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

735/16

KA 15-00027

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW KUZDZAL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered October 28, 2014. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and predatory sexual assault against a child. The judgment was reversed by order of this Court entered November 18, 2016 in a memorandum decision (144 AD3d 1618), and the People of the State of New York on February 16, 2017 were granted leave to appeal to the Court of Appeals from the order of this Court (28 NY3d 1190), and the Court of Appeals on May 8, 2018 reversed the order and remitted the case to this Court for consideration of the facts and issues raised but not determined on the appeal to this Court (— NY3d — [May 8, 2018]),

Now, upon remittitur from the Court of Appeals, and having considered the facts and issues raised but not determined on the appeal to this Court,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the judgment so appealed from is unanimously affirmed.

Memorandum: This case is before us upon remittitur from the Court of Appeals (*People v Kuzdzal*, — NY3d —, 2018 NY Slip Op 03304 [2018], *revg* 144 AD3d 1618 [4th Dept 2016]). When this case was initially before us, we reversed the judgment convicting defendant upon a jury verdict of murder in the second degree for the depraved indifference killing of a person less than 11 years old (Penal Law § 125.25 [4]), and predatory sexual assault against a child (§ 130.96), and we granted a new trial upon determining that Supreme Court did not properly investigate allegations of juror bias. A majority of this Court concluded that "the jurors' alleged reference to defendant as a 'scumbag' indicated the possibility of juror bias, and thus that the court should have granted defendant's request to make an inquiry of the jurors" (*Kuzdzal*, 144 AD3d at 1621). Two

justices dissented, concluding that there was no need for an inquiry pursuant to *People v Buford* (69 NY2d 290 [1987]) because "the court, by stating that it was basing its ruling on what it had heard, determined that the spectator's testimony was not sufficiently credible to warrant disrupting the normal trial procedure or further inquiring into the actions of the two jurors in question" (*Kuzdzal*, 144 AD3d at 1624).

On appeal, the Court of Appeals concluded that the trial court, "based on the lack of credibility of the interested spectator[,] . . . made an implied determination that the spectator was unworthy of belief in direct and immediate response to the prosecutor's request that the court rule as to whether it found the spectator's 'description credible' before proceeding to the *Buford* inquiry" (*Kuzdzal*, — NY3d at —, 2018 NY Slip Op 03304 at *3). The Court of Appeals reversed our order and "remit[ted] the case to [this] Court to exercise [our] own fact-finding power to consider and determine whether the trial court's finding as to the spectator's credibility was supported by the weight of the evidence" (*id.* at —, 2018 NY Slip Op 03304 at *1). We now affirm.

Upon exercising our factual review power, we conclude that the weight of the evidence supports the court's implicit factual determination that the spectator was not credible. Initially, we note that the better practice would have been for the court, when making its determination, to make specific factual findings regarding whether and why it found the spectator not credible, and to set forth its determination and the reasons for it. Nevertheless, in view of the evidence regarding the spectator's credibility, including the internal inconsistencies in her testimony as well as the differences between her description of the sequence of events and the court's record of the proceedings, and after according the requisite "[g]reat deference . . . to the fact[]finder's opportunity to view the witness[ ], hear the testimony and observe demeanor" (*People v Bleakley*, 69 NY2d 490, 495 [1987]), we conclude that the weight of the evidence supports the court's credibility determination. Consequently, the court "was justified in finding the spectator incredible and therefore determining [that] the *Buford* inquiry was not required" (*Kuzdzal*, — NY3d at —, 2018 NY Slip Op 03304 at *4).

Finally, upon remittitur, we have considered defendant's challenge to the severity of the sentence, and we conclude that the sentence is not unduly harsh or severe.

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

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CA 17-01076

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

IN THE MATTER OF ARBITRATION BETWEEN CITY OF SYRACUSE, PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

KATHERINE LEE AND SYRACUSE POLICE BENEVOLENT ASSOCIATION, RESPONDENTS-APPELLANTS.

BOSMAN LAW FIRM, LLC, ROME (A.J. BOSMAN OF COUNSEL), FOR RESPONDENT-APPELLANT KATHERINE LEE.

DEPERNO & KHANZADIAN, PC, NEW HARTFORD (KAREN KHANZADIAN OF COUNSEL), FOR RESPONDENT-APPELLANT SYRACUSE POLICE BENEVOLENT ASSOCIATION.

COUGHLIN & GERHART, LLP, BINGHAMTON (PAUL J. SWEENEY OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeals from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered August 1, 2016 in a proceeding pursuant to CPLR article 75. The order, insofar as appealed from, vacated and held in abeyance the court's order and judgment of December 24, 2014 and denied the cross motion of respondent Katherine Lee to dismiss the petition.

It is hereby ORDERED that the order insofar as appealed from is reversed on the law without costs, the second ordering paragraph is vacated, the cross motion is granted and the petition against respondent Katherine Lee is dismissed.

Memorandum: Respondents, Katherine Lee and Syracuse Police Benevolent Association (hereinafter, Union), separately appeal from an order that, inter alia, vacated an order and judgment granting the petition of petitioner, City of Syracuse (City), to confirm an arbitration award, and denied Lee's cross motion to dismiss the petition against her. The arbitration proceeding arises out of a dispute between the City and respondents concerning General Municipal Law § 207-c benefits received by Lee, a former City police officer who was injured in the line of duty.

After the designee of the Chief of Police directed Lee to return to work and refused to authorize payment for Lee's continued treatment, Lee appealed the directive pursuant to the "General Municipal Law § 207-c Policy" (Policy) negotiated by the City and the Union. The Policy provides, inter alia, that an officer may seek review, by arbitration, of a determination with respect to General

Municipal Law § 207-c benefits. The Policy further provides that an officer shall not be required to return to work and shall continue to receive his or her prior benefits during the review process but, "[i]n the event that the Chief's determination is sustained, the Officer must reimburse the City for the value of benefits received during the pendancy [sic] of the review process."

Under the Policy, "[a]ny Officer . . . shall have a right to a representative of his or her choosing, and at his or her own cost, at any stage of this procedure, and shall be given a reasonable opportunity to . . . obtain a representative and/or counsel." Lee exercised that right and retained an attorney to represent her in the arbitration conducted before arbitrator Michael S. Lewandowski. Consistent with the standard of review set forth in the Policy, the arbitrator concluded that Lee "failed to prove that the City acted arbitrarily [or] capriciously or that the City's determination was affected by an error of law when it determined to discontinue [Lee's] 207-c benefits."

The City thereafter requested that the arbitrator modify the award to allow the City to recoup wages paid to Lee during the pendency of the arbitral review. Lee's attorney and the Union's attorney objected to the City's request. The Union's attorney stated that the Union never agreed to include wages in the "value of benefits" subject to reimbursement to the City under the Policy. Inasmuch as the interpretation of that language of the Policy was not previously raised in the arbitration before him, Lewandowski declined to resolve the parties' disagreement, and the City initiated a second arbitration proceeding before arbitrator Thomas N. Rinaldo to resolve the issue whether the "value of benefits" subject to reimbursement under the Policy includes wages. The City and the Union appeared and were represented by counsel at the arbitration hearing, but neither Lee nor her attorney appeared at the hearing. Rinaldo agreed with the City's position that wages are included in the "value of benefits" for purposes of reimbursement under the Policy.

The City forwarded to Lewandowski a copy of Rinaldo's award, and asked Lewandowski to direct Lee to reimburse the City in the amount of $71,436.44. Lewandowski responded by letter stating that the City was "free to seek reimbursement of wages . . . by whatever means it finds available to it."

The City thereafter commenced a proceeding pursuant to CPLR 7510 to confirm Lewandowski's award, naming both Lee and the Union as respondents. The Union, "on behalf of Katherine Lee," interposed an answer. It is undisputed that Lee was not served with the petition, and neither she nor her attorney participated in the proceeding. Supreme Court granted the petition and confirmed the arbitration award in an order and judgment entered December 24, 2014. By letter dated May 28, 2015, the City asked Lewandowski to make a supplemental award or determination that Lee must reimburse the City $71,436.44 plus interest. Lewandowski declined to do so, concluding that he lacked authority in the matter.

On December 3, 2015, the City moved to resettle the December 24, 2014 order and judgment pursuant to CPLR 5019 (a) and requested that the court amend its order and judgment to reference a sum certain, i.e., $71,436.44. The Union opposed the motion, and Lee cross-moved to dismiss the petition against her for lack of personal jurisdiction.

The court denied the City's motion to resettle the prior order and judgment, concluding that resettlement was not appropriate because the amount of wages subject to reimbursement was not a ministerial matter. The court further concluded, however, that it had inherent authority to vacate the order and judgment in the interest of justice, and it held the order and judgment in abeyance pending a decision by Lewandowski on the amount that the City is entitled to recoup from Lee. The court denied Lee's cross motion to dismiss the petition against her.

We conclude that the court erred in denying the cross motion. Lee established that the court failed to acquire personal jurisdiction over her in the proceeding to confirm the arbitration award by Lewandowski because the City never properly served her (*see generally Matter of Country Wide Ins. Co. v Polednak*, 114 AD2d 754, 754 [1st Dept 1985]). Nor did the court acquire personal jurisdiction over Lee by the unauthorized appearance of the Union's attorney "on behalf of Katherine Lee." Contrary to the City's contention, there is no evidence that Lee expressly or implicitly authorized the Union's attorney to represent her at any stage of the proceedings. We note, moreover, that Lee did not collaterally challenge an order after the proceedings had concluded, but rather "the [cross] motion was made promptly, as soon as the facts were discovered by [Lee], in the very [proceeding] in which the unauthorized appearance" was made by the Union's attorney (*General Elec. Credit Corp. v Salamone*, 42 AD2d 506, 508 [3d Dept 1973]; *cf. Brown v Nichols*, 42 NY 26, 30-31 [1870]). We therefore reverse the order insofar as appealed from, and grant the cross motion and dismiss the petition against Lee for lack of personal jurisdiction.

In concluding that the appearance of the Union's attorney did not confer jurisdiction over Lee, we acknowledge the general rule that an employee has no individual right to enforce a contract between the employee's employer and union (*see Berlyn v Board of Educ. of E. Meadow Union Free Sch. Dist.*, 80 AD2d 572, 573 [2d Dept 1981], *affd* 55 NY2d 912 [1982]; *Parker v Borock*, 5 NY2d 156, 161 [1959]). There are, however, exceptions to that rule, and one of those exceptions applies in the circumstances herein inasmuch as "the contract provides otherwise" (*Matter of Board of Educ., Commack Union Free Sch. Dist. v Ambach*, 70 NY2d 501, 508 [1987], *cert denied sub nom. Margolin v Board of Educ., Commack Union Free Sch. Dist.*, 485 US 1034 [1988]; *see Buff v Village of Manlius*, 115 AD3d 1156, 1157 [4th Dept 2014]). Here, the Policy explicitly provides Union members with the rights "to compel a review of the Chief's determination" and to have counsel or another representative "at any stage of the procedure." Lee availed herself of those rights from the outset of the arbitration and, to the extent that the Union's attorney acted on Lee's behalf during that part of the proceeding that was before arbitrator Rinaldo, that attorney was

not the "representative of . . . [Lee's] choosing" contemplated by the Policy. In any event, while the Union represented all of its members with respect to the proper interpretation of the "value of benefits" to be reimbursed under the Policy, it was Lee alone who would be affected by, and thus entitled to litigate, the amount to be reimbursed to the City.

We further conclude that the court erred in sua sponte vacating its prior order and judgment, which confirmed the arbitration award by Lewandowski, and directing further arbitration. We therefore vacate the second ordering paragraph of the order on appeal. A court has authority to "vacate its own judgment for sufficient reason and in the interests of substantial justice" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]; *see Ruben v American & Foreign Ins. Co.*, 185 AD2d 63, 67 [4th Dept 1992]). That authority, however, is not unlimited (*see Quinn v Guerra*, 26 AD3d 872, 873 [4th Dept 2006], *appeal dismissed* 7 NY3d 741 [2006]). "A court's inherent power to exercise control over its judgments is not plenary, and should be resorted to only to relieve a party from judgments taken through [fraud,] mistake, inadvertence, surprise or excusable neglect" (*Matter of McKenna v County of Nassau, Off. of County Attorney*, 61 NY2d 739, 742 [1984] [internal quotation marks omitted]), none of which is present here (*see id.*; *Gasteiger v Gasteiger*, 288 AD2d 881, 881 [4th Dept 2001]).

In vacating the order and judgment, moreover, the court "exceeded the narrow bounds within which courts are authorized to alter [arbitration] awards" (*McKenna*, 61 NY2d at 742). None of the bases in CPLR 7511 (b) or (c) for vacating or modifying an arbitration award applies to the arbitrator's failure to award the City a specific dollar amount for the value of benefits received by Lee, and the court had no power to disturb the award apart from the grounds set forth in those subdivisions (*see Matter of Professional, Clerical, Tech., Empls. Assn. [Board of Educ. for Buffalo City Sch. Dist.]*, 103 AD3d 1120, 1121 [4th Dept 2013], *lv denied* 21 NY3d 863 [2013]). In addition, the court erred in granting relief to the City inasmuch as the City's motion was made beyond the time limits for seeking relief from the award (*see* CPLR 7511 [a]).

We have considered the remaining issues raised by the parties and conclude that they are lacking in merit.

All concur except NEMOYER, J., who dissents in part and votes to modify in accordance with the following memorandum: Although I agree with the majority that Supreme Court lacked authority to sua sponte vacate its December 24, 2014 order and judgment, I respectfully disagree with the majority's decision to grant respondent Katherine Lee's cross motion to dismiss the CPLR article 75 petition against her for lack of personal jurisdiction. I therefore dissent in part and vote to modify the order on appeal solely by vacating the second ordering paragraph thereof. As so modified, I would affirm.

In his April 6, 2012 award, arbitrator Lewandowski found that Lee failed to prove that petitioner City of Syracuse (City) acted arbitrarily or capriciously, or that the City's decision to

discontinue Lee's General Municipal Law § 207-c benefits was affected by an error of law. Thereafter, the City asked Lewandowski to modify the award and allow it to recoup the wages paid to Lee in accordance with section 10 of the "General Municipal Law § 207-c Policy" (Policy), which provided that, "[i]n the event the chief's determination is sustained, the Officer must reimburse the City for the value of benefits received during the pendancy [sic] of the review process" with such reimbursement to "be effected in a manner to be determined by the arbitrator." Lee's attorney objected to the City's requested modification. Respondent Syracuse Police Benevolent Association (Union) likewise argued that, contrary to the City's position, "[u]nder no circumstances did [it] ever agree to include wages in the phrase 'value of benefits' subject to reimbursement" under the Policy.

Lewandowski declined to address the City's request, and a second arbitrator (Rinaldo) conducted proceedings to determine whether the "value of benefits" language under section 10 of the Policy included wages. The majority correctly notes that the City and the Union appeared before Rinaldo and were represented by counsel, but I believe that the majority incorrectly finds that neither Lee nor her attorney appeared before Rinaldo.

The sole issue before Rinaldo was the interpretation of the term "value of benefits." The Union appeared on behalf of all of its members, including Lee, and asserted the Union's position. Lee had no argument or rights separate and distinct from any other Union member. Rinaldo's determination that wages were included in "value of benefits" for purposes of reimbursement under the policy was binding on Lee, just as it would be on any individual Union member. As the majority acknowledges, the general rule is that "an employee has no individual right to enforce a contract between the employee's employer and union" (*see Berlyn v Board of Educ. of E. Meadow Union Free Sch. Dist.*, 80 AD2d 572, 573 [2d Dept 1981], *affd* 55 NY2d 912 [1982]; *Parker v Borock*, 5 NY2d 156, 161 [1959]). No one can assert, and no one does, that Lee would be entitled to a different interpretation of the phrase "value of benefits" than any other member of the Union.

The majority notes that an exception to the general rule exists when the contract provides otherwise and that, under the Policy, Lee was entitled to representation of her choice at every stage of the proceeding. Thus, the majority concludes that Lee's purported handwritten letter of April 18, 2015 effectively raised, for the first time, a claim that she never authorized the Union's attorney to represent her either before Rinaldo or before Supreme Court in connection with the City's CPLR article 75 confirmation proceeding. However, this position is certainly belied by her actions, or lack thereof.

In a May 15, 2012 letter from the Union to Rinaldo agreeing to arbitrate the "value of benefits" issue, the Union appeared "o/b/o," i.e., "on behalf of," "Officer Katherine Lee." The letter copied Lee and A.J. Bosman, Esq., Lee's attorney in the earlier arbitral proceeding before Lewandowski. After Rinaldo's decision, the Union

wrote a letter to Lewandowski which argued that, "*On behalf of Kathy Lee*, the [Union] seeks a hearing to determine what if anything, is lawfully available to the City for recoupment, and/or whether under the circumstances of this case (in particular the City's unclean hands) the arbitrator should/could order recoupment at all, inasmuch as it was the City that forced her to retire" (emphasis added). Again, copies of that letter were sent to Lee and Bosman. Finally, when the City commenced the instant proceeding to confirm Lewandowski's award, the Union opposed the City's petition with an answer, objections, and points of law "on behalf of Katherine Lee."

Lee has never contended that she was unaware of the Rinaldo arbitration or of the City's article 75 confirmation proceeding. Nor did Lee or Bosman ever attempt, over an almost three-year period, to apprise the arbitrators, Supreme Court, or the Union's attorney of Lee's newfound claim that she had never authorized the Union's counsel to represent her interests—which, after Lewandowski's initial award, were *identical* to the Union's positions. Indeed, Lee does not identify any theory or argument that she could have or would have advanced on her behalf, before either Rinaldo or Supreme Court, that the Union's attorney did not advance on her behalf.

I therefore believe that there can be no question that Lee was represented by the counsel of her choice at each and every stage of this proceeding, to wit, the Union's attorney. As such, Supreme Court correctly found that it had acquired personal jurisdiction over Lee by virtue of that attorney's appearance on her behalf in the City's article 75 confirmation proceeding (*see Wilmington Sav. Fund Socy., FSB v Zimmerman*, 157 AD3d 846, 847 [2d Dept 2018], *lv dismissed* — NY3d —, 2018 NY Slip Op 76153 [2018]). I therefore dissent from so much of the majority's memorandum as grants Lee's cross motion to dismiss the City's article 75 confirmation petition against her for lack of personal jurisdiction.

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

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CA 17-01558

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

NORTHLAND EAST, LLC, NORTHLAND WEST, LLC, DUTTON, LLC, AND MICHAEL W. SWEENEY, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

J.R. MILITELLO REALTY, INC., AND NORDEL II, LLC, DEFENDANTS-RESPONDENTS.

JUSTIN S. WHITE, WILLIAMSVILLE, FOR PLAINTIFFS-APPELLANTS.

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (GUY J. AGOSTINELLI OF COUNSEL), FOR DEFENDANT-RESPONDENT J.R. MILITELLO REALTY, INC.

HURWITZ & FINE, P.C., BUFFALO (EARL K. CANTWELL OF COUNSEL), FOR DEFENDANT-RESPONDENT NORDEL II, LLC.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Henry J. Nowak, Jr., J.), entered April 19, 2017. The order and judgment granted the motion of defendant Nordel II, LLC to dismiss the complaint against it and granted the motion of defendant J.R. Militello Realty, Inc. for summary judgment dismissing the complaint against it and for summary judgment on its counterclaim.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying the motion of defendant J.R. Militello Realty, Inc., reinstating the complaint against it, and vacating the fourth and fifth decretal paragraphs, and as modified the order and judgment is affirmed without costs.

Memorandum: Pursuant to a real estate purchase agreement (contract), plaintiffs agreed to sell their properties to defendant Nordel II, LLC (Nordel), which is a wholly-owned subsidiary of the Buffalo Urban Development Corporation (BUDC). It is undisputed that plaintiffs engaged defendant J.R. Militello Realty, Inc. (JRMR) as their real estate broker to market and sell the subject properties, and that JRMR's president, James R. Militello, acted on JRMR's behalf. After plaintiffs executed the contract but before they closed on the sale of the properties with Nordel, they commenced this action, alleging that JRMR breached its fiduciary duty to them, that Nordel knowingly induced JRMR's breach of that duty, and that both defendants engaged in a scheme to defraud plaintiffs into selling the properties "for far below market value." Both defendants denied the general allegations of the complaint, and JRMR asserted a counterclaim seeking to recover its commission from the sale of the properties, which were

ultimately sold to Nordel for a combined price of $4,400,000.

