a notary public until nearly seven years later, in May 2018. In June 2018, and one month after defendant's signature was acknowledged, defendant commenced a divorce action, in which defendant sought a judgment of divorce that incorporated the agreement. Plaintiff thereafter commenced a separate divorce action. In this ancillary action to the pending divorce actions, plaintiff moved for summary judgment on her complaint as well as an award of $3,000 in attorney's fees. Supreme Court denied the motion, reasoning that defendant's later acknowledgment of the agreement cured any defect. Plaintiff appeals from the order insofar as it denied that part of her motion seeking summary judgment on the complaint. We reverse the order

insofar as appealed from.

Domestic Relations Law § 236 (B) (3) provides that "[a]n agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded." "The acknowledgment requirement [of section 236 (B) (3)] fulfills two important purposes" (*Galetta v Galetta*, 21 NY3d 186, 191 [2013]). "First, 'acknowledgment serves to prove the identity of the person whose name appears on the instrument and authenticate the signature of such person' " (*id.* at 191-192). "Second, it necessarily imposes on the signer a measure of deliberation in the act of executing the document" (*id.* at 192). "[T]he formality of an acknowledgment underscores the weighty personal choices to relinquish significant property or inheritance rights, or to resolve important issues concerning child custody, education and care" (*id.* [internal quotation marks omitted]).

It is undisputed that, at the time the parties entered into the agreement, there was no certificate of acknowledgment with respect to defendant's signature and thus the agreement was defective. We conclude that defendant's attempt to cure that defect nearly seven years later, and on the precipice of a divorce action, by having his signature acknowledged and then filing the agreement is insufficient to cure that defect.

Although the Domestic Relations Law does not expressly provide that a reaffirmation of the agreement is required under these circumstances, the statute does not speak at all regarding the cure of a defective nuptial agreement. The Court of Appeals, however, has remarked that the acknowledgment requirement imposed under Domestic Relations Law § 236 (B) (3) is "onerous and, in some respects, more exacting than the burden imposed when a deed is signed" (*Galetta*, 21 NY3d at 192) and that, unlike an unacknowledged deed, a prenuptial agreement is "unenforceable even if the parties acknowledge that the signatures are authentic and the agreement was not tainted by fraud or duress" (*id.*). Thus, while our dissenting colleagues view the acknowledgment requirement of the agreement as a mere technical step, the Court of Appeals has viewed the requirement as "onerous" and involving "weighty personal choices" (*id.*).

When discussing the issue whether a deficiency in a nuptial agreement that lacks an acknowledgment can be later cured, the Court noted, in dicta, that the weight of the authority in the Appellate Division permits "the absence of an acknowledgment to be cured after the fact, [but only if] *both parties* engaged in a mutual '*reaffirmation*' of the agreement" (*id.* at 195 [emphasis added]). The Court commented that a rule that prohibits a party from attempting to unilaterally cure the absence of an acknowledgment "appears to be sound" (*id.* at 196).

Thus, we conclude that, when an acknowledgment is missing from a nuptial agreement, an acknowledgment and a reaffirmation by the parties is required to cure the defect. To hold otherwise would permit a spouse to act unilaterally to cure the lack of his or her acknowledgment at some later date, and would thereby permit that spouse to choose, based on circumstances that may have changed in ways unanticipated by the other spouse at the time of the initial signing of the agreement, whether to acknowledge the agreement and make it enforceable or to leave it unacknowledged and defective. When the parties mutually sign and acknowledge the agreement, it is clear that they are mutually binding themselves to the weighty decisions that they deliberated on. Thus, in order for the acknowledgment to have true significance and purpose, it must be done contemporaneously with the parties' signatures or, if the acknowledgment occurs at a later date, the agreement must be mutually reaffirmed by the parties (*see generally D'Elia v D'Elia*, 14 AD3d 477, 478 [2d Dept 2005]; *Arizin v Covello*, 175 Misc 2d 453, 457 [Sup Ct, NY County 1998]).

Because the agreement in this case was not reaffirmed by the parties at the time that defendant's signature was acknowledged, we conclude that the agreement is invalid and unenforceable and that plaintiff is therefore entitled to summary judgment on the complaint.

All concur except CURRAN and TROUTMAN, JJ., who dissent and vote to affirm in the following memorandum: We respectfully dissent. Initially, it is undisputed that plaintiff's signature on the nuptial agreement was properly acknowledged, and she makes no assertion on appeal that she was induced into entering the agreement by fraud, overreaching or duress. Similarly, there is no alleged technical infirmity in the form of defendant's acknowledgment. We disagree, however, with the majority's conclusion that the agreement was invalid because it was required to have been contemporaneously acknowledged by the parties at the same time they signed the agreement and, because it was not contemporaneously acknowledged, it should have been "reaffirmed" by both parties to be valid.

Domestic Relations Law § 236 (B) (3) contains no language expressly imposing the requirement endorsed by the majority. Moreover, the cases on which the majority relies to support that conclusion cannot properly be read as holding that the statute contains a contemporaneous acknowledgment or reaffirmation requirement. To be sure, the Court of Appeals, in *Galetta v Galetta* (21 NY3d 186, 195 [2013]), observed that "the weight of Appellate Division authority is against permitting the absence of an acknowledgment to be cured after the fact, unless both parties engaged in mutual 'reaffirmation' of the agreement." Here, as Supreme Court accurately observed, however, the cases cited by the Court of Appeals in *Galetta* all involved the propriety of a subsequent *acknowledgment* to cure a defect that occurred at the time an agreement was initially acknowledged—they did not generally impose a "reaffirmation" requirement.

It also should not be supposed that the Court of Appeals added a

reaffirmation requirement as a precondition to establishing the validity of nuptial agreements in mere dicta describing appellate authority, especially absent a statutory definition of the term "reaffirmation" in the Domestic Relations Law. Although *Arizin v Covello* (175 Misc 2d 453, 454-455 [Sup Ct, NY County 1998]) referenced a "reaffirmation" executed by the parties, the court in that case ultimately analyzed the legal issue in terms of whether the subsequent "acknowledgment" was valid, and the court concluded that the acknowledgment was valid (*id.* at 456-460). Here, as noted above, there is no dispute that defendant's acknowledgment was done in a technically correct manner.

The majority also imposes a further non-statutory requirement—that the acknowledgment "must be done contemporaneously with the parties' signatures." Respectfully, that mandate is unsupported by any precedent and is contrary to the well-settled principles that contracts, including nuptial agreements, are presumed to be valid (*see Bloomfield v Bloomfield*, 97 NY2d 188, 193 [2001]; *Matter of Sunshine*, 51 AD2d 326, 327 [1st Dept 1976], *affd* 40 NY2d 875 [1976]), and may be executed in counterparts and at different locations—which implies that it is possible that such agreements will not be signed and acknowledged by the parties at exactly the same time (*see generally Pulver v Pulver*, 40 AD3d 1315, 1317 [3d Dept 2007]).

In imposing reaffirmation and contemporaneousness requirements, we submit that the majority's approach will likely result in continued efforts to define the precise scope of those new mandates. Thus, inasmuch as the nuptial agreement here was already properly acknowledged by the time its validity was required to be evaluated—i.e., when the matrimonial action was commenced—we would affirm the order on appeal.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

159

CA 19-00684

PRESENT: WHALEN, P.J., CURRAN, TROUTMAN, WINSLOW, AND BANNISTER, JJ.

ANTHONY FARGNOLI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MARK WARFEL, D.O., MARK WARFEL, D.O., P.C., ST. ELIZABETH'S FAMILY PRACTICE, ST. ELIZABETH'S MEDICAL CENTER, IMAGING AT ST. ELIZABETH'S MEDICAL ARTS, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

GALE GALE & HUNT, LLC, SYRACUSE (CATHERINE A. GALE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered January 18, 2019. The order denied in part the motion of defendants-appellants seeking summary judgment dismissing the complaint against them.

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

Memorandum: In this medical malpractice action arising from plaintiff's allegations that, among other things, defendants were negligent in failing to timely diagnose his breast cancer, defendants-appellants (defendants) appeal from an order that, inter alia, denied in part the motion of defendants for summary judgment dismissing the complaint against them. We affirm.

On a motion seeking summary judgment dismissing a medical malpractice cause of action, " 'a defendant has the burden of establishing, prima facie, that he or she did not deviate from the good and accepted standard of . . . care, or that any such deviation was not a proximate cause of the plaintiff's injuries' " (*Culver v Simko*, 170 AD3d 1599, 1600 [4th Dept 2019]; *see Kubera v Bartholomew*, 167 AD3d 1477, 1479 [4th Dept 2018]). Here, as defendants essentially concede, their submissions in support of the motion with respect to the medical malpractice causes of action addressed only deviation, inasmuch as their expert affirmation mentioned causation only in a fleeting and conclusory manner (*see generally Diaz v New York Downtown Hosp.*, 99 NY2d 542, 545 [2002]; *Occhino v Fan*, 151 AD3d 1870, 1871 [4th Dept 2017]). Thus, because defendants did not meet their initial

burden with respect to causation, we conclude that plaintiff was not required to address that element in his opposition to the motion (*see Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019]; *Bhim v Dourmashkin*, 123 AD3d 862, 864 [2d Dept 2014]).

With respect to deviation from the standard of care, however, we conclude that defendants met their initial burden through the submission of the detailed expert affirmation of an internal medicine physician. Defendants' expert opined, in a nonconclusory manner, that defendants' treatment of plaintiff in the two years leading up to his cancer diagnosis was consistent with the accepted standard of care and that defendants took timely action in responding to plaintiff's changing condition during that time (*see Nevarez v University of Rochester*, 173 AD3d 1640, 1641 [4th Dept 2019]; *Boland v Imboden*, 163 AD3d 1408, 1409 [4th Dept 2018], *lv denied* 32 NY3d 912 [2019]; *Chillis v Brundin*, 150 AD3d 1649, 1650 [4th Dept 2017]).

We further conclude that plaintiff raised an issue of fact with respect to deviation in opposition to defendants' motion. Where, as here, a plaintiff's detailed expert affirmation "squarely opposes" the affirmation of a defendant's expert, the result is "a classic battle of the experts that is properly left to a jury for resolution" (*Blendowski v Wiese* [appeal No. 2], 158 AD3d 1284, 1286 [4th Dept 2018] [internal quotation marks omitted]; *see Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018]). Plaintiff's expert affirmation is sufficient to raise an issue of fact, inasmuch as we conclude that it does not "misstate[] the facts in the record" and it is not " 'vague, conclusory, [or] speculative' " (*Occhino*, 151 AD3d at 1871; *see Diaz*, 99 NY2d at 544; *cf. Bubar*, 177 AD3d at 1362).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

161

CA 19-01616

PRESENT: WHALEN, P.J., CURRAN, TROUTMAN, WINSLOW, AND BANNISTER, JJ.

JEFFREY KRENCIK,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

OAKGROVE CONSTRUCTION, INC.,
DEFENDANT-APPELLANT-RESPONDENT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (JEFFREY F. BAASE OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

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

Appeal and cross appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered February 13, 2019. The order granted in part and denied in part the motion of defendant for summary judgment dismissing the complaint and denied the cross motion of plaintiff for partial summary judgment on the issue of liability with respect to the Labor Law § 240 (1) claim.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion seeking summary judgment dismissing the common-law negligence cause of action, the Labor Law § 200 claim, and the Labor Law § 241 (6) claim insofar as it is based on the alleged violation of the federal Occupational Safety and Health Act, and denying that part of the motion seeking summary judgment dismissing the Labor Law § 240 (1) claim and reinstating that claim, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when a tree fell from an excavator and struck him. Defendant was hired as the general contractor of a highway project that included, inter alia, excavation of embankments, grading and reshaping of ditches, and installation of drainage culverts along the New York State Thruway (Thruway). Defendant subcontracted the tree removal work to plaintiff's employer. At the time of the accident, plaintiff was cutting down trees adjacent to the Thruway and plaintiff's supervisor was using the excavator to move the cut trees into piles.

Defendant appeals and plaintiff cross-appeals from an order that granted in part defendant's motion for summary judgment dismissing the

complaint and dismissed plaintiff's Labor Law § 240 (1) claim. The order denied defendant's motion with respect to the common-law negligence cause of action and Labor Law § 200 and § 241 (6) claims, and denied plaintiff's cross motion for partial summary judgment on the issue of liability with respect to the section 240 (1) claim.

Initially, we agree with plaintiff on his cross appeal that Supreme Court erred in granting that part of defendant's motion for summary judgment seeking to dismiss the Labor Law § 240 (1) claim, and we therefore modify the order accordingly. Defendant contends that it was entitled to summary judgment dismissing this claim because plaintiff was not injured during "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (§ 240 [1]). Although trees are not structures and tree removal in and of itself is not an enumerated activity within the meaning of Labor Law § 240 (1), tree removal performed to facilitate an enumerated activity does come within the ambit of this statute (*see Lombardi v Stout*, 80 NY2d 290, 296 [1992]). Defendant failed to meet its initial burden on that part of its motion because defendant's own submissions raised a triable issue of fact whether plaintiff's tree removal work at the time of the accident was ancillary to the larger construction project, specifically the culvert installation work, that was ongoing at the time of the accident (*see Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 881 [2003]; *Lombardi*, 80 NY2d at 296; *cf. Cicchetti v Tower Windsor Terrace, LLC*, 128 AD3d 1262, 1264 [3d Dept 2015]). Contrary to plaintiff's further contention, however, the court properly denied his cross motion seeking summary judgment on the issue of defendant's liability under section 240 (1) inasmuch as plaintiff failed to eliminate all triable issues of fact whether his tree removal work "[fell] into a separate phase easily distinguishable from other parts of the larger construction project" (*Prats*, 100 NY2d at 881).

Next, we agree with defendant that the claim premised on violations of the federal Occupational Safety and Health Act (OSHA) or OSHA regulations must be dismissed because plaintiff was not an employee of defendant (*see Pellescki v City of Rochester*, 198 AD2d 762, 763 [4th Dept 1993], *lv denied* 83 NY2d 752 [1994]), and we therefore further modify the order by granting that part of the motion seeking summary judgment dismissing the Labor Law § 241 (6) claim insofar as it is based on 29 USC § 654 or 29 CFR 1910.135.

Defendant contends that its motion should be granted with respect to the remainder of the Labor Law § 241 (6) claim because plaintiff was not injured "in connection with construction, demolition or excavation work" (*Nagel v D & R Realty Corp.*, 99 NY2d 98, 102 [2002]; *see Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]). That contention is without merit. Although it is well settled that Labor Law § 241 (6) does not apply to a worker who engages in tree trimming that is unrelated to construction, demolition or excavation work (*see Olarte v Morgan*, 148 AD3d 918, 919-920 [2d Dept 2017]; *Crossett v Wing Farm, Inc.*, 79 AD3d 1334, 1336-1337 [3d Dept 2010]; *Enos v Werlatone, Inc.*, 68 AD3d 713, 715 [2d Dept 2009]),

as noted above, there is a triable question of fact whether plaintiff's work at the time of his accident was related to the culvert installation work and was thus related to construction, demolition or excavation work. Further, defendant's submissions in support of its motion raised an issue of fact on the issue of liability under section 241 (6) with respect to whether the tree clearing in which plaintiff was involved was a part of the excavation of the embankments, grading, and reshaping of ditches that was ongoing at the time of his accident. Defendant's further contention that the court should have granted its motion with respect to the Labor Law § 241 (6) claim insofar as it is premised on violations of the Industrial Code because the provisions cited by plaintiff in his first supplemental bill of particulars are inapplicable to the facts of this case is raised for the first time on appeal and thus is not properly before us (*see Dunlap v United Health Serv. Inc.*, 189 AD2d 1072, 1074 [3d Dept 1993]).

Finally, we agree with defendant that the court erred in denying its motion with respect to the common-law negligence cause of action and Labor Law § 200 claim, and we therefore further modify the order accordingly. It is settled law that "where such a claim arises out of alleged defects or dangers arising from a subcontractor's methods or materials, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]; *see Lombardi*, 80 NY2d at 295). Here, defendant met its burden on that part of its motion by submitting evidence establishing "that the alleged dangerous condition arose from the . . . methods [of plaintiff's employer] and that defendant did not exercise supervisory control over the removal of the tree or any aspect of plaintiff's activities" (*Young v Barden & Robeson Corp.*, 247 AD2d 755, 756 [3d Dept 1998], *lv denied* 92 NY2d 802 [1998]), and plaintiff failed to raise a triable issue of fact in opposition (*see Ledwin v Auman*, 60 AD3d 1324, 1326 [4th Dept 2009]; *Kazmierczak v Town of Clarence*, 286 AD2d 955, 956 [4th Dept 2001]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

189

CA 18-02000

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

STEPHANIE L. AND PETER L., INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF M.L., AN INFANT, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

HOUSE OF THE GOOD SHEPHERD AND COUNTY OF ONEIDA, DEFENDANTS-APPELLANTS.

BARCLAY DAMON LLP, SYRACUSE, MAURO LILLING NAPARTY LLP, WOODBURY (RICHARD J. MONTES OF COUNSEL), FOR DEFENDANT-APPELLANT HOUSE OF THE GOOD SHEPHERD.

KENNEY SHELTON LIPTAK NOWAK LLP, JAMESVILLE (DANIEL CARTWRIGHT OF COUNSEL), FOR DEFENDANT-APPELLANT COUNTY OF ONEIDA.

THE KINDLON LAW FIRM, PLLC, ALBANY (GENNARO D. CALABRESE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Oneida County (Erin P. Gall, J.), entered October 11, 2018. The order, among other things, denied the motions of defendants to dismiss the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendant House of the Good Shepherd in part and dismissing the first cause of action insofar as asserted by plaintiffs, as parents and natural guardians of M.L., an infant, and dismissing the second cause of action insofar as asserted by plaintiffs, individually, and as modified the order is affirmed without costs.

Memorandum: In May 2008, plaintiffs, who were the biological parents of a then-three-month-old child (biological child), accepted placement of a nine-year-old child (foster child) from defendant House of the Good Shepherd (Good Shepherd), a not-for-profit corporation that administered a foster care program. At the time of the placement, the foster child was in the care of the County of Oneida Department of Social Services. Plaintiffs were informed that the foster child had been sexually abused by members of his biological family and that he exhibited some behavioral problems. At all relevant times, however, plaintiffs were unaware that the foster child had a history of animal abuse and engaging in sexually inappropriate behavior.

In early 2012, plaintiffs started the process of adopting the foster child, which was completed in December 2012. In the year leading up to the adoption, the foster child began acting in a sexually inappropriate manner toward the biological child and other children. One day after the adoption was finalized, the foster child sexually assaulted the biological child. Thereafter, plaintiffs discovered that they had not been given a complete set of records concerning the foster child, which records would have revealed his full history of engaging in animal abuse and sexually inappropriate behavior. The foster child was removed from plaintiffs' home, and the adoption was vacated.

Based on defendants' alleged failure to fully disclose the foster child's complete history, plaintiffs commenced this action in August 2016. They asserted, individually and on behalf of the biological child, causes of action for fraud and negligence against Good Shepherd and asserted, on behalf of the biological child, a cause of action for negligent infliction of emotional distress against defendants and a cause of action for negligence against defendant County of Oneida. Defendants appeal from an order that, inter alia, denied their respective motions to dismiss the amended complaint against them.

Initially, as Good Shepherd contends and plaintiffs correctly concede, Supreme Court erred in denying the motion of Good Shepherd insofar as it sought dismissal of those claims against it that plaintiffs expressly abandoned, i.e., the first cause of action, for fraud, to the extent asserted on behalf of the biological child and the second cause of action, for negligence, to the extent asserted by plaintiffs individually. Thus, we modify the order accordingly (*see Beechler v Kill Bros. Co.*, 170 AD3d 1606, 1608 [4th Dept 2019], *lv denied in part and dismissed in part* 34 NY3d 973 [2019]; *Mortka v K-Mart Corp.*, 222 AD2d 804, 804 [3d Dept 1995]).

We reject, however, Good Shepherd's contention that the fraud cause of action insofar as asserted in plaintiffs' individual capacity was barred by the statute of limitations and that the court therefore erred in denying its motion to that extent. "The statute of limitations for a cause of action sounding in fraud is six years from the date of the wrong, or two years from the date the fraud could reasonably have been discovered, whichever is later" (*Siler v Lutheran Social Servs. of Metro. N.Y.*, 10 AD3d 646, 648 [2d Dept 2004]; *see* CPLR 213 [8]). Good Shepherd relies on its admission in its verified answer that, "[a]t all times relevant," it knew that the foster child had a history of animal abuse and behaving in a sexually inappropriate manner. Good Shepherd contends that its admission established that it knew about the foster child's relevant history when he was first placed with plaintiffs in May 2008. Thus, it argues that the fraud cause of action accrued in 2008, causing the statute of limitations to expire in 2014. We disagree.

A defendant's mere *knowledge* of something is not an element of a fraud cause of action; instead, a fraud cause of action requires a showing of, inter alia, the false representation of a material fact with the intent to deceive (*see generally Ross v Louise Wise Servs.*,

Inc., 8 NY3d 478, 488 [2007]). Thus, even assuming, arguendo, that Good Shepherd knew of the foster child's history of animal abuse and engaging in sexually inappropriate behavior as early as May 2008, we conclude that its knowledge thereof did not demonstrate that the alleged fraud occurred at that time. Good Shepherd submitted no evidence that, in May 2008, it falsely represented the foster child's relevant history with the intent to deceive plaintiffs. Thus, it did not establish as a matter of law that the fraud cause of action accrued in 2008 (*see generally Chaplin v Tompkins*, 173 AD3d 1661, 1662 [4th Dept 2019]). Moreover, Good Shepherd submitted the amended complaint, wherein plaintiffs alleged that, on numerous occasions in early 2012, they contacted Good Shepherd about the foster child's sexually inappropriate behavior and that, on each occasion, Good Shepherd assured them that the foster child had no history of that type of behavior. We therefore conclude that Good Shepherd failed to meet its initial burden of establishing that the fraud cause of action asserted in 2016 was barred by the applicable six-year statute of limitations (*see* CPLR 213 [8]).

Defendants contend that the court erred in denying their motions with respect to the negligence causes of action insofar as asserted on behalf of the biological child because they did not owe a duty to that child. We also reject that contention. "In the context of a motion to dismiss pursuant to CPLR 3211, [the court] 'determine[s] only whether the facts as alleged [in the complaint] fit within *any cognizable legal theory*' " (*Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 572 [2015], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [emphasis added]). " '[T]he criterion is whether the proponent of the pleading *has a cause of action*, not whether he [or she] has stated one' " (*Leon*, 84 NY2d at 88 [emphasis added]). Our review, therefore, is limited to whether plaintiffs, on behalf of the biological child, have a cause of action sounding in negligence based on defendants' failure to warn of the foster child's complete behavioral history.

The "threshold question" in any negligence action is whether a defendant owes a "legally recognized duty of care to [a] plaintiff" (*Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 232 [2001]), which presents "a legal issue for the courts to decide" (*Oddo v Queens Vil. Comm. for Mental Health for Jamaica Community Adolescent Program, Inc.*, 28 NY3d 731, 735 [2017] [internal quotation marks omitted]). To establish the existence of a legal duty, "[t]he injured party must show that a defendant owed not merely a general duty to society but a specific duty to him or her . . . in order to avoid subjecting an actor to limitless liability to an indeterminate class of persons conceivably injured by any negligence in that act" (*Hamilton*, 96 NY2d at 232 [internal quotation marks omitted]). "[A]ny extension of the scope of duty must be tailored to reflect accurately the extent that its social benefits outweigh its costs" (*id.*).

Additionally, as a general rule a defendant does not have a duty "to control the conduct of third persons so as to prevent them from harming others, even where as a practical matter defendant can

exercise such control" (*id.* at 233 [internal quotation marks omitted]). In determining whether a defendant owes a duty to a plaintiff injured by a third-person tortfeasor, the court must consider whether there is a relationship either: (1) "between [the] defendant and [the] third-person tortfeasor that encompasses [the] defendant's actual control of the third person's actions," *or* (2) "between [the] defendant and [the] plaintiff that requires [the] defendant to protect [the] plaintiff from the conduct of others" (*id.*). The central concern under both of those prongs is whether "the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the *best position* to protect against the risk of harm" (*id.* [emphasis added]). In other words, the "calculus is such that [courts] assign the responsibility of care to the person or entity that can most effectively fulfill th[e] obligation [of protecting against the risk of harm] at the lowest cost" (*Davis*, 26 NY3d at 572). Under those circumstances, "the specter of limitless liability is not present because the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship" (*Hamilton*, 96 NY2d at 233).

In *Davis* (26 NY3d at 569-570), the Court of Appeals recently determined that the defendant medical providers owed a duty to the plaintiffs, who were injured in a car accident caused by the defendants' patient, to warn their patient about the danger of medication administered by the defendants that may have impaired the patient's ability to safely operate an automobile. The Court noted that, by not giving such a warning, the defendants "create[d] a peril affecting every motorist in [the patient's] vicinity" (*id.* at 577). In determining that a duty existed, the Court noted that the defendants were "the only ones who could have provided a proper warning of the effects of that medication" (*id.*). Additionally, the Court determined that: (1) the cost of the duty imposed was small; (2) the duty could be easily satisfied "merely by advising one to whom such medication is administered of the dangers of that medication"; and (3) its decision did not "ero[de] . . . the prevailing principle that courts should proceed cautiously and carefully in recognizing a duty of care" (*id.* at 579-580 [internal quotation marks omitted]).

Here, we conclude that defendants owed a duty of care to the biological child to warn plaintiffs, as the child's parents, of the foster child's complete behavioral history (*see generally id.* at 577). Defendants were the entities that oversaw the foster child's placement with plaintiffs in the *four years* preceding the adoption. In our view, the relationship between defendants and the biological child here was far more substantive than the relationship that supported the finding of a duty in *Davis* (*see id.*). Although defendants contend that they did not owe the biological child a duty because they lacked control over the foster child during the four years that he lived with plaintiffs, control over a third-person tortfeasor is just one way to establish a duty. As noted above, a duty may also exist where "there is a relationship . . . between [the] defendant and [the] plaintiff that requires [the] defendant to protect [the] plaintiff from the conduct of others," and "the key . . . is that the defendant's relationship with *either the tortfeasor or the plaintiff places the*

defendant in the best position to protect against the risk of harm" (*Hamilton*, 96 NY2d at 233 [emphasis added]).

The amended complaint in this action alleged a relationship between the parties that placed defendants in the best position to protect the biological child from the risk of harm and that required defendants to protect the child from the sexual abuse by the foster child by warning plaintiffs of the foster child's history of sexually inappropriate behavior (*see generally id.*). Defendants were in the best position to protect the biological child from that sexual abuse because of their superior knowledge of the foster child's behavioral history and because of the relative ease with which they could have apprised plaintiffs of that history. Indeed, defendants were the only entities that "could have provided a proper warning" regarding the foster child's full behavioral history (*Davis*, 26 NY3d at 577).

Moreover, contrary to defendants' contention, finding a duty here would not raise the "specter of limitless liability . . . because the class of potential plaintiffs to whom the duty is owed[—children of prospective adoptive parents—]is circumscribed by the relationship" (*id.* at 589 [internal quotation marks omitted]). Additionally, we conclude that the cost of the duty imposed on defendants is a small one, i.e., simply disclosing to plaintiffs the information regarding the foster child's behavioral history that was in defendants' possession. Indeed, defendants could have met their duty largely by complying with the disclosure requirements of Social Services Law § 373-a. Moreover, determining that defendants had a duty here does not erode "the prevailing principle that courts should proceed cautiously and carefully in recognizing a duty of care" (*Davis*, 26 NY3d at 580). We are not determining that defendants owed a duty to the public at large, but rather to a very small, readily ascertainable population—children of prospective adoptive parents. Thus, we conclude that "reasonable persons would recognize [the duty] and agree that it exists" (*id.* at 577 [internal quotation marks omitted]).

Finally, we reject defendants' contention that the court erred in denying the motions with respect to the negligent infliction of emotional distress cause of action. Contrary to defendants' assertion, "extreme and outrageous conduct is not an essential element of a cause of action to recover damages for negligent infliction of emotional distress" (*Taggart v Costabile*, 131 AD3d 243, 255 [2d Dept 2015]; *see generally Ornstein v New York City Health and Hosps. Corp.*, 10 NY3d 1, 6 [2008]). We have considered defendants' remaining contentions and conclude that none warrants further modification or reversal of the order.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

238

CA 19-01362

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

IN THE MATTER OF MICHAEL MCGRAW, KATHRYN MCGRAW, ANGELO GRAZIANO, NINA GRAZIANO, J. DUDLEY ROBINSON, DIANA ERMER, MARTIN HUBER, NANCY HUBER, RICHARD IVORY, THOMAS IVORY, ALAN CROWELL, MARILYN CROWELL, SUSAN BALDWIN, JULIE DELCAMP, ROBIN DELCAMP, DAVID HORNBURG, ROBERT MCGRAW AND JOSEPH IVORY, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

TOWN BOARD OF TOWN OF VILLENOVA, BALL HILL WIND ENERGY, LLC AND RENEWABLE ENERGY SYSTEMS AMERICAS, RESPONDENTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (CHARLES W. MALCOMB OF COUNSEL), FOR RESPONDENT-APPELLANT TOWN BOARD OF TOWN OF VILLENOVA.

NIXON PEABODY LLP, BUFFALO (LAURIE STYKA BLOOM OF COUNSEL), FOR RESPONDENT-APPELLANT BALL HILL WIND ENERGY, LLC AND RENEWABLE ENERGY SYSTEMS AMERICAS.

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

Appeals from a judgment (denominated order and judgment) of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered July 22, 2019 in a CPLR article 78 proceeding. The judgment, insofar as appealed from, granted the petition in part.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking, inter alia, to void an approval made by respondent Town Board of Town of Villenova (Town Board) of a local law and the grant of a special use permit to respondent Ball Hill Wind Energy, LLC (Ball Hill) to construct wind turbines up to 599 feet in height in the Town of Villenova. Petitioners own property in the vicinity of the project. By way of background, a draft environmental impact statement (EIS) for the project was accepted by the Town Board in 2008, and a supplemental EIS (SEIS) was prepared and accepted by the Town Board in 2016. A final EIS was completed later that year for the 29 proposed turbines at a maximum height of 492 feet; the plan included a 5.7-mile

overhead transmission line. The Town Board approved the final EIS in November 2016, adopted local laws related to the approval of the project, and granted Ball Hill a special use permit. No judicial challenge was made to those determinations. In 2018, Ball Hill applied to modify the special use permit and amend the local laws to increase the maximum height for the turbines to 599 feet and to replace the overhead transmission line with underground circuits. The Town Board determined that a second SEIS was unnecessary and approved the full environmental assessment form and issued a negative declaration. The Town Board also amended the relevant local laws and special use permit.

In their CPLR article 78 petition, petitioners asserted three causes of action: violation of the State Environmental Quality Review Act (SEQRA); violation of General Municipal Law article 18; and violation of Town of Villenova ordinances. Supreme Court, inter alia, granted petitioners' first cause of action regarding SEQRA, holding that the Town Board did not take a hard look at the effect that the increase in height of the turbines could have on the bald eagle population and the environmental impact of the placement of the electrical lines underground. Respondents appeal, and we now reverse the judgment insofar as appealed from and deny the petition in its entirety.

During the SEQRA process, a SEIS may be required to address "specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS," arising from, inter alia, changes in the project (6 NYCRR 617.9 [a] [7] [i]). A decision to require a SEIS "must be based upon . . . the importance and relevance of the information; and . . . the present state of the information in the EIS" (6 NYCRR 617.9 [a] [7] [ii]). "A lead agency's determination whether to require a SEIS–or in this case a *second* SEIS–is discretionary" (*Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 231 [2007]), and such determination "should be annulled only if it is arbitrary, capricious, or unsupported by the evidence" (*id.* at 232).

We conclude that the Town Board "took a hard look at the areas of environmental concern and made a reasoned elaboration of the basis for its conclusion that a second SEIS was not necessary" (*id.* at 233). The Town Board's discretionary determination was not arbitrary, capricious, or unsupported by the evidence (*see Matter of Viserta v Town of Wawayanda Planning Bd.*, 156 AD3d 797, 798-799 [2d Dept 2017]; *Matter of South Bronx Unite! v New York City Indus. Dev. Agency*, 115 AD3d 607, 609-610 [1st Dept 2014], *lv denied* 24 NY3d 908 [2014]). The prior submissions concerning the impact of the project on bald eagles, combined with the updated materials submitted with the latest project modification, were sufficient to establish that the proposed changes would not adversely impact bald eagles. The materials established that collisions between raptors and wind turbines are rare, and that even the higher, 599-foot turbines lie below the normal flight altitude of bald eagles. With respect to the buried electrical transmission lines, the materials showed that such a modification would have a significant positive environmental impact, reducing the

effect of the project on wetlands. We have reviewed petitioners' remaining arguments regarding the SEQRA review as alternative grounds for affirmance (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]), and conclude that they are without merit.

Petitioners further contend that they are entitled to relief under the second and third causes of action in their petition. The court did not rule on those causes of action, and a court's failure to rule on requests for relief in a petition are deemed a denial thereof (*see Matter of Burkwit v Olson*, 98 AD3d 1236, 1238 [4th Dept 2012]; *see also Bennett Rd. Sewer Co. v Town Bd. of Town of Camillus*, 243 AD2d 61, 67 [4th Dept 1998]). Those causes of action sought relief different from the relief sought in the first cause of action, and the court's judgment therefore did not grant petitioners "the full relief sought" (*Parochial Bus Sys.*, 60 NY2d at 545). Thus, petitioners are aggrieved by the court's failure to rule on the requests for relief under the second and third causes of action and, in the absence of a cross appeal from petitioners, those issues are not properly before us (*see Matter of Feldman v Planning Bd. of the Town of Rochester*, 99 AD3d 1161, 1165 [3d Dept 2012]; *cf. Matter of Adrian v Board of Educ. of City School Dist. of City of Niagara Falls*, 92 AD3d 1272, 1273 [4th Dept 2012], *affd* 20 NY3d 540 [2013]; *Matter of Foreman v Goord*, 302 AD2d 817, 817 [3d Dept 2003]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

239

CA 19-01689

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

MICHAEL MAAK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MEDINA PROFESSIONAL FIREFIGHTERS ASSOCIATION, IAFF LOCAL 2161, DEFENDANT, STEVEN COOLEY, INDIVIDUALLY, AND AS PRESIDENT OF MEDINA PROFESSIONAL FIREFIGHTERS ASSOCIATION, IAFF LOCAL 2161 AND MATTHEW JACKSON, INDIVIDUALLY, AND AS VICE PRESIDENT OF MEDINA PROFESSIONAL FIREFIGHTERS ASSOCIATION, IAFF LOCAL 2161, DEFENDANTS-APPELLANTS.

THE SAMMARCO LAW FIRM, LLP, BUFFALO (ANDREA L. SAMMARCO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Orleans County (Tracey A. Bannister, J.), entered February 22, 2019. The order denied defendants' motion for summary judgment.

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

Memorandum: Plaintiff commenced this action against defendant Medina Professional Firefighters Association, IAFF Local 2161 (Firefighters Association), defendant Steven Cooley, individually, and as president of the Firefighters Association, and defendant Matthew Jackson, individually, and as vice president of the Firefighters Association, seeking damages for, inter alia, intentional infliction of emotional distress and prima facie tort. According to plaintiff, Cooley and Jackson (defendants) made false and disparaging comments concerning plaintiff's performance in the course of his employment with the Village of Medina Fire Department. A prior order dismissed all causes of action except those asserted against defendants individually for intentional infliction of emotional distress and prima facie tort. Defendants now appeal from an order denying their motion for summary judgment dismissing those remaining causes of action. We reverse.

Defendants established their entitlement to summary judgment

dismissing the cause of action for intentional infliction of emotional distress by demonstrating that their conduct was not so extreme or outrageous "as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Cooper v Hodge*, 28 AD3d 1149, 1151 [4th Dept 2006] [internal quotation marks omitted]; *see generally Kondo-Dresser v Buffalo Pub. Schools*, 17 AD3d 1114, 1115 [4th Dept 2005]). In opposition, plaintiff failed to raise a material issue of fact (*see Cleveland v Perry*, 175 AD3d 1017, 1019 [4th Dept 2019]).

