SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JULY 5, 2019

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. BRIAN F. DEJOSEPH

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

1412

CA 18-01313

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

SUSANNE HOLLAND, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LAURA MCCLUSKY, MICHAEL NIMAN, RANDALL HESS AND WELLS COLLEGE, DEFENDANTS-RESPONDENTS.

SCOLARO FETTER GRIZANTI & MCGOUGH, P.C., SYRACUSE (CHAIM J. JAFFE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (JOHN H. CALLAHAN OF COUNSEL), FOR DEFENDANT-RESPONDENT WELLS COLLEGE.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered October 13, 2017. The judgment, among other things, dismissed the amended complaint.

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

Memorandum: In this action for trespass arising out of defendants' use of certain real property allegedly owned by plaintiff, plaintiff appeals from a judgment that, inter alia, granted that part of the motion of Wells College (defendant) for summary judgment on its first counterclaim and declared it to be the fee owner of the properties in question. The judgment further granted that part of defendant's motion, joined by the individual defendants, for summary judgment dismissing the amended complaint and denied plaintiff's motion for, inter alia, summary judgment and to dismiss defendants' affirmative defenses.

We conclude that Supreme Court properly granted defendant summary judgment declaring that it is the fee owner of the contested properties. In support of its motion for summary judgment on its counterclaim, defendant submitted, inter alia, several deeds relevant to determining the fee ownership of the subject properties, including the deed of October 31, 1878 (original railroad deed), which establishes the nature of plaintiff's interest in the subject properties in relation to defendant. By that deed, defendant's predecessor in interest granted plaintiff's predecessor in interest, a railroad company, "the right of way for railroad purposes with a single track as the same is now laid and used . . . , together with ample room for all necessary repairs of the same."

Plaintiff contends that the original railroad deed gave her predecessor in interest fee title to the properties in light of the general presumption that railroad companies acquire fee title to the land "for the construction and operation of [a] railroad" (*Yates v Van De Bogert*, 56 NY 526, 530 [1874]) and the fact that "[t]he words 'right of way' as applied to the land occupied by a railroad line do not necessarily signify that the railroad only has a railroad easement" (*Corning v Lehigh Val. R.R. Co.*, 14 AD2d 156, 164 [4th Dept 1961]). Based on our interpretation of the specific limiting language contained in the deed, however (*see* Real Property Law § 240 [3]; *Margetin v Jewett*, 78 AD3d 1486, 1488 [4th Dept 2010]; *Allen v Cross*, 64 AD2d 288, 291 [4th Dept 1978]), we conclude that the original railroad deed conveyed to plaintiff's predecessor in interest only a right of way easement in the subject properties, leaving defendant, as the successor to the grantor of the original railroad deed, with the fee interest in the properties (*cf. Corning*, 14 AD2d at 164-165). The relevant language in the deed limited the conveyance by describing a right of way only for the railroad track *already in existence* and sufficient to allow for all necessary repairs on that same track. Such language would have been unnecessary surplusage if the original railroad deed intended to convey a fee simple interest to plaintiff's predecessor.

We further conclude that plaintiff did not submit evidence sufficient to raise a material issue of fact in opposition to defendant's showing that it owned the subject properties (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). In light of our determination, plaintiff's motion to dismiss defendants' affirmative defenses is moot (*see Padgett v State of New York*, 163 AD2d 914, 915 [4th Dept 1990], *lv denied* 76 NY2d 711 [1990]).

We have considered plaintiff's remaining contentions and conclude that they do not warrant reversal or modification of the judgment.

Entered: July 5, 2019

Mark W. Bennett
Clerk of the Court

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

1416

CA 18-00700

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

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

V MEMORANDUM AND ORDER

HAMILTON MEDICAL, INC., ET AL., DEFENDANTS, HOLLY PAYNE, RT, CURRINA STONE, RN, ANNA RUSTIN, RN, LINDSEY VALDEZ, RN, EVELYN KHORIATY, M.D., DEFENDANTS-APPELLANTS, AND SUNY UPSTATE MEDICAL UNIVERSITY HOSPITAL, INTERVENOR-APPELLANT.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (JOSEPH M. SPADOLA OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND INTERVENOR-APPELLANT.

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

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered April 5, 2018. The order, insofar as appealed from, granted that part of the motion of plaintiff seeking to compel the production of statements made by defendants-appellants within the quality assurance process concerning the facts and circumstances of the incident that occurred on November 11, 2013 and gave rise to the malpractice claim.

It is hereby ORDERED that the order insofar as appealed from is reversed on the law without costs and that part of the motion seeking to compel the production of statements made by defendants-appellants within the quality assurance process concerning the facts and circumstances of the incident that occurred on November 11, 2013 and gave rise to the malpractice claim is denied.