Nordel filed a CPLR 3211 motion to dismiss, contending that the complaint failed to state a cause of action against Nordel, was refuted by documentary evidence, i.e., the contract, and failed to plead fraud with the requisite particularity (*see* CPLR 3211 [a] [1], [7]; *see also* CPLR 3016 [b]). JRMR thereafter filed a CPLR 3212 motion for summary judgment, seeking dismissal of the complaint against it as well as judgment on its counterclaim. Supreme Court granted both motions. Although we conclude that Nordel's motion was properly granted for reasons stated by the court in its written decision, we agree with plaintiffs that the court erred in granting JRMR's motion (hereafter, motion). We therefore modify the order and judgment accordingly.

Addressing plaintiffs' causes of action against JRMR, we conclude that, even if JRMR established as a matter of law that it was entitled to dismissal of the breach of fiduciary duty and fraud causes of action, plaintiffs raised triable issues of fact sufficient to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

"To state a claim for breach of fiduciary duty, a plaintiff must allege that the defendant owed him [or her] a fiduciary duty, that the defendant committed misconduct, and that the plaintiff suffered damages caused by that misconduct" (*NRT N.Y., LLC v Morin*, 147 AD3d 589, 589 [1st Dept 2017], *lv denied* 30 NY3d 901 [2017]; *see Daly v Kochanowicz*, 67 AD3d 78, 95 [2d Dept 2009]). With respect to the first element, "it is well settled that a real estate broker is a fiduciary with a duty of loyalty and an obligation to act in the best interests of the principal" (*Dubbs v Stribling & Assoc.*, 96 NY2d 337, 340 [2001]; *see Sonnenschein v Douglas Elliman-Gibbons & Ives*, 96 NY2d 369, 374 [2001]). There is thus no dispute that JRMR owed plaintiffs a fiduciary duty.

We conclude that, contrary to defendants' contention, plaintiffs raised triable issues of fact whether Militello, while acting on behalf of JRMR, committed misconduct. It is well settled that, "because of a broker's fiduciary duties, he [or she] has the affirmative duty not to act for a party whose interests are adverse to those of the principal, unless he [or she] has the consent of the principal given after full knowledge of the facts . . . Accordingly, he [or she] cannot act as agent for both seller and purchaser of property in a real estate transaction" (*Matter of Goldstein v Department of State, Div. of Licensing Servs.*, 144 AD2d 463, 464 [2d Dept 1988]). "Where a broker's interests or loyalties are divided due to . . . [the] representation of multiple parties, the broker must disclose to the principal . . . the material facts illuminating the broker's divided loyalties" (*Dubbs*, 96 NY2d at 340; *see Goldstein*, 144 AD2d at 464). Indeed, "[a] failure to disclose *any* interest tending to influence the [broker] . . . constitutes a breach of [the broker's] fiduciary obligation and precludes [the broker] from recovering for services rendered" (*John J. Reynolds, Inc. v Snow*, 11 AD2d 653, 653-654 [1st Dept 1960], *affd* 9 NY2d 785 [1961] [emphasis added]).

Here, in opposition to the motion, plaintiffs submitted multiple emails between Militello and Peter M. Cammarata, who was the president of the buyer, Nordel, and who signed the contract as the president of BUDC. In those emails, Militello discussed his efforts to "box [plaintiffs] into a corner" and have them "make a deal" to sell the properties for substantially less than Militello had opined that they were worth. Thus, despite his representation of plaintiffs, Militello clearly aligned himself with Nordel's interests in those emails, as demonstrated by Militello's use of the pronouns "we" and "our" when discussing with Nordel the plans to deal with plaintiffs. For example, Militello proposed to Cammarata that "[w]e pay" a certain sum for the properties, opined that "we will make a deal with [plaintiffs] at that number," and suggested to Cammarata what "our message" to plaintiffs should be. Militello even complained to Cammarata that plaintiffs were "stringing *us* along" (emphasis added).

We also note that Militello, i.e., the plaintiffs' agent, suggested that Nordel should consider purchasing *other property*, stating, "Would we consider [other] property as [an] alternative to [plaintiffs' property]." Although JRMR established that it did not formally represent Nordel, the emails between Militello, as JRMR's president, and Cammarata, as Nordel's president, raise triable issues of fact whether JRMR, through Militello's actions and statements, assumed "the role of agent for [Nordel] in the purchase of [plaintiffs' properties]" (*Douglas Elliman LLC v Tretter*, 84 AD3d 446, 448 [1st Dept 2011], *affd* 20 NY3d 875 [2012]). In such a situation, JRMR "would be considered a dual agent, with a duty to disclose [its] divided loyalties and obtain the parties' consent thereto" (*id.* at 448-449). On the record before this Court, no such disclosure was made, and no consent was obtained.

With respect to damages, we conclude that plaintiffs raised triable issues of fact whether they suffered damages that were " 'directly caused by [Militello's] misconduct' " (*Daly*, 67 AD3d at 96). There is no dispute that plaintiffs did not commence this action until after the contract between plaintiffs and Nordel was executed and that they did, in fact, sell the properties to Nordel. Contrary to JRMR's contention, the fulfillment of that contract does not establish the absence of damages. BUDC's own appraiser estimated that the value of the properties was at least $160,000 more than the sale price.

We further conclude that the court erred in granting JRMR summary judgment dismissing the third cause of action, for fraud, against it. "The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff[,] and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *see Carlson v American Intl. Group, Inc.*, 30 NY3d 288, 310 [2017]). Even assuming, arguendo, that JRMR met its initial burden with respect to the fraud cause of action, we conclude that plaintiffs raised triable issues of fact sufficient to defeat that part of the motion.

Specifically, plaintiffs' evidence raised issues of fact whether Militello made misrepresentations to them concerning the value of their properties and the willingness of Nordel to purchase different property, and whether Militello knew of the falsity of those statements and made them with the intent to induce plaintiffs' reliance on them. Plaintiffs also submitted evidence raising triable issues of fact whether they justifiably relied on Militello's misrepresentations and suffered damages as a result.

Contrary to JRMR's contention, the general language of the merger clause in the contract does not preclude plaintiffs' cause of action for fraud in the inducement of that contract. JRMR was not a party to that contract, and we note that, even if the contract's merger clause would protect a nonparty to the contract, it is well settled that "a general merger clause is ineffective . . . to preclude parol evidence that a party was induced to enter the contract by means of fraud" (*Manufacturers Hanover Trust Co. v Yanakas*, 7 F3d 310, 315 [2d Cir 1993]). Here, the merger clause contained in paragraph 16.1 is a general merger clause, i.e., an " 'omnibus statement that the written instrument embodies the whole agreement' " and thus does not "disclaim[] the existence of or reliance upon specified representations" and does not preclude plaintiffs' claim that they were "defrauded into entering the contract in reliance on [certain alleged] [mis]representations" (*id.*, quoting *Danann Realty Corp. v Harris*, 5 NY2d 317, 320 [1959]; *see Lieberman v Greens at Half Hollow, LLC*, 54 AD3d 908, 909 [2d Dept 2008]; *Stephens v Sponholz,* 251 AD2d 1061, 1061 [4th Dept 1998]; *cf. Legum v Russo*, 133 AD3d 638, 640 [2d Dept 2015]).

We further conclude that the court erred in granting that part of JRMR's motion with respect to its counterclaim, for recovery of the real estate commission, and granting judgment to JRMR. "During the process of facilitating a real estate transaction, the broker owes a duty of undivided loyalty to its principal . . . If this duty is breached, the broker forfeits his or her right to a commission, *regardless of whether damages were incurred*" (*Douglas Elliman LLC*, 84 AD3d at 448 [emphasis added]; *see P. Zaccaro, Co., Inc. v DHA Capital, LLC*, 157 AD3d 602, 603 [1st Dept 2018], *lv denied* – NY3d –, 2018 NY Slip Op 71851 [2018]; *NRT N.Y., LLC*, 147 AD3d at 589). Inasmuch as there are triable issues of fact whether JRMR, through Militello's actions, breached its duty of undivided loyalty to plaintiffs, there are triable issues of fact whether it forfeited its right to a commission regardless of whether plaintiffs were, in fact, damaged.

We reject JRMR's contention that plaintiffs ratified the sale price or are estopped from asserting their causes of action against JRMR based on the fact that they eventually closed on the properties pursuant to their contract with Nordel. "Ratification is the act of knowingly giving sanction or affirmance to an act that would otherwise be *unauthorized and not binding*" (21 NY Jur 2d, Estoppel, Ratification and Waiver, § 94 [emphasis added]). Plaintiffs commenced this action after they had executed the contract with Nordel but before the closing on the sale and the transfer of title of the properties. Thus, at the time of the sale, there was a legally binding contract

and, had plaintiffs not completed the sale, they may have been liable for breach of contract. Moreover, plaintiffs had a legal obligation to mitigate their damages (*see Holy Props. v Cole Prods.*, 87 NY2d 130, 133 [1995]; *see generally Wilmot v State of New York*, 32 NY2d 164, 168 [1973]). We thus conclude that plaintiffs' sale of the properties to Nordel was not a ratification of the sale price.

With respect to estoppel, "[a] court of equity may preclude a party from denying a material fact which he [or she] has induced another, *who was excusably ignorant of the true facts* and who had a right to rely upon such words or conduct, to believe and act upon them, thereby suffering foreseeable injury and damages . . . The doctrine of equitable estoppel must be applied with great caution, however, when dealing with realty" (*Bergner v Kick*, 85 AD2d 911, 911-912 [4th Dept 1981], *affd* 56 NY2d 795 [1982] [emphasis added]). Contrary to JRMR's contention, there are triable issues of fact whether plaintiffs should be estopped from denying that the value of their properties was no greater than $4.4 million. Although plaintiffs contracted to sell the properties at that price and JRMR acted upon that contract, there are triable issues of fact whether JRMR was "excusably ignorant" of the true value of the property and whether JRMR had a right to rely upon plaintiffs' action in signing the contract with Nordel. We thus conclude that the court erred in granting JRMR's motion.

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

466

CAF 17-00603

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

IN THE MATTER OF KOREY W. SMITH,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KASSI L. LOPEZ, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

HEIDI S. CONNOLLY, SKANEATELES, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (William Rose, R.), entered February 1, 2017 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner primary physical custody of the subject child.

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

Memorandum: Petitioner-respondent father commenced this proceeding pursuant to Family Court Act article 6 and, by amended petition, sought to modify a prior order of custody by awarding him primary physical custody of the subject child. Respondent-petitioner mother filed an amended cross petition also seeking modification of the prior custody order by awarding her primary physical custody, and other relief. The mother appeals from an order that, among other things, denied and dismissed her amended cross petition, and granted the amended petition. We reject the mother's contention that Family Court erred in awarding primary physical custody to the father.

The mother contends that the court erred in failing to make a specific finding of the requisite change in circumstances and erred insofar as it implicitly concluded that there had been such a change. We disagree with the latter contention. Initially, although the court failed to expressly determine whether there had been a sufficient change in circumstances to warrant an inquiry into the best interests of the child on the issue of custody, " 'our review of the record reveals extensive findings of fact, placed on the record by Family Court, which demonstrate unequivocally that a significant change in circumstances occurred since the entry of the consent custody order' "

(*Matter of Morrissey v Morrissey*, 124 AD3d 1367, 1367 [4th Dept 2015], *lv denied* 25 NY3d 902 [2015]; *see Matter of Aronica v Aronica*, 151 AD3d 1605, 1605 [4th Dept 2017]).

Furthermore, the evidence supports the court's implicit conclusion that the father, as the "party seeking a change in an established custody arrangement[,] . . . show[ed] a change in circumstances [that] reflects a real need for change to ensure the best interest[s] of the child" (*Matter of Dormio v Mahoney*, 77 AD3d 1464, 1465 [4th Dept 2010], *lv denied* 16 NY3d 702 [2011] [internal quotation marks omitted]; *see Matter of Moore v Moore*, 78 AD3d 1630, 1630 [4th Dept 2010], *lv denied* 16 NY3d 704 [2011]; *Matter of Perry v Korman*, 63 AD3d 1564, 1565 [4th Dept 2009]). The father met that burden by establishing, inter alia, that the mother relocated her and the child's residence several times within a relatively short time frame (*see Shaw v Shaw*, 155 AD3d 1673, 1674 [4th Dept 2017]; *Matter of Carey v Windover*, 85 AD3d 1574, 1574 [4th Dept 2011], *lv denied* 17 NY3d 710 [2011]), and that the mother had a mental health condition that was not adequately treated (*see Matter of Farner v Farner*, 152 AD3d 1212, 1214 [4th Dept 2017]).

We reject the mother's further contentions that the court made intemperate remarks that demonstrate prejudice against her, and that it erred in failing to limit its determination to the issues to which the parties did not stipulate. Where, as here, the parties stipulated to certain issues related to custody and visitation, the court is not bound by that stipulation and instead must consider the child's best interests in resolving those issues, regardless of the parties' stipulation (*see generally Kelly v Kelly*, 19 AD3d 1104, 1106 [4th Dept 2005], *appeal dismissed* 5 NY3d 847 [2005], *reconsideration denied* 6 NY3d 803 [2006]; *Matter of Sliwinski v Erie County Dept. of Social Servs.*, 195 AD2d 1056, 1057-1058 [4th Dept 1993]). Here, the mother previously alleged that her paramour, who had ongoing substance abuse issues, had engaged in domestic violence toward her in the presence of the child, and she refused to stipulate during this custody proceeding that he would not be left in charge of, or alone with, the subject child. Based on, inter alia, those facts, we agree that the court's determination to award primary physical custody to the father and to grant the mother visitation is in the child's best interests. Additionally, although the court's intemperate remarks reflected a lack of patience that is not appropriate in this delicate matter (*see generally Matter of Esworthy*, 77 NY2d 280, 282-283 [1991]; *Matter of Wilson v Kilkenny*, 73 AD3d 796, 798 [2d Dept 2010], *lv dismissed* 15 NY3d 817 [2010], *rearg denied* 15 NY3d 917 [2010]), we discern no indication of bias (*see Matter of Hanehan v Hanehan*, 8 AD3d 712, 714 [3d Dept 2004]; *cf. Matter of Hannah B. [Theresa B.]*, 108 AD3d 528, 531 [2d Dept 2013]).

We have considered the mother's remaining contentions and

conclude that none warrants modification or reversal of the order.

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

467

CAF 17-00605

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

IN THE MATTER OF KASSI L. LOPEZ,
PETITIONER-APPELLANT,

V ORDER

KOREY W. SMITH, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

HEIDI S. CONNOLLY, SKANEATELES, ATTORNEY FOR THE CHILD

Appeal from an order of the Family Court, Onondaga County (William Rose, R.), entered February 1, 2017 in a proceeding pursuant to Family Court Act article 6. The order dismissed the amended cross petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Chendo O.*, 175 AD2d 635, 635 [4th Dept 1991]).

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

471

CA 17-01931

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

LINDSAY BOLAND, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LINDA IMBODEN, M.D., ET AL., DEFENDANTS,
AND SUSAN E. STRED, M.D., DEFENDANT-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (JAMES D. LANTIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

COTE & VAN DYKE, 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 March 24, 2017. The order, insofar as appealed from, denied the motion of defendant Susan E. Stred, M.D., for summary judgment dismissing the complaint against her.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted and the complaint is dismissed against defendant Susan E. Stred, M.D.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained as a result of defendants' failure to timely diagnose her thyroid cancer. According to plaintiff, Susan E. Stred, M.D. (defendant), a pediatric endocrinologist, was negligent in failing to properly evaluate enlarged lymph nodes in plaintiff's neck and to recommend a biopsy. Defendant consulted with plaintiff's pediatrician in the treatment of plaintiff's thyroid condition, and saw plaintiff once after she had been diagnosed with Hashimoto's thyroiditis. On appeal, defendant contends that Supreme Court erred in denying her motion for summary judgment dismissing the complaint against her. We agree.

In order to meet the initial burden on her motion, defendant was required to "present factual proof, generally consisting of affidavits, deposition testimony and medical records, to rebut the claim of malpractice by establishing that [she] complied with the accepted standard of care or did not cause injury to the patient" (*Cole v Champlain Val. Physicians' Hosp. Med. Ctr.*, 116 AD3d 1283, 1285 [3d Dept 2014]; *see Webb v Scanlon*, 133 AD3d 1385, 1386 [4th Dept 2015]). "A defendant physician may submit his or her own affidavit to meet that burden, but that affidavit must be 'detailed, specific and factual in nature' " (*Webb*, 133 AD3d at 1386), and must "address each

of the specific factual claims of negligence raised in [the] plaintiff's bill of particulars" (*Wulbrecht v Jehle*, 89 AD3d 1470, 1471 [4th Dept 2011] [internal quotation marks omitted]).

In support of her motion, defendant submitted the affidavit of her medical expert in which the expert addressed the claim of negligence raised by plaintiff. The expert explained that, in cases where a patient suffers from both Hashimoto's thyroiditis and thyroid cancer, the cancer usually manifests as a discrete nodule within the thyroid gland, which was not how plaintiff's cancer manifested. Defendant also submitted her own affidavit, with accompanying medical records, wherein she averred that she informed plaintiff that there was no connection between plaintiff's swollen lymph nodes and her Hashimoto's disease, and recommended that plaintiff undergo a further evaluation of her enlarged lymph nodes. Based on those facts, both defendant and defendant's expert opined that defendant had fully conformed with the applicable standard of care. Defendant's affidavit and the affidavit of her expert were sufficiently detailed, specific and factual in nature, and we therefore conclude that defendant established her prima facie entitlement to judgment as a matter of law (*see Suib v Keller*, 6 AD3d 805, 806 [3d Dept 2004]; *Toomey v Adirondack Surgical Assoc.*, 280 AD2d 754, 755 [3d Dept 2001]).

In response, plaintiff failed to raise a triable issue of fact to defeat the motion. Although plaintiff submitted the affidavit of a medical expert, the expert's opinion was speculative, conclusory and "unsupported by competent evidence tending to establish the essential elements of medical malpractice" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]). Plaintiff's expert failed to explain the accepted medical practice from which defendant allegedly deviated, and also failed to address the assertion of defendant's expert regarding the manner in which thyroid cancer presents in patients with Hashimoto's thyroiditis. Thus, we reverse the order insofar as appealed from, grant defendant's motion, and dismiss the complaint against her.

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

539

CA 17-01703

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

IN THE MATTER OF PILOT TRAVEL CENTERS, LLC,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TOWN BOARD OF TOWN OF BATH, TOWN OF BATH PLANNING BOARD, MICHAEL LUFFRED, IN HIS OFFICIAL CAPACITY AS CODE ENFORCEMENT OFFICER OF TOWN OF BATH, LOVE'S TRAVEL STOPS & COUNTRY STORES, INC., RESPONDENTS-RESPONDENTS,
ET AL., RESPONDENTS.
(APPEAL NO. 1.)

HODGSON RUSS LLP, BUFFALO (JOEL J. TERRAGNOLI OF COUNSEL), FOR PETITIONER-APPELLANT.

JEFFREY E. SQUIRES, BATH, FOR RESPONDENTS-RESPONDENTS TOWN BOARD OF TOWN OF BATH, TOWN OF BATH PLANNING BOARD, AND MICHAEL LUFFRED, IN HIS OFFICIAL CAPACITY AS CODE ENFORCEMENT OFFICER OF TOWN OF BATH.

WHITEMAN OSTERMAN & HANNA LLP, ALBANY (CHRISTOPHER M. MCDONALD OF COUNSEL), FOR RESPONDENT-RESPONDENT LOVE'S TRAVEL STOPS & COUNTRY STORES, INC.

Appeal from a judgment (denominated order) of the Supreme Court, Steuben County (Joseph W. Latham, A.J.), entered July 7, 2017 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

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

Memorandum: Petitioner operates a truck stop directly across from the Kanona Truck Stop located in the Town of Bath, a respondent in appeal No. 2 (Town). In July 2016, Love's Travel Stops & Country Stores, Inc., a respondent in appeal No. 1 (Love's), informed the Town of Bath Planning Board, also a respondent in appeal No. 1 (Planning Board), that it had contracted to purchase the Kanona Truck Stop with the intent of constructing a state-of-the-art travel center (project). The Planning Board adopted a resolution designating itself as the State Environmental Quality Review Act ([SEQRA] ECL art 8) "lead agency" for the project, and Love's submitted to it a site plan application for the project. On January 17, 2017, the Planning Board published a notice of public hearing regarding Love's site plan application. The public hearing was held about a week later, and

counsel for petitioner attended, but did not offer any comments or objections. After the hearing, the Planning Board issued a negative declaration under SEQRA, classified the project as a SEQRA Type I action, and determined that the project would not create significant adverse environmental impacts and did not require an Environmental Impact Statement (EIS).

In March 2017, petitioner commenced a CPLR article 78 proceeding seeking to, inter alia, enjoin construction of the project and to annul the negative declaration on the grounds that the Planning Board failed to require an EIS for the project as mandated by Chapter 59 of the Town Code and to take the requisite "hard look" at the environmental impact of the project. In April 2017, the Town adopted a resolution repealing Chapter 59 because it was no longer consistent with SEQRA. Supreme Court thereafter entered the judgment in appeal No. 1, which denied the relief requested in the petition.