Defendants are entitled to summary judgment dismissing the cause of action for prima facie tort because it is based on the same conduct as both the cause of action for intentional infliction of emotional distress and a previously dismissed cause of action for defamation, and it is thus duplicative of those causes of action (*see Ripka v County of Madison*, 162 AD3d 1371, 1373 [3d Dept 2018]; *Bacon v Nygard*, 140 AD3d 577, 578 [1st Dept 2016]; *see generally Freihofer v Hearst Corp.*, 65 NY2d 135, 142-143 [1985]). Moreover, defendants also established their entitlement to summary judgment on the cause of action for prima facie tort by demonstrating a lack of special damages, and plaintiff failed to raise an issue of fact in opposition (*see generally Mancuso v Allergy Assoc. of Rochester*, 70 AD3d 1499, 1501 [4th Dept 2010]; *Vigoda v DCA Prods. Plus*, 293 AD2d 265, 266 [1st Dept 2002]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

243

CA 19-00713

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

IN THE MATTER OF ARBITRATION BETWEEN
SEIGFREID BINGHAM, P.C., PETITIONER-APPELLANT,
ET AL., PETITIONER,

AND MEMORANDUM AND ORDER

AFTERCARE NURSING SERVICES, INC. EMPLOYEE STOCK OWNERSHIP PLAN, AFTERCARE NURSING SERVICES, INC. EMPLOYEE STOCK OWNERSHIP TRUST AND AFTERCARE NURSING SERVICES, INC., RESPONDENTS-RESPONDENTS.

BURDEN, HAFNER & HANSEN, LLC, BUFFALO (ADELA APRODU OF COUNSEL), FOR PETITIONER-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (ERIN C. BOREK OF COUNSEL), AND DAVID H. GOSSEL, WEST SENECA, FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered March 6, 2019 in a proceeding pursuant to CPLR article 75. The order denied the petition insofar as it sought to stay arbitration against petitioner Seigfreid Bingham, P.C. and granted the cross petition insofar as it sought to compel arbitration against that petitioner.

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

Memorandum: The trustee of respondent Aftercare Nursing Services, Inc. Employee Stock Ownership Trust (Trust) retained petitioner-appellant (petitioner), a law firm, to provide legal services to both the Trust and respondent Aftercare Nursing Services, Inc. Employee Stock Ownership Plan (Plan). The Engagement and Fee Agreement (agreement) expressly defines the "client" as *both* the Trust and the Plan, and it further provides that respondent Aftercare Nursing Services, Inc. (Company) "will assume the financial responsibility for the legal fees incurred [there]under." In the section entitled "Dispute Resolution," the agreement provides that "[a]ny dispute between us arising out of, or relating to, this agreement, or the breach thereof, shall be resolved by binding arbitration between the parties. This includes, but is not limited to any claims regarding attorney's fees or costs under the agreement or regarding a claim of attorney malpractice."

The agreement was signed by the trustee on behalf of the Trust

and the Plan and by an attorney acting on behalf of petitioner. The agreement was also signed by a member of the Company's board on behalf of the Company, which executed the agreement "solely to assume the financial responsibilities undertaken by the Plan pursuant to this engagement." Below all the signature blocks is the following statement: "This contract contains a binding arbitration provision which may be enforced by the parties."

A dispute thereafter developed between petitioner and respondents, and respondents served an arbitration demand on, inter alia, petitioner. Petitioners then petitioned to stay arbitration. Respondents opposed the petition and cross-petitioned to compel arbitration. As relevant on appeal, Supreme Court granted respondents' cross petition insofar as it sought to compel arbitration against petitioner and denied petitioners' corresponding petition insofar as it sought to stay arbitration against petitioner. Petitioner appeals, and we now affirm.

"A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). That rule applies with equal force to arbitration agreements (*see Matter of Cullman Ventures [Conk]*, 252 AD2d 222, 228 [1st Dept 1998]). In this case, the agreement provides that the arbitration clause applies to all "parties" to the agreement, and there can be no reasonable dispute that all three respondents—Trust, Plan, and Company—are "parties" to the agreement. Indeed, the Trust and the Plan are collectively defined in the agreement as the "client," and the Company signed the agreement and promised to pay for the services rendered to such "client." Thus, as signed "parties" to the agreement, all three respondents are entitled to invoke the arbitration clause to resolve any dispute with petitioner "arising out of, or relating to, th[e] agreement" (*see generally County of Onondaga v U.S. Sprint Communications Co.*, 192 AD2d 1108, 1108-1109 [4th Dept 1993]), and it is undisputed that the issues to be arbitrated arise out of or are related to the agreement.

We reject petitioner's arguments to the contrary, all of which are preserved for appellate review.

First, petitioner's reliance on *Matter of Allegro Resorts Corp. v Trans-Americainvest (St. Kitts)* (1 AD3d 269 [1st Dept 2003]) is misplaced. In *Allegro*, the First Department affirmed an order staying arbitration because the party against whom arbitration was sought had not signed the agreement containing the arbitration clause (*id.* at 270). Rather, the subject party had signed only a different, separate agreement that did not contain an arbitration provision (*id.*). Here, in contrast, all three respondents—Plan, Trust, and Company—signed and were parties to the single, unified agreement that prescribed arbitration for "[a]ny dispute between us arising from, or relating to, this agreement."

Second, the fact that the agreement provides that the Company

signed it "solely to assume the financial responsibilities undertaken by the Plan" merely limits the Company's *substantive obligations* under the agreement, not its *procedural right* to arbitrate whatever disputes might arise from those—albeit limited—substantive obligations. Put differently, the "solely to assume" language in the agreement does not bar the Company from enforcing the binding arbitration provision in order to resolve any dispute that might arise in connection with its limited substantive obligations under the agreement.

Third, petitioner contends that it cannot be compelled to arbitrate with the Plan or the Company because it—petitioner—did not represent either the Plan or the Company as a "client." With respect to the Plan, petitioner's theory is unavailing because the agreement explicitly provides that petitioner was hired to provide "representation to . . . the 'Plan'[] *and* the trust funding the Plan" (emphasis added). Moreover, while petitioner is correct that it did not represent the Company as a "client," that distinction is irrelevant for purposes of arbitrability because the arbitration clause applies to any "party" to the agreement, not merely to a "client" of petitioner. As respondents put it, "[s]imply because [the Company] was not named specifically as a Client in the Agreement . . . does not mean it does not have the right to enforce the arbitration [clause] for breaches of the Agreement." Indeed, given that the Company is solely liable for the legal fees under the agreement, the agreement's explicit provision for arbitrating fee disputes would be meaningless if, as petitioner now argues, the Company could not invoke the arbitration clause.

Finally, petitioner's contention that the trustee lacked authority to execute the agreement on the Plan's behalf is without merit under well established principles of federal employee benefits law (*see Taylor Forge Engineered Sys., Inc. v Beauchamp*, 1999 WL 450955, *5-6 [D Kan, June 17, 1999, No. Civ. A. 98-2572-KHV], citing, inter alia, 29 USC § 1103 [a]; *see also Petersen v Commr. of Internal Revenue*, 924 F3d 1111, 1120 [10th Cir 2019]).

The parties' remaining contentions are academic in light of our determination.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

245

CA 19-00464

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

IN THE MATTER OF ARBITRATION BETWEEN BUFFALO TEACHERS FEDERATION, INC., PETITIONER-APPELLANT,

AND MEMORANDUM AND ORDER

BOARD OF EDUCATION OF CITY SCHOOL DISTRICT OF CITY OF BUFFALO AND CITY SCHOOL DISTRICT OF CITY OF BUFFALO, RESPONDENTS-RESPONDENTS.

CREIGHTON, JOHNSEN & GIROUX, BUFFALO (CATHERINE CREIGHTON OF COUNSEL), FOR PETITIONER-APPELLANT.

NATHANIEL J. KUZMA, GENERAL COUNSEL, BUFFALO (SHAUNA L. STROM OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered February 26, 2019 in a proceeding pursuant to CPLR article 75. The order denied the petition seeking to vacate an arbitration award and granted respondents' request to confirm the arbitration award.

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

Memorandum: In this proceeding pursuant to CPLR article 75, petitioner appeals from an order denying its petition to vacate an arbitration award in favor of respondents and granting respondents' request to confirm the award. We affirm.

Petitioner filed grievances on behalf of two of its members who were passed over for transfers to City Honors School in favor of members with less seniority. The collective bargaining agreement (CBA) at issue provided that, in selecting teachers to be transferred within the school district, "[l]ength of teaching experience in the school system" is the controlling factor "where all other factors are substantially equal." The arbitrator assigned to the matter issued an opinion and award, which found no violation of the CBA and dismissed the grievances.

We reject petitioner's contention that the arbitrator exceeded his power in rendering the award. It is well settled that an arbitrator exceeds his or her power within the meaning of CPLR 7511 (b) (1) (iii) where, inter alia, the arbitration award " 'is irrational, or clearly exceeds a specifically enumerated limitation on

the arbitrator's power' " (*Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 79 [2003], quoting *Matter of Board of Educ. of Arlington Cent. School Dist. v Arlington Teachers Assn.*, 78 NY2d 33, 37 [1991]). "[A]n arbitrator's rulings, unlike a trial court's, are largely unreviewable" (*Matter of Falzone [New York Cent. Mut. Fire Ins. Co.]*, 15 NY3d 530, 534 [2010]). "An arbitrator's interpretation may even disregard the apparent, or even the plain, meaning of the words of the contract before him [or her] and still be impervious to challenge in the courts" (*Matter of Albany County Sheriff's Local 775 of Council 82, AFSCME, AFL-CIO [County of Albany]*, 63 NY2d 654, 656 [1984] [internal quotation marks omitted]; *see Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 308 [1984], *rearg denied* 62 NY2d 803 [1984]).

The arbitrator here determined that respondent City School District of the City of Buffalo did not violate the seniority provision of the CBA with respect to the grievants because "all other factors" were not "substantially equal." We conclude that, while "a different construction could have been accorded to the subject provision of the [CBA], . . . it cannot be stated that the arbitrator gave a completely irrational construction to the provision in dispute and, in effect, exceeded [his] authority by making a new contract for the parties" (*Matter of New York Finger Lakes Region Police Officers Local 195 of Council 82, AFSCME, AFL-CIO [City of Auburn]*, 103 AD3d 1237, 1237-1238 [4th Dept 2013] [internal quotation marks omitted]).

We likewise reject petitioner's contention that the arbitrator's award is irrational. "An award is irrational if there is no proof whatever to justify the award" (*Matter of Professional, Clerical, Tech., Empls. Assn. [Board of Educ. for Buffalo City Sch. Dist.]*, 103 AD3d 1120, 1122 [4th Dept 2013], *lv denied* 21 NY3d 863 [2013] [internal quotation marks omitted]; *see Matter of Lucas [City of Buffalo]*, 93 AD3d 1160, 1164 [4th Dept 2012]; *Matter of Buffalo Council of Supervisors & Adm'rs, Local No. 10, Am. Fedn. of School Adm'rs [Board of Educ. of City School Dist. of Buffalo]*, 75 AD3d 1067, 1068 [4th Dept 2010]). "An arbitration award must be upheld when the arbitrator 'offer[s] even a barely colorable justification for the outcome reached' " (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006], *cert dismissed* 548 US 940 [2006]; *see Matter of Monroe County Deputy Sheriffs' Assn., Inc. [Monroe County]*, 155 AD3d 1616, 1617 [4th Dept 2017], *lv denied* 31 NY3d 910 [2018]). Here, there is a colorable justification for the arbitrator's determination.

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

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

247

CA 19-00731

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

ENERGYMARK, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NEW WAVE ENERGY CORP., NICHOLAS JERGE, JOHN LUDTKA, JAMES JERGE AND NATHAN GEARY, DEFENDANTS-RESPONDENTS.

COLLIGAN LAW LLP, BUFFALO (KEVIN T. O'BRIEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

THE KNOER GROUP, PLLC, BUFFALO (ALICE J. CUNNINGHAM OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, J.), entered March 19, 2019. The order, among other things, granted defendants' motion to dismiss the complaint.

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

Memorandum: Plaintiff and defendant New Wave Energy Corp. (New Wave) are competing energy suppliers. After New Wave began soliciting plaintiff's clients, plaintiff commenced an action against New Wave and two of its officers, asserting causes of action for, among other things, tortious interference with contractual relations, wrongful inducement of a breach of contract and unjust enrichment. Following a motion seeking dismissal of that complaint pursuant to CPLR 3211 and 3212, Supreme Court dismissed the complaint in its entirety. Plaintiff thereafter commenced this action against the same three defendants as well as two other officers of New Wave. The complaint again asserted causes of action for wrongful and intentional interference with contractual relations, wrongful inducement of a breach of contract, unjust enrichment and permanent injunction. We conclude that, pursuant to CPLR 3211 (a) (7), Supreme Court properly granted defendants' motion to dismiss the complaint on the ground that it failed to state a cause of action.

Contrary to plaintiff's contention, defendants' motion specifically sought dismissal under CPLR 3211 (a) (7), and the court did not improperly convert the motion into one for summary judgment when it concluded that "the current complaint and the documents attached thereto fail to establish that defendants committed an actionable wrong." The court limited its analysis to the contents of

the complaint and its attachments, which is the hallmark of a CPLR 3211 (a) (7) determination (*see generally Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

It is well settled that "[a] motion to dismiss under CPLR 3211 (a) (7) may be granted when exhibits *attached to the complaint* conclusively establish[ ] that a material fact as claimed by the pleader to be one is not a fact at all and that no significant dispute exists regarding it" (*McMahan v McMahan*, 131 AD3d 593, 594 [2d Dept 2015] [emphasis added and internal quotation marks omitted]; *see Omar v Moore*, 171 AD3d 1533, 1533-1534 [4th Dept 2019]). Here, the complaint and attached exhibits conclusively establish that there was no underlying breach of the contracts between plaintiff and its customers and, as a result, a fact material to the substantive causes of action asserted by plaintiff, i.e., a breach of the contracts between plaintiff and its customers (*see Lama Holding Co. v Smith Barney, Inc.*, 88 NY2d 413, 425 [1996]; *Israel v Wood Dolson Co.*, 1 NY2d 116, 120 [1956]) or conduct by defendants that was otherwise "tortious or fraudulent" with respect to the contractual relationships between plaintiff and its customers (*Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 [1972], *rearg denied* 31 NY2d 709 [1972], *cert denied* 414 US 829 [1973]), cannot be established.

Inasmuch as "injunctive relief is simply not available when the plaintiff does not have any remaining substantive cause of action" (*Weinreb v 37 Apts. Corp.*, 97 AD3d 54, 58-59 [1st Dept 2012]; *see Town of Macedon v Village of Macedon*, 129 AD3d 1639, 1641 [4th Dept 2015]), the dismissal of all of the substantive causes of action mandated dismissal of the permanent injunction cause of action.

Based on our determination, we do not address plaintiff's remaining contention.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

262

CA 19-01234

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

COLOR DYNAMICS, INC., PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KEMPER SYSTEM AMERICA, INC., RESPONDENT-RESPONDENT.

HURWITZ & FINE, P.C., BUFFALO (EARL K. CANTWELL OF COUNSEL), FOR PETITIONER-APPELLANT.

GAINEY, MCKENNA & EGLESTON, NEW YORK CITY (BARRY J. GAINEY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, III, J.), entered June 7, 2019. The order denied the motion of petitioner to compel respondent to produce certain documents.

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

Memorandum: This appeal arises from a building renovation project for which petitioner was hired as general contractor. As part of the project, petitioner installed a waterproofing system, manufactured by respondent, on the building's recreation deck. Within about one year of the project's completion, however, the recreation deck allegedly showed signs that the waterproofing system had failed. The condominium association that retained petitioner thereafter initiated an arbitration proceeding against petitioner, and the arbitrator issued a subpoena duces tecum to compel respondent to produce various documents requested by petitioner. Petitioner then commenced this proceeding seeking, inter alia, to compel respondent to comply with the subpoena, and Supreme Court entered an order directing respondent to comply with the subpoena. Respondent responded by producing some, but not all, of the documents in question, and petitioner thereafter filed a motion to compel the production of certain remaining documents. Respondent opposed the motion, contending that the documents in question consisted of consultant reports prepared for respondent in the course of respondent's investigation of the allegedly defective waterproofing system and were immune from disclosure because they constituted material prepared in anticipation of litigation, as well as attorney work product, and because they were protected by attorney-client privilege (*see* CPLR 3101 [b-d]). Petitioner now appeals from an order denying its motion. We affirm.

" 'When a party claims that particular records or documents are exempt or immune from disclosure, the burden is on the party asserting such immunity' " (*Micro-Link, LLC v Town of Amherst*, 155 AD3d 1638, 1643 [4th Dept 2017]). In support of its claim of immunity, respondent submitted, among other things, the affidavits of its outside litigation counsel and chief financial officer (CFO). Those affidavits explained that, prior to the preparation of the earliest of the consultant reports, respondent was informed that the condominium association was considering legal action against it, that respondent then contacted outside litigation counsel, and that outside litigation counsel directed respondent to conduct testing and prepare the relevant reports in order to assist in the defense of a possible future claim against it. Both affidavits confirmed that the consultant reports were generated for the sole purpose of handling the threatened legal action. Respondent's CFO further averred that respondent does not prepare such reports in the normal course of business, and that it did so here only after litigation was threatened and at the direction of counsel.

Although we are not bound by respondent's characterizations of the consultant reports as material prepared in anticipation of litigation, we perceive no justification for disregarding the contents of the affidavits submitted by respondent's litigation counsel and CFO (*see Roswell Park Cancer Inst. Corp. v Sodexo Am., LLC*, 68 AD3d 1720, 1722 [4th Dept 2009]). We thus conclude that the court did not abuse its discretion in denying the motion on the ground that the reports in question were material prepared in anticipation of litigation, and petitioner failed to demonstrate a substantial need for such information and that it was unable to obtain the substantial equivalent of that information without undue hardship (*see* CPLR 3101 [d] [2]; *Foley v West-Herr Ford, Inc.*, 32 AD3d 1236, 1236 [4th Dept 2006]; *see also Micro-Link, LLC*, 155 AD3d at 1643). Although petitioner contends that it no longer has access to the data contained within respondent's consultant reports, on this record, petitioner failed to establish the need for such data or that it did not already obtain, or could not obtain, the "substantial equivalent" of such data through the investigation and expert review that petitioner has already undertaken or could undertake in the future (CPLR 3101 [d] [2]; *see generally Micro-Link, LLC*, 155 AD3d at 1643).

In light of our determination, we do not address whether the documents in question are independently immune from disclosure under attorney-client privilege or as attorney work product.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

274

CA 19-00260

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

IN THE MATTER OF THE ARBITRATION BETWEEN
NEW YORK SCHOOLS INSURANCE RECIPROCAL,
PETITIONER-APPELLANT,

AND MEMORANDUM AND ORDER

DEBORAH KALBFLIESH, RESPONDENT-RESPONDENT.

HURWITZ & FINE, P.C., BUFFALO (STEVEN E. PEIPER OF COUNSEL), FOR PETITIONER-APPELLANT.

CAMPBELL & ASSOCIATES, EDEN (JOHN T. RYAN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio L. Colaiacovo, J.), entered February 4, 2019. The order, among other things, denied the petition insofar as it sought a permanent stay of arbitration.

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

Memorandum: Respondent, while working as a student monitor/aide, sustained injuries when the van in which she was riding was struck by another motor vehicle. The van in which respondent was riding was operated on behalf of respondent's employer by a separate entity, which owned the van. Respondent's employer had hired that entity to provide transportation in connection with educational activities involving respondent and the students she monitored. Following the accident, respondent recovered the full policy limit of $100,000 from the insurer of the vehicle that collided with the van. She thereafter submitted a claim for supplemental uninsured/underinsured motorist (SUM) benefits pursuant to a commercial automobile policy issued to respondent's employer by petitioner, New York Schools Insurance Reciprocal (NYSIR). NYSIR disclaimed coverage on the ground that the van was not insured for SUM coverage inasmuch as it was not owned by respondent's employer, and respondent did not otherwise qualify as an insured under the policy's SUM endorsement. Respondent then demanded arbitration with respect to her claims for SUM coverage. NYSIR commenced this proceeding pursuant to CPLR article 75 seeking, inter alia, a permanent stay of arbitration. Supreme Court, inter alia, denied NYSIR's petition insofar as it sought a permanent stay of arbitration. NYSIR appeals, and we affirm.

Where, as here, "an automobile insurance policy contains a SUM provision and . . . is issued to a corporation, . . . the SUM provision does not follow any particular individual, but instead covers any person [injured] while occupying an automobile owned by the corporation or while being operated on behalf of the corporation" (*Matter of Progressive Cas. Ins. Co. v Beardsley*, 133 AD3d 1273, 1275 [4th Dept 2015] [internal quotation marks omitted]; *see Buckner v Motor Veh. Acc. Indem. Corp.*, 66 NY2d 211, 215 [1985]). Contrary to NYSIR's contention, the court properly denied its request for a permanent stay inasmuch as respondent was occupying a motor vehicle that was being operated on behalf of its insured, respondent's employer (*cf. Roebuck v State Farm Mut. Auto. Ins. Co.*, 80 AD3d 1126, 1128 [3d Dept 2011]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

296

CA 19-01214

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

JOSIAH SCHUTT, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

MARK D. BOOKHAGEN AND STACIE BOOKHAGEN,
DEFENDANTS-RESPONDENTS-APPELLANTS.

LAW OFFICE OF J. MICHAEL HAYES, BUFFALO (ANTHONY J. ZITNIK, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (NELSON E. SCHULE, JR., 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 April 9, 2019. The order granted in part and denied in part plaintiff's motion for partial summary judgment and granted defendants' cross motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is modified on the law by granting that part of the motion seeking summary judgment on liability with respect to the Labor Law § 240 (1) cause of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained while working for a company that defendants had hired to install a new roof on one of their rental properties. Although plaintiff served as a ground laborer on the work site, he was injured when he fell from the roof. According to plaintiff, he had been instructed to go onto the roof and, while there, the toe board that he used to stabilize himself failed, causing him to slide off of the roof. He was not wearing a harness at the time.

Plaintiff appeals and defendants cross-appeal from an order that denied plaintiff's motion for summary judgment on the issue of liability with respect to his Labor Law §§ 240 (1) and 241 (6) causes of action and granted the motion to the extent that it sought a determination that the accident caused his injuries.

We agree with plaintiff on his appeal that Supreme Court should have granted the motion with respect to the Labor Law § 240 (1) cause of action, and we therefore modify the order accordingly. We conclude that plaintiff met his initial burden on that part of the motion by establishing that his " 'injuries were the direct consequence of a

failure to provide adequate protection against a risk arising from a physically significant elevation differential' " (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97 [2015], *rearg denied* 25 NY3d 1195 [2015], quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see Lagares v Carrier Term. Servs., Inc.*, 177 AD3d 1394, 1395 [4th Dept 2019]; *Provens v Ben-Fall Dev., LLC*, 163 AD3d 1496, 1498 [4th Dept 2018]). Specifically, plaintiff submitted his deposition testimony, wherein he stated that the toe board failed, causing him to fall from the roof. He also testified that he was not provided with a harness and that there were no available harnesses nearby.

In opposition, defendants failed to raise a triable issue of fact whether plaintiff's "own conduct, rather than any violation of Labor Law § 240 (1), was the sole proximate cause of the accident" (*Luna v Zoological Socy. of Buffalo, Inc.*, 101 AD3d 1745, 1746 [4th Dept 2012] [internal quotation marks omitted]). To establish a sole proximate cause defense, a defendant must demonstrate that the plaintiff had " 'adequate safety devices available; that [the plaintiff] knew both that they were available and that he [or she] was expected to use them; that [the plaintiff] chose for no good reason not to do so; and that had [the plaintiff] not made that choice he [or she] would not have been injured' " (*Fazekas v Time Warner Cable, Inc.*, 132 AD3d 1401, 1403 [4th Dept 2015], quoting *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]). Here, defendants submitted deposition testimony from the owners of plaintiff's employer, neither of whom wore a harness on the day of the accident, establishing that plaintiff may have been aware that harnesses were somewhere on the work site, was told to wear a harness while on the roof, and was instructed on how to wear a harness. Defendants, however, failed to raise a triable issue of fact whether "safety harnesses 'were readily available at the work site, albeit not in the immediate vicinity of the accident' " (*Lord v Whelan & Curry Constr. Servs., Inc.*, 166 AD3d 1496, 1497 [4th Dept 2018], quoting *Gallagher v New York Post*, 14 NY3d 83, 88 [2010]). The " 'presence of [other safety devices] somewhere at the worksite' does not [alone] satisfy defendants' duty to provide appropriate safety devices" (*Williams v City of Niagara Falls*, 43 AD3d 1426, 1427 [4th Dept 2007], quoting *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524 [1985], *rearg denied* 65 NY2d 1054 [1985]). Significantly, our dissenting colleagues do not address our prior determination that "the presence of a safety harness in [the] plaintiff's truck," was insufficient to raise a triable issue of fact whether the plaintiff's conduct was the sole proximate cause of the injuries sustained as a result of his fall from a roof (*id.*).

Further, "[t]he mere failure by plaintiff to follow safety instructions" does not render plaintiff the sole proximate cause of his injuries (*cf. Fazekas*, 132 AD3d at 1403-1404; *see generally Whiting v Dave Hennig, Inc.*, 28 AD3d 1105, 1106 [4th Dept 2006]; *Young v Syroco, Inc.*, 217 AD2d 1011, 1012 [4th Dept 1995]). The evidence presented by defendants established only that plaintiff possibly failed to follow safety instructions, not that he outright refused to "use available, safe and appropriate equipment" (*Miles v Great Lakes Cheese of N.Y., Inc.*, 103 AD3d 1165, 1167 [4th Dept 2013] [internal

quotation marks omitted]; *see Powers v Del Zotto & Son Bldrs.*, 266 AD2d 668, 669 [3d Dept 1999]). Defendants failed to demonstrate that plaintiff " 'chose for no good reason not to' " wear a safety harness (*Fazekas*, 132 AD3d at 1404). At most, plaintiff's "alleged conduct would amount only to comparative fault and thus cannot bar recovery under the statute" (*Lagares*, 177 AD3d at 1395).

Although defendants also submitted deposition testimony that, after the accident, all of the toe boards were in place and none had been broken, that testimony is of no moment. Regardless of whether the toe board at issue actually broke, that device did not adequately protect plaintiff from an elevation-related fall and therefore failed within the meaning of Labor Law § 240 (1) (*see generally Wolf v Ledcor Constr. Inc.*, 175 AD3d 927, 929 [4th Dept 2019]; *Provens*, 163 AD3d at 1498). We also reject our dissenting colleagues' supposition that a harness, by itself, was an adequate safety device because there is no testimony in the record to establish that fact. Additionally, defendants have made no such argument on appeal.

Contrary to plaintiff's further contention on appeal, we conclude that the court properly denied the motion with respect to the Labor Law § 241 (6) cause of action. The Industrial Code provisions that plaintiff alleges defendants violated, i.e., 12 NYCRR 23-1.16 (c) and 12 NYCRR 23-1.24 (a) and (b), are "sufficiently specific to support a Labor Law § 241 (6) cause of action" (*Kuligowski v One Niagara, LLC*, 177 AD3d 1266, 1268 [4th Dept 2019]; *see Mills v Niagara Mohawk Power Corp.*, 262 AD2d 901, 902 [3d Dept 1999]; *Rudolph v Hofstra Univ.*, 225 AD2d 680, 681 [2d Dept 1996]). However, plaintiff failed to meet his prima facie burden of establishing entitlement to summary judgment with respect to those Industrial Code provisions. Plaintiff alleges that he was not provided with a harness, which would render 12 NYCRR 23-1.16 (c) inapplicable (*see Partridge v Waterloo Cent. School Dist.*, 12 AD3d 1054, 1056 [4th Dept 2004]; *Luckern v Lyonsdale Energy Ltd. Partnership*, 281 AD2d 884, 887 [4th Dept 2001]). Moreover, although plaintiff stated that he was never provided with a harness or instructed on how to use one, he also submitted deposition testimony contradicting those assertions, thereby raising issues of fact. With regard to the other two Industrial Code provisions, both require evidence of the steepness of the slope of the roof, which plaintiff failed to provide (*see Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 682 [2d Dept 2005]).

Contrary to defendants' contention on their cross appeal, and in light of our decision to grant plaintiff's motion with respect to the Labor Law § 240 (1) cause of action, we conclude that the court properly granted the motion insofar as it sought a determination that those injuries identified in the medical examination reports were caused by the accident. To the extent that defendants challenge causation with respect to the other alleged injuries, that challenge is improperly based on evidence outside of the record (*see generally McIntosh v Genesee Val. Laser Ctr.*, 121 AD3d 1560, 1561 [4th Dept 2014], *lv denied* 25 NY3d 911 [2015]; *Matter of Gridley v Syrko*, 50 AD3d 1560, 1561 [4th Dept 2008]).

All concur except SMITH, J.P., and CENTRA, J., who dissent and vote to affirm in the following memorandum: We respectfully dissent and would affirm the order of Supreme Court. Plaintiff was employed as a ground laborer for a business owned by Sean Cryan (Sean) and Richard Cryan (Richard) that had been hired by defendants to install a new roof on their rental property. Although there was deposition testimony that ground laborers do not normally go on the roof, at the time of the accident plaintiff was on the roof attempting to untangle an air hose when he slid off the roof. No one witnessed the fall. Plaintiff testified at his deposition that a toe board "gave out," but Sean and Richard testified that, after the accident, all the toe boards were in place and nothing was broken.

We disagree with the majority that the court erred in denying plaintiff's motion insofar as it sought summary judgment on the issue of liability with respect to the Labor Law § 240 (1) cause of action. It is well settled that "an accident alone does not establish a Labor Law § 240 (1) violation or causation" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 [2003]). To establish liability under Labor Law § 240 (1), the plaintiff must show that "the owner or contractor . . . breach[ed] the statutory duty under section 240 (1) to provide a worker with adequate safety devices, and [that] this breach . . . proximately cause[d] the worker's injuries" (*Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]). "These prerequisites do not exist if adequate safety devices are available at the job site, but the worker either does not use or misuses them" (*id.*).

Contrary to the conclusion of the majority, we agree with the court that there is a triable issue of fact whether there was a violation of Labor Law § 240 (1) and, more specifically, whether defendants provided plaintiff with adequate safety devices. There was evidence submitted that, in addition to the toe boards, safety harnesses were available for plaintiff to use but that he was not wearing one at the time of the accident. A plaintiff is not entitled to summary judgment on a Labor Law § 240 (1) cause of action when there is an issue of fact whether the plaintiff's own conduct was the sole proximate cause of the accident (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]; *Weitzel v State of New York*, 160 AD3d 1394, 1394-1395 [4th Dept 2018]). A triable issue of fact whether a plaintiff's conduct was the sole proximate cause of his or her accident exists when there is evidence and reasonable inferences to be drawn therefrom that the plaintiff "had adequate safety devices available; that [the plaintiff] knew both that they were available and that he [or she] was expected to use them; that [the plaintiff] chose for no good reason not to do so; and that had [the plaintiff] not made that choice he [or she] would not have been injured" (*Cahill*, 4 NY3d at 40; *see Fazekas v Time Warner Cable, Inc.*, 132 AD3d 1401, 1403-1404 [4th Dept 2015]).

In support of his motion, plaintiff submitted excerpts from his own deposition testimony in which he testified that he did not see harnesses in Sean's truck and that the Cryans did not provide him with any safety gear other than gloves and, at times, a safety mask. Plaintiff, however, also submitted excerpts from Richard's deposition

in which he testified that harnesses were kept in his and Sean's trucks, that the workers knew how to use them, and that there were enough for all the workers on the job site. Plaintiff further submitted excerpts from Sean's deposition in which he testified that ground laborers were required to wear a harness if they were on the roof, that he had told plaintiff to wear one, and that plaintiff knew that he had to wear one. In our view, that testimony raised a triable issue of fact whether plaintiff's failure to wear a harness was the sole proximate cause of the accident, and thus plaintiff failed to meet his initial burden on the motion with respect to the Labor Law § 240 (1) cause of action (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Even assuming, arguendo, that plaintiff met his initial burden on that part of the motion, we conclude that defendants raised a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Defendants submitted additional excerpts from the depositions of Richard and Sean. Sean testified that harnesses were kept in a Dewalt storage box and that everyone had access to them. Both he and Richard testified that all employees, including plaintiff, were shown how to wear them, and Richard testified that he specifically told plaintiff that the harnesses were in the truck and that he needed to have one on. That testimony and the reasonable inferences to be drawn therefrom established that there were adequate safety devices, i.e., harnesses, available; that plaintiff knew both that the harnesses were available and that he was expected to use them; that he chose for no good reason not to wear one; and that had he not made that choice he would not have been injured (*see Cahill*, 4 NY3d at 40; *Weitzel*, 160 AD3d at 1395).

The majority concludes that defendants failed to raise a triable issue of fact with respect to the Labor Law § 240 (1) cause of action because there was no showing that the harnesses were readily available at the work site as opposed to being merely somewhere at the work site. The work here was installing a new roof on a home, which was a small construction site. It can reasonably be inferred that Sean's and Richard's trucks were parked either in the driveway of the home or very close by the home. Safety devices need to be "readily available," but they do not need to be "in the immediate vicinity of the accident" (*Gallagher v New York Post*, 14 NY3d 83, 88 [2010]). In our view, the evidence submitted by defendants established that the harnesses in the Dewalt storage box in the truck(s) were readily available to plaintiff, and plaintiff knew where to find them because Richard testified that he told plaintiff that they were in the truck (*cf. id.* at 88).

We further disagree with the majority's assertion that defendants failed to raise a triable issue of fact because plaintiff's mere failure to follow safety instructions does not render him the sole proximate cause of his injuries. As stated by the Court of Appeals, "an instruction by an employer or owner to avoid using unsafe equipment or engaging in unsafe practices is not a 'safety device' in the sense that plaintiff's failure to comply with the instruction is equivalent to refusing to use available, safe and appropriate equipment" (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 563 [1993]; *see*

Stolt v General Foods Corp., 81 NY2d 918, 920 [1993]). In our view, we have more here than a mere instruction to plaintiff to avoid unsafe practices. The deposition testimony of Sean and Richard established that they told plaintiff that he needed to wear a harness and told him where the harnesses were kept, which permits the inference that plaintiff knew that the harnesses were available and that he was expected to use them (*see Fazekas*, 132 AD3d at 1404). Contrary to the assertion of the majority, defendants were not required to show an outright refusal by plaintiff to wear the harness (*see Cahill*, 4 NY3d at 37; *cf. Gallagher*, 14 NY3d at 88).

Plaintiff contends, and the majority agrees, that setting aside the disputed testimony regarding the harnesses, the toe board at issue did not provide adequate protection from an elevation-related risk regardless of whether it was defective and that the failure of one safety device to provide adequate protection entitles him to summary judgment with respect to the Labor Law § 240 (1) cause of action. "Under Labor Law § 240 (1), it is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury" (*Blake*, 1 NY3d at 290). "Thus, if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation" (*id.*). Plaintiff reasons that the failure of the toe board to provide adequate protection constitutes a proximate cause of his injuries and thus that defendants cannot establish that his failure to wear a harness was the sole proximate cause of his injuries. We disagree with that analysis. Nothing precludes an owner or contractor from providing a worker with more than one safety device (*see Weitzel*, 160 AD3d at 1395). Here, plaintiff was provided with two safety devices—a toe board and a harness. Thus, regardless of any failure of the toe board to provide proper protection, there is no breach of the statutory duty to provide plaintiff with "adequate safety *devices*" if the harness is found to be an adequate safety device (*Robinson*, 6 NY3d at 554 [emphasis added]). In other words, the failure of one safety device does not automatically result in a statutory violation of Labor Law § 240 (1) when the worker was provided with another safety device that was adequate to prevent any injury (*see Weitzel*, 160 AD3d at 1395). Where, as here, there is a triable issue of fact whether a harness was available to the plaintiff and the plaintiff knew that he or she was expected to use it but failed to do so, the plaintiff cannot establish as a matter of law that there was any statutory violation or proximate cause.

The majority's conclusion that plaintiff is entitled to partial summary judgment on liability with respect to the Labor Law § 240 (1) cause of action essentially punishes defendants for the actions of plaintiff's employer in providing him with a second safety device. Under the majority's analysis, defendants would fare better if plaintiff's employer had not provided the toe board at all, which defies logic and is contrary to the goal of the statute to make construction sites safer for workers. The purpose of the statute is

to hold an owner or contractor liable for failing to provide a worker with proper protection (*see Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 96 [2015], *rearg denied* 25 NY3d 1195 [2015]). Here, there is a triable issue of fact whether defendants provided plaintiff with adequate protection from the risk of falling from the roof, and thus the court properly denied the motion with respect to the Labor Law § 240 (1) cause of action.

We agree with the majority that the court properly denied plaintiff's motion insofar as it sought summary judgment on the issue of liability with respect to the Labor Law § 241 (6) cause of action. Among other reasons (*see generally Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Riffo-Velozo v Village of Scarsdale*, 68 AD3d 839, 841-842 [2d Dept 2009]), plaintiff failed to meet his initial burden of establishing that defendants violated 12 NYCRR 23-1.16 (c) or 12 NYCRR 23-1.24 (a) or (b) (*see Jock v Landmark Healthcare Facilities, LLC*, 62 AD3d 1070, 1074 [3d Dept 2009]).