Memorandum: Plaintiff commenced this action for personal injuries sustained by her infant son after he suffered a severe brain injury from bilateral pneumothoraxes. Plaintiff alleged that the incident occurred on November 11, 2013 after the infant had been transported to intervenor SUNY Upstate Medical University Hospital (SUNY Upstate) and placed on a ventilator. During discovery, plaintiff requested, inter alia, that defendants-appellants (defendants) and SUNY Upstate produce all documents related to the evaluation of what occurred to the infant on November 11, 2013. Defendants and SUNY Upstate objected to that request, contending that

any responsive documents would have been made as part of SUNY Upstate's quality assurance program and would therefore be privileged and exempt from disclosure pursuant to Education Law § 6527 (3) and Public Health Law § 2805-m (2). Plaintiff thereafter moved to compel, inter alia, production of any statements that defendants "provided to a quality assurance and/or a peer review committee." In support of that part of her motion, plaintiff relied on the statutory exception to the privilege (*see* Education Law § 6527 [3]; Public Health Law § 2805-m [2]). Supreme Court granted the motion in part and, as relevant here, ordered defendants to produce "any statements made by a physician or other health care professional who [was] named as a defendant in this action within the quality assurance process concerning the facts and circumstances of the incident giving rise to the malpractice claim, arising out of events from November 11, 2013." Thereafter, we granted SUNY Upstate's motion to intervene and appear as an appellant. Defendants and SUNY Upstate, as limited by their brief, appeal from the order to the extent that it granted that part of plaintiff's motion seeking to compel production of those statements. We reverse the order insofar as appealed from.

We agree with SUNY Upstate and defendants that the court erred in granting plaintiff's motion with respect to certain statements made by defendants during the quality assurance process. "The New York State Education Law shields from disclosure 'the proceedings [and] the records relating to performance of a medical or a quality assurance review function or participation in a medical and dental malpractice prevention program' " (*Logue v Velez*, 92 NY2d 13, 16-17 [1998], quoting Education Law § 6527 [3]; *see* Public Health Law § 2805-m [2]). Although there is an exception to that privilege, "the exception is narrow" (*Logue*, 92 NY2d at 18) and is limited to "statements made by any person in attendance at such a [quality assurance] meeting who is a party to an action or proceeding the subject matter of which was reviewed at such meeting" (Education Law § 6527 [3]; *see* Public Health Law § 2805-m [2]; *Logue*, 92 NY2d at 18; *Drum v Collure*, 161 AD3d 1509, 1510-1511 [4th Dept 2018]).

Here, the "statements" at issue were provided shortly after the incident and were obtained as part of SUNY Upstate's quality assurance investigation. The statements, however, were not made at a quality assurance committee meeting; nor were they made in response to any inquiries initiated by the committee (*cf. Swartzenberg v Trivedi*, 189 AD2d 151, 152-154 [4th Dept 1993], *lv dismissed* 82 NY2d 749 [1993]). None of the defendants appeared at any committee meeting. Thus, we agree with SUNY Upstate and defendants that plaintiff's proposed construction of the statutory exception would not give any practical effect to the phrase "in attendance," but rather would render that phrase meaningless (*see generally* McKinney's Cons Laws of NY, Book 1, Statutes § 98). Further, the Court of Appeals specifically instructed that the exception is "narrow and limited to statements given at an otherwise privileged peer review meeting" (*Logue*, 92 NY2d at 18; *see generally Katherine F. v State of New York*, 94 NY2d 200, 205-206 [1999]; *Lilly v Turecki*, 112 AD2d 788, 788-789 [4th Dept 1985]). Following plaintiff's proposed construction "would extend the [statutory] exception to a point where it would swallow the general

rule that materials used by a hospital in quality review and malpractice prevention programs are strictly confidential" (*Logue*, 92 NY2d at 19).

To the extent that the Second Department has expanded the statutory exception to the statements at issue here, we decline to follow those cases (*see Santero v Kotwal*, 4 AD3d 464, 465 [2d Dept 2004]; *vanBergen v Long Beach Med. Ctr.*, 277 AD2d 374, 374-375 [2d Dept 2000]).

All concur except CURRAN, J., who concurs in the result in the following memorandum: I concur with the majority that the narrow exception to the privilege against disclosure created by Education Law § 6527 (3) and Public Health Law § 2805-m (2) is limited by express statutory language to only statements concerning the subject matter of litigation made by a party while "in attendance" at a quality assurance (QA) committee meeting (Public Health Law § 2805-m [2]; *see* Education Law § 6527 [3]). I write separately, however, because I submit that our prior decision in *Swartzenberg v Trivedi* (189 AD2d 151 [4th Dept 1993], *lv dismissed* 82 NY2d 151 [1993]) contradicts the well-settled construction of that narrow exception to the rule against such disclosure, and I would therefore expressly disavow that case.