While the first proceeding was pending, petitioner commenced a second CPLR article 78 proceeding seeking, inter alia, to annul the repeal of Chapter 59. By the judgment in appeal No. 2, the court dismissed the second petition based on, inter alia, petitioner's lack of standing. Petitioner now appeals from both judgments.

Although we agree with petitioner in appeal No. 1 that its allegations of harm were sufficient to confer standing upon it and were not rendered moot by the subsequent repeal of Chapter 59 of the Town Code (*see generally Matter of Sierra Club v Village of Painted Post*, 26 NY3d 301, 310-311 [2015]), we conclude that petitioner failed to exhaust its administrative remedies (*see Matter of Michalak v Zoning Bd. of Appeals of Town of Pomfret*, 286 AD2d 906, 908 [4th Dept 2001]). The record establishes that the Planning Board, as the lead agency on the project, held a public hearing that petitioner's counsel attended, but during which he remained silent. Although petitioner made a FOIL request two days after the public hearing, that request did not alert the Planning Board of any specific concerns.

Even assuming, arguendo, that petitioner exhausted its administrative remedies, we reject its contention that the Planning Board's determination was arbitrary and capricious inasmuch as it failed to follow Chapter 59 of the Town Code. "A local law that is 'inconsistent with SEQRA' must be invalidated" (*Miranda Holdings, Inc. v Town Bd. of Town of Orchard Park*, 152 AD3d 1234, 1236 [4th Dept 2017], *lv denied* 30 NY3d 905 [2017]). "[I]nconsistency has been found where local laws prohibit what would have been permissible under State law or impose prerequisite additional restrictions on rights under State law, so as to inhibit operation of the State's general laws" (*New York State Club Assn. v City of New York*, 69 NY2d 211, 217 [1987], *affd* 487 US 1 [1988] [internal quotation marks omitted]). Here, section 59-3 (A) of the Town Code provided that "Type I actions are likely to have an effect on the environment and will, therefore, require the preparation of an environmental impact statement." SEQRA, on the other hand, provides that, "[t]he lead agency must determine the significance of any Type I . . . action . . . [and,] [t]o require an EIS for a proposed action, the lead agency must determine that the

action may include the potential for at least one significant adverse environmental impact" (6 NYCRR 617.7 [a] [1]). Thus, Chapter 59 is inconsistent with SEQRA because SEQRA permits a negative declaration for Type I actions, whereas Chapter 59 effectively precluded a negative declaration in such actions.

Furthermore, where "an agency has followed the procedures required by SEQRA, a court's review of the substance of the agency's determination is limited" (*Matter of Eadie v Town Bd. of Town of N. Greenbush*, 7 NY3d 306, 318 [2006]). "It is well established that, in reviewing the substantive issues raised in a SEQRA proceeding, [a] court will not substitute its judgment for that of the agency if the agency reached its determination in some reasonable fashion" (*Matter of Town of Marilla v Travis*, 151 AD3d 1588, 1591 [4th Dept 2017] [internal quotation marks omitted]). Contrary to petitioner's contention, we conclude that the Planning Board properly "identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination" (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986]). Additionally, we conclude that the court did not abuse its discretion in denying petitioner's request for a preliminary injunction inasmuch as petitioner failed to establish that it would suffer irreparable injury as a result of the project (*see Abramo v HealthNow N.Y.*, 305 AD2d 1009, 1009-1010 [4th Dept 2003]).

Contrary to petitioner's contention in appeal No. 2, we conclude that the court properly determined that petitioner lacked standing to commence the second CPLR article 78 proceeding, challenging the repeal of Chapter 59. To establish standing, petitioner "must not only allege, but if the issue is disputed must prove, that [its] injury is real and different from the injury most members of the public face. Standing requirements 'are not mere pleading requirements but rather an indispensable part of the [petitioner's] case' and therefore 'each element must be supported in the same way as any other matter on which the [petitioner] bears the burden of proof' " (*Matter of Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d 297, 306 [2009]). Petitioner's "status of neighbor . . . does not automatically provide the 'admission ticket' to judicial review" in a land use case, such as this (*Matter of Brighton Residents Against Violence to Children, Inc. v MW Props.*, 304 AD2d 53, 58 [4th Dept 2003], *lv denied* 100 NY2d 514 [2003]), especially where, as here, the repeal of Chapter 59 does not create an injury unique to petitioner. Further, the resolution repealing Chapter 59 does not eliminate environmental review requirements for the Town, and instead expressly provides that all such land use projects remain subject to review under SEQRA. Consequently, inasmuch as petitioner failed to establish an injury distinct from members of the public at large, it lacks standing to contest the repeal of Chapter 59 (*see Matter of Niagara Preserv. Coalition, Inc. v New York Power Auth.*, 121 AD3d 1507, 1509 [4th Dept 2014], *lv denied* 25 NY3d 902 [2015]; *Matter of Bolton v Town*

of S. Bristol Planning Bd., 38 AD3d 1307, 1308 [4th Dept 2007]).

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

544

CA 17-02132

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

IN THE MATTER OF PILOT TRAVEL CENTERS, LLC,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TOWN BOARD OF TOWN OF BATH AND TOWN OF BATH,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 2.)

HODGSON RUSS LLP, BUFFALO (JOEL J. TERRAGNOLI OF COUNSEL), FOR PETITIONER-APPELLANT.

JEFFREY E. SQUIRES, BATH, FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Steuben County (Joseph W. Latham, A.J.), entered October 2, 2017 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Same memorandum as in *Matter of Pilot Travel Centers, LLC v Town Bd. of Town of Bath* ([appeal No. 1] — AD3d — [July 6, 2018] [4th Dept 2018]).

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

578

CAF 17-00054

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

IN THE MATTER OF SHAMECKIA LACHELLE WHITE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LOVANA E. BYRD-MCGUIRE, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

Appeal from an order of the Supreme Court, Onondaga County (Kevin G. Young, J.), dated November 29, 2016 in a proceeding pursuant to Family Court Act article 8. The order directed respondent to stay away from petitioner, among others, until November 29, 2029.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the alternative relief sought in the motion and deleting the expiration date of the order of protection and substituting therefor an expiration date of November 29, 2021, and as modified the order is affirmed without costs.

Memorandum: In these consolidated appeals, arising from a proceeding pursuant to article 8 of the Family Court Act, respondent appeals, in appeal No. 1, from an order of protection that was issued after a determination that she committed a family offense against petitioner. In appeal No. 2, respondent appeals from a further order denying her motion pursuant to CPLR 4404 seeking to set aside the determination that she committed a family offense and dismissing the petition or, in the alternative, to modify the order of protection by decreasing the duration thereof.

Initially, we note that the appeal from the final order in appeal No. 1 brings up for review the propriety of the order in appeal No. 2, and thus the appeal from the order in appeal No. 2 must be dismissed (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435, 435 [2d Dept 1989]; *see also* CPLR 5501 [a] [1]; *see generally Matter of Tehan [Tehan's Catalog Showrooms, Inc.]*, 144 AD3d 1530, 1531 [4th Dept 2016]). With respect to the merits, we agree with respondent that "[Supreme] Court erred in issuing an order of protection without adhering to the procedural requirements of Family Court Act § 154-c (3) . . . , inasmuch as the court did not make a finding of fact that petitioner . . . was entitled to an order of protection based upon 'a judicial finding of fact, judicial acceptance of an admission by [respondent] or judicial finding that [respondent] has given knowing, intelligent and voluntary consent to its issuance' " (*Matter of Hill v*

Trojnor, 137 AD3d 1671, 1672 [4th Dept 2016], quoting § 154-c [3] [ii]). Indeed, the court failed to specify which family offense respondent committed. Nevertheless, "remittal is not necessary because the record is sufficient for this Court to conduct an independent review of the evidence" (*Matter of Langdon v Langdon*, 137 AD3d 1580, 1582 [4th Dept 2016]; *see Matter of Masciello v Masciello*, 130 AD3d 626, 626 [2d Dept 2015]). Upon that review, we conclude that a fair preponderance of the evidence establishes that respondent committed the family offense of harassment in the second degree (*see* §§ 812 [1] [a]; 832; Penal Law § 240.26 [1], [3]; *see generally Matter of Frimer v Frimer*, 143 AD3d 895, 896 [2d Dept 2016]).

We also agree with respondent's further contention that the court erred in denying the alternative relief sought in the motion to modify the duration of the order of protection. Accepting, as we do, the court's finding of "aggravating circumstances" based on respondent's repeated violations of prior orders of protection (Family Ct Act § 827 [a] [vii]), the maximum duration of the order of protection is five years (*see* § 842). We therefore modify the order of protection accordingly.

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

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

579

CAF 17-00922

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

IN THE MATTER OF SHAMECKIA LACHELLE WHITE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LOVANA BYRD-MCGUIRE, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

Appeal from an order of the Supreme Court, Onondaga County (Kevin G. Young, J.), entered February 8, 2017 in a proceeding pursuant to Family Court Act article 8. The order denied the motion of respondent to set aside an order of protection, or in the alternative, to modify the expiration date of the order of protection.

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

Same memorandum as in *Matter of White v Byrd-McGuire* ([appeal No. 1] — AD3d — [July 6, 2018] [4th Dept 2018]).

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

583

CA 17-01590

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

MAL-BON, LLC, MALLARE ENTERPRISES, INC., MALLARE PLOWING, INC., LYNNE MALLARE BONA, MICHAEL MALLARE, JAMES MALLARE AND DOMINIC MALLARE, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MELANIE SMITH AND JOSEPH PALMIERI, INDIVIDUALLY AND AS CO-RESIDENTS, AND SOLCARE, INC., DEFENDANTS-APPELLANTS.

HOGAN WILLIG, PLLC, AMHERST (STEVEN M. COHEN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DUKE HOLZMAN PHOTIADIS & GRESENS LLP, BUFFALO (CHRISTOPHER M. BERLOTH OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered April 26, 2017. The order granted those parts of the motion of plaintiffs for summary judgment dismissing defendants' first, third, fourth, sixth and ninth counterclaims, and dismissed those counterclaims.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of the motion with respect to the fourth counterclaim and with respect to the first, third, and sixth counterclaims insofar as asserted by defendants Melanie Smith, individually and as co-resident, and Solcare, Inc., and reinstating those counterclaims to that extent, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs and defendants operated businesses on adjacent parcels of property and, at some point, defendants began lodging various complaints regarding the operation of plaintiffs' businesses. As a result, plaintiffs commenced this action asserting causes of action for, inter alia, defamation and tortious interference. Defendants answered and, as relevant to this appeal, asserted counterclaims for nuisance, nuisance per se, negligence, trespass, and defamation per se. Plaintiffs moved for summary judgment dismissing the counterclaims, and defendants now appeal, as limited by their brief, from an order to the extent that it granted those parts of the motion with respect to the nuisance, nuisance per se, negligence, and trespass counterclaims.

Initially, we note that plaintiffs' contention that Supreme Court

erred in denying their motion with respect to the counterclaim for defamation per se is not properly before us inasmuch as plaintiffs did not cross-appeal from the order (*see Hecht v City of New York*, 60 NY2d 57, 60-62, 64 [1983]).

Contrary to defendants' contention, we conclude that the court properly granted the motion with respect to the nuisance, nuisance per se, and trespass counterclaims insofar as those counterclaims were asserted by defendant Joseph Palmieri, individually and as co-resident. Plaintiffs met their initial burden by proffering evidence establishing that Palmieri did not have the requisite "ownership or possessory interest in" the subject premises (*Abbo-Bradley v City of Niagara Falls*, 132 AD3d 1318, 1320 [4th Dept 2015]; *see generally Massare v Di Nardo*, 35 AD3d 1157, 1158 [4th Dept 2006]), and defendants failed to raise a triable issue of fact in response (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

We agree with defendants, however, that the court erred in granting the motion with respect to the negligence counterclaim as asserted by all defendants and with respect to the nuisance, nuisance per se, and trespass counterclaims insofar as asserted by defendants Melanie Smith, individually and as co-resident, and Solcare, Inc. (collectively, operative counterclaims). We therefore modify the order accordingly. Viewing the evidence submitted by plaintiffs on their motion in the light most favorable to defendants (*see De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]), we conclude that plaintiffs failed to meet their initial burden with respect to the operative counterclaims inasmuch as they merely pointed to the gaps in defendants' proof (*see Corrigan v Spring Lake Bldg. Corp.*, 23 AD3d 604, 605 [2d Dept 2005]). Plaintiffs' failure to do so requires the denial of the motion with respect to those counterclaims "regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Finally, we note that, in reviewing whether plaintiffs met their burden, we did not consider any evidence that they first submitted in their reply papers (*see Miller v Spall Dev. Corp.*, 45 AD3d 1297, 1298 [4th Dept 2007]; *see also Wonderling v CSX Transp., Inc.*, 34 AD3d 1244, 1245 [4th Dept 2006]).

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

586

CA 17-01556

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

NEW YORK STATE DEPARTMENT OF TRANSPORTATION,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NORTH STAR PAINTING COMPANY, INC., DOING BUSINESS
AS K&K PAINTING COMPANY, DEFENDANT-APPELLANT.

BURKE SCOLAMIERO & HURD, LLP, ALBANY (GEORGE J. HOFFMAN, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (PAUL D. MCCORMICK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Cattaraugus County (Jeremiah J. Moriarty, III, J.), entered April 20, 2017. The order, among other things, granted plaintiff's motion for a conditional order of indemnification against defendant.

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

Memorandum: Plaintiff and defendant, a painting contractor, entered into a contract providing that defendant would paint certain bridges and overpasses along an interstate highway. The contract incorporated specifications providing, in pertinent part, that defendant would indemnify and hold harmless the State of New York, except as prohibited by law, "from suits, claims, actions, damages and costs, of every name and description resulting from the work under its contract during its prosecution and until the acceptance thereof." The specifications further provide that defendant's obligation to indemnify and hold harmless shall not "be deemed limited or discharged by the enumeration or procurement of any insurance for liability for damages imposed by law upon [defendant]." The specifications also required that defendant "procure and maintain . . . insurance for liability for damages imposed by law, for the work covered by the contract, of the types and in the amounts hereinafter provided, covering all operations under the contract whether performed by it or its [s]ubcontractors." Such required insurance included an owners and contractors protective liability (OCPL) policy covering plaintiff's liability for damages imposed by law with respect to all operations under the contract. Century Surety Company (Century) issued an OCPL policy naming plaintiff as the insured and defendant as the designated contractor.

During the OCPL policy period, one of defendant's employees allegedly sustained injuries after falling from a ladder while engaged in painting activity pursuant to the contract, and the employee thereafter commenced a personal injury action against several parties, including plaintiff. Plaintiff commenced this action seeking contractual and common-law indemnification from defendant. Defendant appeals from an order granting plaintiff's subsequent motion for summary judgment seeking a conditional order of contractual and common-law indemnification. We affirm.

Defendant contends that Supreme Court erred in granting the motion because defendant fulfilled its obligation to indemnify plaintiff by procuring the OCPL policy, which contains a clause providing that coverage under that policy would be primary and Century would not seek contribution from other insurance available to plaintiff. We reject that contention. "An insurance agreement is subject to principles of contract interpretation" (*Universal Am. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 [2015]). Where, as here, "a written agreement . . . is complete, clear and unambiguous on its face[, it] must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Inasmuch as the specifications incorporated into the contract provide that defendant's obligation to indemnify and hold harmless shall not "be deemed limited or discharged by the enumeration or procurement of any insurance for liability for damages imposed by law upon [defendant]," it cannot be said that procurement of the OCPL policy fulfilled or discharged defendant's obligation to indemnify plaintiff (*see State of New York v Titan Roofing, Inc.*, 2009 NY Slip Op 31284[U], *6-7 [Sup Ct, Albany County 2009]). Thus, the court properly granted the motion inasmuch as plaintiff established its entitlement to a conditional order of contractual and common-law indemnification and defendant failed to raise an issue of fact (*see Jamindar v Uniondale Union Free Sch. Dist.*, 90 AD3d 612, 616-617 [2d Dept 2011]).

All concur except CURRAN, J., who concurs in the result in the following memorandum: I concur in the result reached by my colleagues but write separately to highlight my concern that, as written, Supreme Court's order may be read as granting relief that is neither ripe for review nor authorized under the law. In my view, absent from the court's order is language specifying the condition upon which the order is based, i.e., the payment by the defendant in the underlying action (here plaintiff, the indemnitee) of any judgment awarded to the plaintiff in that action (*see Oswego County v American Sur. Co. of N.Y.*, 63 NYS2d 723, 725 [Sup Ct, Oswego County 1946], *affd* 272 App Div 862 [4th Dept 1947]). Thus, I would modify the order by vacating the second ordering paragraph and inserting in place thereof the following, which includes the necessary conditioning language to defendant's obligation to indemnify:

> ORDERED, that North Star Painting Company, Inc., doing business as K&K Painting Company shall fully indemnify the State of New York and/or the New York State Department of Transportation (NYSDOT) for any sums awarded to the

plaintiff, by judgment or settlement, in the underlying action, upon payment thereof by the State of New York and/or NYSDOT, as well as for any past and future attorney's fees, disbursements, costs and other expenses incurred in connection with defending said action to the extent incurred by the State of New York and/or NYSDOT.

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

587

CA 17-02014

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

SUSAN M. KINGSLEY, INDIVIDUALLY AND AS THE ADMINISTRATRIX OF THE ESTATE OF JAMES D. KINGSLEY, DECEASED, PLAINTIFF-RESPONDENT,

V

OPINION AND ORDER

THOMAS EDWARD PRICE, M.D., WESTERN NEW YORK OCCUPATIONAL MEDICINE, P.C., MICHAEL ANTHONY TORRES, M.D., ALSO KNOWN AS MICHAEL A. TORRES, M.D., MBA, P.C., EASTERN NIAGARA RADIOLOGY AND NUCLEAR MEDICINE ASSOCIATES, P.C., AUREA SISMEA SUSHILA DESOUZA, M.D., LOCKPORT MEMORIAL HOSPITAL, EASTERN NIAGARA HOSPITAL, DEFENDANTS-APPELLANTS, AND NEW YORK STATE ELECTRIC AND GAS CORP., DEFENDANT-RESPONDENT.

NEW YORK STATE ELECTRIC AND GAS CORP., THIRD-PARTY PLAINTIFF,

V

ONSITE OCCUPATIONAL HEALTH SERVICES, INC., THIRD-PARTY DEFENDANT.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (SETH HISER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DEMARIE & SCHOENBORN, P.C., BUFFALO (JOSEPH DEMARIE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

NIXON PEABODY LLP, ROCHESTER (KEVIN T. SAUNDERS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered June 13, 2017. The order denied the motion of defendants-appellants for summary judgment dismissing the second amended complaint and cross claims against them.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs, the motion is granted, and the second amended complaint and cross claims against defendants-appellants are dismissed.

Opinion by DEJOSEPH, J:

BACKGROUND

Thomas Edward Price, M.D., Western New York Occupational Medicine, P.C. (WNYOM), Michael Anthony Torres, M.D., also known as Michael A. Torres, M.D., MBA, P.C., Eastern Niagara Radiology and Nuclear Medicine Associates, P.C., Aurea Sismea Sushila DeSouza, M.D., Lockport Memorial Hospital, and Eastern Niagara Hospital (defendants) appeal from an order that denied their motion for summary judgment dismissing the second amended complaint and any cross claims against them.

This case arises from the failure of defendants and defendant New York State Electric and Gas Corp. (NYSEG) to inform decedent James D. Kingsley that a chest x ray indicated that he might have lung cancer. Decedent was employed by NYSEG as a class 1 gas fitter. As part of an OSHA-mandated protocol associated with decedent's work activities, he was required to go through periodic medical examinations to determine whether he had an occupation-induced disease. On April 29, 2008, NYSEG sent decedent to WNYOM for an examination and "B-Read" chest x ray, which is an x ray specifically geared to look for issues related to asbestos exposure. The chest x ray was performed at defendant Lockport Memorial Hospital and decedent signed a consent form prior to the procedure. The consent form provided, in pertinent part, the following:

> "I, [decedent], understand that medical examinations done at this facility are for evaluation purposes for either employment suitability or worker's compensation injury/illness treatment. The examinations done here are not intended to detect all underlying health conditions and do not replace the medical care provided by my personal physician. I hereby consent to the examination for the stated purposes or request the services stipulated of [WNYOM].
>
> Furthermore, I understand that all medical information related to my ability to perform the functions of my job will be reported to the designated employer representatives at my place of employment."