With respect to defendants' cross appeal, defendants contend that the court erred in granting plaintiff's motion to the extent that it sought a determination that the accident caused his injuries. The court granted that relief upon receiving no opposition from defendants as to that part of plaintiff's motion. Defendants do not dispute that plaintiff sustained injuries as a result of the fall and, as plaintiff states in his reply brief, "[t]he exact extent, scope of all injuries claimed and their compensatory 'value' is and will be something to be determined by a jury." We therefore see no reason to modify the order.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

306

CA 19-01088

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, WINSLOW, AND BANNISTER, JJ.

JULIE E. PASEK, INDIVIDUALLY AND AS POWER OF ATTORNEY FOR JAMES G. PASEK,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CATHOLIC HEALTH SYSTEM, INC., ET AL., DEFENDANTS,
AND GEORGE R. BANCROFT, M.D., DEFENDANT-APPELLANT.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (J. MARK GRUBER OF COUNSEL), FOR DEFENDANT-APPELLANT.

BROWN CHIARI LLP, BUFFALO (ANGELO S. GAMBINO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered January 28, 2019. The order denied the motion of defendant George R. Bancroft, M.D., for summary judgment dismissing the complaint and cross claims against him.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting in part the motion of defendant George R. Bancroft, M.D., and dismissing the complaint against him except insofar as the complaint, as amplified by the bill of particulars, alleges that he mismanaged the transport of James G. Pasek to the operating room on February 7, 2014, and as modified the order is affirmed without costs.

Memorandum: In this action for, inter alia, medical malpractice seeking damages for injuries sustained by James G. Pasek, George R. Bancroft, M.D. (defendant) appeals from an order denying his motion for summary judgment dismissing the complaint and cross claims against him.

Pasek underwent mitral valve repair surgery in February 2014. Serious complications occurred during the surgery and, during the post-operative period, Pasek was placed on a ventilator and an extracorporeal membrane oxygenation (ECMO) system, which mechanically circulated his blood outside his body through an artificial lung. A few days after the surgery, Pasek's condition deteriorated and he was emergently transported from the open heart unit to the operating room. Defendant was the attending anesthesiologist for the transport, during which the ECMO tubing became unintentionally disconnected. Pasek subsequently suffered, among other things, massive blood loss, hypoxic

brain injury due to a lack of oxygen, and occipital lobe damage, allegedly arising from, inter alia, defendant's malpractice in transporting him to the operating room.

A medical malpractice defendant meets his or her initial burden on a motion for summary judgment by presenting "factual proof, generally consisting of affidavits, deposition testimony and medical records, to rebut the claim of malpractice by establishing that [he or she] complied with the accepted standard of care *or* did not cause any injury to the patient" (*Hope A.L. v Unity Hosp. of Rochester*, 173 AD3d 1713, 1714 [4th Dept 2019]; *see Webb v Scanlon*, 133 AD3d 1385, 1386 [4th Dept 2015]). We agree with defendant that he satisfied his initial burden on the motion with respect to both compliance with the accepted standard of care and proximate cause by presenting factual evidence, including his own detailed affidavit that "address[ed] each of the specific factual claims of negligence raised in plaintiff's bill of particulars" (*Larsen v Banwar*, 70 AD3d 1337, 1338 [4th Dept 2010]) and was "detailed, specific and factual in nature" (*Macaluso v Pilcher*, 145 AD3d 1559, 1560 [4th Dept 2016] [internal quotation marks omitted]; *see Groff v Kaleida Health*, 161 AD3d 1518, 1520 [4th Dept 2018]). The burden thus shifted to plaintiff 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" (*Nowelle B. v Hamilton Med., Inc.*, 177 AD3d 1256, 1257 [4th Dept 2019]; *see Isensee v Upstate Orthopedics, LLP*, 174 AD3d 1520, 1522 [4th Dept 2019]).

The affidavit of plaintiff's expert anesthesiologist addressed defendant's conduct only with respect to the claims arising from defendant's alleged failure to ensure that the transport of Pasek to the operating room was performed safely and his alleged failure to document the disconnection event and resulting blood loss in Pasek's medical chart. Inasmuch as plaintiff's expert failed to address the claims against defendant regarding the diagnosis, consulting, testing, examination, and pre- and post-operative treatment and did not identify any deviation with respect to defendant's efforts to ventilate, monitor, or resuscitate Pasek, those claims are deemed abandoned. Supreme Court thus erred in denying defendant's motion with respect to those claims (*see Bubar v Brodman*, 177 AD3d 1358, 1361 [4th Dept 2019]; *Donna Prince L. v Waters*, 48 AD3d 1137, 1138 [4th Dept 2008]), and we therefore modify the order accordingly.

We conclude that the court properly denied defendant's motion with respect to plaintiff's claim that defendant failed to ensure that the transport of Pasek was conducted safely. Plaintiff raised a triable issue of fact with respect to defendant's deviation from the standard of care by submitting, inter alia, the affidavit of her expert anesthesiologist, the deposition testimony of defendant, and excerpts from the depositions of a nurse and two perfusionists who assisted with the transport. Plaintiff's expert anesthesiologist opined, to a reasonable degree of medical certainty, that defendant and each of the other medical providers who participated in the transport of Pasek had a duty to make sure that the transport was done efficiently, quickly, and safely and to ensure that all equipment

connected to Pasek, including the ECMO tubing, was secure and free from hazards before beginning the transport.

Although defendant stated in his affidavit that his role during the transport was limited to monitoring Pasek's vital signs and maintaining his airway, and that he had no responsibility with respect to the ECMO equipment or for pushing Pasek's bed, defendant also testified at his deposition that it was the responsibility of "the entire team" to make sure that Pasek's bed exited the doorway. Defendant's own testimony thus indicates that, as a member of the transport team, he was responsible, at least in part, for making sure that Pasek's bed exited the doorway safely. Defendant's testimony also conflicted with his statement in his affidavit that he "was not involved physically with the movement of the bed during the transport." Additionally, a perfusionist who assisted with the transport testified that defendant was involved in moving Pasek's bed to the operating room, and a nurse who assisted with the transport testified that defendant was the "head of the transport team." Such testimony contradicted defendant's testimony that there was no "head" of the transport team and that he had no "supervisory duty over those assisting in the transport." Furthermore, when asked who was responsible for the ECMO equipment during the transport, the nurse testified that "Anesthesia" was responsible and a perfusionist testified, "[w]e all have a responsibility to watch the tubing."

We reject defendant's contention that plaintiff failed to raise a triable issue of fact with respect to proximate cause. In his affidavit, defendant stated that there was nothing he did or allegedly failed to do that caused or contributed to any of the injuries claimed by plaintiff and that Pasek did not exhibit any symptoms "at that moment following the disconnection [of the ECMO tubing] during the transport." Plaintiff's expert anesthesiologist, however, stated that defendant's deviations from the standard of care during the transport of Pasek contributed to the unintentional disconnection of the ECMO tubing, which resulted in substantial blood loss, followed by a "sharp drop in [Pasek's] blood pressure and bradycardia." Where, as here, "a nonmovant's expert affidavit squarely opposes the affirmation of the moving part[y's] 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] [internal quotation marks omitted]).

With respect to the claim that defendant failed to document the transport event in Pasek's medical chart, defendant stated in his affidavit that it was neither his duty nor his responsibility to document the transport of Pasek to the operating room and that it would have been inappropriate for him to do so because he did not observe a disconnection of the ECMO tubing and the ECMO equipment was not his responsibility. Plaintiff's expert, however, stated that the standard of care required defendant, as the attending anesthesiologist, to notate his observations of Pasek's blood loss during the transport, and that defendant's failure to document the chart was a deviation from the standard of care. Thus, we conclude that the affidavit of plaintiff's expert was sufficient to raise a

triable issue of fact whether defendant deviated from the applicable standard of care.

We agree with defendant, however, that plaintiff's expert failed to raise an issue of fact with respect to the alleged documentation failure as a proximate cause of Pasek's injury. Defendant, in his own affidavit, stated that nothing he did or failed to do resulted in a misdiagnosis or resulted in a lack of understanding of Pasek's condition by subsequent health care providers, and plaintiff's expert did not opine that defendant's failure to document Pasek's chart caused any injury. The court therefore erred in denying defendant's motion with respect to that claim, and we further modify the order accordingly.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

309

CA 19-00644

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, WINSLOW, AND BANNISTER, JJ.

U.S. BANK NATIONAL ASSOCIATION, NOT IN ITS INDIVIDUAL CAPACITY BUT SOLELY AS TRUSTEE FOR THE RMAC TRUST, SERIES 2016-CTT,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CHARLES A. BROWN, SUSAN L. BROWN,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

GROSS POLOWY, LLC, WESTBURY (TRACY FOURTNER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered December 6, 2018. The order granted the motion of defendants Charles A. Brown and Susan L. Brown to dismiss 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 Charles A. Brown and Susan L. Brown is reinstated.

Memorandum: Plaintiff commenced this mortgage foreclosure action alleging that Charles A. Brown and Susan L. Brown (defendants) defaulted in the payment of their mortgage, which had been assigned to plaintiff. In moving to dismiss the complaint against them, defendants contended that the action is barred by the six-year statute of limitations (*see* CPLR 213 [4]; *see also* CPLR 3211 [a] [5]), and Supreme Court granted the motion. We reverse.

In moving to dismiss the complaint on statute of limitations grounds, the defendant has "the initial burden of establishing prima facie that the time in which to sue has expired . . . , and thus [is] required to establish, inter alia, when the plaintiff's cause of action accrued" (*Larkin v Rochester Hous. Auth.*, 81 AD3d 1354, 1355 [4th Dept 2011] [internal quotation marks omitted]; *see Chaplin v Tompkins*, 173 AD3d 1661, 1662 [4th Dept 2019]). If the defendant meets that burden, " 'the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period' " (*U.S. Bank N.A. v Gordon*, 158 AD3d 832, 835 [2d Dept 2018]; *see Carrington v New York*

State Off. for People With Dev. Disabilities, 170 AD3d 1495, 1496 [4th Dept 2019]; *see also* Siegel, NY Prac § 263 at 509 [6th ed 2018]).

We conclude that defendants met their initial burden on the motion. Where, as here, "a loan secured by a mortgage is payable in installments, separate causes of action accrue for each unpaid installment, and the statute of limitations begins to run on the date that each installment becomes due" (*Wilmington Sav. Fund Socy., FSB v Unknown Heirs at Law of Danny Higdon*, 161 AD3d 1559, 1559 [4th Dept 2018]). "Thus, unless the entire debt had been accelerated by the mortgage holder, on the date of a default the statute of limitations begins to run only for the installment payment that became due on that date" (*id.*). "If, however, the mortgage holder accelerates the entire debt by a demand, the six-year statute of limitations begins to run on the entire debt" (*Wilmington Sav. Fund Socy., FSB v Gustafson*, 160 AD3d 1409, 1410 [4th Dept 2018]). In addition, where, as here, " 'the acceleration . . . is made optional with the holder of the note and mortgage, some affirmative action must be taken evidencing the holder's election to take advantage of the accelerating provision, and until such action has been taken the provision has no operation' " (*Wilmington Sav. Fund Socy., FSB v Fernandez*, 179 AD3d 79, 81 [4th Dept 2019]).

In this case, defendants established, prima facie, that the present action is untimely inasmuch as " '[t]he filing of [a] summons and complaint [in March 2010] seeking the entire unpaid balance of principal in [a] prior foreclosure action constituted a valid election by the plaintiff['s predecessor-in-interest] to accelerate the maturity of the debt,' " and plaintiff commenced the present action in April 2018, more than six years after the statute of limitations began to run (*U.S. Bank N.A. v Balderston*, 163 AD3d 1482, 1483-1484 [4th Dept 2018] [hereafter, *Balderston*]; *see HSBC Bank, N.A. v Vaswani*, 174 AD3d 514, 515 [2d Dept 2019], *lv denied* 35 NY3d 906 [2020]). Plaintiff's contention that defendants did not meet their initial burden because they "failed to submit certain documents is improperly raised for the first time on appeal" (*Lowe's Home Ctrs., Inc. v Beachy's Equip. Co., Inc.*, 49 AD3d 1213, 1214 [4th Dept 2008], *lv denied* 10 NY3d 715 [2008]). "An issue may not be raised for the first time on appeal . . . where[, as here,] it could have been obviated or cured by factual showings or legal countersteps in the trial court" (*id.* at 1214 [internal quotation marks omitted]; *see also AJMRT, LLC v Kern*, 154 AD3d 1288, 1290 [4th Dept 2017]; *Ryan Mgt. Corp. v Cataffo*, 262 AD2d 628, 630 [2d Dept 1999]).

We nevertheless agree with plaintiff that its submissions in opposition to the motion raised a question of fact whether the present action was timely commenced. It is well settled that "[a] lender may revoke its election to accelerate the mortgage, [although] it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action" (*Balderston*, 163 AD3d at 1484 [internal quotation marks omitted]).

Here, plaintiff submitted evidence that its predecessor in

interest mailed letters to defendants in January 2016, i.e., before the statute of limitations expired, revoking the prior acceleration of the mortgage. As plaintiff correctly contends, the evidence, including an affidavit of mailing, established that the letters were properly mailed to defendants at their address, thereby giving rise to the presumption that the letters were received by defendants (*see Hertz Vehs. LLC v Significant Care, PT, P.C.*, 157 AD3d 600, 601 [1st Dept 2018]; *Residential Holding Corp. v Scottsdale Ins. Co.*, 286 AD2d 679, 680 [2d Dept 2001]). Defendants' unsubstantiated denial of receipt was "insufficient to rebut the presumption of proper service at the address where all notices under the mortgage were to be sent" (*Bank of N.Y. v Espejo*, 92 AD3d 707, 708 [2d Dept 2012]; *see Sansone v Cavallaro*, 284 AD2d 817, 818 [3d Dept 2001]). Moreover, on the limited record before us, we conclude that language of the letters and the surrounding circumstances raised a question of fact whether plaintiff's predecessor in interest validly revoked the prior acceleration of the mortgage and, thus, whether the present action was timely commenced (*see generally Wells Fargo Bank, N.A. v Portu*, 179 AD3d 1204, 1206-1207 [3d Dept 2020]; *Milone v US Bank N.A.*, 164 AD3d 145, 152-154 [2d Dept 2018], *lv dismissed* 34 NY3d 1009 [2019]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

321

TP 19-00515

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

IN THE MATTER OF SARAH CUSHMAN, PETITIONER,

V MEMORANDUM AND ORDER

D. VENETTOZZI, DIRECTOR OF SPECIAL HOUSING/INMATE DISCIPLINARY PROGRAM, S. SQUIRES, SUPERINTENDENT OF ALBION CORRECTIONAL FACILITY, M. SIMMONS, ALBION CORRECTIONAL FACILITY'S FORMER DEPUTY SUPERINTENDENT OF SECURITY, R. MATIAS ROBERTS, LIEUTENANT AT ALBION CORRECTIONAL FACILITY, AND D. MACK, CORRECTIONAL OFFICER AT ALBION CORRECTIONAL FACILITY, RESPONDENTS.

SARAH CUSHMAN, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Orleans County [Michael M. Mohun, A.J.], entered March 19, 2019) to review a determination of respondents. The determination found after a tier III hearing that petitioner had violated an inmate rule.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that she violated inmate rule 113.24 (7 NYCRR 270.2 [B] [14] [xiv] [drug use]). Contrary to petitioner's contention, the testimony and evidence presented at the hearing, including the positive results of two urinalysis tests indicating the presence of buprenorphine/suboxone, constitute substantial evidence to support the determination (*see Matter of Lahey v Kelly*, 71 NY2d 135, 138 [1987]; *Matter of Wade v Venettozzi*, 153 AD3d 1649, 1650 [4th Dept 2017]; *Matter of Robinson v Herbert*, 269 AD2d 807, 807 [4th Dept 2000]). Petitioner's denials of the reported misbehavior raised, at most, an issue of credibility for resolution by the hearing officer (*see Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]). Contrary to petitioner's contention, there is no evidence of a break in the chain of custody related to the urine sample, and the proper procedures and documents were utilized (*see Robinson*, 269 AD2d at 807). Petitioner's

request that video evidence of the testing room be shown was properly denied inasmuch as that evidence "would have been either redundant or immaterial" (*Matter of Jackson v Annucci*, 122 AD3d 1288, 1288 [4th Dept 2014] [internal quotation marks omitted]). Petitioner failed to exhaust her administrative remedies with respect to her further contention that she was denied the right to call a certain officer witness, and this Court "has no discretionary power to reach [it]" (*Matter of Nelson v Coughlin*, 188 AD2d 1071, 1071 [4th Dept 1992], *appeal dismissed* 81 NY2d 834 [1993]; *see Matter of Polanco v Annucci*, 136 AD3d 1325, 1325 [4th Dept 2016]). Finally, we reject petitioner's contention that the hearing officer was biased or that the determination flowed from the alleged bias (*see Matter of Jones v Annucci*, 141 AD3d 1108, 1109 [4th Dept 2016]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

335

CA 19-01236

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

KRISTYN JOHNSON-NEULAND, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK MUNICIPAL INSURANCE RECIPROCAL,
DEFENDANT-RESPONDENT.

STANLEY LAW OFFICES, SYRACUSE (STEPHANIE VISCELLI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER, UNIONDALE (AVIS SPENCER DECAIRE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered June 21, 2019. The order granted the motion of defendant insofar as it sought summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff, a parking attendant employed by the City of Oswego (City), was injured when the City police vehicle she was operating was struck by an underinsured motorist. Plaintiff sought supplementary uninsured/underinsured motorist (SUM) coverage from defendant as the City's insurer, but defendant denied coverage to plaintiff because she was driving a police vehicle when the accident occurred. Plaintiff subsequently commenced the instant action against defendant, seeking SUM coverage. Supreme Court granted defendant's motion insofar as it sought summary judgment dismissing the complaint. We affirm.

Plaintiff contends that defendant's motion for summary judgment was premature. We reject that contention inasmuch as plaintiff failed to demonstrate that additional discovery would lead to relevant evidence or give rise to an identifiable issue of fact (*see State of New York v County of Erie*, 265 AD2d 853, 853 [4th Dept 1999]; *see also Nationwide Affinity Ins. Co. of Am. v Beacon Acupuncture, P.C.*, 175 AD3d 1836, 1837 [4th Dept 2019]).

We also reject plaintiff's contention that defendant and the City intended for the subject insurance policy to include SUM coverage for the subject vehicle. The insurance policy did not explicitly provide for SUM coverage for the subject vehicle, and it is well-settled that

a police vehicle is not a motor vehicle for purposes of SUM coverage (*see Matter of State Farm Mut. Auto. Ins. Co. v Fitzgerald*, 25 NY3d 799, 820-821 [2015]; *Matter of State Farm Mut. Auto. Ins. Co. v Amato*, 72 NY2d 288, 294-295 [1988]).

Finally, we reject plaintiff's contention that defendant should be equitably estopped from denying SUM coverage. Defendant met its initial burden on the motion of establishing that it did not represent to plaintiff that SUM coverage existed, and plaintiff failed to raise an issue of fact in opposition. Contrary to plaintiff's contention, the evidence does not demonstrate that defendant made affirmative representations that SUM coverage existed and was available to her (*see Reeve v General Acc. Ins. Co. of N.Y.*, 239 AD2d 759, 761 [3d Dept 1997]; *see also U.S. Specialty Ins. Co. v Beale*, 54 Misc 3d 880, 881-882 [Sup Ct, Dutchess County 2016]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

336.1

CA 19-01669

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

KEITH T. HOLMES, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KEVIN D. MCCREA, DEFENDANT-RESPONDENT,
AND STEVON K. SPENCER, DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., ROCHESTER (SAREER A. FAZILI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARTH SULLIVAN BEHR, LLP, BUFFALO (DOMINIC M. CHIMERA OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeals from an order of the Supreme Court, Monroe County (Debra A. Martin, A.J.), entered February 26, 2019. The order granted the motion of defendant Kevin D. McCrea for summary judgment and dismissed the complaint against him.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries that he sustained in a motor vehicle accident. At the time of the accident, plaintiff was a passenger in a car owned by defendant Kevin D. McCrea (owner) and operated by defendant Stevon K. Spencer (driver), who later pleaded guilty to criminal possession of stolen property (CPSP) in the fifth degree (Penal Law § 165.40) with respect to his use of the car at the time of the accident. The owner moved for summary judgment dismissing the complaint against him on the ground that the driver's criminal conviction constituted conclusive proof that he lacked permission to operate the car (*see generally* Vehicle and Traffic Law § 388 [1]). Supreme Court granted the motion, and we affirm.

Initially, we agree with plaintiff and the driver that the court erred in concluding that plaintiff is collaterally estopped by the driver's conviction from raising an issue of fact with respect to permissive use. The doctrine of collateral estoppel is based on the principle that a party, or one in privity with a party, should not be allowed to relitigate an issue previously decided against it (*see D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]).

" 'A criminal conviction may be given collateral estoppel effect in a subsequent civil litigation if there is an identity of issues and a full and fair opportunity to litigate in the first action' " (*Pink v Ricci*, 100 AD3d 1446, 1447 [4th Dept 2012]; *see S.T. Grand, Inc. v City of New York*, 32 NY2d 300, 304-305 [1973], *rearg denied* 33 NY2d 658 [1973]). Here, plaintiff lacked a full and fair opportunity to litigate the issue of permissive use because he had no involvement or interest in the underlying criminal proceeding (*see generally D'Arata*, 76 NY2d at 664; *Gilberg v Barbieri*, 53 NY2d 285, 291-294 [1981]).

We nevertheless conclude that the owner met his initial burden on the motion of establishing his entitlement to judgment as a matter of law (*see Harris v Jackson*, 30 AD3d 1027, 1029 [4th Dept 2006]). We reject plaintiff's contention that the owner failed to meet his initial burden because his own evidentiary submissions—which included the deposition testimony of the driver that he did not steal the car, but instead "rented" it from the owner—raised an issue of fact with respect to permissive use. Although, as a general matter, "credibility is an issue that should be left to a fact finder at trial, 'there are of course instances where credibility is properly determined as a matter of law' " (*Sexstone v Amato*, 8 AD3d 1116, 1117 [4th Dept 2004], *lv denied* 3 NY3d 609 [2004]; *see Finley v Erie and Niagara Ins. Assn.*, 162 AD3d 1644, 1645-1646 [4th Dept 2018]). Here, the evidence included both the deposition testimony of the owner that the driver stole the car and the police report indicating that the owner timely reported the car stolen. Further, and critically, it is undisputed that the driver pleaded guilty to CPSP in the fifth degree, thereby establishing beyond a reasonable doubt that he knowingly possessed the stolen car (*see* Penal Law § 165.40). The plea established the very fact at issue: the driver was not a permissive user of the vehicle at the time of the accident (*cf. Kemper Independence Ins. Co. v Ellis*, 128 AD3d 1529, 1531-1532 [4th Dept 2015]). We thus conclude that the driver's self-serving deposition testimony that he had permission to operate the car, which is contrary to all other evidence including the driver's own criminal conviction, is incredible as a matter of law (*see Carthen v Sherman*, 169 AD3d 416, 417 [1st Dept 2019]; *Kemper Independence Ins. Co.*, 128 AD3d at 1531; *Smith v New York Cent. Mut. Fire Ins. Co.*, 13 AD3d 686, 688 [3d Dept 2004]).

In opposition, plaintiff failed to raise an issue of fact with respect to permissive use (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

336

CA 19-01506

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

JAMES MONTANA AND APRIL MONTANA, INDIVIDUALLY AND AS HUSBAND AND WIFE, PLAINTIFFS,

V MEMORANDUM AND ORDER

DAVID MARKOWITZ METAL CO., INC. AND MARKOWITZ METALS GROUP, LLC, DEFENDANTS.

DAVID MARKOWITZ METAL CO., INC., THIRD-PARTY PLAINTIFF-RESPONDENT,

V

REVERE COPPER PRODUCTS, INC., THIRD-PARTY DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, SYRACUSE (KENNETH M. ALWEIS OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

GORDON & REES SCULLY MANSUKHANI, LLP, HARRISON, SHAUB, AHMUTY, CRITRIN & SPRATT, LLP, LAKE SUCCESS (CHRISTOPHER SIMONE OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered May 23, 2019. The order denied in part third-party defendant's motion for summary judgment dismissing the third-party complaint.

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

Memorandum: Plaintiffs commenced an action against, among others, David Markowitz Metal Co., Inc. (Markowitz) seeking damages for injuries sustained by James Montana (plaintiff), who was injured while cutting steel bands off of a bale of brass in the course of his employment with third-party defendant, Revere Copper Products, Inc. (Revere). Markowitz then commenced a third-party action against Revere seeking common-law contribution and indemnification. Revere moved for summary judgment dismissing the third-party complaint, and Supreme Court granted the motion with respect to the indemnification cause of action and denied the motion with respect to the contribution cause of action. Revere appeals, and we affirm.

"To sustain a third-party cause of action for contribution, a

third-party plaintiff is required to show that the third-party defendant owed it a duty of reasonable care independent of its contractual obligations[, if any], or that a duty was owed to the plaintiffs as injured parties and that a breach of that duty contributed to the alleged injuries . . . [T]he remedy may be invoked against concurrent, successive, independent, alternative and even intentional tortfeasors . . . All that is required for contribution is that two [parties] be held liable for the same personal injury" (*Santoro v Poughkeepsie Crossings, LLC*, 180 AD3d 12, 17 [2d Dept 2019] [internal quotation marks omitted]). "The critical requirement of a valid third-party claim for contribution is that the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought . . . Thus, contribution is available whether or not the culpable parties are allegedly liable for the injury under the same or different theories" (*Nelson v Chelsea GCA Realty, Inc.*, 18 AD3d 838, 840 [2d Dept 2005] [internal quotation marks omitted]). Here, even assuming, arguendo, that Revere met its initial burden on the motion with respect to the common-law contribution cause of action, we conclude that Markowitz raised triable issues of fact to defeat that part of Revere's motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In opposition to the motion, Markowitz provided the expert affidavit of a mechanical engineer who provided several opinions, including that Revere did not have proper safety protocols in place to minimize the likelihood of injury to its employees, who were instructed to partially deconstruct a brass bale by removing some of the steel bands holding the bale together, and that Revere's instruction to remove some of the steel bands securing the bale created the risk that the baled metal could shift and fall on plaintiff or that the remaining bands could snap under the force of the compressed metal. Contrary to Revere's contention, "the expert . . . possessed . . . the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable" (*Matott v Ward*, 48 NY2d 455, 459 [1979]). Furthermore, the expert affidavit "was neither so conclusory or speculative, nor without basis in the record, as to render it inadmissible . . . Rather, [a]ny purported shortcomings in the affidavit went merely to the weight of the opinion" (*Espinal v Jamaica Hosp. Med. Ctr.*, 71 AD3d 723, 724 [2d Dept 2010] [internal quotation marks omitted]; *see Johnson v Pixley Dev. Corp.*, 169 AD3d 1516, 1520 [4th Dept 2019]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

346

KA 15-01687

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FUZELL ROGERS, III, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered July 22, 2015. The judgment convicted defendant upon a jury verdict of criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the seventh degree and criminally using drug paraphernalia 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, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), defendant contends that County Court erred in granting his request to proceed pro se for a portion of the pretrial proceedings. We affirm.

"It is well-settled that an application to proceed pro se must be denied unless [the] defendant effectuates a knowing, voluntary and intelligent waiver of the right to counsel . . . To this end, trial courts must conduct a *searching inquiry* to clarify that [the] defendant understands the ramifications of such a decision" (*People v Stone*, 22 NY3d 520, 525 [2014] [internal quotation marks omitted and emphasis added]). The purpose of the requisite "searching inquiry" is to "warn [the] defendant of the risks inherent in representing himself [or herself]" and to "apprise him [or her] of the value of counsel" (*People v Crampe*, 17 NY3d 469, 481 [2011], *cert denied* 565 US 1261 [2012] [internal quotation marks omitted]; *see People v Kaltenbach*, 60 NY2d 797, 799 [1983]). As the United States Supreme Court has explained, such an inquiry operates to ensure that the defendant is "*made aware* of the dangers and disadvantages of self-representation, so that the record will establish that he [or she] knows what he [or she] is doing and his [or her] choice is made with eyes open" (*Faretta*

v California, 422 US 806, 835 [1975] [internal quotation marks omitted and emphasis added]; *see also People v Arroyo*, 98 NY2d 101, 104 [2002]; *People v Slaughter*, 78 NY2d 485, 492 [1991]).

The Court of Appeals has consistently " 'eschewed application of any rigid formula and endorsed the use of a nonformalistic, flexible inquiry' " to ensure the voluntariness of a defendant's decision to forgo counsel (*People v Providence*, 2 NY3d 579, 583 [2004], quoting *Arroyo*, 98 NY2d at 104; *see People v Smith*, 92 NY2d 516, 520-521 [1998]). Thus, although the "better practice" is for the trial judge to interrogate the defendant about various topics relevant to self-representation in a criminal case—such as the defendant's age, education, occupation, and prior experience with the criminal justice system—the Court of Appeals in *Providence* nevertheless reiterated that "a waiver of the right to counsel will *not* be deemed ineffective simply because a trial judge does not ask questions designed to elicit each of the [various] specific items of information" (2 NY3d at 583 [emphasis added]). Only when the "whole record" shows that the trial court failed to adequately discharge its obligation to *warn* the defendant of the risks inherent in self-representation and to *apprise* him or her of the value of counsel in a criminal proceeding will the resulting waiver be invalidated (*id.*). Conversely, when the "whole record" memorializes the court's compliance with its core advisory function (*id.*), then the defendant's choice to waive counsel must be respected—even if that decision is "rash[ ]" (*People v Vivenzio*, 62 NY2d 775, 776 [1984]), " 'foolish[ ]' " (*People v Henriquez*, 3 NY3d 210, 213 [2004]), or potentially lethal (*see People v Gordon*, 179 Misc 2d 940, 941-945 [Sup Ct, Queens County 1999]).

Ultimately, as the above discussion demonstrates, the State and Federal Constitutions do not protect a criminal defendant from making a *bad* decision to proceed pro se; they only protect him or her from making an *uninformed* decision to proceed pro se. Indeed, as the Court of Appeals emphasized in *Vivenzio*, a "criminal defendant is entitled to be master of his [or her] own fate and respect for individual autonomy requires that he [or she] be allowed to go to jail under his [or her] own banner if he [or she] so desires and if he [or she] makes the choice with eyes open" (62 NY2d at 776 [internal quotation marks omitted]).

In light of the foregoing, we reject defendant's assertion that his waiver of the right to counsel is automatically invalid given the court's failure to specifically discuss, during the *Faretta* colloquy, the potential maximum sentences and the "nature" of the crimes charged. As noted above, the Court of Appeals in *Providence* explicitly held that the trial judge's failure to mention any specific piece of information was not dispositive of the sufficiency of the requisite searching inquiry, and that a trial court's failure to perfectly align its colloquy with best practices would not invalidate the subsequent waiver so long as the court adequately discharged its core obligation to warn and apprise the defendant of the dangers and pitfalls of self-representation. We respectfully decline to follow the First Department's contrary holding in *People v Rodriguez* (158

AD3d 143, 152-153 [1st Dept 2018], *lv denied* 31 NY3d 1017 [2018]).

Defendant further contends that, by insisting upon his own superior ability to defend his case, he failed to "[a]ccept" or "[u]nderstand" the risks of self-representation that the court articulated during the *Faretta* colloquy. Notably, defendant does not argue that the court failed to adequately apprise him of the risks of proceeding pro se; rather, defendant argues that his refusal to *heed* those warnings—i.e., his refusal to abandon his request to proceed without counsel—demonstrates that he did not "[u]nderstand [o]r [a]ccept" the risks of that course.

We reject defendant's contention. As explained above, the trial court's duty is to apprise the defendant of the risks and drawbacks of self-representation. The trial court's duty is not, as defendant argues here, to ensure that the defendant accepts the weight afforded those risks by the trial court, or by the legal establishment in general. Every criminal defendant is constitutionally entitled to proceed pro se notwithstanding the well-recognized risks of that course, and creating a judicial duty to ensure the defendant's "acceptance" of the risks of self-representation would effectively obligate every trial judge to compel the defendant to proceed with counsel whenever he or she expresses any interest in proceeding pro se, and that would violate the defendant's right to self-representation and require reversal in itself (*see People v Daly*, 98 AD2d 803, 807 [2d Dept 1983], *affd* 64 NY2d 970 [1985]).

So long as the trial court fulfills its duty to ensure that the defendant is "made aware" of the risks of self-representation (*Faretta*, 422 US at 835)—and there is no dispute that the court did so here—then the constitutionally protected "respect for individual autonomy requires that [the defendant] be allowed to go to jail under his [or her] own banner," even when he or she is "harming himself [or herself] by insisting on conducting his [or her] own defense" (*People v McIntyre*, 36 NY2d 10, 14 [1974] [internal quotation marks omitted]). Defendant, in short, cannot fault the court for refusing to violate his right to self-representation in the name of honoring his right to counsel.

Finally, defendant's contention that he was denied a fair trial by prosecutorial misconduct on summation is unpreserved for appellate review, and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see People v Lathrop*, 171 AD3d 1473, 1475 [4th Dept 2019], *lv denied* 33 NY3d 1106 [2019]).

Mark W. Bennett

Entered: August 20, 2020

Clerk of the Court

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

350

CAF 18-02333

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

IN THE MATTER OF VALERIE J. HONEYFORD,
PETITIONER-RESPONDENT,
AND GARY R. HONEYFORD, PETITIONER,

V MEMORANDUM AND ORDER

ANDREA LUKE AND ADAM LUKE, RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

JAMES S. HINMAN, ROCHESTER, FOR RESPONDENTS-APPELLANTS.

MICHAEL STEINBERG, ROCHESTER, FOR PETITIONER-RESPONDENT.

ALISON BATES, VICTOR, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Monroe County (James A. Vazzana, J.), entered October 31, 2018 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner Valerie J. Honeyford visitation with the subject children.

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

Memorandum: These consolidated appeals arise from a proceeding pursuant to Family Court Act article 6, in which petitioner-respondent Valerie J. Honeyford (grandmother) sought visitation with two of her grandchildren over the objection of their parents, respondents-petitioners Andrea Luke and Adam Luke (parents). The parents appeal, in appeal No. 1, from an order that, inter alia, granted visitation to the grandmother following a hearing. In appeal No. 2, the parents appeal from an order that dismissed, without a hearing, their petition in which they sought an order modifying the order in appeal No. 1 and determining that the grandmother violated that order.

Preliminarily, the appellate Attorney for the Children (AFC) contends in each appeal that the subject children were denied effective assistance of counsel in Family Court by their trial AFC's failure to meet with them. "[T]here is no indication in the record whether the trial AFC consulted with [the subject children]. The contention of [the children's] appellate AFC is therefore based on matters outside the record and is not properly before us" (*Matter of Brian S. [Tanya S.]*, 141 AD3d 1145, 1147 [4th Dept 2016]; *see Matter of Daniel K. [Roger K.]*, 166 AD3d 1560, 1561 [4th Dept 2016], *lv denied* 32 NY3d 919 [2019]). Additionally, we conclude that "the issue

is not before us in either appeal because the [AFC] did not file a notice of appeal from either order" (*Matter of Baxter v Borden*, 122 AD3d 1417, 1419 [4th Dept 2014], *lv denied* 24 NY3d 915 [2015]; *see Matter of Carroll v Chugg*, 141 AD3d 1106, 1106 [4th Dept 2016]).

With respect to appeal No. 1, Domestic Relations Law § 72 (1) gives a grandparent standing to seek visitation with his or her grandchildren over the parents' objections where, insofar as relevant here, "circumstances show that conditions exist [in] which equity would see fit to intervene." Furthermore, it is well settled "that a fit parent has a 'fundamental constitutional right' to make parenting decisions . . . For that reason, the Court of Appeals has emphasized that 'the courts should not lightly intrude on the family relationship against a fit parent's wishes. The presumption that a fit parent's decisions are in the child's best interests is a strong one' " (*Matter of Jones v Laubacker*, 167 AD3d 1543, 1545 [4th Dept 2018]; *see Troxel v Granville*, 530 US 57, 69-70 [2000]). Additionally, even where, as here, a grandparent has established standing to seek visitation, "a grandparent must then establish that visitation is in the best interests of the grandchild . . . Among the factors to be considered are whether the grandparent and grandchild have a preexisting relationship, whether the grandparent supports or undermines the grandchild's relationship with his or her parents, and whether there is any animosity between the parents and the grandparent" (*Matter of Hilgenberg v Hertel*, 100 AD3d 1432, 1433 [4th Dept 2012]; *see Matter of E.S. v P.D.*, 8 NY3d 150, 157-158 [2007]). Animosity alone, however, is insufficient to deny a grandparent's request for visitation, inasmuch as " '[i]t is almost too obvious to state that, in cases where grandparents must use legal procedures to obtain visitation rights, some degree of animosity exists between them and the party having custody of the [grandchildren]. Were it otherwise, visitation could be achieved by agreement' " (*E.S.*, 8 NY3d at 157; *see Hilgenberg*, 100 AD3d at 1433-1434).