DeSouza, a radiologist, read the file and issued a report, noting: "R[ight] infrahilar, 4x3 centimeter density. Needs CT," meaning that there was an abnormal mass in decedent's lung and, to further define it, a CAT scan was recommended. The x ray report was sent to an associate analyst for Rochester Gas and Electric Company, a sister company of NYSEG, on May 5, 2008 and, after it was determined that the condition was not work related, NYSEG did not advise decedent of the findings. Decedent eventually reached out to NYSEG for information about the x ray and was made aware of the condition, but by that time the cancer was insurmountable and, on May 5, 2012, decedent died of metastatic lung cancer.

Prior to his death, decedent and his wife, plaintiff Susan M.

Kingsley, commenced this action against defendants and NYSEG and asserted causes of action for medical malpractice and/or negligence, loss of consortium, and wrongful death[1] based on allegations that defendants failed to inform decedent of the results of the chest x ray. Defendants and NYSEG answered, and NYSEG asserted a cross claim against defendants for common-law contribution and indemnification. Plaintiff's bill of particulars to defendants alleged, inter alia, that defendants failed to notify decedent and/or his primary care physician about the x ray results.

Defendants moved for summary judgment dismissing the second amended complaint and any cross claims against them or, in the alternative, to dismiss any cause of action for medical malpractice against them. Supreme Court denied the motion and defendants appeal.

DISCUSSION

At the outset, we conclude that, as set forth in the pleadings and amplified by the bill of particulars, plaintiff's first cause of action sounds in ordinary negligence, *not* medical malpractice. The first cause of action is predicated solely on defendants' failure to transmit information about the mass discovered on decedent's chest x ray to decedent or his primary care physician. "The failure to communicate significant medical findings to a patient or his treating physician is not malpractice but ordinary negligence" (*Yaniv v Taub*, 256 AD2d 273, 274 [1st Dept 1998]; *see Mancuso v Kaleida Health*, 100 AD3d 1468, 1468-1469 [4th Dept 2012]). Moreover, "liability for medical malpractice may not be imposed absent a physician-patient relationship, either express or implied, because 'there is no legal duty in the absence of such a relationship' " (*Cygan v Kaleida Health*, 51 AD3d 1373, 1375 [4th Dept 2008]; *see Gedon v Bry-Lin Hosps.*, 286 AD2d 892, 893-894 [4th Dept 2001], *lv denied* 98 NY2d 601 [2002]). Here, Price and Torres were not involved in any physical examination of decedent or in taking or reviewing his x ray, and there are no allegations that DeSouza incorrectly read decedent's x ray or that decedent was injured when the x ray was taken. Thus, the first cause of action is not for medical malpractice, but for ordinary negligence.

In view of the foregoing, the issue before us is whether defendants had a legal duty, in the context of ordinary negligence, to inform decedent or his physician of the mass in his lung that was detected with the x ray. "Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party" (*Espinal v Melville Snow Contrs., Inc.*, 98 NY2d 136, 138 [2002]). "In the absence of a duty, as a matter of law, there can be no liability" (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016], *rearg denied* 28 NY3d 956 [2016]; *see Gonzalez v*

[1] Decedent died during the pendency of this action. Kingsley maintained the action individually and as the administratrix of decedent's estate, and added a wrongful death cause of action on behalf of decedent's estate.

Povoski, 149 AD3d 1472, 1473 [4th Dept 2017]), and "the existence and scope of a duty is a question of law requiring courts to balance sometimes competing public policy considerations" (*Espinal*, 98 NY2d at 138). "To discern whether a duty exists, the court must not engage in a simple weighing of equities, for a legal duty does not arise 'when[ever] symmetry and sympathy would so seem to be best served' " (*Matter of New York City Asbestos Litig.*, 27 NY3d 765, 787-788 [2016], quoting *De Angelis v Lutheran Med. Ctr.*, 58 NY2d 1053, 1055 [1983]). Along with "logic and science, . . . policy [considerations] play an important role" in determining the bounds of duty (*De Angelis*, 58 NY2d at 1055). "[I]n determining whether a duty exists, courts must be mindful of the precedential, and consequential, future effects of their rulings, and limit the legal consequences of wrongs to a controllable degree" (*Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 232 [2001] [internal quotation marks omitted]).

The Court of Appeals has balanced a number of factors in analyzing questions of duty, "including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability" (*Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 586 [1994]; *see New York City Asbestos Litig.*, 27 NY3d at 788; *Gilson v Metropolitan Opera*, 5 NY3d 574, 576-577 [2005]). Moreover, "[f]oreseeability, alone, does not define duty–it merely determines the scope of the duty once it is determined to exist" (*Hamilton*, 96 NY2d at 232).

NYSEG and plaintiff rely on *Davis v South Nassau Communities Hosp.* (26 NY3d 563 [2015]) and *Landon v Kroll Lab. Specialists, Inc.* (22 NY3d 1 [2013], *rearg denied* 22 NY3d 1084 [2014]) – as did the court – in asserting that defendants had a duty to convey the x ray results to decedent and/or his personal physician, while defendants contend that those cases are inapposite. We agree with defendants that neither *Davis* nor *Landon* requires finding a duty under these circumstances.

In *Davis*, a patient was intravenously treated by the defendants with an opioid narcotic pain killer and a benzodiazepine drug, and was discharged from the defendant hospital about an hour and a half after the medications were administered (*Davis*, 26 NY3d at 570). Nineteen minutes after her discharge, the patient was involved in a motor vehicle accident wherein she crossed a double yellow line and struck a bus operated by the plaintiff driver (*id.* at 570-571). The Court of Appeals held that, "[u]nder these facts," the defendants owed to the plaintiffs a "duty to warn" the discharged patient that the medication she was given "either impaired or could have impaired her ability to safely operate an automobile" (*id.* at 571).

In *Landon*, the Court of Appeals held that the defendant drug testing laboratory could be liable under the common law for negligence in the testing of the plaintiff's "biological sample" (*Landon*, 22 NY3d at 3). At the time of the test, the plaintiff was serving a five-year

term of probation and was subject to random drug testing (*id.* at 4). The defendant performed tests on plaintiff's oral fluid sample pursuant to a contract with Orange County and its probation department, and the plaintiff's sample "screen tested positive for THC" (*id.*). The plaintiff obtained an independent blood test the same day that the oral fluid sample was taken, which came back negative for illicit and controlled substances (*id.*). In his complaint, the plaintiff alleged that the defendant's report describing the results of the positive test was the result of "systemic negligence" because the test was performed without any type of confirmation test or a simultaneous urine sample, and the screen test cutoff level employed by the defendant was substantially lower than other standards (*id.* at 4-5). He alleged that he was required to serve an extended term of probation because of the false test results and defend himself in a violation of probation proceeding brought against him by the probation department (*id.* at 5).

In *Landon*, the Court held that, "[u]nder the circumstances," the defendant owed a duty of care to the plaintiff to adhere to professionally accepted scientific testing standards in performing his drug test (*id.* at 6-7). There were "strong policy-based considerations" behind finding such a duty, including that a false positive report would have "profound, potentially life-altering, consequences for a test subject," and that the defendant was in "the best position to prevent false positive results" (*id.* at 6). Even though there was no contractual relationship between the defendant and the plaintiff, the Court determined that a duty arose " 'where the contracting party, in failing to exercise reasonable care in the performance of [its] duties, launche[s] a force or instrument of harm' " (*id.*, quoting *Espinal*, 98 NY2d at 140).

In this case, however, it is clear that defendants did not launch a force or instrument of harm. Here, there is no dispute that defendants correctly interpreted the results of the x ray and timely conveyed the results to decedent's employer. Notably absent from the record is the identity or even existence of decedent's treating physician. Nor is there any indication that defendants were made aware of any treating physician. Furthermore, the consent form, executed by decedent, specifically indicated that decedent "underst[oo]d that all medical information related to [his] ability to perform the functions of [his] job w[ould] be reported to the designated employer representatives at [his] place of employment." There is also no dispute that defendants adhered to the requirements set forth in the consent form. We therefore conclude that under *Landon* and *Davis* there was no duty to decedent and, as stated by the Court of Appeals, "[w]e have been reluctant to expand a doctor's duty of care to a patient to encompass nonpatients. A critical concern underlying this reluctance is the danger that a recognition of a duty would render doctors liable to a prohibitive number of possible plaintiffs" (*McNulty v City of New York*, 100 NY2d 227, 232 [2003]).

Our dissenting colleague relies heavily on *Davis* and concludes that, "[b]ut for the expansive duty articulated by the Court of Appeals in *Davis* with respect to medical professionals, I would have

joined the majority." In our view, however, the generalized statements about legal duties in *Davis* were intended to summarize existing law, not to call into question longstanding precedents. Indeed, the Court made it a point to note that its holding was limited to the particular facts before it (*see Davis*, 26 NY3d at 571), and explicitly stated that "our decision herein should not be construed as an erosion of the prevailing principle that courts should proceed cautiously and carefully in recognizing a duty of care" (*id.* at 580). Notably, the *Davis* Court reiterated a principle that guides our view of the facts and circumstances of this case: " '[w]hile the temptation is always great to provide a form of relief to one who has suffered, . . . the law cannot provide a remedy for every injury incurred' " (*id.*).

Plaintiff's and our dissenting colleague's reliance on Price's testimony regarding an "ethical" duty and a WNYOM written protocol is misplaced inasmuch as Price's testimony and the written protocol do not conclusively establish a legal duty running from defendants to decedent. "[T]he duty owed by one member of society to another is a legal issue for the courts" (*Eiseman v State*, 70 NY2d 175, 187 [1987]). "While moral and logical judgments are significant components of the analysis, we are also bound to consider the larger social consequences of our decisions and to tailor our notion of duty so that the legal consequences of wrongs [are limited] to a controllable degree" (*id.* [internal quotation marks omitted]). "A line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit. It is always tempting, especially when symmetry and sympathy would so seem to be best served, to impose new duties, and, concomitantly, liabilities, regardless of the economic and social burden. But, absent legislative intervention, the fixing of the 'orbit' of duty, as here, in the end is the responsibility of the courts" (*De Angelis*, 58 NY2d at 1055). Here, we conclude that neither Price's testimony or the WNYOM written protocol imposed a legal requirement on defendants to disclose the x ray results to decedent and/or his treating physician.

We further agree with defendants that NYSEG's contention that defendants had a regulatory duty to provide the results to decedent (*see* 29 CFR 1910.1001 [I] [7] [i] [C]) is raised for the first time in its postargument submission to this Court and is therefore not properly before us (*see Matter of Fichera v New York State Dept. of Envtl. Conservation*, 159 AD3d 1493, 1495-1496 [4th Dept 2018]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

In view of the foregoing, the court erred in denying defendants' motion inasmuch as defendants had no legal duty to decedent to provide him or his treating physician with a copy of the x ray results. Accordingly, we conclude that the order should be reversed, the motion should be granted, and the second amended complaint and cross claims against defendants should be dismissed.

All concur except CURRAN, J., who dissents and votes to affirm in

the following opinion: I respectfully dissent, and I conclude that, in this case, defendants-appellants (defendants) owed a duty of care to decedent James D. Kingsley pursuant to *Davis v South Nassau Communities Hosp.* (26 NY3d 563 [2015]). But for the expansive duty articulated by the Court of Appeals in *Davis* with respect to medical professionals, I would have joined the majority.

In determining whether a duty exits, "courts identify what people may reasonably expect of one another" (*Darby v Compagnie Natl. Air France,* 96 NY2d 343, 347 [2001]). "The question of duty . . . is best expressed as whether the plaintiff's interests are entitled to legal protection against the defendant's conduct" (*Pulka v Edelman,* 40 NY2d 781, 782 [1976], *rearg denied* 41 NY2d 901 [1977] [internal quotation marks omitted]). "Courts resolve legal duty questions by resort to common concepts of morality, logic and consideration of the social consequences of imposing a duty" (*Tenuto v Lederle Labs., Div. of Am. Cyanamid Co.*, 90 NY2d 606, 612 [1997]). It is "critical" to consider "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" (*Davis*, 26 NY3d at 572 [internal quotation marks omitted]). Simply put, "we assign the responsibility of care to the person or entity that can most effectively fulfill that obligation at the lowest cost" (*id.).*

In *Davis*, the defendant physicians and hospital administered medications to a patient who allegedly became unconscious while driving home from the hospital, causing her vehicle to cross a double yellow line and strike a bus that was traveling in the opposite direction (*id.* at 570-571). The Court held that the defendants owed the plaintiff bus driver a duty to warn the patient that the medication they had administered to the patient impaired her ability to safely operate a motor vehicle (*id.* at 571). In so holding, the Court recognized that the defendants owed a duty to "every motorist in [the nonparty patient's] vicinity" (*id.* at 577). As criticized by the dissent in *Davis*, that is akin to a duty owed by the defendants to "an unidentified unknown stranger to defendants' physician-patient relationship" (*id.* at 584 [Stein, J., dissenting]). Although the majority here accurately observes that the Court in *Davis* limited its decision to the facts before it (*id.* at 571), a duty, once recognized, cannot be limited to a single set of facts. Rather, the "key" to understanding the existence of a duty encompassing various factual scenarios is the relationship between the defendant and the injured party (*Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 233 [2001]).

In my view, the relationship here between defendants and decedent is even more direct than the relationship between the defendants and the plaintiff in *Davis* and thus, the negligence cause of action in this case fits very comfortably within the duty of care recognized in *Davis*. Indeed, the *Davis* Court found that medical professionals had a duty to a non-patient, who was a complete stranger to the physician-patient relationship. The concepts of morality and logic must therefore support imposing a duty under the instant circumstances, i.e., that a physician who examines a person and becomes aware of a

potentially deadly condition in that person has a duty to make at least minimal efforts to notify that fellow human being of such condition. The social consequences of applying such a duty of care here are minimal, and clearly less demanding than in *Davis*, which the dissent described as the "heavy cost" of "[e]xtending a physician's duty beyond the patient to a boundless pool of potential plaintiffs" (*id.* at 591 [Stein, J., dissenting]).

Here, decedent was a member of a specific class of employees who were examined by defendants, he was readily identifiable by these defendants, and he was in fact known to them by name. Defendants also were in a uniquely favorable position, as physicians, to appreciate what defendant Thomas Edward Price, M.D. characterized as a "very significant" finding that was possible evidence of a cancerous tumor, and to notify decedent of the risk of harm. Price also candidly admitted that, "ethically," defendant Western New York Occupational Medicine, P.C. (WNYOM) should have followed up with decedent, and that it was in fact WNYOM's practice to contact examinees about any abnormalities. It would have taken very little effort on the part of defendants, especially in this modern era of electronic communication, to alert decedent to the "very significant" finding from the examination. Moreover, applying the *Davis* duty of care here does not impose much of an additional burden on defendants, if any at all, because it was their "practice" to contact the examinees regarding such findings. I further submit that imposing the *Davis* duty of care here does not precipitate any more of an expansion of liability for medical professionals than in *Davis* (and probably much less) because, based on this record, it can be reasonably presumed that medical professionals in defendants' position would have believed that they had an ethical duty to apprise an examinee of such a "very significant" finding.

Accordingly, I would affirm the order denying defendants' motion for summary judgment dismissing the second amended complaint and any cross claims against them.

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

593

KA 15-01349

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ISIAH WILLIAMS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

ISIAH WILLIAMS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered August 5, 2015. The judgment convicted defendant, upon a jury verdict, of criminal possession of a forged instrument in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted on count two of the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a forged instrument in the second degree (Penal Law § 170.25). We note by way of background that, in a prior appeal (*People v Williams*, 101 AD3d 1728 [4th Dept 2012], *lv denied* 21 NY3d 1021 [2013]), we reversed defendant's conviction on count two of the indictment for criminal possession of a forged instrument in the second degree and granted a new trial on that count. Defendant now appeals from a judgment convicting him, following the new trial, of that same count, which is based upon an allegedly forged bank check identified as check number 61517. Inasmuch as it is important to the issues on this appeal, we further note that defendant was acquitted in the prior trial of two counts of criminal possession of a forged instrument in the second degree related to allegedly forged bank checks identified in the indictment as check numbers 61512 and 61519.

At the new trial, notwithstanding that defendant was acquitted of the prior charged criminal conduct involving check numbers 61512 and 61519, the People were permitted to use those checks, over defendant's objection, in their case-in-chief as evidence of, inter alia, defendant's criminal intent and motive with respect to check number 61517. In instructing the jury concerning the purpose for which check numbers 61512 and 61519 could be considered, County Court referred to defendant's alleged involvement with those checks as "uncharged

conduct." The court also instructed the jury: "Regarding evidence of other crimes, there may have been evidence that on another occasion the defendant engaged in criminal conduct." Defendant contends, inter alia, that the People were collaterally estopped at the new trial from using check numbers 61512 and 61519 as evidence with respect to count two involving check number 61517, and that the court committed reversible error in permitting such evidence. We agree.

We conclude that it was improper for the court to characterize any evidence concerning defendant's alleged possession of forged checks numbered 61512 and 61519 as "uncharged conduct" or "criminal conduct." Defendant in fact had been charged, tried, and acquitted of criminal possession of a forged instrument in the second degree with respect to those checks. We therefore further conclude that the People were collaterally estopped by the earlier verdict from presenting any evidence related to check numbers 61512 and 61519 at the new trial (*see People v O'Toole*, 22 NY3d 335, 338 [2013]; *People v Acevedo*, 69 NY2d 478, 486-487 [1987]).

Contrary to the People's contention, we perceive no "unreasonable difficulty" that jeopardizes the jury's truth-seeking function by the application of collateral estoppel here (*O'Toole*, 22 NY3d at 339; *see generally People v Ortiz*, 26 NY3d 430, 437 [2015]). Indeed, we conclude that, during the new trial, the jury was provided with a misleading or untruthful account of defendant's conduct with respect to check numbers 61512 and 61519. Moreover, the People have not established that the application of collateral estoppel here would require any material witness to give untruthful or misleading testimony with respect to check number 61517. The charge at issue herein requires the People to prove only that defendant knew that check number 61517 was forged and that, with intent to defraud, deceive, or injure another, he uttered or possessed the check (*see* Penal Law § 170.25). Thus, even absent any reference to check numbers 61512 or 61519, the People's witnesses can testify to defendant's involvement, if any, with check number 61517 without materially altering testimony concerning that instrument or providing the jury with a misleading or untruthful account.

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

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

599

KA 14-02214

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ISIAH WILLIAMS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ISIAH WILLIAMS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a resentence of the Supreme Court, Monroe County (Frederick G. Reed, A.J.), rendered December, 5, 2014. Defendant was resentenced upon his conviction of criminal possession of a forged instrument in the second degree (four counts) and criminal possession of stolen property in the fifth degree.

It is hereby ORDERED that the resentence so appealed from is unanimously vacated on the law and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: Defendant was convicted upon a jury verdict of four counts of criminal possession of a forged instrument in the second degree (Penal Law § 170.25) and one count of criminal possession of stolen property in the fifth degree (§ 165.40). On a prior appeal, we concluded, inter alia, that County Court erred in allowing defendant to proceed pro se at sentencing, and we therefore remitted the matter to that court for resentencing (*People v Williams*, 101 AD3d 1730, 1733-1734 [4th Dept 2012], *lv denied* 21 NY3d 1021 [2013]). Upon remittal, Supreme Court resentenced defendant.

As an initial matter, we note that, because defendant's notice of appeal is taken from the resentence only, his contentions with respect to the original judgment of conviction, including that the court erred in denying his CPL 330.30 motion and that he was denied a fair trial, are not properly raised on this appeal (*see People v Coble*, 17 AD3d 1165, 1165 [4th Dept 2005], *lv denied* 5 NY3d 787 [2005]).

We agree with defendant, however, that he was illegally resentenced in Supreme Court after his trial was conducted in County Court. It is well settled that "in order to remove a criminal action from County Court to Supreme Court, the Uniform Rules for the New York State Trial Courts require that such removal be authorized by the Chief Administrator and that it occur prior to the entry of a plea or

commencement of trial" (*People v Adams*, 74 AD3d 1897, 1899 [4th Dept 2010]; *see* 22 NYCRR 200.14). Here, although the case was removed by the Chief Administrator, it did not occur prior to the commencement of trial. Thus, Supreme Court lacked authority to resentence defendant, thereby rendering the resentence illegal (*see Adams*, 74 AD3d at 1899). We therefore vacate the resentence, and we remit the matter to County Court for resentencing, following a persistent felony offender hearing.

We reject defendant's further contention that the prosecutor should have been disqualified from appearing at the persistent felony offender hearing because of his involvement with an alleged *Brady* violation. The scope of that hearing was limited to resentencing issues, which did not directly implicate any purported *Brady* violations. Thus, the prosecutor "did not 'serve[] as both a witness and an advocate' in violation of the advocate-witness rule" (*People v Parker*, 133 AD3d 1300, 1301 [4th Dept 2015], *lv denied* 27 NY3d 1154 [2016], *reconsideration denied* 28 NY3d 1030 [2016]). Further, the prosecutor did not inject his own credibility into the hearing in violation of the unsworn witness rule (*see People v Paperno*, 54 NY2d 294, 299-300 [1981]).

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

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

604

KA 15-02121

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ISIAH WILLIAMS, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

ISIAH WILLIAMS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Frederick G. Reed, A.J.), rendered December 4, 2015. The judgment convicted defendant, upon a jury verdict, of criminal possession of a forged instrument in the second degree (two counts), and scheme to defraud in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal possession of a forged instrument in the second degree (Penal Law § 170.25) and one count of scheme to defraud in the second degree (§ 190.60). We reject the contention of defendant that he was denied a fair trial when Supreme Court allowed the People to present testimony regarding the facts underlying count seven of the indictment, which was previously dismissed by this Court (*People v Williams*, 101 AD3d 1734, 1734 [4th Dept 2012]). That testimony was relevant to the crimes charged in counts 5 and 15 of the indictment and was therefore properly admitted at trial (*see generally People v Davis*, 43 NY2d 17, 27 [1977], *cert denied* 435 US 998 [1978], *rearg dismissed* 61 NY2d 670 [1983]; Jerome Prince, Richardson on Evidence § 4-101 at 136 [Farrell 11th ed 1995]).

By failing to object to the court's jury instruction, defendant failed to preserve for our review his contention that he was deprived of a fair trial by that instruction (*see* CPL 470.05 [2]; *see also People v Green*, 35 AD3d 1211, 1212 [4th Dept 2006], *lv denied* 8 NY3d 985 [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 reject defendant's further contention that the grand jury

proceeding was defective, requiring dismissal of the indictment (*see* CPL 210.35 [5]). Although one of the witnesses provided false testimony at the grand jury proceeding relating to count four of the indictment, that count was properly dismissed. Further, "[t]here is no indication that the People knowingly or deliberately presented false testimony before the Grand Jury, and thus there is no basis for finding that the integrity of the Grand Jury proceeding was impaired or [that] the [remaining counts of the] indictment [were] rendered defective by the alleged false testimony" (*People v Klosin*, 281 AD2d 951, 951 [4th Dept 2001], *lv denied* 96 NY2d 864 [2001]; *see generally People v Huston*, 88 NY2d 400, 406-407 [1996]; *People v Miller*, 110 AD3d 1150, 1150-1151 [3d Dept 2013]).

Contrary to defendant's contention, the court did not err in denying his request for a missing witness charge. "A request for a missing witness charge is properly denied where, as here, the party requesting the charge does not establish that the witness could have been expected to testify concerning a material issue" (*People v Williams*, 13 AD3d 1173, 1174 [4th Dept 2004], *lv denied* 4 NY3d 892 [2005], *reconsideration denied* 5 NY3d 796 [2005]; *see People v Morris*, 159 AD2d 934, 934 [4th Dept 1990], *lv denied* 76 NY2d 793 [1990]).

Defendant failed to object to all but one of the allegedly improper remarks made by the prosecutor during opening and closing statements, and thus failed to preserve for our review his contention that he was denied a fair trial by those instances of alleged prosecutorial misconduct (*see* CPL 470.05 [2]; *People v Simmons*, 133 AD3d 1275, 1277 [4th Dept 2015], *lv denied* 27 NY3d 1006 [2016]). In any event, defendant's contention is without merit inasmuch as all of the challenged remarks were either a fair comment on the evidence or a fair response to defendant's summation (*see Simmons*, 133 AD3d at 1277-1278; *see People v Kelly*, 34 AD3d 1341, 1342 [4th Dept 2006], *lv denied* 8 NY3d 847 [2007]). Contrary to defendant's further contention, defense counsel's failure to object to the prosecutor's comments did not deprive defendant of effective assistance of counsel inasmuch as those comments did not constitute prosecutorial misconduct (*see People v Hill*, 82 AD3d 1715, 1715 [4th Dept 2011], *lv denied* 17 NY3d 806 [2011]). With respect to defense counsel's failure to object to the testimony of a prosecution witness and to elicitation by the prosecutor of testimony regarding defendant's nickname, "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 Harris*, 147 AD3d 1328, 1330 [4th Dept 2017]).

We also reject defendant's contention that the court erred in denying his request for substitute counsel inasmuch as the court made the requisite "minimal inquiry" into defendant's objections with respect to defense counsel (*People v Sides*, 75 NY2d 822, 825 [1990]; *see People v Blackwell*, 129 AD3d 1690, 1691 [4th Dept 2015], *lv denied* 26 NY3d 926 [2015]), and properly determined that "there was no basis for substitution of counsel or for further inquiry" (*People v Zuniga*, 149 AD3d 660, 660 [1st Dept 2017], *lv denied* 29 NY3d 1136 [2017]; *see*

People v Medina, 44 NY2d 199, 206-210 [1978]). "Moreover, the timing and circumstances of defendant's [request] strongly suggest that it was a delaying tactic" (*Zuniga*, 149 AD3d at 660; *see Medina*, 44 NY2d at 208).

Contrary to defendant's contention, we further conclude that he was properly adjudicated a persistent felony offender. Even assuming, arguendo, that the People failed to comply with CPL 400.20, we conclude that "strict compliance with the statute was not required inasmuch as defendant received reasonable notice of the accusations against him and was provided an opportunity to be heard with respect to those accusations during the persistent felony offender proceeding" (*People v Gonzalez*, 61 AD3d 1428, 1429 [4th Dept 2009], *lv denied* 12 NY3d 925 [2009]; *see People v Mateo*, 101 AD3d 1458, 1461 [3d Dept 2012], *lv denied* 21 NY3d 913 [2013]; *see generally People v Bouyea*, 64 NY2d 1140, 1142 [1985]). Additionally, the court did not err in admitting in evidence documents that contained his social security number because defendant placed his identity at issue during the persistent felony offender hearing (*see generally People v Battease*, 93 AD3d 888, 889 [3d Dept 2012], *lv denied* 18 NY3d 992 [2012]).

We also reject defendant's contention that the court abused its discretion in sentencing him as a persistent felony offender. We conclude "that [defendant's] history and character . . . and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest" (Penal Law § 70.10 [2]; *see People v Magin*, 152 AD3d 1184, 1184 [4th Dept 2017], *lv denied* 30 NY3d 951 [2017]; *People v Lewis*, 292 AD2d 814, 814-815 [4th Dept 2002], *lv denied* 98 NY2d 677 [2002]).

Finally, we note that the certificate of conviction incorrectly states that defendant was convicted of count four of the indictment. Therefore, the certificate of conviction must be amended to reflect that count four of the indictment was dismissed (*see generally People v Anderson*, 79 AD3d 1738, 1739 [4th Dept 2010], *lv denied* 16 NY3d 856 [2011]).

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

615

KA 16-02082

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS M. LASHER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., J.), rendered June 21, 2016. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree and assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and assault in the first degree (§ 120.10 [1]). Defendant's challenge to the legal sufficiency of the evidence disproving justification is unpreserved for our review because his motion for a trial order of dismissal was not " 'specifically directed' at" that alleged shortcoming in the evidence (*People v Gray*, 86 NY2d 10, 19 [1995]; *see People v Timmons*, 151 AD3d 1682, 1683 [4th Dept 2017], *lv denied* 30 NY3d 984 [2017]; *People v Stoby*, 4 AD3d 766, 766 [4th Dept 2004], *lv denied* 2 NY3d 807 [2004]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We reject defendant's contention that he was denied effective assistance of counsel. Defendant failed to establish "the absence of strategic or other legitimate explanations" for counsel's decision not to pursue the defense of extreme emotional disturbance (*People v Rivera*, 71 NY2d 705, 709 [1988]; *see generally People v Lane*, 60 NY2d 748, 750 [1983]; *People v Castro*, 76 AD3d 421, 426 [1st Dept 2010], *lv denied* 15 NY3d 892 [2010]). Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant was afforded meaningful

representation (*see generally People v Wragg*, 26 NY3d 403, 412 [2015]; *People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, the sentence is not unduly harsh or severe.

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

680

CA 17-01547

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

VERONICA RODRIGUEZ,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

FIRST STUDENT, INC., LAIDLAW TRANSIT INC.,
AND WALTER H. KELLY,
DEFENDANTS-APPELLANTS-RESPONDENTS.

BURDEN, HAFNER & HANSEN, LLC, BUFFALO (PHYLLIS A. HAFNER OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

SPADAFORA & VERRASTRO, LLP, BUFFALO (JOSEPH A. TODORO OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered January 3, 2017. The order, among other things, granted in part and denied in part the cross motion of plaintiff for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained in a motor vehicle accident that occurred when a school bus operated by defendant Walter H. Kelly and owned by defendant Laidlaw Transit Inc. rear-ended plaintiff's stopped vehicle. Supreme Court denied defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury, denied that part of plaintiff's cross motion for summary judgment on the issue of serious injury and granted that part of plaintiff's cross motion on the issue of negligence. Defendants appeal and plaintiff cross-appeals, and we affirm.

With respect to the appeal and cross appeal, we conclude that defendants established their prima facie entitlement to judgment as a matter of law with respect to the permanent consequential limitation of use, significant limitation of use, significant disfigurement and 90/180-day categories of serious injury asserted by plaintiff. Defendants met their initial burden of proof by submitting competent medical evidence establishing that the accident did not cause any of plaintiff's alleged serious injuries (*see generally Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 352-353 [2002]). Specifically, defendants submitted expert medical reports and plaintiff's medical records demonstrating that plaintiff's alleged pain and injuries were related

to preexisting conditions, thus shifting the burden to plaintiff to "com[e] forward with evidence indicating a serious injury causally related to the accident" (*Carrasco v Mendez*, 4 NY3d 566, 580 [2005]).

In opposition to the motion, plaintiff submitted, inter alia, the affirmation and related medical records of her treating chiropractor, who opined that plaintiff's injuries were entirely caused by the accident and were permanent. Those submissions included imaging studies demonstrating that plaintiff suffered from herniated discs and were "accompanied by objective evidence of the extent of alleged physical limitations resulting from the disc injur[ies]" (*Kearse v New York City Tr. Auth.*, 16 AD3d 45, 49 [2d Dept 2005]), i.e., medical records from plaintiff's treating physicians designating numeric percentages of plaintiff's substantial range of motion losses (*see Toure*, 98 NY2d at 350). Thus, plaintiff raised an issue of fact with respect to the permanent consequential limitation of use and significant limitation of use categories. Plaintiff also raised triable issues of fact with respect to the 90/180-day category by submitting objective evidence of a medically determined injury or impairment of a non-permanent nature together with competent evidence that plaintiff's activities were curtailed to a great extent during the relevant time period (*see generally Houston v Geerlings*, 83 AD3d 1448, 1450 [4th Dept 2011]). We further conclude that whether plaintiff's surgical scar constitutes a serious disfigurement is also an issue of fact (*see Langensiepen v Kruml*, 92 AD3d 1302, 1303 [4th Dept 2012]; *Schultz v Penske Truck Leasing Co., L.P.*, 59 AD3d 1119, 1121 [4th Dept 2009]).

Contrary to defendants' contention on their appeal, the court properly granted that part of plaintiff's cross motion for summary judgment on the issue of negligence. It is well settled that "a rear-end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle" (*Pitchure v Kandefer Plumbing & Heating*, 273 AD2d 790, 790 [4th Dept 2000]). Here, plaintiff met her initial burden on the issue of negligence by establishing that her stopped vehicle was rear-ended by Kelly's vehicle and, in opposition, defendants failed to submit the requisite "nonnegligent explanation for the collision" (*Ruzycki v Baker*, 301 AD2d 48, 49 [4th Dept 2002]). We reject defendants' further contention that the court erred in granting summary judgment on the issue of negligence because plaintiff failed to establish that she was free from culpable conduct with respect to the accident (*see Rodriguez v City of New York*, — NY3d —, —, 2018 NY Slip Op 02287, *4-5 [2018]).

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

691

CA 17-01682

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

IN THE MATTER OF PATRICIA ANN GOODYEAR,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF HEALTH,
RESPONDENT-RESPONDENT,
AND JEANENE JUNE DEMARC, RESPONDENT-APPELLANT.

MICHAEL STEINBERG, ROCHESTER, FOR RESPONDENT-APPELLANT.

DYER LAW OFFICES, P.C., SYRACUSE (ANDREA M. FERRO OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an amended order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered June 1, 2017. The amended order granted the petition.

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

Memorandum: Petitioner filed a verified petition seeking, inter alia, "to amend and/or delete the child's birth certificate to amend and/or delete all references to Jeanene June [d]eMarc [respondent] . . . as the mother" of the child, although without stating any statutory underpinnings for such a proceeding. We note at the outset that the order from which respondent appeals was superceded by an amended order entered approximately two months later (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051, 1051 [4th Dept 1990]). We previously issued an order denying respondent's cross motion "insofar as it s[ought] an order deeming [the] appeal . . . to be from the amended order." Nevertheless, upon our review of the full record on appeal, we exercise our discretion to treat the notice of appeal as valid and deem the appeal as taken from the amended order (*see* CPLR 5520 [c]; *Matter of Donegan v Torres*, 126 AD3d 1357, 1358 [4th Dept 2015], *lv denied* 26 NY3d 905 [2015]).

The amended order (order) was issued without a hearing on any issues and in the absence of any motion practice. The order, among other things, changed the child's middle name, and directed respondent New York State Department of Health (DOH) to take several steps, including deleting all references to respondent's name from the child's birth certificate and issuing an amended birth certificate with a new middle name for the child. We reverse the order and

dismiss the petition.

"It is well settled that 'the primary function of a pleading is to apprise an adverse party of the pleader's claim' " (*12 Baker Hill Rd., Inc. v Miranti*, 130 AD3d 1425, 1426 [3d Dept 2015], quoting *Cole v Mandell Food Stores*, 93 NY2d 34, 40 [1999]). Thus, a pleading must, inter alia, set forth the "material elements of each cause of action" (CPLR 3013; *see 12 Baker Hill Rd., Inc.*, 130 AD3d at 1426). Here, the petition failed to set forth any statutory or other authority for the relief requested, leaving respondents and Supreme Court to speculate as to the legal basis for that relief, and whether to employ the procedures for an action or those for a special proceeding (*see generally T.V. v New York State Dept. of Health*, 88 AD3d 290, 306-309 [2d Dept 2011]). Although we have discretion to convert a proceeding to an action (*see* CPLR 103 [c]), we decline to exercise it where, as here, we lack any information regarding what proceeding or action was intended to be commenced and under what authority.

Insofar as the court construed the petition as one pursuant to CPLR article 78 seeking to compel DOH to issue a new birth certificate, or as a complaint in a declaratory judgment action seeking a declaration of petitioner's right to that relief, neither such a proceeding nor such an action is ripe for judicial review. The petition here did not allege that DOH had " 'arrived at a definitive position on the issue [of amending the birth certificate] that inflict[ed] an actual, concrete injury' " on petitioner prior to the commencement of this proceeding or action (*Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510, 519 [1986], *cert denied* 479 US 985 [1986]). Furthermore, "[a]n administrative determination is not 'final and binding' unless the determination is formal, explicit, and unequivocal and unless petitioner receives notice of it" (*Nickerson v City of Jamestown*, 178 AD2d 1003, 1004 [4th Dept 1991]). Here, the only indication in the limited record before us that petitioner sought a name change from DOH is the statement that she called the hospital where the child was born and asked that the child's name be changed, and was apparently told by a hospital employee that such request was denied, which cannot be deemed to be a "final and binding" determination of DOH (*Matter of Agoglia v Benepe*, 84 AD3d 1072, 1076 [2d Dept 2011]). Thus, insofar as the petition is deemed to be part of a proceeding or an action seeking a determination that DOH must change the child's name, it must be dismissed as premature.

With respect to that part of the order directing that the child's name be changed, we note that "Civil Rights Law § 63 authorizes an infant's name change if there is no reasonable objection to the proposed name, and the interests of the infant will be substantially promoted by the change" (*Matter of Eberhardt*, 83 AD3d 116, 121 [2d Dept 2011]). Here, the court erred in ordering DOH to change the name of the child "without conducting a hearing to determine whether 'the interests of the infant will be substantially promoted by the change' " (*Matter of Kyle Michael M.*, 281 AD2d 954, 954 [4th Dept 2001], quoting § 63; *see Matter of Niethe [McCarthy—DePerno]*, 151 AD3d 1952, 1953-1954 [4th Dept 2017]). More importantly, however, the

petition does not seek that relief, nor did the court follow the statutory procedure for determining such a request.

Insofar as the court deemed the petition to be an attempt to commence a proceeding to amend a birth certificate to remove a fictitious name (*see* Public Health Law § 4138 [2] [c]), such a petition is without foundation inasmuch as petitioner concedes that respondent exists, and petitioner does not contend that respondent's name is different from the name on the birth certificate. Consequently, any such part of the petition must be dismissed pursuant to CPLR 3211 (a) (7) for failure to state a cause of action.

Finally, insofar as the petition may be deemed to be a request for "a judgment, order or decree relating to the parentage" that will permit the amendment of a birth certificate pursuant to the Public Health Law (§ 4138 [1] [b]; *see* § 4130 [2]), such a proceeding is redundant. Respondent commenced a proceeding in Family Court that will yield such a judgment, order, or decree. Although Family Court dismissed that proceeding, we have determined that the court erred in doing so, and we have therefore reinstated the petition (*Matter of deMarc v Goodyear*, — AD3d — [July 6, 2018] [4th Dept 2018]). It is well settled that where, as here, "there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same, a court has broad discretion in determining whether an action should be dismissed pursuant to CPLR 3211 (a) (4) on the ground that there is another action pending" (*Scottsdale Ins. Co. v Indemnity Ins. Corp. RRG*, 110 AD3d 783, 784 [2d Dept 2013]). We exercise our discretion to dismiss this petition in favor of the pending Family Court proceeding, which involves the same parties and in essence seeks the same relief.

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

696

CAF 17-01771

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

IN THE MATTER OF JEANENE JUNE DEMARC,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

PATRICIA ANN GOODYEAR, RESPONDENT-RESPONDENT.

MICHAEL STEINBERG, ROCHESTER, FOR PETITIONER-APPELLANT.

DYER LAW OFFICES, P.C., SYRACUSE (ANDREA M. FERRO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Onondaga County (William W. Rose, R.), entered June 15, 2017 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, the petition is reinstated, and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following memorandum: Petitioner commenced this proceeding seeking joint custody of, and visitation with, the five subject children, all of whom were born to respondent and conceived by the implantation of fertilized eggs. With respect to her standing to commence this proceeding, petitioner alleged that she and respondent had previously been involved in a romantic relationship, and that they entered into an agreement to raise and co-parent the child that was alive when the parties met. Petitioner further alleged that, prior to the conception of the younger four children, the parties also agreed that respondent would conceive additional children and the parties would jointly raise them as a family. The Referee granted a hearing on the issue of petitioner's standing to seek custody of the children, at which petitioner's testimony was consistent with the petition. Petitioner also introduced additional evidence on the issue, including that she was listed as a parent on the birth certificate of one of the children, who had petitioner's last name as his middle name, that the middle names of several of the other children were the same as petitioner's first or middle names, and that respondent told one of her child care providers that respondent "wanted to raise a family with" petitioner. During cross-examination of petitioner and her witnesses, respondent introduced evidence to the contrary. At the conclusion of petitioner's case, the Referee granted respondent's motion pursuant to CPLR 4401 to dismiss the petition.

We agree with petitioner that the Referee erred in dismissing the

petition. A motion to dismiss pursuant to CPLR 4401 "should not be granted where the facts are in dispute or where different inferences might reasonably be drawn from undisputed facts, or where the issue depends upon the credibility of witnesses . . . The court cannot properly undertake to weigh the evidence, but must take that view of it most favorable to the [nonmoving] party . . . The test is whether the trial court could find that by no rational process could the trier of the facts base a finding in favor of the [nonmoving party] upon the evidence here presented" (*Cox v Don's Welding Serv.*, 58 AD2d 1013, 1013 [4th Dept 1977] [internal quotation marks omitted]; *see Matter of Wright v State of New York*, 134 AD3d 1483, 1484-1485 [4th Dept 2015]). Thus, "[i]n determining a motion to dismiss for failure to establish a prima facie case, the evidence must be accepted as true and given the benefit of every reasonable inference which may be drawn therefrom . . . The question of credibility is irrelevant, and should not be considered" (*Matter of Mack v Richardson*, 150 AD3d 740, 741 [2d Dept 2017] [internal quotation marks omitted]).