It is also well settled that a court's determination of a grandparent's petition seeking visitation "depends to a great extent upon its assessment of the credibility of the witnesses and upon the assessments of the character, temperament, and sincerity of the parents and grandparents . . . The court's determination concerning visitation will not be disturbed unless it lacks a sound and substantial basis in the record" (*Hilgenberg*, 100 AD3d at 1434 [internal quotation marks omitted]). Here, despite the animosity between the parties, there is a sound and substantial basis in the record for Family Court's determination to award visitation to the grandmother. The court found the grandmother's testimony credible, the record clearly establishes that the grandmother had a loving and beneficial relationship with the children that the parents permitted and encouraged, and there is no evidence in the record that the grandmother or her husband did anything to undermine the parents' relationship with the children. We therefore affirm the order in appeal No. 1.

We also affirm the order in appeal No. 2, in which the court dismissed the parents' modification and violation petition. Insofar

as the parents sought modification, "[i]t is well settled that [a] hearing is not automatically required whenever a parent seeks modification of a [visitation] order . . . In order to . . . warrant a hearing, a petition seeking to modify a prior order of . . . visitation must contain factual allegations of a change in circumstances warranting modification to ensure the best interests of the child" (*Matter of Kriegar v McCarthy*, 162 AD3d 1560, 1560 [4th Dept 2018] [internal quotation marks omitted]). Here, inasmuch as the parents' petition did not allege any change in circumstances, the court properly dismissed their petition insofar as it sought modification of the prior order.

With respect to the parents' request for a determination that the grandmother violated the prior order, a hearing is required only where the "petition[] set[s] forth sufficient allegations 'that, if established at an evidentiary hearing, could support granting the relief sought' " (*Matter of Buck v Buck*, 154 AD3d 1134, 1135 [3d Dept 2017]). Here, the parents' petition alleged only that the grandmother allowed her husband to interact with the subject children during visitation. Inasmuch as the prior order did not prohibit such interaction, the allegations were insufficient to support a finding that the grandmother violated it. Thus, the court properly dismissed the parents' petition insofar as it sought a determination that the grandmother violated the prior order.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

351

CAF 19-00956

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

IN THE MATTER OF ANDREA LUKE AND ADAM LUKE,
PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

VALERIE J. HONEYFORD, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

JAMES S. HINMAN, ROCHESTER, FOR PETITIONERS-APPELLANTS.

MICHAEL STEINBERG, ROCHESTER, FOR RESPONDENT-RESPONDENT.

ALISON BATES, VICTOR, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Monroe County (James A. Vazzana, J.), entered January 29, 2019 in a proceeding pursuant to Family Court Act article 6. The order, among other things, dismissed the petition.

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

Same memorandum as in *Matter of Honeyford v Luke* ([appeal No. 1] — AD3d — [Aug. 20, 2020] [4th Dept 2020]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

356

KA 19-01728

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD L. SCOTT, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Cayuga County Court (Thomas G. Leone, J.), entered April 19, 2019. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*) after a conviction arising from his possession of child pornography on his computer, defendant contends that County Court erred in accepting the People's recommended risk assessment instrument score that rendered him a presumptive level two risk. We reject that contention.

Defendant first contends that the assessment of 30 points under risk factor three for having three or more victims is not supported by the requisite clear and convincing evidence because the People failed to substantiate the number of victims with sufficient admissible evidence. That contention, however, is not preserved for our review because defendant did not specifically oppose the People's request for the assessment of such points on the ground advanced on appeal (*see People v Gillotti*, 23 NY3d 841, 854 [2014]; *People v Leach*, 158 AD3d 1240, 1240 [4th Dept 2018], *lv denied* 31 NY3d 905 [2018]). In any event, defendant's contention lacks merit. The statements in the case summary and presentence report that defendant possessed more than 40 images of child pornography constitute reliable hearsay (*see People v Mingo*, 12 NY3d 563, 573 [2009]; *People v Rivera*, 111 AD3d 1275, 1276 [4th Dept 2013], *lv denied* 22 NY3d 861 [2014]), and defendant did not dispute during the SORA proceeding that the images depicted three or more victims (*see People v Rodriguez*, 147 AD3d 1513, 1513 [4th Dept 2017], *lv denied* 29 NY3d 908 [2017]; *People v Graziano*, 140 AD3d 1541, 1542 [3d Dept 2016], *lv denied* 28 NY3d 909 [2016]).

Defendant next contends that the court erred in assessing 30 points under risk factor five because the proof is insufficient to establish that the images depicted a victim of 10 years old or younger. Even assuming, arguendo, that defendant preserved that contention for our review, we conclude that it lacks merit. "Facts . . . elicited at the time of entry of a plea of guilty shall be deemed established by clear and convincing evidence and shall not be relitigated" at a SORA hearing (Correction Law § 168-n [3]). Here, the evidence established that defendant pleaded guilty to possessing a sexual performance by a child (Penal Law § 263.16), and he does not dispute that, during the plea colloquy with respect to that crime, he admitted possessing an image depicting a child less than 10 years old (*see People v Andrews*, 136 AD3d 880, 880 [2d Dept 2016], *lv denied* 27 NY3d 905 [2016]).

Defendant further contends that the court erred in denying his request for a downward departure from his presumptive risk level. Initially, although defendant correctly asserts that the court should have applied a preponderance of the evidence standard to his request for a downward departure, rather than a clear and convincing evidence standard (*see Gillotti*, 23 NY3d at 860-861), we need not remit the matter because the record is sufficient to enable us to review defendant's contention under the proper standard (*see People v Merkley*, 125 AD3d 1479, 1479 [4th Dept 2015]).

With respect to that review, we conclude that some of the purported mitigating circumstances identified by defendant, such as his lack of drug or alcohol abuse and satisfactory conduct while confined, were adequately taken into account in the risk assessment instrument (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 15-17 [2006] [Guidelines]; *People v Davis*, 170 AD3d 1519, 1519-1520 [4th Dept 2019], *lv denied* 33 NY3d 907 [2019]). Next, while an offender's response to treatment, "if exceptional" (Guidelines at 17), may constitute a mitigating factor to serve as the basis for a downward departure, we conclude that, here, defendant failed to prove by a preponderance of the evidence that his response to treatment was exceptional (*see Davis*, 170 AD3d at 1520; *People v Bernecky*, 161 AD3d 1540, 1541 [4th Dept 2018], *lv denied* 32 NY3d 901 [2018]). Although defendant also contends that his age and health are mitigating factors warranting a downward departure, he failed to establish that he has "physical conditions that minimize [the] risk of re-offense" (Correction Law § 168-l [5] [d]; *see* Guidelines at 5; *People v Smith*, 108 AD3d 1215, 1216 [4th Dept 2013], *lv denied* 22 NY3d 856 [2013]). Finally, to the extent that defendant otherwise established the existence of appropriate mitigating circumstances, we conclude upon examining all of the relevant circumstances that a downward departure is not warranted (*see Bernecky*, 161 AD3d at 1541; *see generally Gillotti*, 23 NY3d at 864).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

359

KA 19-01730

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

AUSTIN PRATT, DEFENDANT-RESPONDENT.

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

JEFFREY R. PARRY, FAYETTEVILLE, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Onondaga County Court (Stephen J. Dougherty, J.), dated May 29, 2019. The order granted defendant's motion to dismiss the indictment.

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

Memorandum: The People appeal from an order granting defendant's motion to dismiss the indictment on statutory speedy trial grounds. Defendant was arrested on June 20, 2018, after his ex-girlfriend alleged that she had received an Instagram message that included photographs of defendant engaging in sexual acts with the ex-girlfriend's 10-year-old sister (victim). The victim confirmed that the photographs were of herself and defendant. On September 7, 2018, defendant was indicted on charges of predatory sexual assault against a child (Penal Law § 130.96); criminal sexual act in the first degree (§ 130.50 [3]); three counts each of use of a child in a sexual performance (§ 263.05), promoting a sexual performance by a child (§ 263.15), and possessing a sexual performance by a child (§ 263.16); and two counts of endangering the welfare of a child (§ 260.10 [1]). On September 13, 2018, defendant was arraigned on the indictment and the People declared their readiness for trial.

Trial was scheduled to commence on May 7, 2019. On May 1, 2019, however, the People withdrew their statement of readiness for trial, stating that new evidence had been discovered that required further investigation because it might contain exculpatory information. Defendant thereafter moved to dismiss the indictment on speedy trial grounds, and County Court granted the motion. The court determined that the purported new evidence had been in the People's possession for the majority of the postreadiness period, and that the People's

failure to properly inspect the evidence in their possession until the week before trial amounted to a lack of ordinary diligence. The court therefore held that the People's original statement of readiness was illusory, and the court charged the People with the entire postreadiness period. We reverse the order, deny the motion, and reinstate the indictment.

"Where, as here, a felony is included in an indictment, the People must be ready for trial within six months, after subtracting excludable time" (*People v Barden*, 27 NY3d 550, 553 [2016]; *see* CPL 30.30 [1] [a]). "The statutory period is calculated by 'computing the time elapsed between the filing of the first accusatory instrument and the People's declaration of readiness, subtracting any periods of delay that are excludable under the terms of the statute and then adding to the result any postreadiness periods of delay that are actually attributable to the People and are ineligible for exclusion' " (*People v Barnett*, 158 AD3d 1279, 1280 [4th Dept 2018], *lv denied* 31 NY3d 1078 [2018], quoting *People v Cortes*, 80 NY2d 201, 208 [1992]).

There are two elements to readiness for trial: (1) " 'a statement of readiness by the prosecutor in open court, . . . or a written notice of readiness' "; and (2) "the People must in fact be ready to proceed at the time they declare readiness" (*People v Chavis*, 91 NY2d 500, 505 [1998]; *see People v Kendzia*, 64 NY2d 331, 337 [1985]). "The statute contemplates an indication of present readiness, not a prediction or expectation of future readiness" (*Kendzia*, 64 NY2d at 337). Thus, "[a] statement of readiness at a time when the People are not actually ready is illusory and insufficient to stop the running of the speedy trial clock" (*People v England*, 84 NY2d 1, 4 [1994], *rearg denied* 84 NY2d 846 [1994]).

There is no dispute that the People were chargeable with an 85-day delay prior to announcing their readiness for trial on September 13, 2018. The People contend only that the court erred in finding that the entirety of the postreadiness time period was chargeable to them. We agree with the People, and conclude that "the total delay that resulted was less than six months, and thus defendant's statutory right to a speedy trial was not violated" (*People v Bastian*, 83 AD3d 1468, 1470 [4th Dept 2011], *lv denied* 17 NY3d 813 [2011]).

Defendant failed to establish that the People were not ready for trial on September 13, 2018, and the People's subsequent withdrawal of their statement of readiness did not render their original statement illusory (*see People v Smith*, 66 AD3d 1223, 1224-1225 [3d Dept 2009], *lv denied* 14 NY3d 773 [2010]). Defendant acknowledged, at oral argument on the motion, that he was not aware of what evidence the People possessed at the time they announced readiness for trial, and he therefore could not say whether the People were actually ready at that time. "In the absence of proof that [a] readiness statement did not accurately reflect the People's position . . . , the People [have] discharged their duty under CPL 30.30" (*People v Carter*, 91 NY2d 795, 799 [1998]).

Furthermore, although defendant contends that the People had the relevant evidence in their possession in October 2018 and thus, as of that date, the People were not truly ready for trial and should be chargeable for any delay occurring thereafter, the record establishes that the People were prepared to proceed to trial until the week before trial, when the prosecutor discovered that there may be evidence that would be exculpatory. " '[P]ostreadiness delay may be chargeable to the People when the delay is attributable to their inaction and directly implicates their ability to proceed to trial' " (*People v Fulmer*, 87 AD3d 1385, 1385 [4th Dept 2011], *lv denied* 18 NY3d 994 [2012], quoting *Carter*, 91 NY2d at 799).

The record shows that the People were not aware until April 30, 2019 that mistakes by police detectives had incorrectly led them to conclude that they could not locate the user of the Instagram account that had been used to send the photographs of defendant engaging in sexual acts with the victim to defendant's ex-girlfriend. While we agree with the court that the People's late realization was entirely due to the People's failure to properly inspect the evidence within their possession, the time chargeable to the People is only the delay that is directly attributable to their inaction, and that which directly implicated their ability to proceed to trial (*see Fulmer*, 87 AD3d at 1385). Thus, the delay that is chargeable to the People due to their inaction with respect to the photographs is any additional time that they required to investigate the matter, which they could have previously investigated. Moreover, the People's need to further investigate the photographs did not render their prior statement of readiness illusory because the record shows that, at the time they announced their readiness, the People would have been able to establish a prima facie case and proceed at trial (*see People v Hewitt*, 144 AD3d 1607, 1607-1608 [4th Dept 2016], *lv denied* 28 NY3d 1185 [2017]; *People v Rouse*, 4 AD3d 553, 556 [3d Dept 2004], *lv denied* 2 NY3d 805 [2004]).

Ultimately, because defendant moved to dismiss the indictment nine days after the People withdrew their statement of readiness, that time period is, at present, the only time that could have been chargeable to the People as a result of their request for an adjournment. Thus, we conclude that the court erred in granting the motion because the 94-day period of delay attributable to the People did not exceed six months and thereby did not violate defendant's right to a speedy trial (*see Bastian*, 83 AD3d at 1470).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

360

KA 18-00165

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WAYNE A. BABB, JR., DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KAIXI XU OF COUNSEL), FOR DEFENDANT-APPELLANT.

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered September 11, 2017. The judgment convicted defendant upon a jury verdict of endangering the welfare of a child.

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 endangering the welfare of a child (Penal Law § 260.10 [1]), defendant contends that the conviction is based on legally insufficient evidence. We reject that contention. Defendant's girlfriend left her three-year-old son in his care while she was at work from 7:00 a.m. until 4:00 p.m. She testified at trial that the child had no injuries of concern when she left for work, but there were red marks on the child's face when she returned home for lunch and, later that evening, she discovered that the child's testicles were red. The girlfriend's testimony is sufficient to establish that the child sustained the injuries while in defendant's care (*see People v Tompkins*, 8 AD3d 901, 902-903 [3d Dept 2004]). Moreover, the medical evidence contradicted defendant's explanations for how the child sustained the injuries (*see People v Wright*, 81 AD3d 1161, 1163 [3d Dept 2011], *lv denied* 17 NY3d 803 [2011]). We thus conclude that " 'there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt' " (*People v Danielson*, 9 NY3d 342, 349 [2007]; *see People v Bleakley*, 69 NY2d 490, 495 [1987]). Furthermore, viewing the evidence in light of the elements of the crime as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although defendant challenges the credibility of his girlfriend's testimony, we conclude that " 'the jury was in the best position to assess the credibility of the witness[ ] and, on this record, it cannot be said that the jury

failed to give the evidence the weight it should be accorded' " (*People v McCall*, 177 AD3d 1395, 1396 [4th Dept 2019], *lv denied* 34 NY3d 1130 [2020]).

Insofar as defendant contends that the verdict is inconsistent, we reject his contention. Although the jury acquitted him of assault in the second degree (Penal Law § 120.05 [9]) and forcible touching (§ 130.52 [1]), those crimes require that the defendant act intentionally (§ 15.05 [1]), whereas endangering the welfare of a child requires only that the defendant act knowingly (§ 15.05 [2]; *see* § 260.10 [1]; *People v Fernandez*, 126 AD3d 639, 639 [1st Dept 2015], *lv denied* 26 NY3d 967 [2015]).

Defendant further contends that County Court erred in permitting the testimony of a Child Protective Services investigator concerning a finding of abuse or neglect with respect to the same incident that was entered upon defendant's consent pursuant to Family Court Act § 1051 (a). We reject that contention. Consent to such an order is analogous to an *Alford* plea (*see Matter of William N. [Kimberly H.]*, 118 AD3d 703, 705 [2d Dept 2014]; *Matter of Christopher H. v Lisa H.*, 54 AD3d 373, 373 [2d Dept 2008]), which "binds [a defendant] as strongly as any admission of the facts constituting the crime charged" (*Matter of Cumberland Pharmacy v Blum*, 69 AD2d 903, 903 [2d Dept 1979]). Thus, testimony concerning the disposition of the Family Court proceeding was properly received in evidence against defendant (*see People v Smielecki*, 77 AD3d 1420, 1421 [4th Dept 2010], *lv denied* 15 NY3d 956 [2010]; *see generally Matter of Aaron H. [Barbara H.]*, 72 AD3d 1602, 1602 [4th Dept 2010], *lv denied* 15 NY3d 704 [2010]).

Although we agree with defendant that the prosecutor's comment in summation concerning defendant's pretrial silence was improper (*see generally People v Conyers*, 52 NY2d 454, 457-458 [1981]), we conclude that it was " 'not so egregious as to deprive defendant of a fair trial' " (*People v Jones*, 155 AD3d 1547, 1549 [4th Dept 2017], *amended on rearg* 156 AD3d 1493 [4th Dept 2017], *lv denied* 32 NY3d 1205 [2019]). By failing to object to the other allegedly improper comments by the prosecutor during summation, defendant failed to preserve the remainder of his contention for our review (*see People v Simmons*, 133 AD3d 1227, 1228 [4th Dept 2015]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

367

CA 19-01391

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

LINDA LOUISE GREEN,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

KATHERINE ANNE REPINE AND WAYNE EUGENE REPINE,
DEFENDANTS-RESPONDENTS-APPELLANTS.

O'BRIEN & FORD P.C., BUFFALO (CHRISTOPHER M. PANNOZZO OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

HAGELIN SPENCER LLC, BUFFALO (R.J. PORTER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered January 16, 2019. The order granted in part and denied in part the motion of defendants for summary judgment and the cross motion of plaintiff 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 recover damages for injuries that she sustained in an automobile accident. In her supplemental bill of particulars, plaintiff alleged that she sustained serious injuries to her shoulder, cervical spine, and lumbar spine under the permanent loss of use, permanent consequential limitation of use, significant limitation of use, and 90/180-day categories set forth in Insurance Law § 5102 (d). Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury, and plaintiff cross-moved for summary judgment on, among other things, the issue of serious injury. Plaintiff now appeals and defendants cross-appeal from an order that, inter alia, denied both defendants' motion and plaintiff's cross motion with respect to the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories of serious injury. We affirm.

Contrary to defendants' contention in their cross appeal, they failed to meet their initial burden on their motion with respect to plaintiff's shoulder injury under the permanent consequential limitation of use and significant limitation of use categories. Although defendants submitted evidence that plaintiff's injuries were

caused by a preexisting condition, defendants' submissions " 'fail[ed] to account for evidence that plaintiff had no complaints of pain prior to the accident' " (*Sobieraj v Summers*, 137 AD3d 1738, 1739 [4th Dept 2016]; *see Barnes v Occhino*, 171 AD3d 1455, 1456-1457 [4th Dept 2019]). Contrary to plaintiff's contention on her appeal, she similarly failed to meet her initial burden on her cross motion with respect to her shoulder injury under those categories inasmuch as plaintiff's own submissions raised an issue of fact whether her shoulder injury was the result of a preexisting, degenerative condition (*see generally Harris v Campbell*, 132 AD3d 1270, 1271 [4th Dept 2015]).

Regarding plaintiff's alleged injury to her lumbar and cervical spine under the significant limitation of use and permanent consequential limitation of use categories, we agree with defendants on their cross appeal that they met their initial burden on their motion by submitting the affirmed report of a physician, who opined that plaintiff suffered from a preexisting, degenerative condition in her spine and did not suffer a traumatic injury as a result of the accident (*see generally Jones v Leffel*, 125 AD3d 1451, 1452 [4th Dept 2015]; *Schader v Woyciesjes*, 55 AD3d 1292, 1293 [4th Dept 2008]). We conclude, however, that plaintiff raised an issue of fact in opposition. Plaintiff submitted objective medical evidence supporting the conclusion that she sustained a serious injury to her lumbar and cervical spine, along with the opinion of a physician who, based upon review of plaintiff's pre-accident and post-accident imaging, concluded that the injury was causally related to the accident and "that any preexisting condition suffered by plaintiff was aggravated by the accident" (*Croisdale v Weed*, 139 AD3d 1363, 1364 [4th Dept 2016]; *see generally Chmiel v Figueroa*, 53 AD3d 1092, 1093 [4th Dept 2008]). For the same reasons, we conclude that plaintiff failed to meet her initial burden on her cross motion with respect to the injury to plaintiff's lumbar and cervical spine under the significant limitation of use and permanent consequential limitation of use categories inasmuch as her submissions also included the report of the physician, first submitted by defendants, who opined that plaintiff suffered from a preexisting, degenerative condition in her spine and did not suffer a traumatic injury as a result of the accident.

Contrary to the contentions of both parties, defendants and plaintiff likewise failed to meet their initial burdens on their respective motion and cross motion with respect to whether plaintiff was prevented from "performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than [90] days during the [180] days immediately following the occurrence of the injury or impairment" (Insurance Law § 5102 [d]). Although the parties' respective submissions showed that plaintiff was out of work for not less than 90 days during the 180 days immediately following the accident, that is not dispositive of whether plaintiff was prevented from performing "substantially all" of her daily activities (*Savilo v Denner*, 170 AD3d 1570, 1571 [4th Dept 2019] [internal quotation marks omitted]; *see Amamedi v Archibala*, 70 AD3d 449, 450 [1st Dept 2010], *lv denied* 15 NY3d 713 [2010]), and the opinion of plaintiff's physician that plaintiff was "100% disabled" is

conclusory (*see generally Blake v Portexit Corp.*, 69 AD3d 426, 426-427 [1st Dept 2010]), and is contradicted by plaintiff's deposition testimony that she was able to perform certain activities and household tasks, albeit with limitation.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

372

CA 19-01298

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

KRISTEN DEFISHER AND PAUL DEFISHER,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

PPZ SUPERMARKETS, INC., DOING BUSINESS AS
PATON'S MARKET PLACE, AND BPMZ, LLC,
DEFENDANTS-RESPONDENTS.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (ANDREW J. CONNELLY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (CHARLES C. SPAGNOLI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Wayne County (Daniel G. Barrett, A.J.), entered November 26, 2018. The judgment was entered in favor of defendants upon a jury verdict.

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

Memorandum: Plaintiffs commenced this negligence action seeking to recover damages for injuries sustained by Kristen DeFisher (plaintiff) when she slipped and fell, allegedly due to water on the floor, in the vestibule of defendants' supermarket. Plaintiffs appeal from a judgment entered in favor of defendants based upon a jury verdict finding that there was no water on the floor where plaintiff fell. We affirm.

Plaintiffs contend that Supreme Court improperly reversed a purported factual finding in its earlier spoliation order by ruling, on the eve of trial, that defendants would be permitted to contest whether video footage that had not been retained would have captured the area where plaintiff fell. Plaintiffs failed to include the spoliation order in the record on appeal, however, and we are thus unable to review their contention (*see Resetarits Constr. Corp. v City of Niagara Falls*, 133 AD3d 1229, 1229 [4th Dept 2015]; *Cherry v Cherry*, 34 AD3d 1186, 1186 [4th Dept 2006]). Plaintiffs, " 'as the appellant[s], submitted this appeal on an incomplete record and must suffer the consequences' " (*Cherry*, 34 AD3d at 1186).

We reject plaintiffs' further contention that the court erred in denying their motion for a directed verdict made at the close of

proof. It is well settled that "a directed verdict is appropriate where the . . . court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party . . . In determining whether to grant a motion for a directed verdict pursuant to CPLR 4401, the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in [the] light most favorable to the nonmovant" (*Brenner v Dixon*, 98 AD3d 1246, 1247 [4th Dept 2012] [internal quotation marks omitted]; *see Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). "[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 and is generally a question of fact for the jury" (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997] [internal quotation marks omitted]). Here, the parties introduced conflicting evidence regarding the existence of water on the floor where plaintiff fell, which presented a question of fact for the jury to resolve (*see Grizzanto v Golub Corp.*, 188 AD2d 1015, 1015 [4th Dept 1992]; *cf. Santana v Western Beef Retail, Inc.*, 132 AD3d 837, 838 [2d Dept 2015]).

Plaintiffs also challenge the verdict on the ground that it is against the weight of the evidence. As a preliminary matter, we conclude that plaintiffs were not required to preserve their contention that the jury verdict was contrary to the weight of the evidence by making a postverdict motion for a new trial (*see Evans v New York City Tr. Auth.*, 179 AD3d 105, 109-111 [2d Dept 2019]). Inasmuch as the trial court is authorized to order a new trial "on its own initiative" when the verdict is contrary to the weight of the evidence (CPLR 4404 [a]) and "the power of the Appellate Division . . . is as broad as that of the trial court" (*Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]), "this Court also possesses the power to order a new trial where the appellant made no motion for that relief in the trial court" (*Evans*, 179 AD3d at 110; *see Bintz v City of Hornell*, 268 App Div 742, 747 [4th Dept 1945], *affd* 295 NY 628 [1945]; *see also* CPLR 5501 [c]; *Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 500 [1978]). To the extent that our prior decisions hold otherwise, they should no longer be followed (*see e.g. Cyrus v Wal-Mart Stores E., LP*, 160 AD3d 1487, 1488 [4th Dept 2018]; *Likos v Niagara Frontier Tr. Metro Sys., Inc.*, 149 AD3d 1474, 1476 [4th Dept 2017]; *Mazella v Beals*, 124 AD3d 1328, 1329 [4th Dept 2015]; *Barnes v Dellapenta*, 111 AD3d 1287, 1288 [4th Dept 2013]; *Lucas v Weiner*, 99 AD3d 1202, 1202-1203 [4th Dept 2012]; *Harris v Stoelzel*, 96 AD3d 1459, 1459-1460 [4th Dept 2012]; *Murdoch v Niagara Falls Bridge Commn.*, 81 AD3d 1456, 1457 [4th Dept 2011], *lv denied* 17 NY3d 702 [2011]; *Homan v Herzig* [appeal No. 2], 55 AD3d 1413, 1413-1414 [4th Dept 2008]).

Contrary to plaintiffs' contention, however, the verdict is not against the weight of the evidence. It is well settled that a verdict may be set aside as against the weight of the evidence only if "the evidence so preponderate[d] in favor of the [plaintiffs] that [the verdict] could not have been reached on any fair interpretation of the

evidence" (*Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995] [internal quotation marks omitted]). Here, the conflicting evidence regarding the existence of the alleged dangerous condition raised a question of credibility to be resolved by the jury (*see Parr v Mongarella*, 77 AD3d 1429, 1430 [4th Dept 2010]), and we conclude that "the jury's determination that there was no water on the [floor of the vestibule] where the incident occurred was supported by a fair interpretation of the evidence" (*Grullon v West 48th St. Redevelopment Corp.*, 75 AD3d 621, 623 [2d Dept 2010]).

We have reviewed plaintiffs' remaining contentions and conclude that they lack merit.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

373

CA 19-01578

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

BRIAN A. BERMEL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

VITAL TECH DENTAL LABS, INC., DEFENDANT-APPELLANT.

NESPER, FERBER, DIGIACOMO, JOHNSON & GRIMM, LLP, AMHERST (GABRIEL J. FERBER OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF STEPHEN F. SZYMONIAK, WILLIAMSVILLE (STEPHEN F. SZYMONIAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered August 13, 2019. The order denied defendant's motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing plaintiff's claim for commissions that accrued subsequent to the termination of plaintiff's employment, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking, inter alia, payment of commissions that he allegedly earned from sales that occurred during the course of his employment with defendant. In paragraph 17 of his complaint, plaintiff also asserted that he was owed "commissions on sales to any accounts generated by [plaintiff] on a future and ongoing basis including post-termination of [plaintiff's] employment." Plaintiff alleges that defendant had promised to pay him those commissions pursuant to an oral employment agreement.

On appeal from an order denying its motion for summary judgment dismissing the complaint, defendant contends that, even assuming arguendo that there was an oral employment agreement between plaintiff and defendant, such an oral agreement would be void pursuant to General Obligations Law § 5-701 (a), i.e., the statute of frauds. As relevant here, General Obligations Law § 5-701 (a) (1) provides that "[e]very agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking . . . [b]y its terms is not to be performed within one year from the making thereof." "Only those agreements which, by their terms, 'have absolutely no possibility in fact and law of full performance within one year' will fall within the statute of

frauds" (*JNG Constr., Ltd. v Roussopoulos*, 135 AD3d 709, 710 [2d Dept 2016], quoting *D & N Boening v Kirsch Beverages*, 63 NY2d 449, 454 [1984]).

Here, plaintiff was an at-will employee of defendant, and "an at-will employment . . . is capable of being performed within one year despite the fact that compensation remains to be calculated beyond the one-year period" (*Harrison v Harrison*, 57 AD3d 1406, 1408 [4th Dept 2008]; *see Hubbell v T.J. Madden Constr. Co., Inc.*, 32 AD3d 1306, 1306 [4th Dept 2006]; *American Credit Servs. v Robinson Chrysler/Plymouth*, 206 AD2d 918, 919 [4th Dept 1994]). We therefore reject defendant's contention that the court erred in denying its motion with respect to plaintiff's claim for payment of commissions fixed and earned during the course of plaintiff's employment with defendant (*see Harrison*, 57 AD3d at 1407-1408).

We agree with defendant, however, that the court erred in denying its motion with respect to plaintiff's claim for "commissions on sales to any accounts generated by [plaintiff] on a future and ongoing basis including post-termination of [plaintiff's] employment," i.e., the claim for commissions that would accrue subsequent to the termination of plaintiff's employment. Although "[a]n oral agreement that is terminable at will is capable of performance within one year and, therefore, does not come within the Statute of Frauds . . . [,] General Obligations Law § 5-701 (a) (1) bars enforcement of a promise to pay commissions that extends indefinitely, dependent solely on the acts of a third party and beyond the control of the defendant" (*Murphy v CNY Fire Emergency Servs.*, 225 AD2d 1034, 1035 [4th Dept 1996] [internal quotation marks omitted]). Thus, the court erred in denying defendant's motion with respect to plaintiff's claim for commissions accruing subsequent to the termination of plaintiff's employment, as stated in paragraph 17 of the complaint (*see Zupan v Blumberg*, 2 NY2d 547, 550 [1957]; *Tamara Brokerage, Inc. v Andreoli*, 24 AD3d 536, 537 [2d Dept 2005]; *Murphy*, 225 AD2d at 1035), and we therefore modify the order accordingly.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

376

CA 19-01549

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

SUSAN COTTRELL AND EARL COTTRELL,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

BENDERSON DEVELOPMENT COMPANY, LLC, AND
BENDERSON 85-1 TRUST, DEFENDANTS-APPELLANTS.

FITZGERALD & ROLLER, P.C., BUFFALO (DEREK J. ROLLER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CANTOR & WOLFF, BUFFALO (DAVID WOLFF OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, III, J.), entered August 6, 2019. The order denied the motion of defendants for summary judgment dismissing the second amended complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Susan Cottrell (plaintiff) when she allegedly slipped in the parking lot of defendants' premises. Defendants appeal from an order denying their motion for summary judgment dismissing the second amended complaint. We affirm.

Contrary to defendants' contention, they failed to meet their initial burden of establishing that they lacked constructive notice of the alleged icy condition. Initially, we note that plaintiffs did not allege that defendants created or had actual notice of the icy condition, and thus we are concerned only with whether defendants had constructive notice (*see generally Wood v Buffalo & Fort Erie Pub. Bridge Auth.*, 178 AD3d 1383, 1384 [4th Dept 2019]). Defendants failed to meet their initial burden of establishing as a matter of law that "the alleged icy condition was not visible and apparent or that the ice formed so close in time to the accident that [defendants] could not reasonably have been expected to notice and remedy the condition" (*Waters v Ciminelli Dev. Co., Inc.*, 147 AD3d 1396, 1397 [4th Dept 2017] [internal quotation marks omitted]; *see Wood*, 178 AD3d at 1384). Although plaintiff allegedly fell on "black ice," that fact alone does not establish as a matter of law that the ice was not visible and apparent (*see Wood*, 178 AD3d at 1384) and, here, defendants'

submissions included the deposition testimony of multiple witnesses who testified that they saw the alleged patch of ice. Furthermore, defendants' submission of evidence of "[t]he salting of the area approximately [seven] hours before plaintiff fell does not establish that the ice formed so close in time to the accident that defendant[s] could not reasonably have been expected to notice and remedy the condition" (*Conklin v Ulm*, 41 AD3d 1290, 1291 [4th Dept 2007]; *see generally Waters*, 147 AD3d at 1398).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

379

KA 19-00864

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILBERT WILSON, JR., DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS (BRUCE A. ROSEKRANS OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Wayne County Court (Daniel G. Barrett, J.), entered March 6, 2019. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk under the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends, and the People correctly concede, that County Court erred in assessing five points against him under risk factor 9, for number and nature of prior crimes. The People failed to prove a prior crime by the requisite clear and convincing evidence (*see* Correction Law § 168-n [3]; *People v Cook*, 29 NY3d 121, 125 [2017]) inasmuch as the only evidence of a prior crime consists of "hearsay statements that are vague, inconsistent or equivocal, and otherwise unsubstantiated" (*People v Stewart*, 61 AD3d 1059, 1060 [3d Dept 2009]; *see People v Gonzalez*, 28 AD3d 1073, 1074 [4th Dept 2006]; *see generally People v Mingo*, 12 NY3d 563, 573 [2009]). Nevertheless, the correct total of 75 points would still yield a presumptive level two assessment.

Contrary to defendant's further contention, the court did not abuse its discretion in denying defendant's request for a downward departure from his presumptive risk level. We conclude that defendant "failed to establish by a preponderance of the evidence the existence of mitigating factors not adequately taken into account by the guidelines" (*People v Lewis*, 156 AD3d 1431, 1432 [4th Dept 2017], *lv denied* 31 NY3d 904 [2018]; *see People v Gillotti*, 23 NY3d 841, 861,

864 [2014]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

380

KA 19-00528

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHESTER J. THOMAS, 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 Supreme Court, Monroe County (Vincent M. Dinolfo, A.J.), entered November 24, 2018. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that Supreme Court erred in granting an upward departure from his presumptive classification as a level one risk to a level two risk. We reject that contention.

It is well settled that when the People establish, by clear and convincing evidence (*see* Correction Law § 168-n [3]), the existence of aggravating factors that are "as a matter of law, of a kind or to a degree not adequately taken into account by the [risk assessment] guidelines," a court "must exercise its discretion by weighing the aggravating and [any] mitigating factors to determine whether the totality of the circumstances warrants a departure" from a sex offender's presumptive risk level (*People v Gillotti*, 23 NY3d 841, 861 [2014]; *see People v Sincerbeaux*, 27 NY3d 683, 689-690 [2016]; Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006]).

Here, the People established by clear and convincing evidence the existence of aggravating factors not adequately taken into account by the risk assessment guidelines. Contrary to defendant's contention, the court "properly relied upon factors that, 'as a matter of law, . . . tend[ed] to establish a higher likelihood of reoffense or danger

to the community' " (*People v Vaillancourt*, 112 AD3d 1375, 1376 [4th Dept 2013], *lv denied* 22 NY3d 864 [2014]; *see People v Wyatt*, 89 AD3d 112, 123 [2d Dept 2011], *lv denied* 18 NY3d 803 [2012]), including his history of violence toward the victim that, despite criminal sanctions resulting therefrom, subsequently escalated to the underlying violent sex offense against the victim (*see People v Gonzalez*, 178 AD3d 741, 742 [2d Dept 2019], *lv denied* 35 NY3d 902 [2020]; *People v Amorin*, 164 AD3d 1483, 1483-1484 [2d Dept 2018]; *People v Davis*, 139 AD3d 1226, 1228 [3d Dept 2016]). Contrary to defendant's further contention, the aggravating factors outweighed any mitigating factors, and the totality of the circumstances thus warranted an upward departure to avoid an under-assessment of defendant's dangerousness and risk of sexual recidivism (*see People v Mangan*, 174 AD3d 1337, 1339 [4th Dept 2019], *lv denied* 34 NY3d 905 [2019]; *People v Sczerbaniewicz*, 126 AD3d 1348, 1349-1350 [4th Dept 2015]; *see generally Gillotti*, 23 NY3d at 861).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

399

KA 19-00884

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TAYLOR I. BECKSTEAD, DEFENDANT-APPELLANT.

CAITLIN M. CONNELLY, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered December 12, 2018. The judgment convicted defendant upon her plea of guilty of burglary in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of burglary in the first degree (Penal Law § 140.30 [2]). We affirm.