Here, the Referee made credibility determinations and weighed the probative value of the evidence in making a determination on the motion to dismiss. Consequently, we reverse the order, reinstate the petition and remit the matter to Family Court to determine, after a full hearing, whether petitioner, by clear and convincing evidence, has established with respect to the four younger children that she "has agreed with the biological parent of the child[ren] to conceive and raise [them] as co-parents" (*Matter of Brooke S.B. v Elizabeth A.C.C.*, 28 NY3d 1, 28 [2016]), and whether, despite being a "partner without such an agreement [she] can establish standing" with respect to the older child (*id.*).

We reject petitioner's further contention that the Referee erred in bifurcating the hearing and limiting the preliminary inquiry to the issue of petitioner's standing to seek custody of the subject children. "The standing issue must be resolved first" and, "if standing is found," the Referee should then determine whether joint custody and visitation is in the best interests of the children (*Matter of Emanuel S. v Joseph E.*, 78 NY2d 178, 183 [1991]; *cf. Matter of Lynda D. v Stacy C.*, 37 AD3d 1151, 1151 [4th Dept 2007]; *see generally Matter of Wilson v McGlinchey*, 2 NY3d 375, 380 [2004]).

We agree with petitioner, however, that the Referee erred in failing to appoint an attorney for the children under the circumstances of this case (*see Matter of Arlene R. v Wynette G.*, 37 AD3d 1044, 1045 [4th Dept 2007]; *cf. Lee v Halayko*, 187 AD2d 1001, 1002 [4th Dept 1992]). Thus, upon remittal, counsel should be appointed for the children.

Finally, insofar as petitioner's brief may be read to challenge the Referee's denial of her request for interim visitation, we do not consider that challenge. At the conclusion of the hearing on this matter, the Referee issued a stay-away order of protection with respect to a different petition, to which petitioner stipulated, thus rendering moot petitioner's challenge to the earlier ruling (*see generally Matter of Salo v Salo*, 115 AD3d 1368, 1368 [4th Dept 2014]).

We further conclude that the exception to the mootness doctrine does not apply (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

714

CAF 16-01131

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

IN THE MATTER OF LYNDON S.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

HILLARY S., RESPONDENT-APPELLANT.

WILLIAM D. BRODERICK, JR., ELMA, FOR RESPONDENT-APPELLANT.

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

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered June 14, 2016 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject child.

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

Memorandum: Respondent mother appeals from an order that, inter alia, adjudged that she neglected the subject child. We reject the mother's contention that Family Court erred in granting petitioner access to her mental health records. It is well settled that "a party's mental health records are subject to discovery where that party has placed his or her mental health at issue" (*Matter of Richard SS.*, 29 AD3d 1118, 1124 [3d Dept 2006]; *see Matter of Joseph M., Jr. [Joseph M., Sr.]*, 150 AD3d 1647, 1649 [4th Dept 2017], *lv denied* 29 NY3d 917 [2017]; *see generally Ace v State of New York*, 207 AD2d 813, 814 [2d Dept 1994], *affd* 87 NY2d 993 [1996]). The evidence in the record establishes that the mother had refused to authorize disclosure of the mental health records, which made it impossible to assess whether she was compliant with her prescribed mental health treatment. Indeed, the paramount issue in this case was the mother's mental health and its alleged impact upon the subject child which required an assessment of the mother's mental health. Thus, we conclude that the court properly disclosed the records (*see Joseph M., Jr.*, 150 AD3d at 1649).

We agree with the mother that records from Erie County Medical Center and Horizon Health Services, Inc. were improperly admitted in evidence inasmuch as the respective records were certified by "someone

other than the head of the hospital or agency" and were not "accompanied by a photocopy of a signed delegation of authority signed by both the head of the hospital or agency and by such other employee" (Family Ct Act § 1046 [a] [iv]). We conclude that the error is harmless, however, because, even if those records are excluded from consideration, the finding of neglect is nonetheless supported by a preponderance of the credible evidence (*see generally Matter of Kadyn J. [Kelly M.H.]*, 109 AD3d 1158, 1159 [4th Dept 2013]; *Matter of John QQ.*, 19 AD3d 754, 755-756 [3d Dept 2005]).

" 'A respondent's mental condition may form the basis of a finding of neglect if it is shown by a preponderance of the evidence that his or her condition resulted in imminent danger to the child[ ]' " (*Matter of Jayvien E. [Marisol T.]*, 70 AD3d 430, 435-436 [1st Dept 2010]; *see Matter of Jesse DD.*, 223 AD2d 929, 930-931 [3d Dept 1996], *lv denied* 88 NY2d 803 [1996]). An "imminent danger" to the child may result from a respondent's "long-standing history of mental illness and noncompliance with treatment" (*Matter of Alexis H. [Jennifer T.]*, 90 AD3d 1679, 1680 [4th Dept 2011], *lv denied* 18 NY3d 810 [2012]; *see Jesse DD.*, 223 AD2d at 931-932). " '[P]roof of mental illness alone will not support a finding of neglect . . . The evidence must establish a causal connection between the parent's condition, and actual or potential harm to the child[ ]' " (*Matter of Jesus M. [Jamie M.]*, 118 AD3d 1436, 1437 [4th Dept 2014], *lv denied* 24 NY3d 904 [2014]; *see Matter of Sean P. [Brandy P.]*, 156 AD3d 1339, 1340 [4th Dept 2017], *lv denied* 31 NY3d 903 [2018]). The court, "which saw and heard the witnesses, is in the best position to assess credibility," and thus its determinations with respect thereto should not be disturbed if they are supported by the record (*Matter of Kai B.*, 38 AD3d 882, 883 [2d Dept 2007]).

Here, multiple witnesses testified that the mother had not been taking her medications as prescribed, and the mother testified that she had experienced at least two nervous breakdowns and contracted "brain fever" from the spread of a sexually transmitted disease, which resulted in epilepsy-type symptoms. The mother further testified that, at different times, she had been prescribed Risperdal, Limbitrol, Xanax, and Klonopin, some of which she declined to take upon self-determining that she no longer needed them, and that she had not seen any of her mental health providers in more than six months. The court also heard testimony about the mother's troubling behaviors, including her tendency to disassociate and become non-communicative for days at a time and her habit of staring off into space for significant periods of time. The incident that gave rise to the investigation, which involved the mother pounding on the floors of her apartment with a hammer because she thought that the child could hear the downstairs neighbors saying inappropriate things, scared the child to such a degree that he hid inside a cat crate with a blanket over it so that he could not be seen. We conclude that the evidence is sufficient to establish a causal connection between the mother's failure to treat her mental illness and actual or potential harm to the child (*see Jesus M.*, 118 AD3d at 1437).

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

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

718

CA 17-01701

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

PAUL WROBEL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOHN A. DOE, ET AL., DEFENDANTS,
BUFFALO BILLS, INC., APEX SECURITY GROUP, INC.,
CONTEMPORARY SERVICES CORPORATION, AND COUNTY
OF ERIE, DEFENDANTS-RESPONDENTS.

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

GOLDBERG SEGALLA LLP, BUFFALO (DANIEL HUNTER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS BUFFALO BILLS, INC. AND COUNTY OF ERIE.

BARCLAY DAMON LLP, BUFFALO (ARIANNA KWIATKOWSKI OF COUNSEL), FOR DEFENDANT-RESPONDENT APEX SECURITY GROUP, INC.

WALSH, ROBERTS & GRACE, BUFFALO (KEITH N. BOND OF COUNSEL), FOR DEFENDANT-RESPONDENT CONTEMPORARY SERVICES CORPORATION.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered June 30, 2017. The order granted the motions of defendants APEX Security Group, Inc., Contemporary Services Corporation, and Buffalo Bills, Inc. and the County of Erie, seeking summary judgment dismissing the amended complaint against them.

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

Memorandum: Plaintiff, a fan of the Miami Dolphins, was attending a game between the Dolphins and defendant Buffalo Bills, Inc. (Bills) at Ralph Wilson Stadium when he was attacked from behind by a group of Bills fans. The stadium is owned by defendant County of Erie (County). Plaintiff suffered a severe injury to his knee as a result of the unprovoked attack, and he commenced this negligence action to recover for his injuries. Supreme Court subsequently granted the respective motions of the Bills and the County, defendant Apex Security Group, Inc. (Apex), and defendant Contemporary Services Corporation (CSC), for summary judgment dismissing the amended complaint against them. We now affirm.

Preliminarily, we note that plaintiff abandoned any challenge to the motions of Apex and CSC by failing to raise any issues in his brief with respect thereto (*see Ciesinski v Town of Aurora*, 202 AD2d

984, 984 [4th Dept 1994]). Contrary to plaintiff's contention, the court properly determined that the conduct of the Bills and the County was not a proximate cause of his injuries. "[A]s an independent act far removed from [the allegedly negligent] conduct [of the Bills and the County], the [assailants' unprovoked] criminal assault broke the causal nexus [between such allegedly negligent conduct and plaintiff's injury]. The attack was extraordinary and not foreseeable or preventable in the normal course of events" (*Maheshwari v City of New York*, 2 NY3d 288, 295 [2004]; *see Colarossi v University of Rochester*, 2 NY3d 773, 774 [2004]; *Curcio v East Coast Hoops, Inc.*, 24 AD3d 997, 998 [3d Dept 2005], *lv denied* 6 NY3d 710 [2006]). Indeed, "[i]t is difficult to understand what measures could have been undertaken to prevent plaintiff's injury except presumably to have had a security officer posted at the precise location where the incident took place or wherever [rival football fans] were gathered, surely an unreasonable burden" (*Florman v City of New York*, 293 AD2d 120, 127 [1st Dept 2002]). We thus conclude that the court properly granted the motion of the Bills and the County and dismissed the amended complaint against them.

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

724

CA 18-00134

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

THOMAS L. MILLS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NIAGARA FRONTIER TRANSPORTATION AUTHORITY AND NIAGARA FRONTIER TRANSIT METRO SYSTEM, INC., DEFENDANTS-APPELLANTS.

DAVID J. STATE, GENERAL COUNSEL, BUFFALO (VICKY-MARIE J. BRUNETTE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MAXWELL MURPHY, LLC, BUFFALO (ALAN D. VOOS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered May 2, 2017. The order denied the motion of defendants for summary judgment dismissing the amended 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 amended complaint to the extent that the amended complaint, as amplified by the bill of particulars, alleges that defendants created the allegedly dangerous condition, negligently maintained and inspected the bus on which the allegedly dangerous condition existed, and failed to warn plaintiff of the allegedly dangerous condition, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that he sustained when he slipped and fell while a passenger on a bus owned by defendant Niagara Frontier Transit Metro System, Inc., which is a subsidiary of defendant Niagara Frontier Transportation Authority. It is undisputed that plaintiff fell after he slipped in a puddle of hydraulic fluid that had been caused by a malfunctioning piece of equipment. In his amended complaint, as amplified by his bill of particulars, plaintiff alleged that defendants had actual and/or constructive notice of the allegedly dangerous condition, created the condition, failed to warn plaintiff of the condition, and negligently maintained or inspected the bus. Defendants moved for summary judgment dismissing the amended complaint, and plaintiff opposed the motion, contending only that there were triable issues of fact with respect to the theories of actual and constructive notice. We conclude that Supreme Court properly denied the motion insofar as it sought to dismiss the negligence claims predicated on the theories of actual and

constructive notice, but erred in denying the motion with respect to the other theories of negligence.

Generally, in premises liability actions, where a defendant moves for summary judgment on the ground that it was not negligent, the defendant bears "the initial burden of establishing that it maintained its premises in a reasonably safe condition, had no actual or constructive knowledge of the [allegedly dangerous condition] and did not create the allegedly dangerous condition" (*Atkinson v Golub Corp. Co.*, 278 AD2d 905, 905-906 [4th Dept 2000]; *see Jarvis v LaFarge N. Am., Inc.* [appeal No. 4], 52 AD3d 1179, 1181-1182 [4th Dept 2008], *lv denied* 11 NY3d 707 [2008]). That general rule applies where, as here, the plaintiff is injured as the result of an allegedly dangerous condition on a bus (*see Barrett v New York City Tr. Auth.*, 80 AD3d 550, 550-551 [2d Dept 2011]; *Cintron v New York City Tr. Auth.*, 61 AD3d 803, 804 [2d Dept 2009]; *Blackwood v New York City Tr. Auth.*, 36 AD3d 522, 523 [1st Dept 2007]).

We agree with defendants that they met their initial burden of establishing as a matter of law that they did not create the allegedly dangerous condition and that the bus was properly maintained and inspected. We also note that defendants established as a matter of law that the condition was open and obvious, thereby negating any duty to warn (*see Pelow v Tri-Main Dev.*, 303 AD2d 940, 941 [4th Dept 2003]). "[P]laintiff did not oppose the motion to that extent, thus implicitly conceding that defendants were entitled to summary judgment to that extent" (*Hagenbuch v Victoria Woods HOA, Inc.*, 125 AD3d 1520, 1521 [4th Dept 2015]; *see Clarke v Wegmans Food Mkts., Inc.*, 147 AD3d 1401, 1402 [4th Dept 2017]). We therefore modify the order accordingly.

We further conclude, however, that defendants failed to establish as a matter of law that they lacked actual or constructive notice of the allegedly dangerous condition. "To establish that they did not have actual notice of the allegedly dangerous condition, defendants were required to show that they did not receive any complaints concerning the area where plaintiff fell and were unaware of any [fluid] or other substance in that location prior to plaintiff's accident" (*Navetta v Onondaga Galleries LLC*, 106 AD3d 1468, 1469 [4th Dept 2013]; *see Costanzo v Woman's Christian Assn. of Jamestown*, 92 AD3d 1256, 1257 [4th Dept 2012]). To establish that they did not have constructive notice of the allegedly dangerous condition, defendants had the burden of establishing "as a matter of law that the condition was not visible and apparent or that it had not existed for a sufficient length of time before the accident to permit defendants or their employees to discover and remedy it" (*Finger v Cortese*, 28 AD3d 1089, 1091 [4th Dept 2006]; *see Rivers v May Dept. Stores Co.*, 11 AD3d 963, 964 [4th Dept 2004]).

In support of their motion, defendants submitted a DVD containing video of the incident that was recorded by security cameras inside the bus. The video begins at approximately 10:57 p.m., immediately after a scheduled layover. When the video begins, the entire bus is empty and a large puddle of fluid is clearly visible on the floor of the

upper rear deck of the bus. It is several feet in length and, at its widest, is approximately one foot across. At the beginning of the video, one can see dark areas to the front and side of the puddle as well as on one step leading up to the rear deck. Those dark areas appear to be track marks that existed before any passengers boarded the bus following that scheduled layover. Plaintiff enters the bus at 11:00:04 p.m., and he slips in the puddle at 11:00:21 p.m., striking his head and shoulder on a seat in the back of the bus. During the entire video, which is approximately 30 minutes in length, the size of the puddle does not change appreciably.

Defendants also submitted excerpts of deposition testimony from the bus operator as well as a recording of his call to "control" to report the incident. The bus operator maintained that he had inspected the bus during the layover and that the puddle did not exist at that time. According to defendants' route information reports, which were submitted in support of the motion, the layover occurred from 10:40 p.m. until approximately 10:58 p.m. and, as noted above, the video began at approximately 10:57 p.m., i.e., one minute before the layover concluded. In our view, the bus operator's statements regarding his inspection seem inconsistent with the video evidence.

"On a motion for summary judgment, . . . self-serving statements of an interested party which refer to matters exclusively within that party's knowledge create an issue of credibility which should not be decided by the court but should be left for the trier of facts" (*Sacher v Long Is. Jewish-Hillside Med. Ctr.*, 142 AD2d 567, 568 [2d Dept 1988]). Indeed, "[i]f everything or anything had to be believed in court simply because there is no witness to contradict it, the administration of justice would be a pitiable affair" (*Punsky v City of New York*, 129 App Div 558, 559 [2d Dept 1908]).

Here, although the bus operator claimed that he inspected the bus during the layover and did not see any oil on the floor, there was no one else on the bus at the time, and defendants did not preserve the relevant portion of the video of the bus interior during the layover. Thus, plaintiff is not in a position to refute the bus operator's claims, and a jury could disbelieve those claims even though they are uncontroverted (*see Matter of Nowakowski*, 2 NY2d 618, 622 [1957]; *Perez v Andrews Plaza Hous. Assoc., L.P.*, 68 AD3d 512, 512 [1st Dept 2009]; *Strader v Ashley*, 61 AD3d 1244, 1246 [3d Dept 2009], *lv dismissed* 13 NY3d 756 [2009]).

" '[V]iew[ing] the evidence in the light most favorable to the party opposing the motion, [and] giving that party the benefit of *every reasonable inference*' " (*Esposito v Wright*, 28 AD3d 1142, 1143 [4th Dept 2006] [emphasis added]; *see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957]), we conclude that there is a triable issue of fact because the evidence of the size of the puddle and that the puddle had been "tracked through" before any passengers boarded the bus following the layover constitutes circumstantial evidence that would permit a jury to infer that the puddle had existed for a sufficient length of time for defendants to have discovered and remedied it (*Davis v Supermarkets*

Gen. Corp., 205 AD2d 730, 731 [2d Dept 1994]; *see Anderson v Central Tractor Farm & Family Ctr.*, 250 AD2d 1023, 1024 [3d Dept 1998]; *cf. Mueller v Hannaford Bros. Co.*, 276 AD2d 819, 820 [3d Dept 2000]).

Inasmuch as defendants failed to meet their initial burden with respect to the theories of actual and constructive notice, the burden never shifted to plaintiff to raise a triable issue of fact with respect to those two theories of negligence (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

747

CA 18-00146

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

DELPHI HOSPITALIST SERVICES LLC,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

EDWARD L. PATRICK, DEFENDANT-RESPONDENT.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (JAMES P. BLENK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BOND SCHOENECK & KING, PLLC, BUFFALO (BRADLEY A. HOPPE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered November 28, 2017. The order denied plaintiff's motion for a preliminary injunction.

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

Memorandum: Plaintiff, a staffing agency that provides a range of emergency medical and hospitalist services to small community hospitals, commenced this action seeking to enforce a restrictive covenant in an employment agreement signed by defendant, a licensed physician assistant. Pursuant to the terms of the covenant, defendant was precluded from providing any medical services to any hospital at which he had provided services through his employment with plaintiff for a certain period of time after defendant's employment contract was terminated or plaintiff's contract with the particular hospital was terminated. From 2013 through 2017, defendant worked at Ira Davenport Hospital (Ira Davenport) in Bath, New York, which had contracted with plaintiff for the provision of medical and hospitalist services. After Ira Davenport terminated its contract with plaintiff and contracted with a competing medical staffing company, defendant terminated his contract with plaintiff and continued to work at Ira Davenport by accepting a position with plaintiff's competitor.

Plaintiff thereafter moved for a preliminary injunction enjoining defendant from providing services to Ira Davenport as well as any hospital in New York that had a contract for services with plaintiff at which defendant had provided medical services. Supreme Court denied the motion, and we now affirm.

It is well settled that " '[p]reliminary injunctive relief is a drastic remedy [that] is not routinely granted' " (*Sutherland Global*

Servs., Inc. v Stuewe, 73 AD3d 1473, 1474 [4th Dept 2010]). Moreover, "[i]n reviewing an order denying a motion for [a] preliminary injunction, we should not determine finally the merits of the action and should not interfere with the exercise of discretion by [the court] but should review only the determination of whether that discretion has been abused" (*Esi-Data Connections v Proulx*, 185 AD2d 705, 705 [4th Dept 1992] [internal quotation marks omitted]).

"In order to establish its entitlement to a preliminary injunction, the party seeking the injunction must establish, by clear and convincing evidence, . . . three separate elements: '(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor' " (*Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212, 216 [4th Dept 2009], quoting *Doe v Axelrod*, 73 NY2d 748, 750 [1988]).

Here, contrary to plaintiff's contention, the court did not abuse its discretion in denying plaintiff's motion for a preliminary injunction inasmuch as plaintiff failed to establish, "through the tender of evidentiary proof" (*Esi-Data Connections*, 185 AD2d at 705), that "the harm to plaintiff from denial of the injunction as against the harm to defendant from granting it" tips in plaintiff's favor (*Edgeworth Food Corp. v Stephenson*, 53 AD2d 588, 588 [1st Dept 1976]). We note that defendant resides in Pennsylvania and that, while working at Ira Davenport over the past five years, his Pennsylvania license to be a physician assistant "had lapsed," precluding him from working in that state without obtaining a new license. According to defendant, it would take him "months to complete any credentialing process" to obtain a new license, during which time he would be out of work.

Although plaintiff offered to place defendant at two hospitals in New York State, one of them was 3½ to 4 hours from his home. The other hospital was closer to defendant's home, but defendant had worked there previously and asked for a transfer after only a month due to various conditions that made him "extremely uncomfortable."