Initially, we emphasize once again that, "[c]ontrary to the People's contention, and as we have previously noted, it is well settled that this Court's sentence-review power may be exercised, if the interest of justice warrants, without deference to the sentencing court . . . , and that we may substitute our own discretion for that of a trial court which has not abused its discretion in the imposition of a sentence" (*People v White*, 153 AD3d 1565, 1568 [4th Dept 2017], *lv denied* 30 NY3d 1065 [2017] [internal quotation marks omitted]). Nevertheless, the sentence is not unduly harsh or severe.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

400

KA 16-02127

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLENE M. MESS, DEFENDANT-APPELLANT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (ADAM W. KOCH OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, SPECIAL PROSECUTOR, BATAVIA (WENDY EVANS LEHMANN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered June 23, 2016. 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 was invalid. The plea colloquy establishes that defendant knowingly, voluntarily, and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]). Inasmuch as defendant's valid waiver of the right to appeal specifically included a waiver of the right to challenge the severity of the sentence and defendant was informed of the maximum sentence County Court could impose in its discretion, the waiver encompasses her challenge to the severity of her sentence (*see People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Lasher*, 151 AD3d 1774, 1775 [4th Dept 2017], *lv denied* 29 NY3d 1129 [2017]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

422

KA 16-00928

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TAQUAN JONES, 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 February 16, 2016. The judgment convicted defendant upon a plea of guilty of robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [4]), defendant contends that his sentence is unduly harsh and severe. Initially, we note that defendant waived his right to appeal, but we conclude that the waiver is invalid. County Court mischaracterized the waiver of the right to appeal as an absolute bar to defendant taking a direct appeal, with no clarifying language in either the oral colloquy or the written waiver that certain issues remain available for appellate review. We therefore conclude that the colloquy and written waiver were insufficient to ensure that the waiver was voluntary, knowing, and intelligent (*see People v Thomas*, 34 NY3d 545, 562-567 [2019], *cert denied* — US — [Mar. 30, 2020]; *People v Brown*, 180 AD3d 1341, 1341 [4th Dept 2020], *lv denied* 35 NY3d 968 [2020]; *People v Stenson*, 179 AD3d 1449, 1449 [4th Dept 2020], *lv denied* 35 NY3d 974 [2020]). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

423

KA 17-01592

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY THOMPSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (David W. Foley, A.J.), rendered November 30, 2016. The judgment convicted defendant, upon a 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 affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a controlled substance in the third degree (§ 220.16 [12]). We affirm. Even assuming, arguendo, that defendant's waiver of the right to appeal does not preclude our review of his challenge to the severity of the period of postrelease supervision imposed by County Court, we nevertheless conclude that such aspect of his sentence is not unduly harsh or severe.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

424

KA 18-00856

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SEAN M. VICKERS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered January 5, 2018. The judgment convicted defendant upon a plea of guilty of course of sexual conduct against a child in the first 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 course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]), defendant contends that, although he validly waived his right to appeal, he may nevertheless seek a sentence reduction in the interest of justice (*see* CPL 470.15 [6] [b]). We reject that contention inasmuch as a valid waiver of the right to appeal encompasses a challenge to the severity of the sentence and also "includes waiver of the right to invoke [this Court's] interest-of-justice jurisdiction to reduce the sentence" (*People v Lopez*, 6 NY3d 248, 255 [2006]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

425

KA 19-00815

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT WASYL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Sara Sheldon, J.), rendered February 8, 2019. The judgment convicted defendant, upon a plea of guilty, of attempted burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his guilty plea, of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). We agree with defendant that his waiver of the right to appeal is invalid. County Court mischaracterized the nature of the right that defendant was being asked to cede by portraying the waiver as an absolute bar to defendant taking an appeal, and there is no clarifying language in either the oral or written waiver indicating that appellate review remained available for certain issues. Furthermore, the record fails to establish that defendant "read and understood the contents of the written waiver that he executed during the proceeding" (*People v Miller*, 161 AD3d 1579, 1579 [4th Dept 2018], *lv denied* 31 NY3d 1119 [2018]; *see generally People v Bradshaw*, 18 NY3d 257, 265 [2011]). We therefore conclude that the waiver of appeal was not knowing and voluntary (*see People v Thomas*, 34 NY3d 545, 564-565 [2019], *cert denied* — US — [Mar. 30, 2020]; *see generally People v Lopez*, 6 NY3d 248, 256 [2006]). We nevertheless conclude that the negotiated sentence, which is the statutory minimum sentence (*see* § 70.08 [2], [3] [c]), cannot be characterized as unduly harsh or severe (*see People v Laury*, 156 AD3d 1473, 1473-1474 [4th Dept 2017], *lv denied* 32 NY3d 939 [2018]; *see also People v Carter*, 280 AD2d 977, 978 [4th Dept 2001], *lv denied* 96 NY2d 860 [2001]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

434

CA 19-01505

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

BRIAN MITCHELL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PO N. LAM, M.D., AND ASSOCIATED MEDICAL PROFESSIONALS OF NY, PLLC, ALSO KNOWN AS A.M.P., DEFENDANTS-APPELLANTS.

GALE GALE & HUNT, LLC, SYRACUSE (MATTHEW J. VANBEVEREN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

COTE & VANDYKE, LLP, SYRACUSE (JOSEPH S. COTE, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered July 18, 2019. The order, among other things, denied that part of defendants' motion seeking to dismiss plaintiff's claim of lack of informed consent.

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

Memorandum: In this medical malpractice action in which plaintiff seeks damages arising from a surgical procedure, defendants appeal from an order that, inter alia, denied that part of their motion seeking dismissal of plaintiff's claim of lack of informed consent. We reject defendants' contention that Supreme Court erred in denying that part of their motion, and therefore we affirm. A medical professional may be deemed to have committed the intentional tort of battery, rather than medical malpractice, "if he or she carries out a procedure or treatment to which the patient has provided 'no consent at all' " (*VanBrocklen v Erie County Med. Ctr.*, 96 AD3d 1394, 1394 [4th Dept 2012]; *see McCarthy v Shah*, 162 AD3d 1727, 1728 [4th Dept 2018]). Nevertheless, the lack of informed consent may be a proper element of a medical malpractice claim against a medical professional who is alleged to have negligently exceeded the scope of the patient's consent (*see Ponholzer v Simmons*, 78 AD3d 1495, 1496 [4th Dept 2010], *lv dismissed* 16 NY3d 886 [2011]; *cf. Tirado v Koritz*, 156 AD3d 1342, 1343 [4th Dept 2017]). Here, plaintiff pleaded in the alternative that defendant Po N. Lam, M.D. failed to recall the scope of the consent while performing the hernia-related procedure and thereby "negligently exceeded the scope of plaintiff's consent" (*Ponholzer*, 78

AD3d at 1496).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

447

KA 16-01255

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERALD J. DAVIS, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered April 19, 2016. The judgment convicted defendant upon a plea of guilty of robbery in the second degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Davis* ([appeal No. 2] — AD3d — [Aug. 20, 2020] [4th Dept 2020]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

448

KA 16-02099

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERALD J. DAVIS, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a resentence of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered October 4, 2016. Defendant was resentenced upon his conviction of robbery in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the second degree (Penal Law § 160.10 [2] [a]) and, in appeal No. 2, he appeals from a resentence on that conviction. Initially, we note that defendant's contention on appeal concerns only the resentence in appeal No. 2, and we therefore dismiss the appeal from the judgment in appeal No. 1 (*see People v Loiz* [appeal No. 2], 175 AD3d 872, 872-873 [4th Dept 2019]; *People v Patterson*, 128 AD3d 1377, 1377 [4th Dept 2015]). Contrary to defendant's contention, the resentence is not unduly harsh or severe.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

449

KA 19-01043

PRESENT: PERADOTTO, J.P., LINDLEY, NEMOYER, TROUTMAN, AND DEJOSEPH,

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN A. DUKES, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (John L. DeMarco, J.), entered April 12, 2019. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order classifying him as a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). On appeal, defendant contends that County Court erred in granting an upward departure based on a 2010 presentence report that, according to defendant, contained or reflected inadmissible statement(s) that he ostensibly made in connection with a 2007 juvenile delinquency proceeding. Although defendant noted, during this SORA proceeding, the undisputed legal principle that a "confession, admission or statement" made by a juvenile delinquent in Family Court is inadmissible "as evidence against him or his interests in any other court" (Family Ct Act § 381.2 [1]), he never asserted below that County Court was actually relying on any such confession, admission or statement in this case. In other words, while defendant recited below the legal principle upon which he now relies, he never linked that principle to any fact in this case nor did he explain why or how that principle should apply here. Indeed, defendant's appellate brief does not even identify the purported confession, admission, or statement upon which the court allegedly relied in its upward departure determination. By failing to "link the asserted [principle of law] to any specific aspect of the evidence" (*People v Jean-Baptiste*, 38 AD3d 418, 425 [1st Dept 2007, McGuire, J., concurring], *lv denied* 9 NY3d 877 [2007]), defendant failed to preserve his present argument for appellate review (*see generally People v Gillotti*, 23 NY3d 841, 854 [2014]).

In any event, the record is devoid of any indication that the court actually relied on any confession, admission, or statement by defendant in making its upward departure determination. Indeed, the court's written decision reflected its awareness of the requirements of Family Court Act § 381.2 (1).

All concur except PERADOTTO, J.P., and LINDLEY, J., who dissent and vote to modify in accordance with the following memorandum: We respectfully dissent. In our view, County Court erred in relying on the facts underlying two juvenile delinquency adjudications entered against defendant in Family Court to grant an upward departure from the presumptive level two risk yielded by his score on the risk assessment instrument (RAI). We would thus modify the order accordingly.

The relevant facts are not in dispute. When he was 17 years old, defendant robbed a store and forced the clerk at gunpoint to perform oral sex on him. He later pleaded guilty to robbery in the first degree (Penal Law § 160.15 [4]) and criminal sexual act in the first degree (§ 130.50 [1]) with respect to those acts and was sentenced as an adult to nine years in prison. As defendant neared his release date, County Court held a hearing pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*) after which it determined that 105 points should be assessed against him on the RAI, making defendant a presumptive level two risk. In a letter sent to defendant following the hearing, however, the court, through its law clerk, stated that it was considering an upward departure to a level three risk based on the underlying facts of two juvenile delinquency adjudications from 2007, when defendant was 14 years old. The case was rescheduled to give defendant an opportunity to be heard in opposition to the possible grant of a sua sponte upward departure.

At the ensuing court appearance, defense counsel objected to the court's consideration of the facts underlying the juvenile delinquency adjudications. In support of the objection, defense counsel relied on Family Court Act § 381.2 (1), which provides that "any confession, admission or statement" made by a juvenile delinquent in Family Court is inadmissible "as evidence against him or his interests in any other court." The People did not respond to defendant's argument with respect to the admissibility of the underlying facts of the juvenile delinquency adjudications. Instead, they sought an upward departure on other grounds not relevant to this appeal.

Nevertheless, the court granted an upward departure based solely on the underlying facts of the juvenile delinquency adjudications, which did not involve any sex offenses or allegations of sexual misconduct. In doing so, the court cited to a portion of defendant's presentence report (PSR) from the predicate sex offense that recounts defendant's criminal history and indicates that the juvenile delinquency adjudications arose from a home burglary and a liquor store robbery during which defendant stole alcohol. That was error.

"[B]ecause Correction Law § 168-n (3) compels the People to prove the existence of facts supporting a defendant's overall risk level

classification by clear and convincing evidence, the People cannot obtain an upward departure pursuant to the guidelines unless they prove the existence of certain aggravating circumstances by clear and convincing evidence" (*People v Gillotti*, 23 NY3d 841, 861-862 [2014]; *see People v Tatner*, 149 AD3d 1595, 1595 [4th Dept 2017], *lv denied* 29 NY3d 916 [2017]). Such aggravating circumstances must, of course, be proved by *admissible* evidence (*cf. People v Diaz*, 100 AD3d 1491, 1491 [4th Dept 2012], *lv denied* 20 NY3d 858 [2013]).

Although juvenile delinquency adjudications cannot be considered crimes for SORA purposes when the court is assessing points for criminal history (*see* Family Ct Act § 381.2 [1]; *People v Gibson*, 149 AD3d 1567, 1568 [4th Dept 2017]; *People v Brown*, 148 AD3d 1705, 1706-1707 [4th Dept 2017]), the underlying facts of the adjudications may be considered when determining whether to grant an upward departure from the recommended risk level (*see People v Updyke*, 133 AD3d 1063, 1064 [3d Dept 2015]; *People v Shaffer*, 129 AD3d 54, 56 [3d Dept 2015]).

Here, as noted, defendant challenged the admissibility of the underlying facts of his juvenile delinquency adjudications as set forth in the PSR, asserting that they appeared to be based upon admissions that he made in Family Court. The challenge was well founded inasmuch as the PSR stated that defendant entered admissions to both juvenile delinquency adjudications, and the PSR does not indicate the source of its summary of the underlying facts. As further noted, the People did not respond to defendant's objection. On appeal, the People state that the references in the PSR to the underlying facts "*appear* to be summaries of the accusatory instruments filed in Family Court" (emphasis added). Such speculation has no basis in the record and cannot sustain the court's ruling (*see generally Diaz*, 100 AD3d at 1491). It is just as likely, if not more so, that the summary of the underlying facts of the juvenile delinquency adjudications came from defendant's admissions thereto, which would render the summary inadmissible under Family Court Act § 381.2 (1).

In light of defendant's objection pursuant to Family Court Act § 381.2 (1) and the People's failure to respond thereto, the record does not establish the admissibility of the statements in the PSR recounting the facts underlying defendant's juvenile delinquency adjudications. County Court thus erred in relying on those facts as aggravating circumstances to justify the upward departure inasmuch as it cannot be said that those facts are supported by admissible evidence (*see generally Diaz*, 100 AD3d at 1491). We therefore conclude that the People failed to meet their burden at the SORA hearing of proving the existence of aggravating circumstances by clear and convincing evidence (*see generally Gillotti*, 23 NY3d at 861-862), and the court erred in granting an upward departure from risk level two to risk level three.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

451

KA 18-00078

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH W. SHANTZ, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CARA A. WALDMAN 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 September 9, 2016. The judgment convicted defendant upon his plea of guilty of unlawful surveillance in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the supplemental sex offender victim fee, and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of unlawful surveillance in the second degree (Penal Law § 250.45 [2]), defendant contends that his waiver of the right to appeal is invalid because Supreme Court's explanation thereof was confusing and inaccurate. We agree. The better practice is for the court to use the Model Colloquy, which " 'neatly synthesizes . . . the governing principles' " (*People v Dozier*, 179 AD3d 1447, 1447 [4th Dept 2020], *lv denied* 35 NY3d 941 [2020], quoting *People v Thomas*, 34 NY3d 545, 567 [2019], *cert denied* — US — [Mar. 30, 2020]; *see* NY Model Colloquies, Waiver of Right to Appeal). Here, by telling defendant that the waiver meant that he was giving up his right to appeal any aspect of his case and that any attempt to appeal would likely result in the appellate court refusing to even hear such an appeal, the court "mischaracterized the waiver of the right to appeal, portraying it in effect as an 'absolute bar' to the taking of an appeal" (*People v Cole*, 181 AD3d 1329, 1330 [4th Dept 2020], quoting *Thomas*, 34 NY3d at 564). Moreover, the colloquy lacked adequate clarifying language indicating that the right to take an appeal was retained; instead, when the court solicited defendant's understanding of its explanation, defendant indicated that he understood the waiver to preclude an appeal and the court failed to correct defendant's misunderstanding (*see Thomas*, 34 NY3d at 564-566; *People v Stenson*, 179 AD3d 1449, 1449 [4th Dept 2020],

lv denied 35 NY3d 974 [2020]; *cf. People v Morrison*, 179 AD3d 1454, 1455 [4th Dept 2020], *lv denied* 35 NY3d 972 [2020]). We thus conclude on this record that the purported waiver of the right to appeal is not enforceable inasmuch as the totality of the circumstances fails to reveal that defendant "understood the nature of the appellate rights being waived" (*Thomas*, 34 NY3d at 559; *see People v Youngs*, 183 AD3d 1228, 1228-1229 [4th Dept 2020]).

As defendant further contends and the People correctly concede, the court erred in imposing a supplemental sex offender victim fee inasmuch as defendant was convicted of an offense contained in article 250 of the Penal Law (*see* § 60.35 [1] [b]). Although defendant correctly concedes that he failed to preserve his contention for our review (*see People v Coleman*, 170 AD3d 1661, 1661 [4th Dept 2019], *lv denied* 33 NY3d 1068 [2019]; *People v Parker*, 137 AD3d 1625, 1626 [4th Dept 2016]), we exercise our power to review the contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]), and we modify the judgment by vacating the supplemental sex offender victim fee (*see People v Arnold*, 107 AD3d 1526, 1528 [4th Dept 2013], *lv denied* 22 NY3d 953 [2013]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

452

KA 19-01732

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HECTOR SERRANO, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Stephen T. Miller, A.J.), entered June 18, 2019. 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.*). Contrary to defendant's contention, County Court did not err in denying his request for a downward departure from his presumptive risk level. Even assuming, arguendo, that defendant met his burden of establishing the existence of an appropriate mitigating factor by a preponderance of the evidence, we conclude that the court providently exercised its discretion in denying defendant's request for a downward departure (*see People v Wooten*, 136 AD3d 1305, 1306 [4th Dept 2016]; *see also People v Bernecky*, 161 AD3d 1540, 1541 [4th Dept 2018], *lv denied* 32 NY3d 901 [2018]). We reject defendant's related contention that the court erred in denying his request for a downward departure because the assessment of points under risk factors 3 and 7 resulted in an "inflated" score on his risk assessment instrument (*see People v Tirado*, 165 AD3d 991, 992 [2d Dept 2018], *lv denied* 32 NY3d 914 [2019]; *People v Goldman*, 150 AD3d 905, 907 [2d Dept 2017]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

463

CA 19-01085

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

DONALD F. PICK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MIDROX INSURANCE COMPANY, DEFENDANT-RESPONDENT.

GUSTAVE J. DETRAGLIA, JR., UTICA, FOR PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, JAMESVILLE (MATTHEW C. RONAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered May 3, 2019. The order granted defendant's motion insofar as it sought summary judgment declaring that defendant had no obligation to cover the subject damage and dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion insofar as it sought summary judgment declaring that defendant had no obligation to cover damage to the property and dismissing the complaint is denied, the declaration is vacated, the complaint is reinstated, and the matter is remitted to Supreme Court, Oneida County, for further proceedings in accordance with the following memorandum: Defendant insures plaintiff's agricultural property under a policy that covers damage from a "windstorm." The policy, however, does not define the term "windstorm." After the property was damaged by an event that plaintiff characterizes as a "windstorm," he commenced this action for a judgment declaring that defendant must cover the damage under the "windstorm" provision. Defendant moved for summary judgment dismissing the complaint and declaring that it had no obligation to cover the subject damage, reasoning that the damage was caused by the collapse of a structurally deficient silo on the property, not by one or more gusts of wind. In any event, defendant continued, even had the damage been caused by one or more gusts of wind, such a gust or gusts did not constitute a "windstorm" covered under the policy. Alternatively, defendant sought summary judgment declaring that its coverage obligation was limited in various specified ways.

Supreme Court granted defendant's motion insofar as it sought summary judgment dismissing the complaint and declaring that defendant had no obligation to cover the subject damage. The court deemed defendant's alternative ground for summary judgment to be moot given the complaint's dismissal. We now reverse.

We agree with plaintiff that the competing expert affidavits submitted by the parties create triable issues of fact as to the actual cause of the damage in this case. Thus, defendant is not entitled to summary judgment on the ground that the damage was caused by an explicit policy exclusion, such as wear and tear or failure to act (*compare Khuns v Bay State Ins. Co.*, 78 AD3d 1496, 1497-1499 [4th Dept 2010] *with Fairchild v Genesee Patrons Coop. Ins. Co.*, 238 AD2d 841, 842 [3d Dept 1997], *lv denied* 90 NY2d 807 [1997]).

Defendant is likewise not entitled to summary judgment on the ground that plaintiff's loss would not be covered under the "windstorm" provision even had the damage been caused by one or more gusts of wind. That issue cannot be resolved as a matter of law because the critical term—"windstorm"—"is ambiguous and susceptible of [at least] two reasonable interpretations, . . . and the resolution of the ambiguity is for the trier of fact" (*State of New York v Home Indem. Co.*, 66 NY2d 669, 671 [1985]; *see Boggs v Commercial Mut. Ins. Co.*, 220 AD2d 973, 974-975 [3d Dept 1995]; *Show Car Speed Shop v United States Fid. & Guar. Co.*, 192 AD2d 1063, 1064-1065 [4th Dept 1993]; *Mawardi v New York Prop. Ins. Underwriting Assn.*, 183 AD2d 756, 757-758 [2d Dept 1992]). We note that neither party submitted competent extrinsic evidence that conclusively establishes the meaning of the term "windstorm" in the policy, much less whether the "windstorm" provision applies upon the occurrence of one or more sustained gusts of wind (*cf. Fairchild*, 238 AD2d at 842).

Given our determination, the motion is no longer moot insofar as it sought alternative relief, and we therefore remit the matter to Supreme Court to determine the motion to that extent (*see Richardson v Kempney Trucking*, 12 AD3d 1099, 1100 [4th Dept 2004]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

465

CA 19-01648

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

TJJK PROPERTIES, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

A.E.Y. ENGINEERING, D.P.C., AND MICHAEL G. YOUNG,
DEFENDANTS-APPELLANTS.

SUGARMAN LAW FIRM, LLP, SYRACUSE (BRITTANY L. HANNAH OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Wayne County (John B. Nesbitt, A.J.), entered August 12, 2019. The order, among other things, denied in part the motion of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the determination that plaintiff asserted a malpractice claim and that the motion should be denied with respect thereto and granting those parts of the motion for summary judgment dismissing the second and third causes of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiff entered into a contract with defendant A.E.Y. Engineering, D.P.C. (AEY) pursuant to which AEY agreed to prepare a site plan for a campground on property plaintiff was developing (property). Defendant Michael G. Young owns a 25% share of AEY. Plaintiff awarded its site work contract to nonparty Affronti Excavating and Trucking, LLC, which discovered that the topography of the site plan differed from the actual conditions on the property. Plaintiff believed that AEY's site plan was inaccurate, resulting in additional costs and delaying the opening of the campground. Consequently, plaintiff commenced this action to recover damages sustained as a result of defendants' alleged breach of contract, fraudulent misrepresentation, and negligent misrepresentation. Defendants thereafter moved for summary judgment dismissing the complaint. In its order, Supreme Court, sua sponte, determined that the breach of contract cause of action "also appears to sound in malpractice" and granted the motion with respect to the breach of contract claim against Young. The court otherwise denied the motion, including with respect to any malpractice claim against defendants. Defendants appeal.

We agree with defendants that plaintiff did not assert a malpractice claim. Plaintiff asserted three causes of action sounding only in breach of contract, fraudulent misrepresentation, and negligent misrepresentation. Additionally, in opposing defendants' motion, plaintiff did not argue that it had a malpractice claim. Consequently, we modify the order by vacating the determination that plaintiff asserted a malpractice claim and that the motion should be denied with respect thereto (*cf. Denhaese v Buffalo Spine Surgery, PLLC*, 144 AD3d 1519, 1520 [4th Dept 2016]).

Contrary to defendants' contention, the court properly denied the motion with respect to the breach of contract cause of action against AEY. Although defendants met their initial burden on the motion with respect to that cause of action against AEY (*see Junger v John V. Dinan Assoc., Inc.*, 164 AD3d 1428, 1430 [2d Dept 2018]), plaintiff raised triable issues of fact by submitting the joint expert affidavit of a civil engineer and a certified code enforcement officer (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The conflicting opinions in the affidavits of the parties' experts regarding, inter alia, whether AEY's site plan omitted key elements that are typically included in such plans and whether AEY was obligated and failed to verify whether the topographic map it relied on reflected the actual conditions at the property cannot be resolved on a motion for summary judgment (*see Junger*, 164 AD3d at 1430; *Swormville Fire Co., Inc. v K2M Architects P.C.*, 147 AD3d 1310, 1311 [4th Dept 2017]; *see also Mary Imogene Bassett Hosp. v Cannon Design, Inc.*, 84 AD3d 1524, 1527 [3d Dept 2011]).

We agree with defendants, however, that the court erred in denying their motion with respect to the fraudulent and negligent misrepresentation causes of action inasmuch as those causes of action are duplicative of the breach of contract cause of action. We therefore further modify the order accordingly. Here, plaintiff's causes of action for fraudulent and negligent misrepresentation "are not separate and apart" from its breach of contract cause of action inasmuch as they "are predicated upon precisely the same purported wrongful conduct" alleged in the breach of contract cause of action (*OP Solutions, Inc. v Crowell & Moring, LLP*, 72 AD3d 622, 622 [1st Dept 2010]). Indeed, all three causes of action are based upon the primary allegations that the site plan provided by AEY was inaccurate, incomplete, misrepresented the conditions actually existing on the property, and contained other serious defects (*see Sestito v David L. Vickers & Sons*, 175 AD3d 955, 956 [4th Dept 2019]; *Muncil v Widmir Inn Rest. Corp.*, 155 AD3d 1402, 1404-1405 [3d Dept 2017]; *Tra-Lin Corp. v Empire Beef Co., Inc.*, 113 AD3d 1141, 1141-1142 [4th Dept 2014]).

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

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

466

CA 19-01074

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

JAMES LUPPINO, SUCCESSOR ADMINISTRATOR OF ESTATE
OF MARIA V. LUPPINO, DECEASED,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JENNIFER G. FLANNERY, AS ADMINISTRATOR OF THE
ESTATE OF WILLIAM E. O'BRIEN, M.D., DECEASED,
ET AL., DEFENDANTS,
AND CATHOLIC HEALTH SYSTEM DOING BUSINESS AS
KENMORE MERCY HOSPITAL, DEFENDANT-RESPONDENT.

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

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), AND BARGNESI BRITT PLLC, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered November 19, 2018. The order denied the motion of plaintiff for a new trial on the issue of damages.

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

Memorandum: In this medical malpractice and wrongful death action, the jury returned a verdict that, inter alia, found Catholic Health System doing business as Kenmore Mercy Hospital (defendant) negligent and awarded no damages for pecuniary injury and $25,000 for pain and suffering. Plaintiff, as successor administrator of the estate of Maria V. Luppino (decedent), appeals from an order denying his posttrial motion pursuant to CPLR 4404 to set aside the jury verdict in part and for a new trial on damages only.

Plaintiff contends that the jury's verdict awarding no damages for pecuniary injury to decedent's husband and her adult children is against the weight of the evidence. Initially, contrary to defendant's assertion, we conclude that the absence of a full trial transcript "does not 'render[ ] meaningful appellate review impossible' " with respect to plaintiff's contention inasmuch as the record on appeal contains the relevant testimony regarding the purported pecuniary injuries (*Eldridge v Shaw*, 99 AD3d 1224, 1226 [4th Dept 2012]). We nevertheless conclude that plaintiff's contention lacks merit because "the evidence on the issue of [pecuniary] loss . . . did not so

preponderate in favor of . . . plaintiff such that the verdict could not have been reached on any fair interpretation of the evidence" (*Estevez v Tam*, 148 AD3d 779, 780 [2d Dept 2017]; *see also Kastick v U-Haul Co. of W. Mich.*, 292 AD2d 797, 799 [4th Dept 2002]; *Hartman v Dermont*, 89 AD2d 807, 808 [4th Dept 1982]).

Plaintiff further contends that the award for pain and suffering is inadequate in that it deviates materially from what would be reasonable compensation (*see* CPLR 5501 [c]). We agree with defendant, however, that the record on appeal is inadequate to enable our review of that contention. Where, as here, "a condition existing before the malpractice occurred may have contributed to the . . . injury, the [injured party] is not entitled to recover those damages that the preexisting condition would have caused in the absence of malpractice" (*Oakes v Patel*, 20 NY3d 633, 647 [2013]). Thus, to evaluate the issue raised by plaintiff, we must review the trial testimony and any relevant exhibits to determine the extent to which the evidence established that "the pain and suffering that [decedent] endured was not preventable" even with appropriate medical care (*id.*). The record on appeal, however, does not contain the full trial transcript or any relevant exhibits and, in particular, omits the testimony of certain medical experts for the defense (*see Polyfusion Electronics, Inc. v AirSep Corp.*, 30 AD3d 984, 985 [4th Dept 2006]; *see also JR Factors, Inc. v Astoria Equities, Inc.*, 159 AD3d 801, 801-802 [2d Dept 2018]; *Bouchey v Claxton-Hepburn Med. Ctr.*, 117 AD3d 1216, 1216-1217 [3d Dept 2014]). We therefore conclude that plaintiff, "as the appellant, 'submitted this appeal on an incomplete record and must suffer the consequences' " (*Polyfusion Electronics, Inc.*, 30 AD3d at 985).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

468

CA 19-02060

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

AMY PIZZOLI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NEW HARTFORD CENTRAL SCHOOL DISTRICT AND BOARD OF EDUCATION OF NEW HARTFORD CENTRAL SCHOOL DISTRICT, DEFENDANTS-APPELLANTS.

THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (FRANK W. MILLER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LAW OFFICES OF MARC JONAS, ESQ., UTICA (MARC JONAS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered July 30, 2019. The order, among other things, denied defendants' cross motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when she tripped and fell over an extension plate that was covered by a mat inside defendants' building. Defendants appeal from an order that, inter alia, denied their cross motion for summary judgment dismissing the complaint. We affirm.

Even assuming, arguendo, that Supreme Court erred in taking an adverse inference against defendants in connection with their cross motion as a spoliation sanction, we nevertheless conclude that the court properly denied the cross motion inasmuch as defendants failed to meet their initial burden of establishing that the alleged defect was trivial as a matter of law and thus nonactionable (*see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 82-83 [2015]). Defendants did not submit any measurements of the alleged defect and, contrary to their contention, the visual estimate of defendants' maintenance supervisor and the photographs submitted in support of the cross motion are insufficient to establish that the alleged defect was trivial as a matter of law (*see id.*; *Clauss v Bank of Am., N.A.*, 151 AD3d 1629, 1631 [4th Dept 2017]; *Padarat v New York City Tr. Auth.*, 137 AD3d 1095, 1096-1097 [2d Dept 2016]). Defendants' related contention that they are entitled to summary judgment dismissing the complaint because the alleged defect was open and obvious is without merit (*see Jaques v Brez*

Props., LLC, 162 AD3d 1665, 1666-1667 [4th Dept 2018]). Defendants' remaining contention does not require modification or reversal of the order.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

470

CA 19-02130

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

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR SECURITIZED ASSET BACKED TRUST RECEIVABLES LLC TRUST 2007-BRI, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-BRI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

EDWARD J. LEWIS, DEFENDANT-RESPONDENT, DAIMLER CHRYSLER FINANCIAL SERVICES, ET AL., DEFENDANTS.

BLANK ROME LLP, NEW YORK CITY (TIMOTHY W. SALTER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DOMBROW LAW FIRM, SYRACUSE (RUSSELL W. DOMBROW OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered April 29, 2019. The order denied plaintiff's motion for summary judgment and granted the cross motion of defendant Edward J. Lewis for summary judgment dismissing the complaint and for leave to amend the answer to include a counterclaim.

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

Memorandum: Plaintiff commenced this mortgage foreclosure action alleging that Edward J. Lewis (defendant) defaulted by failing to pay his monthly mortgage installments. Plaintiff, as limited by its brief, appeals from an order insofar as it granted that part of defendant's cross motion for summary judgment dismissing the complaint against him on the ground that the action is time-barred because it accrued when a prior foreclosure action, which was later dismissed, was commenced (*see* CPLR 213 [4]). We affirm.

Contrary to plaintiff's contention, defendant met his initial burden of establishing that the action is untimely (*see Deutsche Bank Natl. Trust Co. v Adrian*, 157 AD3d 934, 935 [2d Dept 2018]). " 'With respect to a mortgage payable in installments, separate causes of action accrue[ ] for each installment that is not paid, and the statute of limitations begins to run, on the date each installment becomes due' " (*Wilmington Sav. Fund Socy., FSB v Fernandez*, 179 AD3d 79, 81 [4th Dept 2019]). However, "[i]f the mortgage holder accelerates the debt

by a demand or by commencement of a foreclosure action, the statute of limitations begins to run on the entire debt" (*Ditech Fin., LLC v Corbett*, 166 AD3d 1568, 1568 [4th Dept 2018]). Here, in support of the cross motion, defendant submitted plaintiff's complaint in the prior foreclosure action, which was filed on May 20, 2008 and "declare[d] immediately due and payable the entire unpaid balance of principal." Thus, defendant established that the mortgage debt was accelerated on that date and that the six-year statute of limitations applicable to mortgage foreclosure actions had expired by the time plaintiff commenced the instant action on April 6, 2015 (*see Deutsche Bank Natl. Trust Co.*, 157 AD3d at 935).

Contrary to plaintiff's related contention, it failed to raise a triable issue of fact " 'whether the statute of limitations was tolled or otherwise inapplicable, or whether . . . plaintiff actually commenced the action within the applicable limitations period' " (*Bank of N.Y. Mellon v Dieudonne*, 171 AD3d 34, 39 [2d Dept 2019], *lv denied* 34 NY3d 910 [2020]). It is well settled that "[a] lender may revoke its election to accelerate the mortgage, [although] it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action" (*U.S. Bank N.A. v Balderston*, 163 AD3d 1482, 1484 [4th Dept 2018] [internal quotation marks omitted]). Additionally, "de-acceleration notices must . . . be clear and unambiguous to be valid and enforceable" (*Milone v US Bank N.A.*, 164 AD3d 145, 153 [2d Dept 2018], *lv dismissed* 34 NY3d 1009 [2019]). Plaintiff failed to establish that the correspondence that it sent to defendant during the six-year limitations period constituted an unambiguous affirmative act of de-acceleration (*see Deutsche Bank Natl. Trust Co.*, 157 AD3d at 935-936).

Finally, we reject plaintiff's contention that under these circumstances the exercise of its option to accelerate the payments did not take effect until the entry of a judgment of foreclosure (*see Bank of N.Y. Mellon*, 171 AD3d at 39-40; *see also Wells Fargo Bank, N.A. v Portu*, 179 AD3d 1204, 1207 [3d Dept 2020]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

471

KA 16-00980

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KHARYE JARVIS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS 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 June 2, 2016. The appeal was held by this Court by order entered March 22, 2019, decision was reserved and the matter was remitted to Supreme Court, Monroe County, for further proceedings (170 AD3d 1622 [4th Dept 2019]). The proceedings were held and completed.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of manslaughter in the first degree (Penal Law § 125.20 [1]). We previously held this case, reserved decision, and remitted the matter to Supreme Court "to make and state for the record a determination whether defendant is an eligible youth within the meaning of CPL 720.10 (2) with the benefit of an updated presentence report and, if so, whether defendant should be afforded youthful offender status" (*People v Jarvis*, 170 AD3d 1622, 1623 [4th Dept 2019]). Upon remittal, the court determined that defendant was not an eligible youth because he used a handgun during the course of the crimes and there were no mitigating circumstances to warrant finding defendant an eligible youth under the exception in CPL 720.10 (3).

Defendant contends that the court's failure to grant certain requests regarding the updated presentence report (PSR) violated "basic notions of fairness and due process." Inasmuch as the court did not rely on the allegedly unsubstantiated statements in the PSR or the requested victim statement letter summarized therein, defendant was not prejudiced by the court's denial of his requests related to those items (*see People v Ferguson*, 177 AD3d 1247, 1250 [4th Dept 2019]; *People v Rogers*, 156 AD3d 1350, 1350 [4th Dept 2017], *lv denied* 31 NY3d 986 [2018]). Further, to the extent that defendant contends

that the court erred in failing to strike certain statements from the PSR, defendant did not meet his burden of establishing that the challenged statements were inaccurate (*see People v Washington*, 170 AD3d 1608, 1610 [4th Dept 2019], *lv denied* 33 NY3d 1036 [2019]).