Plaintiff, on the other hand, asserted in support of its motion for a preliminary injunction that defendant's violation of the restrictive covenant "pose[d] an immediate threat of irreparable harm to [plaintiff] in the form of the loss of its investment in its employees and the erosion of its business model." Plaintiff further asserted that defendant's violation of the restrictive covenant would set "a dangerous precedent" that would allow plaintiff's competitors "to take away more contracts from [plaintiff]—without the significant initial recruitment and other investments [that plaintiff] has had to incur." Plaintiff's argument in support of its motion, however, refers to the effect on its business model in the event that the court ultimately rules in defendant's favor concerning the enforceability of the restrictive covenant, not on the effect of allowing defendant to continue working at Ira Davenport during the pendency of the case. "[T]he harm to plaintiff from denial of the [preliminary] injunction as against the harm to defendant from granting it," i.e., defendant's unemployment during the pendency of the case, thus tips in defendant's

favor (*id.*). Indeed, we can see no great harm to plaintiff in maintaining the status quo until the case is resolved.

Inasmuch as plaintiff failed to establish one of the three required elements for a preliminary injunction, we see no need to address the merits of the other two required elements.

All concur except CURRAN, J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent. In my view, plaintiff met its burden of establishing, by clear and convincing evidence, that the restrictive employment covenant is enforceable, plaintiff will suffer irreparable injury to its goodwill if provisional relief is not granted, and the equities tip strongly in plaintiff's favor. Therefore, I conclude that Supreme Court abused its discretion in denying plaintiff's motion for a preliminary injunction and would reverse the order.

As an initial matter, the majority and I appear to agree that plaintiff possesses a legitimate business interest deserving of consideration in the weighing of the equities between the parties. This conclusion is contrary to the court's determination that plaintiff's legitimate business interests are not impaired inasmuch as plaintiff lost its contract with Ira Davenport Hospital (Ira Davenport) and, thus, plaintiff does not have any such interest worthy of being weighed. To that extent, I submit that the majority and I agree that the court erred in that determination.

In balancing the equities between the parties, the majority reaches the conclusion that a preliminary injunction would alter the status quo and render defendant unemployed "during the pendency of this case." However, the majority overlooks a number of significant facts in the record. First and foremost, defendant has not said that he would be unemployed during the pendency of this case. He argues only that he will not be able to work at Ira Davenport, something he does not deny is in breach of his employment agreement with plaintiff. As the court noted, plaintiff limited its request "to restrain[ing] defendant from providing services to Ira Davenport only." Thus, defendant is at liberty to seek employment at any other hospital in New York State, many of which are undoubtedly closer to his Pennsylvania home. I further submit that we should not give any weight to the self-inflicted harm defendant asserts in the form of his declining two other positions offered by plaintiff, allowing his Pennsylvania license to lapse and apparently not seeking employment at any other New York hospital. In my view, the majority weighs too heavily the easier road chosen by defendant.

Second, the majority fails to appreciate the depth of the harm caused to plaintiff by our Court's refusal to enforce the restrictive covenant by the only effective means available, i.e., a preliminary injunction. It is significant that the remedy of an injunction was specifically stipulated in the employment agreement as the only remedy available to plaintiff inasmuch as defendant admitted in that agreement that his breach of the restrictive covenant would cause "substantial and irreparable injury" to plaintiff.

The "business model" references by the majority do not fully describe plaintiff's legitimate business interests. Plaintiff's entire business is built around establishing mutually-beneficial contractual arrangements with rural hospitals and nursing homes. Plaintiff's service allows the rural hospitals to save the time, effort and expense of finding competent medical professionals to practice at their facilities. Instead, these medical facilities pay to plaintiff a flat rate for its service of ensuring that professionals, such as defendant, are willing to practice at a rural facility, and are fully trained, licensed and insured. This is especially so for someone like defendant, who the record shows "was a highly skilled practitioner, who unlike the vast majority of his peers, could handle working alone in an emergency room department without the support of a doctor."

The essential reason I agree with plaintiff that the decision not to enforce the restrictive covenant through a preliminary injunction is "dangerous precedent" is that plaintiff has demonstrated that its business model is its most valuable asset and constitutes its "goodwill" deserving of protection.

Our courts have long recognized the value of goodwill in the business realm and its suitability for equitable relief. Recently, the Court of Appeals defined goodwill in the following terms: "Goodwill is an intangible asset of a business, corresponding in this context to what a buyer would pay for the business, over and above its value as a mere sum of tangible assets, because of the patronage and support of regular customers. Goodwill consists in every positive advantage[] that has been acquired by a proprietor in carrying on [a] business, whether connected with the premises in which the business is conducted, or with the name under which it is managed, or with any other matter carrying with it the benefit of the business . . . It is, in Judge Cardozo's words, what people will pay for any privilege that gives a reasonable expectancy of preference in the race of competition. Such expectancy may come from succession in place or name or otherwise to a business that has won the favor of its customers" (*Congel v Malfitano*, 31 NY3d 272, 292-293 [2018] [internal quotation marks omitted]).

This concept of goodwill is a creature of the English common law as described in the old English case of *Cruttwel v Lye* (17 Ves 335, 346, 34 Eng Rep 129, 134 [1810]). There, Lord Eldon wrote that "[t]he goodwill which has been the subject of sale is nothing more than the probability[] that the old customers will resort to the old place" (*id.*). Our Court has similarly written that goodwill "represents an elusive concept" but includes value accumulated "in consequence of the general public patronage and encouragement, which [the business] receives from constant or habitual customers" (*Moore v Johnson*, 108 AD3d 1125, 1126 [4th Dept 2013], *lv dismissed* 22 NY3d 950 [2013] [internal quotation marks omitted]).

In a situation similar to this one, the Third Department wrote that "an anticompetitive covenant may prevent the competitive use of client relationships that the employer assisted the employee in

developing through the employee's performance of services in the course of employment" (*Scott, Stackrow & Co., C.P.A.'s, P.C. v Skavina*, 9 AD3d 805, 806 [3d Dept 2004], *lv denied* 3 NY3d 612 [2004]; *see Ippolito v NEEMA Emergency Med. of N.Y.*, 127 AD2d 821, 822 [2d Dept 1987] [enforcing restrictive covenant in nearly identical situation]). Moreover, because "[l]ost goodwill and lost opportunity are damages which are difficult to quantify" (*Gundermann & Gundermann Ins. v Brassill*, 46 AD3d 615, 617 [2d Dept 2007]), the goodwill of a business is considered a valuable right to which equitable protection is extended (*see Nobu Next Door v Fine Arts Hous.*, 3 AD3d 335, 335 [1st Dept 2004], *affd* 4 NY3d 839 [2005]).

Plaintiff's goodwill is manifested here in the relationship of trust plaintiff establishes with its client medical facilities to provide independent contractor relationships with competent, licensed and insured medical professionals willing to serve in a rural community. As the Court of Appeals explained in *BDO Seidman v Hirshberg* (93 NY2d 382 [1999]), "[t]he employer has a legitimate interest in preventing former employees from exploiting or appropriating the goodwill of a client or customer, which had been created and maintained at the employer's expense, to the employer's competitive detriment" (*id.* at 392). In failing to grant the injunction here, I submit that we allow plaintiff's valuable asset to be pirated away by another.

In the absence of equitable relief, I submit that, contrary to the majority's conclusion, the status quo is dramatically changed. Defendant is now at liberty to work for Ira Davenport, either as an agent of plaintiff's competitor or as a direct employee, without having to incur any of the time, effort or expense of having cultivated the relationship with the hospital, and Ira Davenport likewise has not had to incur the time, effort or expense of finding a highly-skilled professional like defendant to work in Bath, New York. The contract with Ira Davenport is not the legitimate business interest plaintiff seeks to protect, but rather, plaintiff seeks to protect its value as a turnkey operation providing highly-capable professionals at a quantified cost with little or no effort or time invested by the client hospitals. If the medical professionals under contract with plaintiff are now free to violate the restrictive covenants and go to work directly for the medical facilities where they presently serve, or contract with one of plaintiff's competitors as defendant did here, it is obvious that plaintiff's business model is no longer viable. For these reasons, I am unable to agree with the majority that the largely self-inflicted harm to defendant outweighs the likelihood that plaintiff's business model will not survive. Therefore, I conclude that plaintiff has established that a balancing of the equities favors granting the preliminary injunction.

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

779

KA 16-01950

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM REED, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered June 29, 2015. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree, grand larceny in the third degree and criminal mischief in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]), grand larceny in the third degree (§ 155.35 [1]), and criminal mischief in the fourth degree (§ 145.00 [1]), arising from an incident in which a home was burglarized while the homeowner was at work. The perpetrator broke through two sets of glass doors to gain entry into the dwelling and stole, among other items, jewelry valued in excess of $18,000 from the master bedroom. A blood-stained sweater was discovered on the floor in the master bedroom, and the blood was subsequently linked to defendant through DNA testing.

Defendant contends that County Court erred in denying his motion to dismiss the indictment on speedy trial grounds. Where, as here, a defendant seeks dismissal of the indictment based on the statutory right to a speedy trial and the People respond by identifying periods of time that should be excluded from the speedy trial calculation, the defendant " 'preserves challenges to the People's reliance on those exclusions for appellate review by identifying any legal or factual impediments to the use of those exclusions' " (*People v Allard*, 28 NY3d 41, 45 [2016]; quoting *People v Goode*, 87 NY2d 1045, 1047 [1996]). In response to defendant's motion, the People alleged, inter alia, that defendant had requested an adjournment during a proceeding on November 4, 2013 and, at an evidentiary hearing, they presented testimony in support of that allegation. At the evidentiary hearing, defendant did not contend, as he does on appeal, that the transcript

of the November 4, 2013 proceeding does not support the court's determination that he had requested or consented to the adjournment on that date. Thus, defendant failed to preserve that contention for our review (*see People v Brown*, 82 AD3d 1698, 1699 [4th Dept 2011], *lv denied* 17 NY3d 792 [2011]; *People v Elijah*, 272 AD2d 273, 273 [1st Dept 2000], *lv denied* 95 NY2d 865 [2000]; *see generally Allard*, 28 NY3d at 46-47), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant further contends that he was deprived of a fair trial by three instances of alleged misconduct by the prosecutor on summation. Defendant correctly concedes, however, that he did not object to any of those alleged instances of prosecutorial misconduct, and thus he failed to preserve his contention for our review (*see People v Lowery*, 158 AD3d 1179, 1179 [4th Dept 2018]; *People v Lewis*, 140 AD3d 1593, 1595 [4th Dept 2016], *lv denied* 28 NY3d 1029 [2016]). 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 he was deprived of effective assistance of counsel because of numerous alleged errors by defense counsel. We reject defendant's contention that defense counsel was ineffective for failing to object to the alleged prosecutorial misconduct on summation. The prosecutor was entitled "to comment upon every pertinent matter of fact bearing upon the questions the jury [had] to decide" (*People v Ashwal*, 39 NY2d 105, 109 [1976] [internal quotation marks omitted]; *see generally People v Galloway*, 54 NY2d 396, 399 [1981]). In any event, even assuming, arguendo, that the prosecutor's comments were improper, we conclude that the alleged misconduct was not so egregious as to deny defendant a fair trial (*see People v Ielfield*, 132 AD3d 1298, 1299 [4th Dept 2015], *lv denied* 27 NY3d 1152 [2016]; *People v Hunter*, 115 AD3d 1330, 1331 [4th Dept 2014], *lv denied* 23 NY3d 1038 [2014]). Defense counsel was therefore not ineffective for failing to object to the alleged instances of prosecutorial misconduct (*see Lowery*, 158 AD3d at 1180; *People v Black*, 137 AD3d 1679, 1681 [4th Dept 2016], *lv denied* 27 NY3d 1128 [2016], *reconsideration denied* 28 NY3d 1026 [2016]).

We have considered defendant's remaining claims of ineffective assistance of counsel, and we conclude that he failed to meet his burden of demonstrating "the absence of strategic or other legitimate explanations" for defense counsel's allegedly deficient conduct (*People v Rivera*, 71 NY2d 705, 709 [1988]; *see People v Carver*, 27 NY3d 418, 421 [2016]). Viewing the evidence, the law, and the circumstances of this case in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is against

the weight of the evidence (*see People v Jackson*, 66 AD3d 1415, 1416 [4th Dept 2009]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The jury was entitled to infer that defendant had the requisite intent to commit burglary, larceny, and criminal mischief from the evidence that he broke doors to gain entry into the victim's home and removed valuables therefrom without the permission of the owner (*see People v Melendez*, 24 AD3d 1223, 1223 [4th Dept 2005], *affd* 8 NY3d 886 [2007]; *see generally People v Frumusa*, 134 AD3d 1503, 1504 [4th Dept 2015], *affd* 29 NY3d 364 [2017], *rearg denied* 29 NY3d 1110 [2017]). We note that resolution of issues of credibility and the weight to be accorded to the evidence are primarily questions to be determined by the jury (*see People v Abon*, 132 AD3d 1235, 1236 [4th Dept 2015], *lv denied* 27 NY3d 1127 [2016]), and we perceive no basis for disturbing the jury's determinations in this case.

Finally, the sentence is not unduly harsh or severe.

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

786

CA 18-00161

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

IN THE MATTER OF ARBITRATION BETWEEN
LIFT LINE, INC., PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

AMALGAMATED TRANSIT UNION, LOCAL 282,
RESPONDENT-APPELLANT.

BLITMAN & KING LLP, ROCHESTER (JULES L. SMITH OF COUNSEL), FOR RESPONDENT-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (ROY R. GALEWSKI OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered May 3, 2017 in a proceeding pursuant to CPLR article 75. The order and judgment granted the petition to vacate in part an arbitration award, vacated such award in part, denied the application of respondent to confirm the award and reimposed the penalty of employment termination.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the petition is denied, the application is granted and the arbitration award is confirmed.

Memorandum: Respondent appeals from an order and judgment that granted the petition seeking partial vacatur of an arbitration award, vacated the award in part, denied respondent's application to confirm the award, and reimposed the original penalty of employment termination. The arbitrator determined that the grievant should be reinstated with back pay and benefits. We agree with respondent that Supreme Court erred in vacating the award in part, and we conclude that the arbitration award should be confirmed.

The terms of the collective bargaining agreement (CBA) provided that, if the discharge of an employee was found to be without "just cause," the record of the offense would be cleared from the employee's personnel file. The CBA also incorporated a memorandum of agreement with respect to employee attendance (attendance policy) that set forth an eight-step disciplinary process, including discharge of the employee at step eight. The attendance policy provided that an employee "who is tardy will progress one step in the attendance disciplinary process for each instance of tardiness," and would move

back one step if he or she did not have "another incident of tardiness for six consecutive months after such discipline." The grievant here was late to work on seven occasions over the course of a little over one year and was thus at step seven at the time of the incident that led to her termination. In that incident, she was one minute late to work after her vehicle was stuck behind a disabled train at a rail crossing near her employer's facility. The arbitrator analyzed the just cause provision together with the attendance policy and concluded that petitioner's strict application of the attendance disciplinary process to terminate the grievant was "overly severe, especially with the absence of any evidence that efficiency or other difficulties were created by the [g]rievant's one-minute tardiness."

As relevant here, a court may vacate an arbitration award if it finds that the rights of a party were prejudiced when "an arbitrator . . . exceeded his [or her] power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made" (CPLR 7511 [b] [1] [iii]). "Such an excess of power occurs only where the arbitrator's award violates strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power" (*Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336 [2005]; *see Matter of Kowaleski [New York State Dept. of Correctional Servs.]*, 16 NY3d 85, 90-91 [2010]). "[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]).

We agree with respondent that the arbitrator's award was not irrational. An award is irrational "if there is no proof whatever to justify" it (*Matter of Buffalo Council of Supervisors & Adm'rs, Local No. 10, Am. Fedn. of Sch. Adm'rs [Board of Educ. of City Sch. Dist. of Buffalo]*, 75 AD3d 1067, 1068 [4th Dept 2010] [internal quotation marks omitted]; *see Matter of Peckerman v D & D Assoc.*, 165 AD2d 289, 296 [1st Dept 1991]), and "[a]n 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]). Here, there is a colorable justification for the arbitrator's determination. The attendance policy was a no-fault, straightforward progression of discipline that would be imposed for every incident of tardiness. Nevertheless, the CBA also had the "just cause" provision, and the arbitrator concluded that strict adherence to the attendance policy could be rejected in exceptional cases. In concluding that the grievant's termination was overly severe, the arbitrator relied on the fact that the grievant called in

10 minutes before her shift to say that she might be late due to the delay caused by the disabled train; another employee called in to report the same delay; the delay was unexpected and abnormal; the grievant was only one minute late; and no difficulties were created by the grievant's tardiness. The arbitrator made a rational interpretation of the just cause provision and the attendance policy (*see generally Matter of Civil Serv. Empls. Assn. v Lombard*, 50 AD2d 708, 709 [4th Dept 1975], *affd* 41 NY2d 915 [1977]; *Matter of Town of Scriba [Teamsters Local 317]*, 129 AD3d 1596, 1597 [4th Dept 2015]). While "a different construction could have been accorded to the subject provision[s] 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 also agree with respondent that the arbitrator did not exceed a specifically enumerated limitation on his power. The CBA provided that the arbitrator "shall have no power or authority to add to, subtract from, modify, change, or alter any provisions of this Agreement." Contrary to petitioner's contention, the arbitrator did not impose any new requirement upon petitioner before it could discipline its employees and thus did not add to or alter the CBA. As explained above, the arbitrator determined, *under the specific facts of this case*, that the penalty of termination could not be upheld. The arbitrator did not adopt any new rules that petitioner must follow in future disciplinary cases, and we therefore reject petitioner's slippery slope argument (*see Matter of State of New York [Div. for Youth] [Mays]*, 214 AD2d 869, 870 [3d Dept 1995]). "The argument that the arbitrator exceeded a limitation in the collective bargaining agreement . . . is nothing more than a challenge to the substance of the arbitrator's contract interpretation, which . . . is foreclosed" (*Albany County Sheriff's Local 775 of Council 82, AFSCME, AFL-CIO*, 63 NY2d at 656).

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

797

KA 14-01048

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN W. SPINKS, DEFENDANT-APPELLANT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (BRIAN SHIFFRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered April 29, 2014. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree and robbery in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, that part of the omnibus motion seeking to suppress the showup identification evidence is granted and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [4]) and two counts of robbery in the second degree (§ 160.10 [1], [2] [a]), defendant contends that Supreme Court erred in denying those parts of his omnibus motion seeking to suppress a showup identification of defendant made by the victim and a cell phone. We agree with defendant in part and conclude that the showup identification should have been suppressed.

The evidence at the suppression hearing establishes that police officers responded to a 911 dispatch at 1:15 a.m. indicating that a taxicab driver had been robbed and possibly pistol whipped on State Street in the City of Rochester. Two to three minutes later, an updated dispatch described the suspects as three black males wearing "all black clothing" and stated that one of the suspects was carrying a book bag. The updated dispatch indicated that the men were headed east on Platt Street, which is east of State Street. "Within two to three minutes" of that updated dispatch, an officer spotted three black men wearing dark clothing with one carrying a book bag at the intersection of Jay Street and Verona Street, which is located to the west of State Street. The men were walking in a southwesterly direction on Jay Street. Upon seeing the officer, two of the men fled and ran through a nearby park before being apprehended. Defendant, however, made no attempt to flee or to avoid interaction with the

officer. After defendant was taken into custody, he was positively identified by the victim during a showup procedure. A cell phone was recovered near the intersection where defendant was stopped and detained. The court refused to suppress the showup identification and the cell phone, concluding that the officer had reasonable suspicion that defendant had committed a crime.

Although the determination of the suppression court is afforded great weight, this Court has the same "fact-finding authority to determine whether the police conduct was justified" (*People v Lopez*, 149 AD3d 1545, 1546-1547 [4th Dept 2017]; *see People v McRay*, 51 NY2d 594, 605 [1980]; *People v Prochilo*, 41 NY2d 759, 761 [1977]; *People v Noah*, 107 AD3d 1411, 1412 [4th Dept 2013]). We reject defendant's contention that suppression of the recovered cell phone is required inasmuch as there was no evidence that the phone was discarded as a result of unlawful police activity (*see generally People v Wilkerson*, 64 NY2d 749, 750 [1984]). We agree with defendant, however, that the showup identification should have been suppressed as the fruit of an illegal stop and detention.

The necessary predicate for stopping and detaining defendant was that the officer have " 'at least a reasonable suspicion that [defendant] ha[d] committed, [was] committing, or [was] about to commit a crime' " (*Lopez*, 149 AD3d at 1547; *see People v Hough*, 151 AD3d 1591, 1592 [4th Dept 2017], *lv denied* 30 NY3d 950 [2017]; *People v Lightfoot*, 124 AD3d 802, 803 [2d Dept 2015], *lv denied* 25 NY3d 990 [2015]). Here, even assuming, arguendo, that the as-yet unidentified 911 caller was reliable and had a sufficient basis of knowledge (*see People v Ingram*, 114 AD3d 1290, 1292 [4th Dept 2014], *appeal dismissed* 24 NY3d 1201 [2015]; *People v Jackson*, 108 AD3d 1079, 1079 [4th Dept 2013], *lv denied* 22 NY3d 997 [2013]; *see generally People v Argyris*, 24 NY3d 1138, 1140-1141 [2014], *rearg denied* 24 NY3d 1211 [2015], *cert denied* 577 US —, 136 S Ct 793 [2016]), we conclude that the information available to the detaining officer did not provide reasonable suspicion to stop and detain defendant.

While the general description of the men matched the description provided by the 911 dispatcher, the court failed to give adequate consideration to the difference between the location where the dispatcher stated that the suspects had been observed running from the crime scene, i.e., east of State Street, and the location where the officer stopped defendant, i.e., west of State Street. Significantly, there was no testimony at the suppression hearing that defendant or the other two men had been running or appeared out of breath even though they were located nearly half a mile from the reported location within a short period of time of the relevant dispatch (*see People v Thomas*, 300 AD2d 416, 416 [2d Dept 2002], *lv denied* 99 NY2d 620 [2003]; *cf. People v Carson*, 122 AD3d 1391, 1392 [4th Dept 2014], *lv denied* 25 NY3d 1161 [2015]). Further, the court relied on the fact that there were no other persons present in the general vicinity where defendant was stopped. The detaining officer conceded, however, that no search had occurred on the east side of State Street—the area where the suspects had originally been observed (*cf. People v Nelson*, 24

AD3d 253, 254 [1st Dept 2005], *lv denied* 6 NY3d 816 [2006]). Although the two men accompanying defendant fled upon seeing the detaining officer, "[t]he flight of [some] member[s] of a group is hardly indicative of the collective guilt of the group. It is just as readily demonstrative of the innocence of [defendant,] who remain[ed] at the scene" (*People v Thompson*, 127 AD3d 658, 661 [1st Dept 2015]). We therefore conclude that the victim's identification of defendant at the showup procedure must be suppressed as the unattenuated product of an illegal stop and detention (*see generally People v Dodt*, 61 NY2d 408, 417 [1984]).

We note that the evidence presented at trial suggested that the victim may have had an independent basis to identify defendant. Thus, "[i]nasmuch as the identification of defendant by the victim was critical to the prosecution and there was no evidence at the suppression hearing to permit a determination whether the in-court identification had an independent source, defendant is 'entitled to a new trial to be preceded by a hearing as to whether there was an independent basis for the identification testimony of the [robbery victim]' " (*People v Adams*, 106 AD3d 1496, 1496 [4th Dept 2013]).

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

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

811

TP 18-00205

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

IN THE MATTER OF TYRONE HILL, PETITIONER,

V MEMORANDUM AND ORDER

STATE UNIVERSITY OF NEW YORK AT BUFFALO,
RESPONDENT.

LIPPES & LIPPES, BUFFALO (JOSHUA R. LIPPES OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [E. Jeannette Ogden, J.], entered January 30, 2018) to review a determination of respondent. The determination sanctioned petitioner for violations of the State University of New York at Buffalo Student Code of Conduct University Standards and Administrative Regulations.

It is hereby ORDERED that the determination is unanimously annulled on the law without costs, the petition is granted, and respondent is directed to expunge all references to this matter from petitioner's school record.

Memorandum: Petitioner, an undergraduate student at respondent State University of New York at Buffalo, commenced the instant CPLR article 78 proceeding to annul respondent's determination that he possessed weapons and engaged in harassment. Respondent sanctioned petitioner with 50 hours of community service, two years of disciplinary probation, and exclusion from on-campus housing. We agree with petitioner that the record is devoid of any evidence, much less substantial evidence, to support respondent's determination (*see generally Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 498-499 [2011]; *Matter of West v State Univ. of N.Y. at Buffalo, Off. of Vice-President for Student Affairs*, 159 AD3d 1486, 1487 [4th Dept 2018]). Instead, respondent's determination rests exclusively on a "seriously controverted" hearsay statement, and that does not, as a matter of law, constitute substantial evidence (*Matter of McGillicuddy's Tap House, Ltd. v New York State Liq. Auth.*, 57 AD3d 1052, 1053 [3d Dept 2008]). We therefore annul the determination, grant the petition, and direct respondent to expunge all references to this matter from petitioner's school record (*see West*, 159 AD3d at

1487; *Matter of Nawaz v State Univ. of N.Y. Univ. at Buffalo School of Dental Medicine*, 296 AD2d 863, 863 [4th Dept 2002]).

We decline respondent's invitation to remit this matter for a new hearing in light of its failure to transcribe the disciplinary hearing. Annulment and expungement is the prescribed remedy for an administrative determination that is unsupported by substantial evidence (*see Matter of Barnes v Fischer*, 108 AD3d 990, 990 [3d Dept 2013], *lv denied* 22 NY3d 855 [2013]), and it would be anomalous if respondent was afforded a new opportunity to establish petitioner's culpability based on its own procedural error in failing to transcribe the initial hearing.

Finally, we are compelled to express our dismay at respondent's cavalier attitude toward petitioner's due process rights in this case, and we remind respondent—and all other colleges and universities, particularly state-affiliated institutions—of their unwavering obligation to conduct student disciplinary proceedings in a manner that comports with fundamental notions of due process for the accused, that renders determinations consistent with the facts, and that respects the presumption of innocence to which all students are entitled.

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

812.1
CA 18-00467

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

ROBINSON HOME PRODUCTS, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ONEIDA, LTD., AND EVERYWARE GLOBAL, INC.,
DEFENDANTS-RESPONDENTS.

WOODS OVIATT GILMAN LLP, ROCHESTER (WILLIAM F. SAVINO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MILBANK, TWEED, HADLEY & MCCLOY LLP, NEW YORK CITY (ATARA MILLER OF COUNSEL), AND HARTER SECREST & EMERY LLP, ROCHESTER, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered March 16, 2018. The order denied the motion of plaintiff for a preliminary injunction and vacated a temporary restraining order.

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

Memorandum: This litigation arises from a license agreement pursuant to which defendants gave plaintiff the right to manufacture and distribute merchandise within the United States using defendants' brand names. Defendants notified plaintiff that they were terminating the license agreement because plaintiff allegedly breached several of its terms, including by selling branded merchandise outside the United States. In response, plaintiff commenced this action seeking declaratory relief, specific performance, and money damages for breach of contract. Supreme Court initially granted plaintiff's request for a temporary restraining order that precluded defendants from interfering with its use of the license or from terminating the license agreement but, after approximately 11 months, the court vacated that order and denied plaintiff's motion for a preliminary injunction. Plaintiff appeals, contending that the court abused its discretion in denying that motion. We affirm.

It is well settled that, "[i]n order to establish its entitlement to a preliminary injunction, the party seeking the injunction must establish, by clear and convincing evidence . . . , three separate elements: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor . .

. A motion for a preliminary injunction is addressed to the sound discretion of the trial court[,] and the decision of the trial court on such a motion will not be disturbed on appeal, unless there is a showing of an abuse of discretion" (*Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212, 216 [4th Dept 2009] [internal quotation marks omitted]). Here, even assuming, arguendo, that plaintiff established that it will sustain irreparable harm as a result of the alleged breach of the licensing agreement that cannot be "adequately compensated with money damages" (*Main Evaluations v State of New York*, 296 AD2d 852, 854 [4th Dept 2002], *appeal dismissed and lv denied* 98 NY2d 762 [2002]), and that the balance of equities tips in its favor, we conclude that the court did not abuse its discretion in denying the motion because plaintiff failed to show a likelihood of success on the merits (*cf. Doe v Axelrod*, 73 NY2d 748, 750-751 [1988]).

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

812

CA 18-00070

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

ANGEL DONER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GARY CAMP, DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (ARLOW M. LINTON OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAMPBELL & ASSOCIATES, EDEN, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (JESSLYN A. HOLBROOK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Frank A. Sedita, III, J.), entered October 5, 2017. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries that she sustained when she fell on wooden steps located on premises owned by defendant. Supreme Court properly denied defendant's motion for summary judgment dismissing the complaint. Contrary to his contention, defendant failed to meet his prima facie burden. "In a slip and fall case, a defendant may establish its prima facie entitlement to judgment as a matter of law by submitting evidence that the plaintiff cannot identify the cause of his or her fall without engaging in speculation" (*Rinallo v St. Casimir Parish*, 138 AD3d 1440, 1441 [4th Dept 2016] [internal quotation marks omitted]; *see Lane v Texas Roadhouse Holdings, LLC*, 96 AD3d 1364, 1364 [4th Dept 2012]). Here, defendant submitted the deposition testimony of plaintiff, who testified that the worn condition of the steps caused her to fall. Plaintiff further testified that, when she stepped onto the bottom step with her right foot, her ankle rolled inward, causing her to fall over the left side of the steps. A photograph in the record showed that a significant portion of the wood on the right hand side of the bottom step was worn away. That evidence " 'render[ed] any other potential cause of [her] fall sufficiently remote or technical to enable [a] jury to reach [a] verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence' " (*Rinallo*, 138 AD3d at 1441). Inasmuch as defendant failed to meet his prima facie burden, we need not consider whether plaintiff raised an issue of fact in opposition (*see*

Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]).

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

819

KA 15-01505

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHERRITA L. CRUMPLER, DEFENDANT-APPELLANT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (BRIAN SHIFFRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered August 27, 2015. The judgment convicted defendant, upon a jury verdict, 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 a jury verdict, of manslaughter in the first degree (Penal Law § 125.20 [1]), arising from an altercation during which the victim, defendant's girlfriend, sustained a fatal stab wound. Defendant contends that County Court erred in admitting in evidence statements made by a police investigator and her partner during a videotaped interrogation of defendant that was played for the jury inasmuch as such statements constituted improper opinion evidence expressing that defendant's account of an accidental stabbing was not truthful and contrary to the physical evidence. Defendant failed to preserve that contention for our review inasmuch as she did not object to the admission in evidence of those statements (*see* CPL 470.05 [2]; *People v Scully*, 61 AD3d 1364, 1365 [4th Dept 2009], *affd* 14 NY3d 861 [2010]). Defendant likewise failed to preserve for our review her contention that the court erred in failing to give a limiting instruction regarding that evidence because she did not request such an instruction (*see* CPL 470.05 [2]; *Scully*, 61 AD3d at 1365). Inasmuch as defendant did not object, she also failed to preserve for our review her contention that the court improperly admitted opinion testimony in evidence when the investigator testified on two occasions that, as an interrogation technique, during the course of questioning she provided defendant with additional information learned by the police during their investigation because, in light of the physical evidence, she did not believe defendant's account (*see* CPL 470.05 [2]). We decline to exercise our power to review those unpreserved

contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Davis*, 213 AD2d 665, 665 [2d Dept 1995], *lv denied* 86 NY2d 734 [1995]).

Even assuming, arguendo, that defendant's challenge to another instance of similar testimony by the investigator is preserved for our review on the ground that the court, in response to defendant's general objection, expressly decided that the investigator was permitted to express her opinion as to the veracity of defendant's account (*see* CPL 470.05 [2]), we conclude that any error was harmless. That testimony was merely cumulative of similar statements admitted in evidence without objection and there is no significant probability that the jury would have acquitted defendant had the investigator not provided that testimony (*see People v Haggerty*, 23 NY3d 871, 876 [2014]; *People v Guay*, 18 NY3d 16, 24 [2011]; *People v Workman*, 56 AD3d 1155, 1157 [4th Dept 2008], *lv denied* 12 NY3d 789 [2009]).

We reject defendant's contention that she was denied effective assistance of counsel inasmuch as she failed to " 'demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712 [1998]). The record establishes that defense counsel chose not to challenge the admission in evidence of the statements made during the interrogation and at trial as a reasonable strategy. Indeed, defense counsel relied on those statements in order to argue that defendant provided a credible account that the stabbing was an accident that occurred when the victim introduced a knife into a quarrel, as evidenced by the fact that defendant willingly spoke to the police and, despite hours of accusations by two seasoned homicide investigators who were permitted to lie during the interrogation, defendant consistently, truthfully, and adamantly maintained that she never intended to harm the victim. Under the circumstances of this case, defense counsel could have legitimately determined that an additional limiting instruction was unnecessary in light of the standard instruction given to the jury providing that they should evaluate police testimony in the same manner as the testimony of any other witness, along with the fact that the jury was repeatedly made aware that the investigator and her partner were permitted to lie to defendant during the interrogation and had used interrogation techniques to prompt responses from her. Moreover, defense counsel's alleged shortcomings did not render him ineffective in light of the totality of his representation of defendant (*see People v Gross*, 26 NY3d 689, 696 [2016]). Among other things, defense counsel made appropriate motions, effectively cross-examined the People's witnesses, introduced evidence in favor of defendant, and made appropriate opening and closing statements, thereby mounting a cogent, albeit unsuccessful, defense premised upon portraying defendant as a credible and sympathetic individual who was involved in a tragic accident but was not criminally liable for the victim's death (*see People v Henderson*, 27 NY3d 509, 513-514 [2016]). Thus, viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant further contends that the court erred in failing to conduct an inquiry into whether a juror was asleep during the beginning portion of the interrogation videotape that was played for the jury and in failing to discharge that juror. Defendant failed to preserve that contention for our review inasmuch as she did not request that the court conduct such an inquiry and did not move to discharge the juror (*see People v Brown*, 159 AD3d 1415, 1415-1416 [4th Dept 2018]; *People v Armstrong*, 134 AD3d 1401, 1401 [4th Dept 2015], *lv denied* 27 NY3d 962 [2016]). Indeed, after defense counsel brought the matter to the court's attention, the court stated that it would pay additional attention to all jurors, defense counsel acquiesced to the suggestions of the court and the prosecutor that the jury be provided more regular breaks and be informed at the outset of the length of each segment of the videotape, and the court instructed the jury to remain attentive. We thus conclude that defendant "demonstrated a willingness to continue to accept the juror as a trier of fact" and now "cannot be heard to complain" (*People v Quinones*, 41 AD3d 868, 868 [2d Dept 2007], *lv denied* 9 NY3d 1008 [2007]; *see Armstrong*, 134 AD3d at 1401). We decline to exercise our power to review defendant's unpreserved contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to defendant's related contention, we conclude that she was not deprived of effective assistance of counsel by defense counsel's failure to request that the court conduct an inquiry or to move to discharge the juror (*see generally Gross*, 26 NY3d at 696).

Defendant correctly concedes that her contention that she was denied a fair trial by prosecutorial misconduct on summation is not preserved for our review inasmuch as she did not object to the allegedly improper remarks (*see People v Sanford*, 148 AD3d 1580, 1583 [4th Dept 2017], *lv denied* 29 NY3d 1133 [2017]). In any event, that contention is without merit inasmuch as the prosecutor's remarks constituted a fair response to defense counsel's summation and fair comment on the evidence (*see People v Rivera*, 133 AD3d 1255, 1256 [4th Dept 2015], *lv denied* 27 NY3d 1154 [2016]).

We reject defendant's further contention that the verdict is against the weight of the evidence. Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the jury did not fail to give the evidence the weight it should be accorded (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Finally, the sentence is not unduly harsh or severe.

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

850

KA 16-00655

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL PUTMAN, DEFENDANT-APPELLANT.

JOHN J. RASPANTE, 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 (Barry M. Donalty, J.), rendered June 23, 2015. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree and petit larceny.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]) and petit larceny (§ 155.25). Defendant does not challenge the validity of his waiver of the right to appeal, and his valid waiver encompasses his contention that the sentence is unduly harsh and severe (*see People v Bryant*, 28 NY3d 1094, 1096 [2016]; *People v Lopez*, 6 NY3d 248, 255-256 [2006]).

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

852

KA 15-02075

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH L. SOUTHARD, DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Peter C. Bradstreet, J.), rendered November 24, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the period of postrelease supervision to a period of 5 years and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted burglary in the first degree (Penal Law §§ 110.00, 140.30 [2]). Defendant was sentenced, as a second felony offender, to a determinate term of 5 years' imprisonment and 10 years' postrelease supervision (PRS). As defendant correctly contends, the 10-year period of PRS is illegal. The only legal period of PRS under these circumstances is 5 years (*see* § 70.45 [2]). Although this issue was not raised before the sentencing court, we cannot allow an illegal sentence to stand (*see People v Adams*, 126 AD3d 1405, 1406 [4th Dept 2015], *lv denied* 25 NY3d 1158 [2015]). We therefore modify the judgment by reducing the period of PRS from 10 years to 5 years (*see generally People v Hughes*, 112 AD3d 1380, 1381 [4th Dept 2013], *lv denied* 23 NY3d 1038 [2014]).

We note that the uniform sentence and commitment sheet incorrectly states that the underlying offense was committed on August 23, 2013, and it must be amended to state the correct offense date of August 28, 2013. Additionally, the certificate of conviction does not reflect defendant's status as a second felony offender, and it must be amended accordingly (*see generally People v Johnson*, 161 AD3d 1529, 1529 [4th Dept 2018]).

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

853

KA 16-01481

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTONE HERROD, ALSO KNOWN AS TONE,
DEFENDANT-APPELLANT.

THE KINDLON LAW FIRM, PLLC, ALBANY (LEE C. KINDLON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (David W. Foley, A.J.), rendered June 27, 2016. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Erie County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant contends that County Court misstated his burden under the first step of the three-step *Batson* test. We agree. In order for the moving party to satisfy its burden at step one, it must " 'show[ ] that the facts and circumstances of the voir dire raise an inference that the other party excused one or more jurors for an impermissible reason' " (*People v Baxter*, 108 AD3d 1158, 1159 [4th Dept 2013], quoting *People v Smocum*, 99 NY2d 418, 421 [2003]). "A defendant 'need not show [either] a pattern of discrimination' " (*People v Anthony*, 152 AD3d 1048, 1050 [3d Dept 2017]) or, as the court stated here, "a systematic approach by the prosecution." Rather, a defendant may satisfy his or her burden under the first step by demonstrating that "members of the cognizable group were excluded while others with the same relevant characteristics were not" or that the People excluded members of the cognizable group "who, because of their background and experience, might otherwise be expected to be favorably disposed to the prosecution" (*People v Childress*, 81 NY2d 263, 267 [1993]).

We conclude that defendant met his burden under step one by establishing that there is a basis in the record to infer that the People exercised the peremptory challenge in a discriminatory manner. Here, defense counsel explained to the court that the relevant prospective juror was the first African-American male "that's been available without a [for]-cause" challenge and that the prospective juror provided answers during voir dire that were favorable to the prosecution, i.e., that the prospective juror had a number of family members in law enforcement, had a college degree and had at one time been robbed. Defense counsel thus implied that he could not ascertain from the prospective juror's answers a reason for the peremptory challenge other than racial bias. The court did not provide defense counsel with any further opportunity to develop that argument and, instead, interrupted defense counsel and concluded that a pattern of discrimination had not been established.

Inasmuch as there is a basis in the record to infer that the People exercised the peremptory challenge in a discriminatory manner, we conclude that "the burden shifted to the People to articulate a nondiscriminatory reason for striking the juror, and the court then should have determined whether the proffered reason was pretextual" (*People v Davis*, 153 AD3d 1631, 1632 [4th Dept 2017]; *see generally People v James*, 99 NY2d 264, 270-271 [2002]). We therefore hold the case, reserve decision, and remit the matter to County Court for that purpose (*see Davis*, 153 AD3d at 1632).

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court

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

854

KA 17-00295

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NORMAN R. QUIGLEY, DEFENDANT-APPELLANT.

JAMES S. KERNAN, PUBLIC DEFENDER, LYONS (ROBERT TUCKER 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.), dated November 28, 2016. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court abused its discretion in denying his application for a downward departure from his presumptive risk level. Even assuming, arguendo, that defendant preserved the contention raised on appeal for our review by seeking a downward departure on different grounds before the trial court, we conclude that it lacks merit. Here, defendant "failed to establish his entitlement to a downward departure from his presumptive risk level inasmuch as he failed to establish the existence of a mitigating factor by the requisite preponderance of the evidence" (*People v Nilsen*, 148 AD3d 1688, 1689 [4th Dept 2017], *lv denied* 29 NY3d 912 [2017]; *see People v Puff*, 151 AD3d 1965, 1966 [4th Dept 2017], *lv denied* 30 NY3d 904 [2017]).

Entered: July 6, 2018

Mark W. Bennett
Clerk of the Court