However, we agree with defendant that, as the People correctly concede, the court erred in concluding that defendant was ineligible for youthful offender treatment (*see People v Willis*, 161 AD3d 1584, 1584 [4th Dept 2018]; *People v Dhillon*, 143 AD3d 734, 735 [2d Dept 2016]). Inasmuch as "the sentencing court must make 'a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it' " (*Willis*, 161 AD3d at 1584, quoting *People v Rudolph*, 21 NY3d 497, 501 [2013]), we therefore again hold the case, reserve decision, and remit the matter to Supreme Court to make and state for the record a determination whether defendant should be afforded youthful offender status (*see id.*; *Dhillon*, 143 AD3d at 736).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

473

KA 19-00977

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERALD J. ORTIZ, DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS (BRUCE A. ROSEKRANS OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Wayne County Court (John B. Nesbitt, J.), entered October 25, 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 ([SORA] Correction Law § 168 *et seq*.). Contrary to defendant's contention, County Court's determination that the victim was "10 or less" years of age at the time the abuse began is supported by the requisite clear and convincing evidence (*see* § 168-n [3]; *People v Carbone*, 89 AD3d 1392, 1392 [4th Dept 2011], *lv denied* 18 NY3d 806 [2012]). That evidence was contained in the police reports, which provided that the victim reported to the police officers that the abuse began when she lived on one particular street. Although there is no evidence concerning when the victim and her family moved to a different address, defendant pleaded guilty to count three of the indictment, which alleged that the victim was living at a second address on the date of her 11th birthday. As a result, the court correctly determined that any "abuse beginning at [the first address] would necessarily have occurred when the victim was age 10 or less."

As defendant correctly concedes, he failed to preserve for our review his contention that he is entitled to a downward departure (*see People v Austin*, 171 AD3d 1494, 1495 [4th Dept 2019], *lv denied* 33 NY3d 910 [2019]; *People v Havens*, 144 AD3d 1632, 1632 [4th Dept 2016], *lv denied* 29 NY3d 901 [2017]). In any event, that contention lacks merit inasmuch as defendant failed "to allege mitigating circumstances that are, as a matter of law, of a kind or to a degree not adequately taken into account by the Risk Assessment Guidelines and Commentary"

(*People v Voymas*, 122 AD3d 1336, 1337 [4th Dept 2014], *lv denied* 25 NY3d 913 [2015]; *see People v Phillips*, 162 AD3d 1752, 1753 [4th Dept 2018], *lv denied* 32 NY3d 908 [2018]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

474

KA 19-00548

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHELLSIE BLUE, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Vincent M. Dinolfo, J.), entered February 8, 2019. 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 modified on the law by determining that defendant is a level one risk pursuant to the Sex Offender Registration Act and as modified the order is affirmed without costs.

Memorandum: Defendant appeals from an order determining that she is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*) based on her conviction in federal court, upon her plea of guilty, of conspiracy to commit sex trafficking of a minor (18 USC §§ 1591, 1594 [c]).

Initially, we reject defendant's contention that her conviction in a foreign jurisdiction did not require her to register under SORA. As relevant to this appeal, SORA's registration requirement applies to persons convicted in any other jurisdiction of an offense that "includes all of the essential elements" of a crime specified in Correction Law § 168-a (2) (a), (b), or (c) (§ 168-a [2] [d] [i]; *see People v Kennedy*, 7 NY3d 87, 89 [2006]; *Matter of Dewine v State of N.Y. Bd. of Examiners of Sex Offenders*, 89 AD3d 88, 89 [4th Dept 2011]). "[T]he 'essential elements' provision in SORA requires registration whenever an individual is convicted of criminal conduct in a foreign jurisdiction that, if committed in New York, would have amounted to a registrable New York offense" (*Matter of North v Board of Examiners of Sex Offenders of State of N.Y.*, 8 NY3d 745, 753 [2007]). Making that determination "necessarily requires that the Board compare the elements of the foreign offense with the analogous New York offense to identify points of overlap. When the Board finds

that the two offenses cover the same conduct, the analysis need proceed no further for it will be evident that the foreign conviction is the equivalent of the registrable New York offense for SORA purposes. In circumstances where the offenses overlap but the foreign offense also criminalizes conduct not covered under the New York offense, the Board must review the conduct underlying the foreign conviction to determine if that conduct is, in fact, within the scope of the New York offense" (*id.*).

Even assuming, arguendo, that the elements of defendant's federal conviction for conspiracy to commit sex trafficking of a minor do not perfectly overlap with those of an analogous New York offense, we conclude that defendant's underlying conduct would nonetheless constitute promoting prostitution in the third degree under Penal Law § 230.25. The undisputed evidence establishes that defendant enticed the 14-year-old victim to engage in commercial sex acts, set up advertisements for the victim, provided a location for the victim to perform those acts, and took all of the money made by the victim for those acts. That evidence demonstrates that defendant "advance[d] or profite[d] from prostitution of a person less than [19] years old" (§ 230.25 [2]), and inasmuch as it also establishes that the victim was in fact less than 17 years old, defendant is required to register under SORA (*see* Correction Law § 168-a [2] [a] [i]; *North*, 8 NY3d at 753).

Contrary to defendant's further contention, we conclude that County Court properly assessed 15 points under risk factor 11 on the risk assessment instrument (RAI) for her history of drug abuse "inasmuch as [t]he statements in the case summary and presentence report with respect to defendant's substance abuse constitute reliable hearsay supporting the court's assessment of points under th[at] risk factor" (*People v Kunz*, 150 AD3d 1696, 1696 [4th Dept 2017], *lv denied* 29 NY3d 916 [2017] [internal quotation marks omitted]; *see People v Ramos*, 41 AD3d 1250, 1250 [4th Dept 2007], *lv denied* 9 NY3d 809 [2007]). Specifically, defendant's admitted daily marijuana use and evidence that she completed drug abuse treatment while incarcerated amply established facts sufficient to warrant the assessment of points under risk factor 11 (*see People v Palmer*, 20 NY3d 373, 377-378 [2013]; *People v Merkley*, 125 AD3d 1479, 1479 [4th Dept 2015]; *People v Mundo*, 98 AD3d 1292, 1293 [4th Dept 2012], *lv denied* 20 NY3d 855 [2013]).

Upon our review of the record, however, we agree with defendant that the court improperly assessed 25 points under risk factor two for sexual contact with the victim and 20 points under risk factor four for engaging in a continuing course of sexual misconduct because the People did not establish by the requisite clear and convincing evidence (*see People v Pettigrew*, 14 NY3d 406, 408 [2010]) that there was any sexual contact between defendant and the victim (*see e.g. People v Dilillo*, 162 AD3d 915, 916 [2d Dept 2018], *lv denied* 32 NY3d 905 [2018]; *People v Costello*, 35 AD3d 754, 755 [2d Dept 2006]; *see generally People v Walker*, 175 AD3d 735, 736 [2d Dept 2019], *lv denied* 34 NY3d 908 [2020]) or that defendant shared the intent of the

victim's clients in engaging her in sexual contact (*see People v S.G.*, 4 Misc 3d 563, 569-571 [Sup Ct, NY County 2004]). Defendant's score on the RAI, originally assessed at 100 points, must therefore be reduced by 45 points, which results in a total score of 55 and renders defendant a presumptive level one risk. We modify the order accordingly.

In light of our determination, defendant's remaining contention is academic.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

477

KA 18-01370

PRESENT: CARNI, J.P., CURRAN, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN P. KNORR, DEFENDANT-APPELLANT.

DANIELLE C. WILD, ROCHESTER, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (KAYLAN C. PORTER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered March 15, 2018. The judgment convicted defendant upon a plea of guilty of sexual abuse in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed and the matter is remitted to Monroe County Court for resentencing.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of sexual abuse in the first degree (Penal Law § 130.65 [3]), defendant contends that County Court failed to exercise its discretion at sentencing. We agree.

The court initially imposed a one-year term of interim probation and informed defendant that, if he complied with the terms of interim probation, the court would impose a nine-year term of probation. Defendant, however, violated the terms of interim probation. At sentencing, the court informed defendant that it had taken "quite frankly, a lot of arm twisting" to get defendant the plea arrangement he had received and that the court had to "twist the arm of the People to get them to go along with giving [defendant the] chance on interim probation." The court then stated that if it gave defendant "a sentence that's anywhere less than seven years," the People would be "looking at [the court] on every single case that" it would have in the future, would conclude that the court's "word is no good," and thus would not continue offering plea arrangements to defendants because they would not expect the court to abide by a pre-plea sentencing commitment. Thus, the court said, it had "no choice today . . . but to sentence [defendant]" to seven years' imprisonment.

"[T]he sentencing decision is a matter committed to the exercise of the *court's* discretion and . . . can be made only after careful

consideration of all facts available at the time of sentencing" (*People v Farrar*, 52 NY2d 302, 305 [1981]; *see People v Dupont*, 164 AD3d 1649, 1650 [4th Dept 2018]; *People v Dowdell*, 35 AD3d 1278, 1280 [4th Dept 2006], *lv denied* 8 NY3d 921 [2007]). "The determination of an appropriate sentence requires the exercise of discretion after due consideration given to, among other things, the crime charged, the particular circumstances of the individual before the court and the purpose of a penal sanction, i.e., societal protection, rehabilitation and deterrence" (*Farrar*, 52 NY2d at 305). Here, the court indicated that it had no choice but to sentence defendant pursuant to its agreement with the People (*see Dupont*, 164 AD3d at 1650), and the sentencing transcript, read in its entirety, does not reflect that the court conducted the requisite discretionary analysis (*cf. People v Clause*, 167 AD3d 1532, 1532-1533 [4th Dept 2018]). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing.

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

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

478

KA 15-00651

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEION PETERSON, DEFENDANT-APPELLANT.

REEVE BROWN PLLC, ROCHESTER (GUY A. TALIA OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered February 17, 2015. The judgment convicted defendant upon his plea of guilty of criminal sale of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, indictment No. 2014-042 is reinstated and the matter is remitted to Livingston County Court for further proceedings on indictment Nos. 2014-042 and 2014-172.

Memorandum: Defendant appeals from a judgment entered in Livingston County convicting him upon a plea of guilty of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). The plea satisfied another indictment pending against defendant in Livingston County (indictment No. 2014-042). Pursuant to the plea agreement, County Court sentenced defendant to a determinate term of imprisonment that was to run concurrently with a 10-year sentence previously imposed on defendant in Monroe County for criminal possession of a weapon in the second degree. We later reversed the Monroe County judgment and dismissed the indictment (*People v Peterson*, 159 AD3d 1588 [4th Dept 2018]). Defendant now contends, and the People correctly concede, that, inasmuch as his plea in Livingston County was induced by the promise of a concurrent sentence, which is no longer possible, the judgment must be reversed and the plea vacated (*see People v Rowland*, 8 NY3d 342, 345 [2007]; *People v Pichardo*, 1 NY3d 126, 129 [2003]; *cf. People v Walker*, 148 AD3d 1569, 1569 [4th Dept 2017], *lv denied* 29 NY3d 1088 [2017]; *People v Kalinowski*, 84 AD3d 1739, 1741 [4th Dept 2011]; *see also People v Williams*, 79 AD3d 1653, 1655 [4th Dept 2010], *affd* 17 NY3d 834 [2011]). This will result in the reinstatement of indictment No. 2014-042, which was satisfied by defendant's plea (*see* CPL 470.55 [2]; *see generally*

People v Green, 56 AD3d 1238, 1239 [4th Dept 2008]).

Defendant further contends that the court erred in determining that indictment No. 2014-042 was supported by legally sufficient evidence and that the grand jury proceedings in that case were not defective. That contention is not properly before us on this appeal.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

482

CAF 18-01579

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

IN THE MATTER OF MONROE COUNTY CHILD SUPPORT ENFORCEMENT UNIT, ON BEHALF OF LISA E. SPROUL, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT M. HEMMINGER, RESPONDENT-APPELLANT.

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

JOHN P. BRINGWATT, COUNTY ATTORNEY, ROCHESTER (ELIZABETH D. TAFFE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered July 30, 2018 in a proceeding pursuant to Family Court Act article 4. The order denied the objections of respondent to the order of the Support Magistrate.

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

Memorandum: Respondent father appeals from an order denying his objections to the Support Magistrate's determination that he willfully violated a prior order of child support. We affirm. A parent is presumed to have sufficient means to support his or her minor child (*see* Family Ct Act § 437; *Matter of Powers v Powers*, 86 NY2d 63, 68-69 [1995]). "Thus, proof that respondent has failed to pay support as ordered alone establishes petitioner's direct case of willful violation, shifting to respondent the burden of going forward" (*Powers*, 86 NY2d at 69; *see Matter of Huard v Lugo*, 81 AD3d 1265, 1267 [4th Dept 2011], *lv denied* 16 NY3d 710 [2011]). To meet that burden, the respondent must offer "some competent, credible evidence of his inability to make the required payments" (*Powers*, 86 NY2d at 70). Moreover, if the respondent contends that he or she was unable to meet the support obligation because a physical disability interfered with his or her ability to maintain employment, the respondent must "offer competent medical evidence to substantiate" that claim and "establish that the alleged physical disability affected [his or] her ability to work" (*Matter of Hwang v Tam*, 158 AD3d 1216, 1217 [4th Dept 2018] [internal quotation marks omitted]; *see Matter of Fogg v Stoll*, 26 AD3d 810, 810-811 [4th Dept 2006]).

Here, petitioner made out a prima facie case by establishing that

the father had not made certain payments required by the prior order, a claim the father did not dispute (*see Matter of Riggs v VanDusen*, 78 AD3d 1577, 1577 [4th Dept 2010]). The father failed to meet his burden of demonstrating his inability to make the required payments inasmuch as he failed to present evidence establishing that he made reasonable efforts to obtain gainful employment (*see Matter of Movsovich v Wood*, 178 AD3d 1441, 1442 [4th Dept 2019], *lv denied* 35 NY3d 905 [2020]). Further, although the father asserted that he was physically unable to perform certain work he had performed in the past and that he had been unable to obtain employment that was suitable in light of his alleged physical limitations, he failed to offer any medical evidence to substantiate his claim that his disability prevented him from making the required payments (*see Movsovich*, 178 AD3d at 1442; *see generally Matter of Mandile v Deshotel*, 166 AD3d 1511, 1512 [4th Dept 2018]). Indeed, the record reflects that the father's claim for Social Security benefits was denied (*cf. Hwang*, 158 AD3d at 1217-1218).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

484

CA 19-00145

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

JULIANNE RIZZO, INDIVIDUALLY AND ON BEHALF OF NATIONAL VACUUM CORP., NATIONAL MAINTENANCE CONTRACTING CORP., NATIONAL POWER ASSOCIATES CORP., AND NATIONAL RESPONSE & EMERGENCY SERVICES, INC., AND JULIANNE RIZZO CPA, P.C., FORMERLY KNOWN AS ELLEGATE & RIZZO CPA'S P.C., INDIVIDUALLY AND ON BEHALF OF NATIONAL VACUUM CORP., NATIONAL MAINTENANCE CONTRACTING CORP., NATIONAL POWER ASSOCIATES CORP., AND NATIONAL RESPONSE & EMERGENCY SERVICES, INC., PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

NATIONAL VACUUM CORP., ET AL., DEFENDANTS, NATIONAL MAINTENANCE CONTRACTING CORP., AND SAMUEL D. LEHR, DEFENDANTS-APPELLANTS.

MAGAVERN MAGAVERN GRIMM LLP, NIAGARA FALLS (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GROSS SHUMAN P.C., BUFFALO (DAVID H. ELIBOL OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Henry J. Nowak, Jr., J.), entered January 24, 2019. The order granted the cross motion of defendants Samuel D. Lehr and National Maintenance Contracting Corp. for leave to reargue and, upon reargument, adhered to a prior order granting the motion of plaintiffs for partial summary judgment and denying the cross motion of those defendants for partial summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking, inter alia, a declaration that plaintiff Julianne Rizzo, in her individual capacity, was and remains a 20% owner of defendant National Maintenance Contracting Corp. (NMCC). Supreme Court granted plaintiffs' motion for partial summary judgment on the issue of Rizzo's 20% ownership of NMCC, concluding that the doctrine of tax estoppel precluded NMCC and defendant Samuel D. Lehr (collectively, defendants) from denying Rizzo's ownership interest in NMCC, and denied defendants' cross motion for summary judgment dismissing the complaint against them insofar as it alleges that Rizzo owns 20% of

NMCC. Defendants now appeal from an order that granted their cross motion for leave to reargue their prior cross motion and their opposition to plaintiffs' motion and, upon reargument, adhered to the court's prior determination. We affirm.

The court properly granted the motion and denied the cross motion for summary judgment based on its conclusion that the doctrine of tax estoppel precluded defendants from denying that Rizzo has a 20% ownership interest in NMCC. Under the doctrine of tax estoppel, " '[a] party to litigation may not take a position contrary to a position taken in [a] . . . tax return' " (*Matter of Elmezzi*, 124 AD3d 886, 887 [2d Dept 2015], quoting *Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 [2009]; *see Amalfi, Inc. v 428 Co., Inc.*, 153 AD3d 1610, 1610 [4th Dept 2017]). Here, plaintiffs met their initial burden on the motion by submitting a copy of Form 2553: Election by a Small Business Corporation (election form) that Lehr—in his capacity as president of NMCC—signed under penalty of perjury. The document was also signed by Rizzo, Lehr, and defendant John G. Kozlowski in their capacity as shareholders. The column in the election form labeled "Number of shares or percentage of ownership," lists "60" beside Kozlowski's name and "20" beside both Rizzo's and Lehr's names. By filing that election form, Lehr—who admitted that it was his signature on the form—and NMCC swore that Rizzo owned 20% of the company and are thereby estopped from denying Rizzo's ownership interest (*see Matter of Ansonia Assoc. L.P. v Unwin*, 130 AD3d 453, 454 [1st Dept 2015]).

Defendants failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). We reject defendants' contention that, because the election form does not specify whether Rizzo owns 20 shares or 20% of the company, there is an issue of fact with respect to what percentage of NMCC Rizzo owns. Even if the numbers "60," "20," and "20" refer to the number of shares issued to the shareholders instead of their percentages of ownership, they demonstrate that NMCC issued a total of 100 shares to its shareholders and therefore that Rizzo, as owner of 20 of the 100 shares, owns 20% of NMCC.

In light of our determination, defendants' remaining contention is academic.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

499

KA 19-00487

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY MILLER, DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS, FOR RESPONDENT.

Appeal from an order of the Wayne County Court (John B. Nesbitt, J.), dated December 31, 2018. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). In August 1994 in the State of Virginia, defendant was convicted following his plea of guilty of rape (Va Code Ann § 18.2-61) and malicious wounding (§ 18.2-51), after his conviction following a trial of those crimes (criminal trial) was reversed based on prosecutorial misconduct. Defendant had attacked his sister's roommate with a tire iron, raped her, and then forced her to dress, kneel, and lean over, whereupon he began striking the back of her head with the tire iron.

We reject defendant's contention that County Court abused its discretion in assessing points against him under risk factors 7, 12, and 13 of the risk assessment instrument (RAI). The court properly assessed 20 points under risk factor 7 inasmuch as the People established by clear and convincing evidence that defendant and the victim had met only the day before the offenses, had only brief interactions, and thus were strangers (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 12 and n 8 [2006] [Guidelines]; *see also People v Lewis*, 178 AD3d 864, 865 [2d Dept 2019], *lv denied* 35 NY3d 902 [2020]; *People v Mabee*, 69 AD3d 820, 820 [2d Dept 2010], *lv denied* 15 NY3d 803 [2010]). Indeed, defendant did not even know the victim's name and referred to her in his criminal trial testimony as "the girl" and "that girl" (*see People v Middlemiss*, 153 AD3d 1096, 1097 [3d Dept 2017], *lv denied* 30 NY3d 906 [2017]). The court also properly assessed 10 points under risk factor

12 because the People presented clear and convincing evidence that defendant later claimed that the sexual activity with the victim was consensual and that he was not responsible for his actions because he was overcome with an irresistible impulse to harm the victim (*see generally* Correction Law § 168-n [3]; *People v Havens*, 144 AD3d 1632, 1633 [4th Dept 2016], *lv denied* 29 NY3d 901 [2017]; *People v Kyle*, 64 AD3d 1177, 1178 [4th Dept 2009], *lv denied* 13 NY3d 709 [2009]). Additionally, the court properly assessed 10 points under risk factor 13. The People established that defendant's behavior while being supervised on probation, including his probation violation for disobeying his probation officer's directive to refrain from contacting anyone at a volunteer organization from which defendant had been banned, was unsatisfactory (*see generally People v Carlberg*, 145 AD3d 1646, 1647 [4th Dept 2016]; *People v Young*, 108 AD3d 1232, 1233 [4th Dept 2013], *lv denied* 22 NY3d 853 [2013], *rearg denied* 22 NY3d 1036 [2013]). Consequently, we conclude that the court properly assessed 110 points on defendant's RAI, making him a presumptive level three risk.

Contrary to defendant's further contention, the People also established by clear and convincing evidence the applicability of the Guidelines' fourth override, i.e., that there has been "a clinical assessment that the offender has a psychological, physical, or organic abnormality that decreases his [or her] ability to control impulsive sexual behavior" (Guidelines at 4). During the criminal trial, defendant's expert psychiatrist testified that defendant suffered from an "organic mental syndrome" or "organic personality syndrome," which was the basis for defendant's defense of insanity due to an irresistible impulse. The psychiatrist's clinical assessment was corroborated by defendant's criminal trial testimony that he could not stop himself from committing the offenses against the victim. That override automatically results in a presumptive level three designation (*see People v Lagville*, 136 AD3d 1005, 1006 [2d Dept 2016]; *see also People v Cobb*, 141 AD3d 1174, 1175 [4th Dept 2016]; Guidelines at 3-4). We have examined defendant's remaining contention and conclude that it does not warrant modification or reversal of the order.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

511

CA 19-01263

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

WILLIAM T. KOREN, JR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MORGAN RAINTREE, LLC, DEFENDANT-RESPONDENT,
AND LYMAN JONES UNLIMITED, LLC, DEFENDANT.

BRIAN K. TOWEY, BUFFALO, FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (RAUL E. MARTINEZ OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered February 1, 2019. The order granted the motion of defendant Morgan Raintree, LLC for summary judgment dismissing the amended complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, and the amended complaint is reinstated against defendant Morgan Raintree, LLC.

Memorandum: Plaintiff commenced this negligence action against, among others, his landlord, Morgan Raintree, LLC (defendant), to recover damages for the injuries he sustained after he allegedly fell on a walkway that defendant had purportedly failed to properly clear of ice and snow. Defendant thereafter moved for summary judgment dismissing the amended complaint against it on the grounds that plaintiff's presence on the subject walkway was not reasonably foreseeable during the winter and that, even if his presence was reasonably foreseeable, plaintiff did not actually fall on that walkway but rather on an adjacent grassy area that it had no duty to maintain. Supreme Court granted defendant's motion, and we now reverse.

"New York landowners owe people on their property a duty of reasonable care under the circumstances to maintain their property in a safe condition . . . The duty of a landowner to maintain [his or her] property in a safe condition extends to persons whose presence is reasonably foreseeable by the landowner" (*Breau v Burdick*, 166 AD3d 1545, 1546 [4th Dept 2018] [internal quotation marks omitted]). "Questions concerning foreseeability . . . are generally questions for the jury" (*Brown v Rome Up & Running, Inc.*, 68 AD3d 1708, 1709 [4th Dept 2009] [internal quotation marks omitted]).

Here, defendant's own submissions on the motion raise triable issues of fact as to the foreseeability of plaintiff's presence on the walkway. Specifically, defendant's submissions established that the walkway on which plaintiff allegedly fell connected the apartment complex's community center to a parking lot and that plaintiff had frequently walked his dog in the general vicinity in the preceding month. Moreover, there were no signs indicating that the subject walkway was closed, nor were there any gates or other physical barriers to accessing the walkway during the winter. Thus, when the evidence is viewed in the light most favorable to plaintiff as the nonmoving party, we conclude that defendant "failed to establish as a matter of law that plaintiff's presence on the [subject walkway] was not reasonably foreseeable" (*Breau*, 166 AD3d at 1547; *see Brown*, 68 AD3d at 1709; *Sirface v County of Erie*, 55 AD3d 1401, 1402 [4th Dept 2008], *lv dismissed* 12 NY3d 797 [2009]).

Finally, defendant's contention that plaintiff actually slipped not on the subject walkway but rather on an adjacent grassy area that it had no duty to maintain is contradicted by plaintiff's deposition testimony. Contrary to defendant's contention, there is nothing inherently incredible about plaintiff's testimony as a matter of law and, by submitting that testimony in support of its motion, defendant's own evidence created a triable issue of fact as to where plaintiff actually fell (*see Harris v FJN Props., LLC*, 18 AD3d 1089, 1090 [3d Dept 2005]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

519

TP 19-01983

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

IN THE MATTER OF ROCHESTER REDEVELOPMENT, LLC,
PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION AND BASIL SEGGOS, AS COMMISSIONER
OF THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION, RESPONDENTS.

KNAUF SHAW LLP, ROCHESTER (AMY K. KENDALL OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (DUSTIN J. BROCKNER OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [James J. Piampiano, J.], entered July 29, 2019) to review a determination of respondents. The determination denied the application of petitioner for a freshwater wetlands permit to construct a home on waterfront property.

It is hereby ORDERED that the determination is unanimously confirmed without costs, the petition insofar as it sought to annul the determination is dismissed and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination of respondents denying its application for a freshwater wetlands permit to construct a home on waterfront property on Irondequoit Bay. A Class I wetland surrounds Irondequoit Bay (*see* 6 NYCRR 664.5 [a]). The Environmental Conservation Law requires a permit for construction in a wetland and adjacent area, defined as 100 feet from the boundary of the wetland (ECL 24-0701 [1], [2]). Petitioner's proposed dock would be located entirely within the wetland, and the remainder of the project would be located in the adjacent area of the wetland. A hearing was held and, in an interim decision, respondent Basil Seggos, as Commissioner of respondent New York State Department of Environmental Conservation, remitted the matter for an additional hearing for further development of the record. Following the additional hearing, the Commissioner agreed with the recommendation of the Administrative Law Judge and denied the application.

Our review of respondents' determination is limited to whether it is supported by substantial evidence (*see* CPLR 7803 [4]; *Matter of Wilson v Iwanowicz*, 97 AD3d 595, 595 [2d Dept 2012]; *Matter of Valiotis v State of New York*, 95 AD3d 1026, 1027 [2d Dept 2012], *lv dismissed* 19 NY3d 1008 [2012]). "[T]he substantial evidence standard is a minimal standard" and refers to "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*Matter of Haug v State Univ. of N.Y. at Potsdam*, 32 NY3d 1044, 1045-1046 [2018] [internal quotation marks omitted]; *see Rainer N. Mittl, Ophthalmologist, P.C. v New York State Div. of Human Rights*, 100 NY2d 326, 331 [2003]; *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]).

In enacting the Freshwater Wetlands Act, the legislature declared that it was "the public policy of th[is] state to preserve, protect and conserve freshwater wetlands and the benefits derived therefrom, to prevent the despoliation and destruction of freshwater wetlands, and to regulate use and development of such wetlands to secure the natural benefits of freshwater wetlands, consistent with the general welfare and beneficial economic, social and agricultural development of the state" (ECL 24-0103). Freshwater wetlands "are invaluable resources for flood protection, wildlife habitat, open space and water resources" (ECL 24-0105 [1]). "Any loss of freshwater wetlands deprives the people of the state of some or all of the many and multiple benefits to be derived from wetlands," including "wildlife habitat by providing breeding, nesting and feeding grounds and cover for many forms of wildlife, wildfowl and shorebirds, including migratory wildfowl and rare species such as the bald eagle and osprey," and "erosion control by serving as sedimentation areas and filtering basins, absorbing silt and organic matter and protecting channels and harbors" (ECL 24-0105 [7] [b], [f]).

Construction of the type proposed by petitioner in the adjacent area of the wetland is considered "usually incompatible with a wetland and its functions or benefits" (6 NYCRR 663.4 [d] [42]) and requires respondents, before issuing a permit, to consider the three tests for "compatibility" (6 NYCRR 663.5 [d]), which determine whether "the activity (i) would be compatible with preservation, protection and conservation of the wetland and its benefits, and (ii) would result in no more than insubstantial degradation to, or loss of, any part of the wetland, and (iii) would be compatible with public health and welfare" (6 NYCRR 663.5 [e] [1]). If all three compatibility tests are met, a permit, with or without conditions, may be issued (6 NYCRR 663.5 [d] [1]).

Petitioner contends that it demonstrated that the project met the compatibility standards (*see* 6 NYCRR 663.5 [e] [1]) and that the determination that it did not meet the first two tests was not based on substantial evidence. We reject that contention. Respondents' determination that petitioner had not shown that the project would be compatible with the preservation, protection and conservation of the wetland and its benefits and that the project would result in no more than insubstantial degradation to, or loss of, any part of the wetland is supported by substantial evidence (*see Wilson*, 97 AD3d at 596;

Matter of Watts v New York State Dept. of Envtl. Conservation, 36 AD3d 622, 622-623 [2d Dept 2007], *lv denied* 8 NY3d 812 [2007]; *Matter of Kroft v New York State Dept. of Envtl. Conservation*, 7 AD3d 714, 714-715 [2d Dept 2004]). Specifically, there was evidence at the hearings that the project would result in the loss of both wildlife habitat and erosion control (*see* ECL 24-0105 [7] [b], [f]).

In its petition, petitioner sought the alternative relief of requiring respondents to proceed under the laws of condemnation as set forth in Environmental Conservation Law § 24-0705 (7). "Within the context of [its] review proceeding, a court is authorized to determine whether denial of the permit was proper and, if so, whether the regulation of the particular land has become so rigorous as to amount to a taking without just compensation" (*Spears v Berle*, 48 NY2d 254, 260 [1979]). Judicial review is thus a two-step process (*see Matter of Gazza v New York State Dept. of Envtl. Conservation*, 89 NY2d 603, 612 [1997], *cert denied* 522 US 813 [1997]; *Spears*, 48 NY2d at 261). "If [a] court finds that the permit denial is supported by substantial evidence, then a second determination is made in the same proceeding to determine whether the restriction constitutes an unconstitutional taking requiring compensation" (*de St. Aubin v Flacke*, 68 NY2d 66, 70 [1986]; *see Gazza*, 89 NY2d at 612-613). A hearing must be held "at which the landowner and the State may produce expert testimony and other evidence bearing upon the regulation's effect on the value of the subject parcel" (*Spears*, 48 NY2d at 261). We conclude that there was insufficient evidence at the administrative hearing regarding the taking issue (*see id.* at 261 n 3), and thus we remit the matter to Supreme Court for a hearing on that issue (*see Matter of Matthews v New York State Dept. of Envtl. Conservation*, 25 AD3d 710, 711 [2d Dept 2006]; *Matter of Grimaldi v New York State Dept. of Envtl. Conservation*, 299 AD2d 410, 410-411 [2d Dept 2002]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

520

KA 18-00658

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MOHAMED JUMALE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered March 10, 2017. The judgment convicted defendant upon his plea of guilty of attempted burglary in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), defendant, a noncitizen, contends that his felony guilty plea was not knowingly, voluntarily, and intelligently entered because Supreme Court failed to advise him of the potential deportation consequences of such a plea, as required by *People v Peque* (22 NY3d 168 [2013], *cert denied* 574 US 840 [2014]). As a preliminary matter, we note that defendant's challenge to the voluntariness of his plea would survive even a valid waiver of the right to appeal (*see People v Roman*, 160 AD3d 1492, 1492 [4th Dept 2018]). Even assuming, arguendo, that defendant was required to preserve his contention under the circumstances of this case (*see People v Delorbe*, 35 NY3d 112, 118-119 [2020]), we exercise our power to address it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). "[D]ue process compels a trial court to apprise a defendant that, if the defendant is not an American citizen, he or she may be deported as a consequence of a guilty plea to a felony" (*Peque*, 22 NY3d at 176). Here, the record of the plea proceeding establishes that the court failed to fulfill that obligation (*see id.* at 200; *People v Medina*, 132 AD3d 1363, 1363 [4th Dept 2015]). As defendant contends and contrary to the People's suggestion, "the case should be remitted to afford defendant the opportunity to move to vacate his plea upon a showing that there is a reasonable probability that he would not have pleaded guilty had the court advised him of the possibility of deportation" (*Medina*, 132 AD3d

at 1363 [internal quotation marks omitted]; *see Peque*, 22 NY3d at 200-201). We therefore hold the case, reserve decision, and remit the matter to Supreme Court for that purpose.

Defendant further contends that he was denied effective assistance of counsel because defense counsel misadvised him about the potential deportation consequences of the plea (*see Padilla v Kentucky*, 559 US 356, 374 [2010]). We conclude that defendant's contention "is based, in part, on matter appearing on the record and, in part, on matter outside the record and, thus, constitutes a 'mixed claim of ineffective assistance' " (*People v Alvarracin*, 148 AD3d 1041, 1042 [2d Dept 2017], *lv denied* 29 NY3d 1075 [2017]). Where, as here, "the 'claim of ineffective assistance of counsel cannot be resolved without reference to matter outside of the record, a CPL 440.10 proceeding is the appropriate forum for reviewing the claim in its entirety' " (*People v Wilson* [appeal No. 2], 162 AD3d 1591, 1592 [4th Dept 2018] [emphasis omitted]; *see Medina*, 132 AD3d at 1364; *see generally People v Maffei*, — NY3d —, —, 2020 NY Slip Op 02680, *3 [2020]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

521

KA 17-00620

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUDITH C. KELLEY, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (CAITLIN M. CONNELLY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered August 4, 2016. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated, a class D felony (two counts).

It is hereby ORDERED that said appeal from the judgment insofar as it imposed a sentence of imprisonment is unanimously dismissed, the judgment is modified as a matter of discretion in the interest of justice by vacating the fine and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting her, upon a jury verdict, of two counts of driving while intoxicated as a class D felony (Vehicle and Traffic Law §§ 1192 [2], [3]; 1193 [1] [c] [ii]). Even assuming, arguendo, that County Court erred in excluding evidence of defendant's homelessness at the time of the crime, we conclude that such error was harmless because the "proof that defendant . . . operat[ed] the vehicle . . . was overwhelming, and there is no reasonable possibility that the jury would have acquitted [her]" had the disputed evidence been admitted (*People v Woodward*, 219 AD2d 837, 837 [4th Dept 1995], *lv denied* 87 NY2d 1027 [1996]; *see People v Obieke*, 298 AD2d 931, 932 [4th Dept 2002], *lv denied* 99 NY2d 538 [2002]). Defendant's challenges to the length of her indeterminate term of imprisonment are moot because she has already served that term (*see People v Laney*, 117 AD3d 1481, 1482 [4th Dept 2014]). We agree with defendant, however, that the imposition of a fine was unduly harsh and severe under the circumstances of this case (*see People v Neal*, 148 AD3d 1699, 1700 [4th Dept 2017], *lv denied* 29 NY3d 1084 [2017]; *People v Judd*, 111 AD3d 1421, 1423 [4th Dept 2013], *lv denied* 23 NY3d 1039 [2014]; *see generally People v Thomas*, 245 AD2d 1136, 1137 [4th Dept 1997]). We therefore modify the judgment by vacating the fine. Defendant's remaining challenge to the fine is

academic in light of our determination.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

539

KA 19-01050

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRYAN E. GRISWOLD, DEFENDANT-APPELLANT.

CAITLIN M. CONNELLY, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Patrick F. McAllister, A.J.), rendered November 29, 2018. The judgment convicted defendant upon a plea of guilty of unlawful surveillance in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by amending the order of protection to expire on November 29, 2026, and as modified the judgment is affirmed and Steuben County Court is directed to redact all copies of defendant's presentence report in accordance with the following memorandum: On appeal from a judgment convicting him upon his plea of guilty of unlawful surveillance in the second degree (Penal Law § 250.45 [1]), defendant contends that County Court imposed several unlawful conditions of probation. We disagree. Notwithstanding that the conviction is not of a sex offense, the court did not err in requiring defendant to undergo sex offender treatment as a condition of probation (*see People v Wahl*, 302 AD2d 976, 976 [4th Dept 2003], *lv denied* 99 NY2d 659 [2003]; *People v Brown*, 34 Misc 3d 143[A], 2012 NY Slip Op 50096[U], *1 [App Term, 2d Dept, 9th & 10th Jud Dists, 2012]; *see generally People v Castaneda*, 173 AD3d 1791, 1792-1793 [4th Dept 2019], *lv denied* 34 NY3d 929 [2019], 34 NY3d 1126 [2020]).

We reject defendant's contention that the court denied him due process in relying on unsubstantiated information in the presentence report (PSR) in imposing the conditions of probation. The court explicitly stated on the record that it was not relying on the disputed characterizations in the PSR in imposing sentence. We agree with defendant, however, that the court should have granted his motion to strike any references in the PSR to defendant being a sexual predator or having sexual predatory thoughts and engaging in sexual predatory behaviors. " 'Sexual predator' " is a statutory term applicable to persons who are convicted of certain specific crimes and

have specific diagnosed mental conditions (Correction Law § 168-a [7] [a]), and defendant was not so convicted or diagnosed. We therefore direct the court to redact the PSR accordingly. We reject defendant's contention with respect to the probation officer's statement in the PSR that defendant was "grooming" the victim inasmuch as that is a commonly understood term (*see e.g. Matter of Mudge v Huxley*, 79 AD3d 1395, 1396-1397 [3d Dept 2010]).

Defendant's contention concerning the duration of the order of protection is not preserved for our review (*see People v Nieves*, 2 NY3d 310, 315-316 [2004]; *People v Collins*, 117 AD3d 1535, 1535 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014], *reconsideration denied* 24 NY3d 1218 [2015]). Nevertheless, we exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]), and we conclude that, because no determinate or indeterminate term of incarceration was imposed, the order of protection must be amended by limiting its duration to "eight years from the date of . . . sentencing" (CPL 530.13 [former (4) (A) (i)]). We therefore modify the judgment by amending the order of protection to expire on November 29, 2026.

Finally, the bargained-for sentence is not unduly harsh or severe.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

540

KA 16-01242

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENITH K. BROWN, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered May 25, 2016. The judgment convicted defendant upon a plea of guilty of attempted criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). As defendant contends and the People correctly concede, defendant's waiver of the right to appeal does not encompass his challenge to the severity of the enhanced sentence inasmuch as Supreme Court "failed to advise defendant prior to his waiver 'of the potential period of incarceration that could be imposed for an enhanced sentence' " (*People v Newton* [appeal No. 1], 173 AD3d 1680, 1680 [4th Dept 2019]; *see People v Watson*, 169 AD3d 1526, 1528 [4th Dept 2019], *lv denied* 33 NY3d 982 [2019]). Nevertheless, the sentence is not unduly harsh or severe. We have reviewed defendant's remaining contentions and conclude that none warrants reversal or modification of the judgment.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

593.1

KA 20-00886

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HILLARD SMITH, ALSO KNOWN AS MARK SMITH,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a resentence of the Supreme Court, Erie County (M. William Boller, A.J.), rendered May 18, 2018. Defendant was resentenced upon his conviction of, inter alia, criminal possession of a weapon in the third degree (two counts).

It is hereby ORDERED that the resentence so appealed from is unanimously reversed on the law and the matter is remitted to Supreme Court, Erie County, for resentencing on counts 1, 3 and 5 through 10 of the indictment.

Same memorandum as in *People v Smith* ([appeal No. 1] — AD3d — [Aug. 20, 2020] [4th Dept 2020]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

593

KA 18-00944

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HILLARD SMITH, ALSO KNOWN AS MARK SMITH,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (DEBORAH K. JESSEY 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 February 23, 2018. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree (two counts), burglary in the first degree, assault in the third degree, menacing in the second degree (two counts), criminal possession of a weapon in the third degree (two counts) and criminal contempt in the first degree (two counts).

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is modified on the law and the facts by reversing those parts convicting defendant of manslaughter in the first degree under count two of the indictment and assault in the third degree under count four of the indictment and dismissing those counts of the indictment, and as modified the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of manslaughter in the first degree (Penal Law § 125.20 [1]) as a lesser included offense of murder in the first degree (§ 125.27 [1] [a] [vii]; [b]) and murder in the second degree (§ 125.25 [1]) under counts one and two of the indictment, respectively, one count of burglary in the first degree (§ 140.30 [3] [count three]), one count of assault in the third degree (§ 120.00 [1] [count four]), two counts of menacing in the second degree (§ 120.14 [1] [counts five and eight, respectively]), and two counts of criminal possession of a weapon in the third degree (§ 265.02 [1] [counts six and nine, respectively]). In appeal No. 2, defendant appeals from the resentence on that conviction.

We note at the outset that, inasmuch as the sentence in appeal No. 1 was superseded by the resentence in appeal No. 2, the appeal from the judgment in appeal No. 1 insofar as it imposed sentence must be dismissed (*see People v Primm*, 57 AD3d 1525, 1525 [4th Dept 2008], *lv denied* 12 NY3d 820 [2009]). In addition, although the notice of appeal in appeal No. 1 relates to the judgment rendered on February 23, 2018, and not the resentence on May 18, 2018, we exercise our discretion to treat the notice of appeal as also including an appeal from the resentence (*see People v Hennigan* [appeal No. 1], 145 AD3d 1528, 1528 [4th Dept 2016], *lv denied* 29 NY3d 998 [2017]; *see also* CPL 460.10 [6]).

Contrary to defendant's contention in appeal No. 1, Supreme Court properly denied his motion to sever counts one through three of the indictment from the remaining counts. "Offenses are joinable if, inter alia, proof of either offense would be material and admissible as evidence-in-chief at the trial of the other offense" (*People v Smith*, 109 AD3d 1150, 1150-1151 [4th Dept 2013], *lv denied* 22 NY3d 1090 [2014]; *see* CPL 200.20 [2] [b]). In this case, counts one through three of the indictment arose from an April 12, 2017 incident in which defendant broke into the home of his former girlfriend and stabbed to death her then-boyfriend. The remaining counts of the indictment arose from previous, escalating acts of domestic violence by defendant against the same woman. We thus conclude that the evidence of the prior incidents was admissible with respect to the April 12, 2017 incident on the basis of overlapping evidence (*see People v Perez*, 47 AD3d 409, 410-411 [1st Dept 2008], *lv denied* 10 NY3d 843 [2008]), as well as to establish defendant's intent when he broke into the home of his former girlfriend (*see Smith*, 109 AD3d at 1150-1151; *People v Ivy*, 217 AD2d 948, 949 [4th Dept 1995], *lv denied* 86 NY2d 843 [1995]). "[O]nce the offenses were properly joined, the court lacked the statutory authority to sever" (*People v Cornell*, 17 AD3d 1010, 1011 [4th Dept 2005], *lv denied* 5 NY3d 805 [2005]; *see Smith*, 109 AD3d at 1151).

Defendant next contends in appeal No. 1 that the evidence is legally insufficient to support the conviction with respect to manslaughter in the first degree under counts one and two of the indictment, burglary in the first degree under count three of the indictment, assault in the third degree under count four of the indictment, menacing in the second degree under count five of the indictment, and criminal possession of a weapon in the third degree under count six of the indictment. By failing to renew his motion for a trial order of dismissal after presenting evidence, defendant failed to preserve his contention for our review (*see People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]; *People v Norman*, 183 AD3d 1240, 1242 [4th Dept 2020]). Nonetheless, " 'we necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of defendant's challenge regarding the weight of the evidence' " (*People v Gibson*, 134 AD3d 1512, 1514 [4th Dept 2015], *lv denied* 27 NY3d 1151 [2016]). 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

with respect to counts one, two, three, five, and six is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). We agree with defendant, however, that the verdict with respect to count four is against the weight of the evidence. With respect to that count, which arose from a January 10, 2017 incident in which defendant struck his former girlfriend with a closed fist, we conclude that the People failed to present evidence establishing beyond a reasonable doubt that she sustained a physical injury (*see Gibson*, 134 AD3d at 1513-1514). We thus modify the judgment by reversing that part convicting defendant of assault in the third degree under count four of the indictment and dismissing that count of the indictment.

Defendant further contends in appeal No. 1 that he should not have been convicted under both count one and count two of the indictment inasmuch as count two of the indictment, which charged him with murder in the second degree (Penal Law § 125.25 [1]), is a lesser included offense of murder in the first degree (§ 125.27 [1] [a] [vii]; [b]), the offense charged in count one of the indictment (*see People v Brown*, 181 AD3d 701, 703 [2d Dept 2020]; *People v Jeremiah*, 147 AD3d 1199, 1206 [3d Dept 2017], *lv denied* 29 NY3d 1033 [2017]). We agree. Initially, we note that defendant was not required to preserve his contention for our review (*see People v Bank*, 129 AD3d 1445, 1448 [4th Dept 2015], *affd* 28 NY3d 131 [2016]). Under the circumstances here, the court should have instructed the jury to consider count two "only in the alternative as an inclusory concurrent count" of count one (*People v Flecha*, 43 AD3d 1385, 1386 [4th Dept 2007], *lv denied* 9 NY3d 990 [2007]; *see* CPL 300.40 [3] [b]). The court, however, erred when it did not instruct the jury to consider counts one and two in the alternative and instead directed the jury to consider the lesser included offenses of manslaughter in the first degree and manslaughter in the second degree for *each* of the two murder charges. That error resulted in the jury improperly returning a verdict convicting defendant of two identical counts of manslaughter in the first degree with respect to the same victim. We therefore further modify the judgment by reversing the conviction of manslaughter in the first degree under count two of the indictment and dismissing that count of the indictment (*see People v McIntosh*, 162 AD3d 1612, 1618 [4th Dept 2018], *affd* 33 NY3d 1064 [2019]; *Bank*, 129 AD3d at 1448-1449).

We have reviewed defendant's remaining contentions in appeal No. 1 and conclude that none requires further modification or reversal of the judgment.

In appeal No. 2, defendant contends, and the People correctly concede, that defendant's 2006 conviction of robbery with firearms or other dangerous weapons under North Carolina law (*see* NC Gen Stat § 14-87 [a]) does not constitute a predicate violent felony conviction (*see* Penal Law § 70.04 [1] [b] [i]; *People v Durant*, 121 AD3d 709, 710 [2d Dept 2014]). Therefore, we reverse the resentence and remit the matter to Supreme Court for resentencing on counts 1, 3 and 5 through 10 of the indictment (*see People v Moss*, 147 AD3d 1297, 1298 [4th Dept

2017]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

595

KA 16-02269

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JHON POLANCO, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BENJAMIN L. NELSON 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 August 1, 2016. The judgment convicted defendant upon his plea of guilty of attempted robbery in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [3]). We agree with defendant that Supreme Court erred in failing to determine whether he should be afforded youthful offender status (*see People v Rudolph*, 21 NY3d 497, 501 [2013]; *People v Lester*, 155 AD3d 1579, 1579 [4th Dept 2017], *lv denied* 32 NY3d 1206 [2019]). As the People correctly concede, defendant is an eligible youth, and a sentencing court must make "a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it" (*Rudolph*, 21 NY3d at 501; *see People v Willis*, 161 AD3d 1584, 1584 [4th Dept 2018]). We therefore hold the case, reserve decision, and remit the matter to Supreme Court to make and state for the record a determination whether defendant should be afforded youthful offender status (*see People v Singleton-Pradia*, 170 AD3d 1520, 1520-1521 [4th Dept 2019]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

609.1

KA 19-01040

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL BRYANT, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON 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 April 18, 2019. The judgment convicted defendant upon his plea of guilty of attempted assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [7]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. The record establishes that the oral waiver, together with the written waiver of the right to appeal, was knowing, intelligent, and voluntary (*see People v Thomas*, 34 NY3d 545, 560-563 [2019]; *People v Lopez*, 6 NY3d 248, 256 [2006]), and that valid waiver forecloses his challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 255; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

609.2

KA 18-02407

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRANCE LOVE, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP 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 (Russell P. Buscaglia, A.J.), rendered June 1, 2018. The judgment convicted defendant, upon a plea of guilty, of 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 his plea of guilty, of robbery in the first degree (Penal Law § 160.15 [3]). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our review of his challenge to the severity of his sentence (*see People v Love*, 181 AD3d 1193, 1193 [4th Dept 2020]), we conclude that the sentence is not unduly harsh or severe.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

629

CA 19-00788

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

JAMES E. CONARTON, ON BEHALF OF HIMSELF
AND ALL PERSONS SIMILARLY SITUATED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HOLY SMOKE BBQ AND CATERING, LLC,
DEFENDANT-APPELLANT.

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

CERIO LAW OFFICES, SYRACUSE (MICHAEL D. ROOT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered April 18, 2019. The order granted plaintiff's motion for class action certification and denied defendant's cross motion to dismiss the complaint.

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

Memorandum: Defendant appeals from an order that granted plaintiff's motion for class action certification and denied defendant's cross motion to dismiss the complaint. Initially, although it is generally improper for the moving party to submit evidence for the first time with its reply papers, Supreme Court may consider such evidence where, as here, the opposing party has the opportunity to submit a surreply (*see Ferrari v National Football League*, 153 AD3d 1589, 1590 [4th Dept 2017]). Contrary to defendant's contention, we conclude that the court properly granted the motion inasmuch as plaintiff relied on evidence that satisfied the five prerequisites set forth in CPLR 901 (a) (*see Ferrari*, 153 AD3d at 1591-1593), and the factors set forth in CPLR 902 (*see id.* at 1593). We have reviewed defendant's remaining contentions and conclude that they do not require reversal or modification of the order.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

630.1

KA 18-01962

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DESHAUN SOMERS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered October 2, 2017. The judgment convicted defendant upon a plea of guilty of manslaughter in the second degree.

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

Memorandum: Defendant appeals, in appeal No. 1, from a judgment convicting him upon his plea of guilty of manslaughter in the second degree (Penal Law § 125.15 [1]). In appeal No. 2, he appeals from a judgment, also entered upon a plea of guilty, convicting him of aggravated harassment of an employee by an inmate (§ 240.32). Defendant contends in both appeals that he did not validly waive his right to appeal, and that the sentences are unduly harsh and severe. We agree with defendant that he did not validly waive his right to appeal. Because County Court provided defendant with erroneous information about the scope of the waiver of the right to appeal, including characterizing that waiver as an absolute bar to the taking of an appeal, we conclude that the colloquy was insufficient to ensure that the waiver was voluntary, knowing, and intelligent (*see People v Thomas*, 34 NY3d 545, 560-564 [2019], *cert denied* — US — [Mar. 30, 2020]). The better practice is for the court to use the Model Colloquy, "which 'neatly synthesizes . . . the governing principles' " (*People v Dozier*, 179 AD3d 1447, 1447 [4th Dept 2020], *lv denied* 35 NY3d 941 [2020], quoting *Thomas*, 34 NY3d at 567; *see* NY Model Colloquies, Waiver of Right to Appeal). Nevertheless, we conclude that the sentences are not unduly harsh or severe.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

630.2

KA 19-00068

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DESHAUN SOMERS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered October 2, 2017. The judgment convicted defendant, upon a plea of guilty, of aggravated harassment of an employee by an inmate.

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

Same memorandum as in *People v Somers* ([appeal No. 1] — AD3d — [Aug. 20, 2020] [4th Dept 2020]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

630.3

KA 18-02066

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MELVIN WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered May 3, 2018. The judgment convicted defendant upon a plea of guilty of robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [4]), defendant contends that the waiver of the right to appeal is not valid and he challenges the severity of the sentence. We agree with defendant that the waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 562-563 [2019], *cert denied* — US — [Mar. 30, 2020]), and we note that the better practice for County Court is "to use the Model Colloquy, which 'neatly synthesizes . . . the governing principles' " (*People v Dozier*, 179 AD3d 1447, 1447 [4th Dept 2020], *lv denied* 35 NY3d 941 [2020], quoting *Thomas*, 34 NY3d at 567; *see* NY Model Colloquies, Waiver of Right to Appeal). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

652

CA 19-01164

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

PAULA L. GIBBS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STATE FARM FIRE AND CASUALTY COMPANY,
DEFENDANT-RESPONDENT.

PAULA L. GIBBS, PLAINTIFF-APPELLANT PRO SE.

MURA & STORM, PLLC, BUFFALO (JERRY MARTI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered November 28, 2018. The order, among other things, granted defendant's motion for sanctions as against plaintiff.

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

Memorandum: Plaintiff appeals from an order that, inter alia, granted the motion of defendant seeking the imposition of sanctions against plaintiff and denied plaintiff's request that sanctions be imposed against defendant and its counsel. Contrary to plaintiff's contention, we conclude that Supreme Court did not abuse its discretion in imposing a sanction against plaintiff for her frivolous conduct in disregarding its order settling the record for another appeal (*see* 22 NYCRR 130-1.1 [c] [1]; *Place v Chaffee-Sardinia Volunteer Fire Co.*, 143 AD3d 1271, 1272 [4th Dept 2016]; *Vacation Vil. Homeowners' Assn. v Mordkofsky*, 265 AD2d 746, 746-747 [3d Dept 1999], *appeal dismissed* 94 NY2d 898 [2000]). We further conclude that the court did not err in denying plaintiff's request for sanctions. Plaintiff "did not make a proper motion for such relief" (*Nicit v Nicit*, 181 AD2d 1046, 1047 [4th Dept 1992]; *see* CPLR 2214, 2215; 22 NYCRR 130.1-1 [d]) and, in any event, plaintiff's contention that the court abused its discretion in denying her request for the imposition of sanctions against defendant and its counsel, to the extent that it is properly before us in the context of this appeal, is without merit (*see Amherst Magnetic Imaging Assoc. v Community Blue, HMO of Blue Cross of W. N.Y.*, 286 AD2d 896, 898 [4th Dept 2001], *lv denied* 97 NY2d 612 [2002]; *Peck v Voss*, 265 AD2d 890, 891 [4th Dept 1999]).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

685

KA 18-01289

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BERNARD DORTCH, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, SULLIVAN & CROMWELL LLP, NEW YORK CITY (JULIA A. MALKINA 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 April 16, 2018. The judgment convicted defendant, after a nonjury trial, of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is reversed on the law, those parts of the omnibus motion seeking to suppress physical evidence and statements are granted, the indictment is dismissed, and the matter is remitted to Supreme Court, Monroe County, for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him, after a nonjury trial, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We agree with defendant that Supreme Court erred in refusing to suppress the physical evidence found on his person and his subsequent statements to the police.

In his omnibus motion, defendant sought to suppress that evidence on various grounds. Specifically, he asserted that the police did not possess probable cause or reasonable suspicion to stop him, inasmuch as the police misidentified him as his brother. Defendant also asserted that "[n]o arrest warrant or search warrant had been issued against [him]." Furthermore, defendant "specifically challenge[d] both the reliability and sufficiency of hearsay information" relied on by the arresting officers.

At the suppression hearing, the People called three Rochester police officers. One of the officers testified that he observed defendant standing on the sidewalk in the City of Rochester and mistakenly identified defendant for defendant's brother. That officer and another officer testified that defendant and his brother look

alike and share the same general physical characteristics. One of the officers testified that defendant's brother had two outstanding arrest warrants, and that officer informed his fellow officers of the warrants. According to the officers' testimony, the police then approached defendant, who fled on foot. The police eventually apprehended defendant and placed him under arrest based upon the arrest warrants issued for defendant's brother. The officers then searched defendant's person and found a loaded revolver in his jacket pocket and, after waiving his *Miranda* rights, defendant made statements admitting to his possession of the handgun.

We agree with defendant that, under the circumstances of this case, the People failed to meet their burden of establishing the existence of the alleged valid and outstanding warrants justifying the stop and search of defendant (*see generally People v Jennings*, 54 NY2d 518, 520 [1981]). It is well settled that, although "a defendant who challenges the legality of a search and seizure has the burden of proving illegality, the People are nevertheless put to the burden of going forward to show the legality of the police conduct in the first instance" (*People v Berrios*, 28 NY2d 361, 367-368 [1971] [internal quotation marks and emphasis omitted]).

As relevant to this appeal, " '[t]he arrest of a person who is mistakenly thought to be someone else is valid if the arresting officer (a) has probable cause to arrest the person sought, and (b) reasonably believed the person arrested was the person sought' " (*People v Tejada*, 270 AD2d 655, 657 [3d Dept 2000], *lv denied* 95 NY2d 805 [2000]). The " 'reasonableness of the arresting officers' conduct must be determined by considering the totality of the circumstances surrounding the arrest' " (*id.*). Thus, to establish a lawful arrest of defendant, the People were required to establish the existence of a validly issued arrest warrant for defendant's brother or probable cause to arrest him (*see People v Lee*, 126 AD2d 568, 569-570 [2d Dept 1987]) and, here, the People concede that the police arrested defendant based only upon the arrest warrants issued for defendant's brother.

Contrary to the People's position and the dissent's assertion, we conclude that defendant challenged the existence and validity of the arrest warrants for his brother by questioning the police witnesses at the suppression hearing concerning the status of the arrest warrants and whether they were still valid (*see People v Richards*, 151 AD3d 1717, 1718-1719 [4th Dept 2017]; *cf. People v Boone*, 269 AD2d 459, 459 [2d Dept 2000], *lv denied* 95 NY2d 850 [2000], *reconsideration denied* 95 NY2d 961 [2000]). Notably, the court acknowledged and "accept[ed] that the [d]efendant [was] in fact contesting the validity of [the] warrants." Once defendant challenged the existence and validity of the arrest warrants, the People were " 'required to make a further evidentiary showing by producing the . . . warrant[s]' " (*Richards*, 151 AD3d at 1719), or "reliable evidence that the warrant[s were] active and valid" (*People v Searight*, 162 AD3d 1633, 1635 [4th Dept 2018]). Here, the People failed to meet their burden inasmuch as they failed to produce the arrest warrants themselves or other reliable evidence that the warrants were active and valid (*see id.*; *People v*

Lopez, 206 AD2d 894, 894 [4th Dept 1994], *lv denied* 84 NY2d 937 [1994]; *cf. Boone*, 269 AD2d at 459). The dissent's reliance on the officers' testimony alone is misplaced and not supported by the case law.

Thus, inasmuch as the People failed to meet their burden of showing the legality of the police conduct in arresting defendant in the first instance, we conclude that the court erred in refusing to suppress the physical evidence seized and defendant's subsequent statements. Because our determination results in the suppression of all evidence supporting the crime charged, the indictment must be dismissed (*see Searight*, 162 AD3d at 1635; *Lee*, 126 AD2d at 569-570; *see also People v Wallace*, 181 AD3d 1214, 1217 [4th Dept 2020]).

All concur except NEMOYER and WINSLOW, JJ., who dissent and vote to affirm in the following memorandum: The majority holds that the People failed to show that the police acted lawfully in arresting defendant. We cannot agree. We therefore respectfully dissent and vote to affirm.

The evidence at the suppression hearing established that defendant was arrested because the police mistook him for his brother, Sheffield Dortch, and it is undisputed that Sheffield had two outstanding warrants. According to the hearing testimony, the officers were looking for Sheffield on the date in question, and one officer explained that he confirmed the continued existence of the warrants "almost every day" and "almost every shift when [he] was looking for [Sheffield]." Notably, defendant never specifically challenged the existence or validity of Sheffield's warrants; indeed, defendant only questioned the relevant officer about his actions in checking those warrants. That, in our view, should be the end of the matter; defendant did not preserve the argument upon which the majority grants relief, i.e., that the People failed to prove the existence and validity of Sheffield's warrants (*see People v Dodt*, 61 NY2d 408, 416 [1984]).

But even assuming that the issue is adequately preserved, the law favors upholding the suppression court's resolution of the merits. The arrest of a person mistaken for someone else is valid if the arresting officer was legally authorized to arrest the person sought and " 'reasonably believed the person arrested was the person sought' " (*People v Tejada*, 270 AD2d 655, 657 [3d Dept 2000], *lv denied* 95 NY2d 805 [2000]). Moreover, the existence of a warrant can be established *either* by producing the instrument itself *or* by adducing reliable evidence that the warrant was active and valid at the time in question (*see People v Searight*, 162 AD3d 1633, 1635 [4th Dept 2018]). Here, as the suppression court found, the police "undertook due diligence repeatedly to assure that Sheffield Dortch's warrants were in fact still active and that [the officer's] inquiry, on the date in question or the day prior, is adequate assurance that valid warrants existed for the arrest of Sheffield." Thus, given the People's reliable evidence that Sheffield's warrants were active and valid at the time of defendant's arrest, there can be no doubt that the police were legally authorized to arrest Sheffield, and there is

no dispute that the police reasonably believed that defendant was Sheffield. It follows that defendant was lawfully arrested, and that the evidentiary fruits of that arrest were properly admitted (*see People v Boone*, 269 AD2d 459, 459 [2d Dept 2000], *lv denied* 95 NY2d 850 [2000], *reconsideration denied* 95 NY2d 961 [2000]; *see also People v Lee*, 126 AD2d 568, 569 [2d Dept 1987]; *People v Ferguson*, 115 AD2d 615, 616 [2d Dept 1985]). The judgment should accordingly be affirmed.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

704

KA 15-00415

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JACOB A. HORN, DEFENDANT-APPELLANT.

FELDMAN AND FELDMAN, MANHASSET (STEVEN A. FELDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Marianne Furfure, A.J.), rendered December 23, 2014. The judgment convicted defendant upon a jury verdict of murder in the second degree, criminal possession of a weapon in the third degree and tampering with physical evidence (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [1]). We affirm. The case arose from the violent death of an alleged drug dealer and white supremacist whose body the police found concealed in the cupboard of an abandoned mansion. Defendant has given three inconsistent accounts of the victim's death. First, he told his fiancée that he killed the victim in a rage. Then, he told a police investigator that he killed the victim in self-defense. Later, at trial, he testified that his accomplice coerced him into participating in the murder and subsequently lying to the police.

At the outset, we note that defendant failed to preserve for our review his contention that he was denied his Fourteenth Amendment right to a fair trial by County Court's rulings (*see People v Lane*, 7 NY3d 888, 889 [2006]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant contends that the evidence is legally insufficient to support the conviction of murder in the second degree because he proved the affirmative defense of duress by a preponderance of the evidence, thereby negating the element of intent. Defendant failed to preserve that contention for our review because his motion for a trial

order of dismissal was not " 'specifically directed' " at the alleged error (*People v Gray*, 86 NY2d 10, 19 [1995]; *cf. People v Hammond*, 84 AD3d 1726, 1726 [4th Dept 2011], *lv denied* 17 NY3d 816 [2011]). In any event, even assuming, arguendo, that defendant established duress, we reject his contention that such a defense would negate the requisite intent to kill (*see* Penal Law § 125.25 [1]). Duress is an affirmative defense that does not negate any of the elements that the People are required to prove in the first instance, such as intent (*see* § 40.00; *People v Bastidas*, 67 NY2d 1006, 1007 [1986], *rearg denied* 68 NY2d 907 [1986]; *see also United States v Leal-Cruz*, 431 F3d 667, 671 [9th Cir 2005]). Furthermore, we conclude that defendant's confession to his fiancée and his statement to the police constitute legally sufficient evidence that he intended to kill the victim (*see People v Geddes*, 49 AD3d 1255, 1256 [4th Dept 2008], *lv denied* 10 NY3d 863 [2008]).

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

Defendant further contends that the court abused its discretion by allowing the prosecutor to question him about his sex life. More particularly, the prosecutor asked defendant during cross-examination whether he lied to his fiancée in order to convince her to have unprotected sex with him by falsely telling her that he had not had unprotected sex with other women. Insofar as defendant contends that the testimony is irrelevant, we reject his contention. A testifying defendant "may be cross-examined concerning any immoral, vicious or criminal acts of his [or her] life [that] have a bearing on his [or her] credibility as a witness, provided the cross-examiner questions in good faith and upon a reasonable basis in fact" (*People v Duffy*, 36 NY2d 258, 262 [1975], *mot to amend remittitur granted* 36 NY2d 857 [1975], *cert denied* 423 US 861 [1975]). The testimony here was relevant to defendant's credibility and was properly admitted for impeachment purposes (*see People v Chebere*, 292 AD2d 323, 324 [1st Dept 2002], *lv denied* 98 NY2d 673 [2002]; *People v Roberts*, 197 AD2d 867, 868 [4th Dept 1993], *lv denied* 82 NY2d 901 [1993]). Insofar as defendant contends that the probative value of the testimony at issue was substantially outweighed by its prejudicial effect, he failed to preserve his contention for our review because he did not object to the testimony on that ground (*see People v Cullen*, 110 AD3d 1474, 1475 [4th Dept 2013], *affd* 24 NY3d 1014 [2014]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's contention that the court abused its discretion by admitting seven photographs of his body in evidence for the alleged purpose of showing that he did not sustain injury in the incident. Those photographs were relevant to disprove self-defense, which the People reasonably anticipated would be raised by defendant

(*see People v Di Bella*, 277 AD2d 699, 702 [3d Dept 2000], *lv denied* 96 NY2d 758 [2001]). Although defendant further contends that the court abused its discretion by admitting in evidence an eighth photograph depicting a "666" tattoo on his neck, defendant failed to preserve his contention for our review (*see People v Dickerson*, 42 AD3d 228, 236-237 [1st Dept 2007], *lv denied* 9 NY3d 960 [2007]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We agree with defendant, however, that the court abused its discretion when it permitted the prosecutor to play for the jury a scene from the film, *The Boondock Saints*. The scene takes place inside a courtroom, where the protagonists threaten everyone with pistols. Some people in the scene, presumably those playing the jurors, watch in astonishment while ducking for cover. The protagonists make loud, self-aggrandizing statements, declaring themselves vigilantes tasked by God with bringing justice to the world (*e.g.* "Each day we will spill their blood till it rains down from the sky!"). For those who do not behave morally, the protagonists offer a message: "One day you will look behind you and you will see we three . . . and we will send you to whichever God you wish." The protagonists put their guns to the back of the defendant's head while he is knelt on the floor in an execution-style pose. Gunfire erupts, and everyone runs out of the courthouse screaming.

The prosecutor's ostensible reason for playing that particular scene was to rebut defendant's testimony that he was coerced by his accomplice into participating in the murder and subsequently lying to the police. The relevance of that scene is that defendant posted quotations from it on social media two days after the victim's murder and one day before he gave the allegedly coerced statement to the police.

Although that scene from *The Boondock Saints* was relevant for that purpose, relevant evidence "may still be excluded by the trial court in the exercise of its discretion if its probative value is substantially outweighed by the danger that it will unfairly prejudice the other side or mislead the jury" (*People v Scarola*, 71 NY2d 769, 777 [1988]). Here, the prejudice created by playing that scene results not only from the possibility that the jury would perceive defendant's taste in movies to be an endorsement of violence. The violence in question was directed in part against a jury during a criminal trial, and thus the scene also likely affected the jury's objectivity. Moreover, the scene degrades the criminal justice system, and the jury system in particular, implying that the reasonable doubt legal standard is responsible for freeing murderers and that justice can only be accomplished by vigilantes. On the other hand, the scene had little probative value. Defendant never actually posted the video on social media; he only quoted from it. The prosecutor could simply have asked defendant on cross-examination whether the quote referenced a scene from a film in which vigilantes execute a criminal. Playing the scene served no purpose other than to prejudice the jury against defendant. Because the probative value of the scene from *The Boondock Saints* video was substantially outweighed

by the danger that its admission would prejudice defendant or mislead the jury, the court abused its discretion in admitting it (*see People v Herman*, 187 AD2d 1027, 1028 [4th Dept 1992]; *cf. Scarola*, 71 NY2d at 777).

Nevertheless, we conclude that the error is harmless. The evidence against defendant is overwhelming and there is no "significant probability" that the jury would have acquitted defendant but for the error (*People v Crimmins*, 36 NY2d 230, 242 [1975]; *see People v Taylor*, 148 AD3d 1607, 1608 [4th Dept 2017]). There is no dispute that defendant participated in the victim's murder. Prior to trial, defendant gave two differing accounts of the murder but, in both versions, he acknowledged intentionally killing the victim. Then, at trial, he tried to blame his accomplice, presenting an implausible duress defense. An acquittal would not have been impossible, but we cannot conclude that under the circumstances there would have been a significant probability of acquittal had the jury not watched *The Boondock Saints*. Although we conclude that reversal is unwarranted on that ground, we take this opportunity to admonish the prosecutor and to remind him that "prosecutors have 'special responsibilities . . . to safeguard the integrity of criminal proceedings and fairness in the criminal process' " (*People v Huntsman*, 96 AD3d 1387, 1388 [4th Dept 2012], *lv denied* 20 NY3d 1099 [2013], quoting *People v Santorelli*, 95 NY2d 412, 421 [2000]).

We reject defendant's related contention concerning the admission of another clip featuring a video montage of the *Sons of Anarchy* television program, which defendant posted on his social media page on the same date that he posted the quote from *The Boondock Saints*. We conclude that the *Sons of Anarchy* video was relevant, and that its probative value was not outweighed by its potential for prejudice (*see generally People v Hayes*, 168 AD3d 489, 490 [1st Dept 2019], *lv denied* 33 NY3d 977 [2019]).

Defendant further contends that the *Sandoval* ruling was an abuse of discretion (*see People v Standsblack*, 162 AD3d 1523, 1524-1525 [4th Dept 2018], *lv denied* 32 NY3d 1008 [2018]). We reject that contention. Because the crime of criminal impersonation "involve[s] acts of dishonesty and thus [was] probative with respect to the issue of defendant's credibility," the court did not abuse its discretion in allowing the People to question defendant about that conviction on cross-examination (*see People v Thomas*, 165 AD3d 1636, 1637 [4th Dept 2018], *lv denied* 32 NY3d 1129 [2018], *cert denied* — US —, 140 S Ct 257 [2019] [internal quotation marks omitted]).

We reject defendant's contention that the People violated CPL 710.30. The People were not required to include his statement that the victim "could take a hit" in a CPL 710.30 notice because the statement was used solely for purposes of impeachment (*see People v Gunter*, 284 AD2d 932, 932 [4th Dept 2001], *lv denied* 96 NY2d 902 [2001]; *People v Rigo*, 273 AD2d 258, 258-259 [2d Dept 2000], *lv denied* 95 NY2d 937 [2000]; *People v Sanzotta*, 191 AD2d 1032, 1032 [4th Dept 1993]).

Contrary to defendant's further contention, the court did not err in failing to, sua sponte, charge the jury on intoxication given defendant's theory at trial (*see People v Herrera*, 161 AD3d 1006, 1007 [2d Dept 2018], *lv denied* 33 NY3d 1105 [2019], *reconsideration denied* 34 NY3d 951 [2019]). Contrary to defendant's related contention, counsel was not ineffective for failing to request such a charge or for any additional reason claimed by defendant. Viewing the evidence, the law and the circumstances of the case, in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant failed to preserve his remaining contentions for our review, and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

All concur except LINDLEY, J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent because I do not agree with the majority that County Court's error in admitting in evidence the video of a scene from *The Boondock Saints* is harmless. The error is not harmless because the proof of guilt is not overwhelming. I would thus reverse the judgment and grant defendant a new trial on counts one, two, three, five and six of the indictment.

The evidence in this case established that the victim was killed after being repeatedly struck in the head with a fire poker. There is no dispute that defendant and his codefendant were the only people present when the victim was killed. Thus, we know that one or both of them committed the murder. We also know that the codefendant alone returned to the crime scene with bleach and ammonia hours after the murder and attempted to clean blood from the floors and walls. Defendant told his girlfriend the next day that he killed the victim in a fit of rage. When later questioned by the police, however, defendant said that he alone killed the victim in self-defense after they argued about Adolf Hitler. Oddly, the codefendant, who was questioned separately, admitted to the police that he alone killed the victim. The codefendant later pleaded guilty to murder in the second degree in return for a sentence promise of 20 years to life. The codefendant was awaiting sentencing when defendant's case went to trial.

During their direct case, the People relied primarily on defendant's admissions that he killed the victim. The parties stipulated that the codefendant already pleaded guilty to murder and would invoke his rights under the Fifth Amendment if called to the stand. Although both defendant and the codefendant were charged as accessories, the People presented no evidence indicating how defendant aided and abetted the codefendant in the killing, nor did they present any evidence of how the codefendant aided and abetted defendant. Instead, when the People rested, their theory was that defendant killed the victim as a principal.

When defendant took the stand, he raised the defense of duress,

testifying that the codefendant struck the victim multiple times in the back of the head with a fire poker and then handed the weapon to defendant and demanded that he strike the victim as well. Defendant further testified that he felt threatened by the codefendant, who previously claimed to have killed another person, and that he was horrified to see the victim killed in such a brutal manner by the codefendant's unprovoked violence. According to defendant, he swung the fire poker once at the victim after the victim had already been struck multiple times in the head by the codefendant. Defendant believed that the victim was probably dead when he struck him.

On cross-examination, the prosecutor sought to admit in evidence a video of an extremely violent scene from *The Boondock Saints*, which defendant acknowledged was his favorite movie and from which he quoted on social media. According to the People, the scene was relevant to defendant's state of mind when he confessed to the police. Over defendant's objection, the court admitted the video, which was played for the jury. The court also allowed the prosecutor to introduce a video depicting a violent scene from the television show *Sons of Anarchy* that defendant had posted on social media.

Although the majority agrees with the People that the videos were relevant, it concludes that the court abused its discretion in admitting in evidence the scene from *The Boondock Saints* on the ground that its prejudicial effect greatly exceeds its probative value, stating that "[p]laying the scene served no purpose other than to prejudice the jury against defendant." The majority nevertheless finds the error to be harmless given that defendant admitted to the police and his girlfriend that he intentionally killed the victim and that he undisputedly was present when the murder was committed.

In my view, neither video was relevant to any material issue. The fact that defendant enjoyed violent television shows and movies does not contradict his testimony that he was horrified to see the codefendant repeatedly strike the victim in the head with a fire poker, nor does that fact in any way undermine defendant's duress claim. Moreover, as the majority concludes, the probative value of the scene from *The Boondock Saints* was substantially outweighed by its prejudicial effect, which was enormous considering the content, as described above by the majority. We thus all agree that the court erred in admitting the movie scene in evidence even if the court was correct in finding it to be relevant. The question then becomes whether the error is harmless.

"Under our traditional harmless error analysis, an appellate court does not reach the question of prejudice unless the evidence is overwhelming in the first instance" (*People v Mairena*, 34 NY3d 473, 484 [2019]). As the Court of Appeals stated long ago, "unless the proof of the defendant's guilt, without reference to the error, is overwhelming, there is no occasion for consideration of any doctrine of harmless error" (*People v Crimmins*, 36 NY2d 230, 241 [1975]). "That is, every error of law (save, perhaps, one of sheerest technicality) is, *ipso facto*, deemed to be prejudicial and to require a reversal, unless that error can be found to have been rendered

harmless by the weight and the nature of the other proof" (*id.*).

Although " 'overwhelming proof of guilt' cannot be defined with mathematical precision" (*id.*), it stands to reason that overwhelming proof of guilt requires more evidence of guilt than proof beyond a reasonable doubt. If that were not so, then all errors would be harmless in cases where the verdict is not against the weight of the evidence.

Here, giving deference to the jury's credibility determinations, I would agree that the People proved defendant's guilt of murder in the second degree beyond a reasonable doubt and that, viewing the evidence in light of the elements of that crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). "Although a different verdict would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded" (*People v Metales*, 171 AD3d 1562, 1564 [4th Dept 2019], *lv denied* 33 NY3d 1107 [2019]; *see Bleakley*, 69 NY2d at 495).

I cannot agree, however, that there is overwhelming proof of defendant's guilt. While defendant admitted to the police that he alone killed the victim, that admission of sole culpability is belied by the fact that the codefendant pleaded guilty to intentional murder for killing the same person. The same is true of defendant's admission to his girlfriend.

Here, the only evidence that defendant acted as an accessory to the criminal conduct of the codefendant is defendant's testimony that he struck the victim once after the codefendant had unexpectedly struck the victim multiple times in the head with the fire poker. If that is really what happened, it lends credence to defendant's claim of duress. Moreover, if the codefendant had repeatedly struck the victim in the head before handing the fire poker to defendant, it raises a question whether the victim was already dead when he was struck by defendant, as defendant suggested during his testimony. Even though the jury evidently did not credit defendant's testimony, it does not necessarily follow that the proof of guilt is overwhelming.

Considering that there is no evidence that the murder was planned or premeditated, it appears that either defendant or the codefendant suddenly decided to kill the victim for some unknown reason by striking him in the head with the fire poker. That likely scenario leaves little room for accomplice liability. Given that the codefendant pleaded guilty to intentional murder, the proof is far from overwhelming that defendant alone killed the victim. And considering that the only evidence of defendant's guilt as an accessory is his own testimony, which also supports his duress defense, the proof of defendant's guilt as an accessory is similarly not overwhelming. In sum, there are too many unanswered questions in this case for us to conclude that the court's egregious evidentiary ruling constitutes harmless error.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

714.1

CAF 19-00856

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

IN THE MATTER OF RAYMOND H., JR.

ORLEANS COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DANA C., RESPONDENT-APPELLANT.

ANDREW G. MORABITO, EAST ROCHESTER, FOR RESPONDENT-APPELLANT.

KATHERINE K. BOGAN, COUNTY ATTORNEY, MEDINA (WENDY S. SISSON OF COUNSEL), FOR PETITIONER-RESPONDENT.

CHARLES PLOVANICH, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Orleans County (Michael F. Griffith, A.J.), entered March 26, 2019 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

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

Memorandum: In a proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order that, inter alia, revoked a suspended judgment and terminated her parental rights with respect to the subject child. The mother's contentions were not raised before Family Court and are therefore unpreserved for our review (*see Matter of Michael S. [Charle S.]*, 182 AD3d 1053, 1054 [4th Dept 2020]; *Matter of Guck v Prinzing*, 100 AD3d 1507, 1508 [4th Dept 2012], *lv denied* 21 NY3d 851 [2013]). Moreover, the mother's contentions are directed at the "prior order finding permanent neglect and suspending judgment [that] was entered on consent of [the mother] and thus is beyond appellate review" (*Matter of Aiden T. [Melissa S.]*, 164 AD3d 1663, 1665 [4th Dept 2018], *lv denied* 32 NY3d 917 [2019] [internal quotation marks omitted]; *see Matter of Xavier O.V. [Sabino V.]*, 117 AD3d 1567, 1567 [4th Dept 2014], *lv denied* 24 NY3d 903 [2014]). We therefore conclude that the mother's appeal must be dismissed.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

716

KA 18-00931

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES M. PELLIS, DEFENDANT-APPELLANT.

MICHAEL G. CIANFARANO, OSWEGO, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Oswego County Court (Donald E. Todd, J.), dated February 22, 2018. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Contrary to defendant's contention, County Court properly considered his youthful offender adjudication for burglary in the second degree when assessing points under risk factor 9 (*see People v Francis*, 30 NY3d 737, 747-748 [2018]; *People v Gamble*, 141 AD3d 1119, 1119 [4th Dept 2016], *lv dismissed* 28 NY3d 1044 [2016]; *People v Williams*, 122 AD3d 1378, 1379 [4th Dept 2014]). Burglary in the second degree is a class C violent felony offense (*see* Penal Law § 70.02 [1] [b]), and thus based on that youthful offender adjudication the court properly assessed 30 points under risk factor 9 (*see People v Vasquez*, 89 AD3d 816, 816 [2d Dept 2011]; *People v Stacconi*, 81 AD3d 1046, 1046-1047 [3d Dept 2011]), which, when combined with the points assessed under the other relevant risk factors not at issue on this appeal, rendered defendant a presumptive level three risk.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

717

KA 18-01798

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TROY JONES, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SHERRY A. CHASE 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 June 27, 2017. The judgment convicted defendant upon a plea of guilty of attempted robbery 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: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [2]), and criminal possession of a weapon in the second degree (§ 265.03 [3]). He contends that he did not validly waive his right to appeal and that the sentence is unduly harsh and severe.

Contrary to defendant's contention, the waiver of the right to appeal is valid because, during the colloquy, County Court established that the right to appeal was "separate and distinct" from those rights automatically forfeited by pleading guilty (*People v Lopez*, 6 NY3d 248, 256 [2006]; *see People v Bryant*, 28 NY3d 1094, 1096 [2016]), and did not "utterly mischaracterize[] the nature of the right . . . defendant was being asked to cede" (*People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US — [Mar. 30, 2020] [internal quotation marks omitted]).

The valid waiver of the right to appeal encompasses defendant's challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 255-256).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

733

CA 18-01355

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

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

V MEMORANDUM AND ORDER

DONALD G., RESPONDENT-APPELLANT.

KAMAN BERLOVE MARAFIOTI JACOBSTEIN & GOLDMAN, LLP, ROCHESTER (GARY MULDOON OF COUNSEL), FOR RESPONDENT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FREDERICK A. BRODIE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered June 29, 2018 in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, granted the motion of petitioner to set aside a jury verdict and ordered a new trial.

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

Memorandum: Petitioner commenced this proceeding pursuant to Mental Hygiene Law article 10, alleging that respondent is a sex offender requiring civil management. After a jury trial, the jury found that respondent is not a detained sex offender suffering from a mental abnormality (*see* §§ 10.03 [i]; 10.07 [d]). Thereafter, Supreme Court granted petitioner's motion to set aside the verdict pursuant to CPLR 4404 (a) on the ground of juror misconduct. That was error. We therefore reverse the order, deny the motion, and reinstate the jury verdict (*see generally Ortega v Healthcare Servs. Group, Inc.*, 166 AD3d 1506, 1507 [4th Dept 2018]).

In 1991, respondent was sentenced to an indeterminate term of incarceration of 12½ to 25 years upon a conviction of, inter alia, rape in the first degree. Respondent has served his sentence, but remains incarcerated because his release was stayed (*see* Mental Hygiene Law § 10.06 [h]). In a trial on the petition, a key piece of evidence was that respondent had not been cited for sexual misbehavior during his nearly 30 years in prison. Three psychology experts testified, two on behalf of petitioner and one on behalf of respondent. Although they all agreed that prison is a controlled environment, their collective testimony established the manner in

which incarcerated men may act out sexually, either with each other, such as respondent had while incarcerated as a teenager, or against female staff. For example, there was expert testimony that an inmate may masturbate in front of, leer at, linger around, or harass female staff. There was also expert testimony that some inmates have documented issues dealing with women in authority, child pornography has been found in prison and, though rare, there are instances of vaginal rape in prison. During summations, in reference to respondent's argument that his lack of sexual misbehavior while incarcerated supported the conclusion that he did not have difficulty controlling his sexual behavior, petitioner urged the jurors to use "common sense," and said: "This is somewhat of a prison community, so, there might be some common sense that you have as far as how a prison is run. There is not a lot of opportunities for a guy like this to find either a young girl or a single mom or some other female to rape in prison."

The jury returned a special verdict, finding that respondent "has a congenital or acquired condition that predisposes him to commit sex offenses," but does not suffer from a "[m]ental [a]bnormality" as defined in Mental Hygiene Law § 10.03 (i) inasmuch as his condition does not "result[] in his having serious difficulty in controlling such conduct." The court ordered respondent's immediate release, but stayed the order to allow petitioner time to determine if there were grounds for appeal.

Petitioner then moved to set aside the verdict pursuant to CPLR 4404 (a). Petitioner alleged, inter alia, that the jury foreperson had informed the jurors that his father, a correction officer, said that " 'if inmates wanted to do something in prison they could do it.' " The court convened a hearing on the issue of juror misconduct. After taking testimony from all 12 jurors, the court found that the foreperson had committed juror misconduct. Although the issue of sexual misbehavior in prison was the subject of testimony of "some length" at trial, the "outside influence" of the statements attributed to the foreperson's father affected at least the foreperson, "if not the other jurors," thereby creating "a substantial risk of prejudice to the rights of the state." Based on that finding, the court granted the motion and set aside the verdict.

We agree with respondent that the court abused its discretion in setting aside the verdict. "A new trial may be warranted in 'the interests of justice' if there is evidence that substantial justice has not been done as a result of juror misconduct" (*LaChapelle v McLoughlin*, 68 AD3d 824, 825 [2d Dept 2009]; *see* CPLR 4404 [a]). Such misconduct may warrant a new trial if a juror concealed his or her bias by failing to answer questions truthfully during voir dire (*see Luster v Schwarz*, 35 AD2d 872, 874 [3d Dept 1970]; *Knickerbocker v Erie R.R. Co.*, 247 App Div 495, 496 [4th Dept 1936]), if a juror injected "significant extra-record facts" into deliberations, thereby becoming an "unsworn witness to nonrecord evidence" (*Edbauer v Board of Educ. of N. Tonawanda City School Dist.* [appeal No. 3], 286 AD2d 999, 1001 [4th Dept 2001] [internal quotation marks omitted]), or if a juror undertook the role of an expert by providing " 'personal

specialized assessments not within the common ken of juror experience and knowledge . . . concerning a material issue in the case' " (*Campopiano v Volcko* [appeal No. 2], 61 AD3d 1343, 1344 [4th Dept 2009], quoting *People v Maragh*, 94 NY2d 569, 574 [2000]). That said, there is no "ironclad rule" concerning juror misconduct (*Alford v Sventek*, 53 NY2d 743, 745 [1981]), and "not every irregularity in the conduct of jurors requires a new trial" (*Khaydarov v AK1 Group, Inc.*, 173 AD3d 721, 722-723 [2d Dept 2019]; *see Russo v Mignola*, 142 AD3d 1064, 1066 [2d Dept 2016]). The court must examine the specific facts of each case " 'to determine the nature of the material placed before the jury and the likelihood that prejudice would be engendered' " (*Alford*, 53 NY2d at 745, quoting *People v Brown*, 48 NY2d 388, 394 [1979]). A new trial is required only if the misconduct "prejudiced a substantial right of a party" (*Khaydarov*, 173 AD3d at 723; *see generally Alford*, 53 NY2d at 745).

Initially, we note that the court did not rule on that part of the motion seeking to set aside the verdict on the ground that the foreperson engaged in misconduct by offering his own expert opinion of the "scientific data" during jury deliberations. Petitioner does not pursue that ground in its brief, and conceded at oral argument that it is no longer pursuing it on appeal. Therefore, we deem that ground to have been abandoned (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

Upon our review of the facts of this case, we conclude that petitioner was not prejudiced by the foreperson's failure to disclose during voir dire that his father previously worked as a correction officer (*see generally Alford*, 53 NY2d at 745). We note that several of the jurors in this case either worked in prison or had close relations who worked as correction officers or in law enforcement. Neither party seems to have considered that to have been a disqualifying attribute because those jurors were selected to serve on the jury. Indeed, because the trial was held in the shadow of Auburn Correctional Facility, it would have been difficult for the parties to select 12 qualified jurors with no connection to the prison. Petitioner's attorney was well aware of that fact and seized upon it during summation, urging the jurors to draw upon their knowledge of the internal workings of prisons in order to decide the case. Petitioner had every reason to believe that a jury packed with prison employees and their relations would likely return a verdict unfavorable to the convicted offender. Petitioner cries foul only because its strategy backfired.

Furthermore, the remarks attributed to the foreperson's father—i.e., "if inmates wanted to do something in prison they could do it"—are unlikely to have caused prejudice to petitioner. That notion was already held by several members of the jury. A juror who worked in prison himself testified at the hearing: "I don't think it is any secret that things go on in prison that ain't supposed to." Another juror, whose brother worked in prison, testified: "I know that" "things can happen in prison." Yet another juror, who had no apparent connection to the prison system, testified: "I felt that it is kind of a known fact what goes on in prison." The jurors'

testimony, including the statement attributed to the foreperson's father, merely expressed the vague notion that inmates engage in unsavory activities in prison despite the restrictiveness of the environment. That hardly controversial notion is one commonly held amongst the general public. In contrast to those vague notions expressed by the jurors at the hearing, the expert psychologists gave detailed testimony at trial about the specific kinds of sexual misbehavior that occur in prison, and all of that trial testimony was properly before the jury. The foreperson's allegedly prejudicial remarks were not prejudicial, but superfluous or redundant.

Our dissenting colleagues suggest that the foreperson intentionally concealed his connection to the prison system in order to infiltrate the jury. In doing so, they assert that the foreperson failed at the hearing to explain his failure to disclose his father's occupation. We respectfully submit that our colleagues' assertion is belied by the record. Specifically, the foreperson provided the following testimony, which the court did not discredit: "I didn't [disclose that information] because it wouldn't affect my ability to be fair and impartial and that's what [the court] wanted us to do." In our view, that testimony demonstrates that the foreperson was acting under a reasonable misunderstanding of the questions during voir dire. The dissent makes much of the foreperson's level of education, which includes a bachelor's degree in biology and a master's in "Teaching," but it is notable that the foreperson has no legal education and therefore is not schooled in answering the court's questions with the degree of precision that is expected of members of the bar. Thus, contrary to the dissent, we cannot conclude that deception or intentional concealment is evident on the face of this record.

Insofar as petitioner asserts that a new trial is warranted because the foreperson inserted outside facts into the deliberations, those being the expert opinions of his father, we conclude that a new trial is unwarranted for the reasons discussed above.

All concur except CURRAN and WINSLOW, JJ., who dissent and vote to affirm in the following memorandum: We respectfully dissent and vote to affirm the order because, in our view, Supreme Court did not abuse its discretion in granting petitioner's motion for a new trial in the interest of justice (*see* CPLR 4404 [a]; *see generally Matter of Small Smiles Litig.*, 125 AD3d 1395, 1395 [4th Dept 2015]). "The authority to grant a new trial is discretionary in nature and is vested in the trial court predicated on the assumption that the [j]udge who presides at trial is in the best position to evaluate errors therein . . . . Notably, [the court's] decision in [that] regard will not be disturbed absent an abuse of discretion" (*Straub v Yalamanchili*, 58 AD3d 1050, 1051 [3d Dept 2009] [internal quotation marks omitted]).

We agree with the majority that, under CPLR 4404 (a), "[a] new trial may be warranted in 'the interest[] of justice' if there is evidence that *substantial justice* has not been done as a result of juror misconduct" (*LaChapelle v McLoughlin*, 68 AD3d 824, 825 [2d Dept 2009] [emphasis added]). Specifically, a verdict may be set aside for

juror misconduct "on the ground that a juror had not truthfully responded to questions put to him [or her]" where "the moving party . . . show[s] concealment of facts, bias or prejudice" (*Holland v Blake*, 38 AD2d 344, 346 [3d Dept 1972], *affd* 31 NY2d 734 [1972]; *see Remillard v Louis Williams, Inc.*, 59 AD3d 764, 766 [3d Dept 2009]; *Matter of Buchanan*, 245 AD2d 642, 646 [3d Dept 1997], *lv dismissed* 91 NY2d 957 [1998]).

"Litigants are entitled to a full and fair disclosure of all the facts. It is the duty of a prospective juror to answer truthfully questions of him [or her] as to his [or her] qualifications and he [or she] should not keep silent if, in good conscience, he [or she] ought to reveal facts which he [or she] has reason to believe would render him [or her] unacceptable" (*Holland*, 38 AD2d at 345-346). "Moreover, a prospective juror is not only duty bound to truthfully answer all questions posed during voir dire, but is obligated to volunteer information which he or she has reason to believe would render him [or her] unacceptable to the litigants" (*Buchanan*, 245 AD2d at 646).

Here, we conclude that the court did not abuse its discretion in granting the motion because petitioner established that the jury foreperson concealed facts during jury selection, which he subsequently used to exert influence over deliberations. The foreperson's concealment of relevant facts readily allowed the court to conclude that substantial justice was not done, warranting a new trial (*see LaChapelle*, 68 AD3d at 825; *Holland*, 38 AD2d at 346). In our view, the foreperson prejudiced the jury's deliberations by introducing outside material related to the concealed facts (*cf. Buchanan*, 245 AD2d at 646).

The foreperson, who was well-educated, executed a juror questionnaire affirming "that the statements made on this questionnaire are true and I understand that any false statements made on this questionnaire are punishable under Article 210 of the Penal Law." The questionnaire directly asked the prospective jurors whether they "or someone close to [them] (relative or close friend)" had "ever been employed by [a] . . . [l]aw [e]nforcement o[r] [c]riminal [j]ustice [a]gency." Despite that plain question, the foreperson did not disclose that his father worked as a correction officer. Contrary to the majority's view, we do not agree that a legal education was necessary for the foreperson to comprehend the relevant question or the bolded language contained in the questionnaire's affirmation.

The foreperson also failed to disclose the information about his father during voir dire. During that part of the proceeding, the court asked the initial panel of prospective jurors, of which the foreperson was a member, whether "any of [them] have relatives engaged in the field of law enforcement." Although one prospective juror, who sat next to the foreperson, disclosed that her brother was a police officer, the foreperson remained silent. Later on, petitioner's counsel asked the prospective jurors whether there was anything else they thought the attorneys would like to know. Another prospective juror stated that he had volunteered at the local correctional facility on religious retreats, but the foreperson again remained

silent. In contrast, when prospective jurors were asked whether they had any thoughts about psychology as a science, the foreperson volunteered that he had taken courses in patient psychology, had spent a year in medical school, and worked as a science teacher. Shortly thereafter, the foreperson was sworn in as a trial juror, and directed to return to court in two days. Despite having additional time to come forward with the information about his father's occupation before trial commenced, the foreperson never made such disclosure.

At the posttrial hearing, the foreperson admitted that, in the juror questionnaire, he did not disclose his father's employment. Rather than explaining his failure to disclose that information on a form signed under penalty of law, the foreperson testified that he did not understand why he would have to disclose his father's employment. In our view, that bold statement, coupled with the foreperson's silence throughout voir dire, permitted the court to reasonably conclude that the foreperson deliberately concealed the requested information. Furthermore, when asked whether his father's employment "came up" during jury selection, the foreperson equivocated between "I don't think it did" and "I don't remember." In our view, the foreperson's explanatory assertion, relied upon by the majority, that he did not disclose the relevant information "because it wouldn't affect [his] ability to be fair and impartial and that's what [the court] wanted [him] to do" merely demonstrated indifference to his obligation to truthfully answer the straightforward questions put to him by the court. The foreperson also never indicated that he made a mistake by not disclosing that information, or that he had forgotten his father's occupation (*cf. Holland*, 38 AD2d at 346).

The foreperson's equivocal responses on the subject of disclosure at the hearing—as detailed above—are, in our view, not the statements of a juror who honored the "duty . . . to truthfully answer all questions posed during voir dire," and "to volunteer information which he or she has reason to believe would render him [or her] unacceptable to the litigants" (*Buchanan*, 245 AD2d at 646). The foreperson was plainly competent enough to read and understand the questionnaire, and was attentive throughout voir dire. To that end, we note that during voir dire the foreperson was compelled to disclose his educational background in response to a direct question on that subject. Moreover, the actions of other prospective jurors in response to relevant questions should have indicated the need for the foreperson to disclose the fact of his father's employment. Although "[a]n incorrect answer given under a mistaken impression" will not warrant a new trial (*Holland*, 38 AD2d at 346), here, we conclude that the foreperson's silence under these specific circumstances weighs heavily in support of concluding that the court properly determined that there had been juror misconduct warranting a new trial.

Furthermore, the court was entitled to conclude that the foreperson's misconduct prevented substantial justice from being done, and therefore properly granted the motion for a new trial, because the misconduct infected the jury's deliberations. During trial, the court instructed the jury to consider only the facts and evidence that they heard and observed in the courtroom. It repeated this instruction in

its charge at the end of the trial. Despite those clear instructions, the record established that the foreperson told the other members of the jury about his father's occupation—the very fact he did not think warranted any mention at jury selection. Additional evidence at the hearing from other members of the jury permitted the court to conclude that the foreperson told the other jurors that, according to his father, inmates could do pretty much whatever they wanted to do in prison, which included engaging in sexual acts. That outside material, which the foreperson brought into the deliberation room from an unknown and unqualified witness, directly sought to resolve the question of whether respondent could control his sexual behavior—an essential element in determining whether respondent suffers from a mental abnormality such that he is a dangerous sex offender requiring confinement (*see* Mental Hygiene Law § 10.03 [i]).

Although there is competing evidence in the record regarding the extent to which that information impacted deliberations, the record supports the court's conclusion that it affected at least one juror—i.e., the foreperson. Inasmuch as unanimous verdicts are required in Mental Hygiene Law article 10 cases (*see* § 10.07 [d]), that at least one juror was influenced by the foreperson's failure to disclose certain relevant information established that petitioner was denied substantial justice and that a new trial should be granted. Ultimately, where, as here, the trial court has overseen the jury selection process, heard all of the evidence, and conducted a posttrial evidentiary hearing on the issue of juror misconduct, we should defer to its determination, in light of its "superior opportunity to evaluate the proof and the credibility of the witnesses" (*Carter v Shah*, 31 AD3d 1151, 1151-1152 [4th Dept 2006] [internal quotation marks omitted]). Thus, we conclude that the court did not abuse its discretion in granting petitioner's motion for a new trial in the interest of justice.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

735

KA 18-01761

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT T. BENTLEY, DEFENDANT-APPELLANT.

HAYDEN DADD, CONFLICT DEFENDER, GENESEO (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Livingston County Court (Dennis S. Cohen, J.), dated April 30, 2018. The order denied the petition of defendant for a downward modification of his risk level 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 denying his petition pursuant to Correction Law § 168-o (2) seeking to modify the prior determination that he is a level three risk pursuant to the Sex Offender Registration Act (SORA) (§ 168 *et seq.*). We affirm.

As the party seeking a modification of his SORA risk level determination, defendant had the "burden of proving the facts supporting the requested modification by clear and convincing evidence" (Correction Law § 168-o [2]; *see People v Williams*, 170 AD3d 1531, 1531 [4th Dept 2019]; *People v Cullen*, 79 AD3d 1677, 1677 [4th Dept 2010], *lv denied* 16 NY3d 709 [2011]). Contrary to defendant's contention, he failed to meet that burden (*see People v Charles*, 162 AD3d 125, 140 [2d Dept 2018], *lv denied* 32 NY3d 904 [2018]; *People v Johnson*, 124 AD3d 495, 496 [1st Dept 2015]; *see generally People v Lashway*, 25 NY3d 478, 484 [2015]). It is well settled that "the relevant inquiry regarding Correction Law § 168-o (2) applications is whether conditions have changed subsequent to the initial risk level determination warranting a modification thereof" (*People v Anthony*, 171 AD3d 1412, 1413 [3d Dept 2019]). Here, the evidence at the hearing on the petition to modify the SORA risk level determination failed to establish that defendant completed sex offender treatment. Additionally, the evidence demonstrated that defendant has not addressed the mental health issues from which he suffers, and that he was subsequently convicted of several crimes arising from his plan to

kidnap and rape his probation officer. Thus, defendant failed to submit clear and convincing evidence of facts supporting the requested modification (*see generally People v Austin*, 182 AD3d 937, 938-939 [3d Dept 2020]; *Anthony*, 171 AD3d at 1413).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

736

KA 18-02274

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON CIPOLLA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (James A.W. McLeod, A.J.), rendered September 26, 2018. The judgment convicted defendant upon a plea of guilty of burglary in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of burglary in the third degree (Penal Law § 140.20), defendant contends that the waiver of the right to appeal is not valid. We agree. We conclude that the colloquy was insufficient to ensure that the waiver was voluntary, knowing, and intelligent, because County Court provided defendant with erroneous information about the scope of the waiver of the right to appeal, including characterizing the waiver as an absolute bar to the taking of an appeal (*see People v Thomas*, 34 NY3d 545, 560-564 [2019], *cert denied* — US — [Mar. 30, 2020]). The better practice is for the court to use the Model Colloquy, "which 'neatly synthesizes . . . the governing principles' " (*People v Dozier*, 179 AD3d 1447, 1447 [4th Dept 2020], *lv denied* 35 NY3d 941 [2020], quoting *Thomas*, 34 NY3d at 567; *see* NY Model Colloquies, Waiver of Right to Appeal). Furthermore, although there was also a written waiver of the right to appeal, "the court failed to confirm that [defendant] understood the contents of the written waiver[]" (*Thomas*, 34 NY3d at 566; *see People v Cooper*, 85 AD3d 1594, 1594 [4th Dept 2011], *affd* 19 NY3d 501 [2012]; *People v Testerman*, 149 AD3d 1559, 1559 [4th Dept 2017]). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court

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

1079

KA 18-01060

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW D. RINGROSE, ALSO KNOWN AS ROSE,
DEFENDANT-APPELLANT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (BRIAN SHIFFRIN 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 November 12, 2014. The judgment convicted defendant upon a nonjury verdict of luring a child (six counts), criminal sexual act in the third degree and rape in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of six counts of luring a child and dismissing counts one through five and eight of the indictment, and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him following a nonjury trial of criminal sexual act in the third degree (Penal Law § 130.40 [2]), rape in the third degree (§ 130.25 [2]), and six counts of luring a child (§ 120.70 [1]), defendant contends, inter alia, that the evidence is legally insufficient to support the conviction on the counts of luring a child and that the verdict is against the weight of the evidence with respect to those counts. We agree. We therefore modify the judgment by reversing those parts convicting him of six counts of luring a child and dismissing counts one through five and eight of the indictment.

The evidence at trial established that, when defendant was 30 years old, he met 16-year-old BD on an adult dating website. The two thereafter communicated via cell phone, text messages, Facebook messaging, Skype and Snapchat. Shortly thereafter, NS, a friend of BD, initiated contact with defendant through Facebook. NS was also 16 years old at the time. While communicating for weeks with both BD and NS via cell phone, text messages, Facebook, Skype and Snapchat, defendant lied about his age and his military status, among other things. Also, he flattered the girls by saying that they were "really

cute" and that he "really liked" them. Both girls lived in Ontario County and were juniors in high school.

Defendant eventually met NS in person and drove her to his house in Monroe County, where they had sexual intercourse. Over the ensuing two or three weeks, defendant drove NS to his house three more times to engage in sexual activity. In the meantime, defendant twice had both sexual intercourse and oral sexual contact with BD, once at her house in Ontario County after picking her up at school and driving her home, and the other time at his house after driving her there.

Defendant was later arrested and charged in Ontario County with one count each of rape in the third degree (sexual intercourse with BD) and criminal sexual act in the third degree (oral sex with BD) and six counts of luring a child. The counts charging luring a child alleged that defendant lured NS and BD into his motor vehicle for the purpose of committing a felony sex offense against them.

Following a nonjury trial, defendant was convicted on all counts. County Court sentenced defendant as a second felony offender to consecutive indeterminate terms of imprisonment of 2 to 4 years on each of the counts of luring a child, reduced by operation of law to an aggregate term of 10 to 20 years, and to four-year determinate terms of imprisonment on the remaining counts. The four-year terms are to run concurrently to each other but consecutively to the sentence imposed for luring a child. The aggregate sentence is 14 to 24 years, plus a term of postrelease supervision.

In a separate prosecution, defendant was convicted in Monroe County of multiple counts of statutory rape for the sexual intercourse he engaged in with BD and NS at his residence. He was also convicted in Monroe County of raping a third girl. Monroe County Court imposed an aggregate prison term of 16 years, concurrent to the sentence imposed in Ontario County.

"A verdict is legally sufficient when, viewing the facts in a light most favorable to the People, there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 349 [2007] [internal quotation marks omitted]; *see People v Acosta*, 80 NY2d 665, 672 [1993]). If the evidence is legally insufficient to establish an element of the charged crime, it necessarily follows that the verdict is against the weight of the evidence inasmuch as we "necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of defendant's challenge regarding the weight" (*People v Stepney*, 93 AD3d 1297, 1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]; *see Danielson*, 9 NY3d at 349; *People v Francis*, 83 AD3d 1119, 1120 [3d Dept 2011], *lv denied* 17 NY3d 806 [2011]).

Here, to convict defendant of luring a child, the People were required to establish that, on or about the dates alleged in the indictment, defendant lured the victims into his motor vehicle, that the victims were less than 17 years of age, and that defendant engaged

in that activity for the purpose of committing a felony sex offense against the victims (*see* Penal Law § 120.70 [1]). In our view, the People failed to prove that defendant lured the victims into a motor vehicle.

The indictment did not specifically allege which of defendant's statements to the victims constitute the acts of luring, and discovery provided no elucidation on that point. At trial, the People argued that defendant lured the victims by making numerous false statements to the victims before he met them in person. The People also suggested that defendant lured the victims with his flattering comments about their physical appearances. Even if those statements constitute luring, it is clear from the record that they were made well before defendant and the victims had any concrete plans to meet. Thus, those statements were not made by defendant in an effort to persuade the victims to enter his motor vehicle. The fact that defendant drove the victims to his house days and weeks later cannot transform his statements into luring. We therefore conclude that the evidence is legally insufficient to establish a key element of luring a child under Penal Law § 120.70 (1), and the verdict is therefore also against the weight of the evidence.

Moreover, as defendant points out on appeal, even if we were to conclude that defendant lured the victims into his car with the statements he made to them on the phone and through the various social media platforms, all such statements were made before defendant's first sexual encounter with each victim and cannot be relied upon by the People to support the subsequent counts of luring a child inasmuch as there has to be a separate and distinct act of luring for each count. It follows that four of the six counts of luring a child would have to be dismissed even if we were to accept the dubious theory that defendant lured the victims into his car by the statements he made to them days and weeks earlier.

In light of our determination, we need not address defendant's other contentions regarding the weight and sufficiency of the evidence. We have reviewed defendant's remaining contentions and conclude that they do not require reversal or further modification of the judgment.

All concur except CARNI and CURRAN, JJ., who dissent and vote to affirm in the following memorandum: We respectfully dissent and would affirm. The majority concludes that the evidence is legally insufficient to support defendant's conviction on the counts of luring a child (Penal Law § 120.70 [1]). The majority bases its conclusion on the People's failure to establish that defendant committed contemporaneous acts of luring at the time that he invited the victims to enter his motor vehicle. Defendant did not, however, raise that issue on appeal as a ground for modifying the judgment, and thus it is not properly before us (*see generally People v Pace*, 70 AD3d 1364, 1366 [4th Dept 2010], *lv denied* 14 NY3d 891 [2010]).

We reject the contentions raised by defendant on appeal. By failing to seek a trial order of dismissal on the ground that the

evidence is legally insufficient to support the conviction on the counts of luring a child because the People failed to establish that defendant had knowledge of the age of his two minor victims, defendant failed to preserve that contention for our review (*see People v Townsley*, 50 AD3d 1610, 1611 [4th Dept 2008], *lv denied* 11 NY3d 742 [2008]). In any event, that contention lacks merit. The offense of luring a child does not require that a defendant have knowledge that his victim is less than 17 years of age (*see* Penal Law § 15.20 [3]; *see generally People v Burman*, 173 AD3d 1727, 1728-1729 [4th Dept 2019]). Defendant likewise failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction on the counts of luring a child because the People failed to establish that defendant acted for the purpose of engaging in a felony sex offense (*see Townsley*, 50 AD3d at 1611). In any event, that contention lacks merit inasmuch as defendant's intent to engage in such an offense "may be inferred from [his] conduct as well as the surrounding circumstances" (*People v Hatton*, 26 NY3d 364, 370 [2015] [internal quotation marks omitted]).

We reject defendant's related contention that defense counsel's failure to raise those grounds in support of the motion for a trial order of dismissal constituted ineffective assistance. As we determined herein, the evidence is legally sufficient on each of the grounds raised by defendant, and it is well settled that a defendant "is not denied effective assistance of trial counsel merely because counsel does not make a motion or argument that has little or no chance of success" (*People v Lopez*, 119 AD3d 1426, 1428 [4th Dept 2014], *lv denied* 25 NY3d 990 [2015] [internal quotation marks omitted]).

We reject defendant's contention that the evidence is legally insufficient to support the conviction on the counts of luring a child because the evidence established that his minor victims followed him voluntarily. Because the Penal Law contains no definition of "lure" (*see* Penal Law § 120.70), we must give the term its "ordinary" and "commonly understood" meaning, for which we may use dictionary definitions as "useful guideposts" (*People v Ocasio*, 28 NY3d 178, 181 [2016] [internal quotation marks omitted]). The term "lure" is defined as "to attract, entice, or tempt; allure" (Webster's Unabridged Dictionary [Random House 1999]). We conclude that "lure," as used in Penal Law § 120.70, contemplates a minor victim who has decided to follow a defendant after the defendant encouraged, invited, or otherwise persuaded the victim to make that decision, and we thus further conclude that the evidence against defendant is sufficient notwithstanding the fact that his victims accompanied him without his use of threats, force, or other forms of compulsion. For the same reasons, viewing the evidence in light of the elements of the crime of luring a child as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict with respect to those counts is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We also reject defendant's contention that County Court erred in refusing to suppress a statement defendant made to an officer before

the officer advised defendant of his *Miranda* rights. It is well settled that "the safeguards required by *Miranda* are not triggered unless a suspect is subject to custodial interrogation" (*People v Paulman*, 5 NY3d 122, 129 [2005] [internal quotation marks omitted]; *see People v Bell-Scott*, 162 AD3d 1558, 1559 [4th Dept 2018], *lv denied* 32 NY3d 1169 [2019]). Here, defendant's encounter with the officer rose at most to a level three detention under the framework of *People v De Bour* (40 NY2d 210, 222-223 [1976]; *see generally People v Suttles*, 171 AD3d 1454, 1455 [4th Dept 2019]; *People v Layou*, 71 AD3d 1382, 1383 [4th Dept 2010]), and defendant thus was not in custody when he made the statement (*see People v Bennett*, 70 NY2d 891, 893-894 [1987]; *People v Shelton*, 111 AD3d 1334, 1336 [4th Dept 2013], *lv denied* 23 NY3d 1025 [2014]; *People v Wiesmore*, 204 AD2d 1003, 1004-1005 [4th Dept 1994], *lv denied* 84 NY2d 873 [1994]).

Even assuming, arguendo, that the court erred in allowing a police investigator to offer testimony regarding the physical appearance of one of defendant's victims, we conclude that any error in admitting that testimony is harmless (*see People v LoMaglio*, 124 AD3d 1414, 1416 [4th Dept 2015], *lv denied* 25 NY3d 1203 [2015]). "In a bench trial, the court is presumed to have considered only competent evidence in reaching its verdict," and defendant has not shown "that the admission of inadmissible testimony prejudiced him" (*id.* [internal quotation marks omitted]). Although defendant is correct that the presumption does not apply where the trial judge improperly allows testimony over objection without "some reliable indication that, notwithstanding the erroneous ruling, the judge knows that the evidence must be disregarded" (*People v Pabon*, 28 NY3d 147, 158 [2016]), the judge here provided such a reliable indication by sustaining two prior, related objections and establishing on the record that the judge understood the narrow context in which the investigator's testimony could properly be considered.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court