In *Swartzenberg*, we held that a letter supplied by a defendant physician in a medical malpractice action fell within the aforementioned exception and was therefore discoverable. We specifically rejected a "hypertechnical reading of the statute," and determined that "such an interpretation would not serve any statutory purpose" (*id.* at 153). We held that the statute's purpose was to "encourage peer review of physicians by guaranteeing confidentiality to those persons performing the review function" and that, therefore, the statute "was not intended to extend protection to persons . . . whose conduct is the subject of review" (*id.*). As I understand the analysis in *Swartzenberg*, this Court, in evaluating whether the exception applied, focused on the distinction between the *persons* who made the challenged statements—i.e., between those who performed the review function and those whose conduct was the subject of review—and determined that statements made by the latter were subject to disclosure. Here, in my view, the majority properly abandons that distinction to focus on the more germane one, namely, whether the statements were made "*in attendance* at . . . a [quality assurance] meeting" or whether the statements were made at other times (emphasis added). That is the correct distinction on which we should focus.

I cannot, however, accept the majority's reasoning that *Swartzenberg* pertains only to "inquiries initiated by the [QA] committee." *Swartzenberg* never explicitly made such a holding, and instead concluded that the letter from the defendant physician at issue was "the functional equivalent of a statement" to the committee (*id.* at 154). The Court focused on the fact that the defendant physician communicated with the QA committee as the relevant consideration to determine whether the exception applied. It did not limit the exception's scope to only those instances where a statement was made by the defendant physician at a QA committee meeting or

submitted in response to the committee's specific inquiries.

Moreover, even if *Swartzenberg* created a carve-out from the "in attendance at a meeting" requirement based on whether a statement was made by a party in response to a QA committee inquiry, the effect is far too broad and conflicts with the narrowness of the exception (Public Health Law § 2805-m [2]; *see* Education Law § 6527 [3]; *Logue v Velez*, 92 NY2d 13, 18 [1998]). For example, as was the case here, statements are often made by defendant physicians to hospital QA professionals, and it is undoubtedly true that such statements may be considered part of the general inquiry conducted by the committee. Thus, even limiting the application of *Swartzenberg* to inquiries by the committee to a party suggests that, any time a QA committee requests statements from a party, the committee is conducting an extra-meeting inquiry, rendering such statements discoverable. That undercuts our narrow holding here that the only discoverable statements are those made while *in attendance* at a QA committee meeting.

Thus, I would expressly disavow *Swartzenberg* as contrary to our construction of the narrow statutory exception permitted under Education Law § 6527 (3) and Public Health Law § 2805-m (2).

Entered: July 5, 2019

Mark W. Bennett
Clerk of the Court

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

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CA 18-00595

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

MICHAEL L. GILKERSON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JASON L. BUCK, MATTHEW J. SILE, JAMES W. SILE, ET AL., DEFENDANTS, AND ASHLEY E. EVANS, DEFENDANT-APPELLANT. (APPEAL NO. 1.)

LAW OFFICES OF JENNIFER S. ADAMS, YONKERS (NICOLE PALMERTON OF COUNSEL), FOR DEFENDANT-APPELLANT.

FANIZZI & BARR, P.C., NIAGARA FALLS (MELISSA A. MURPHY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Sara Sheldon, A.J.), entered November 16, 2017. The order denied the motion of defendant Ashley E. Evans for summary judgment dismissing the complaint of plaintiff Michael L. Gilkerson and cross claims against her.

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

Memorandum: Plaintiffs Michael L. Gilkerson and Amber M. Talarico commenced separate negligence actions against the same defendants, seeking to recover damages for injuries that they sustained in a multivehicle accident. Defendant Matthew J. Sile (Matthew) was driving a pick-up truck owned by his father, defendant James W. Sile, when the truck was broadsided in an intersection by a vehicle driven by defendant Jason L. Buck. When Buck's vehicle collided with Matthew's truck, the truck flipped over and subsequently collided with Gilkerson's motorcycle, causing injuries to Gilkerson and his passenger, Talarico. Ashley E. Evans (defendant) was traveling in a minivan behind plaintiffs' motorcycle and also became involved in the accident. In each action, defendant moved for summary judgment dismissing the complaint and cross claims against her. Defendant asserted that she cannot be found negligent because she did not cause the collision between Buck's vehicle and Matthew's truck or the collision between the truck and plaintiffs' motorcycle, and there is no evidence that defendant's vehicle ever came into contact with plaintiffs or their motorcycle. Defendant further asserted that, even if a question of fact exists whether her vehicle came into contact with plaintiffs or their motorcycle, her conduct was not a proximate

cause of the accident because she was driving reasonably and prudently when she was confronted with an emergency situation. In appeal No. 1, defendant appeals from an order denying her motion for summary judgment dismissing Gilkerson's complaint and all cross claims against her. In appeal No. 2, defendant appeals from an order denying her motion for summary judgment dismissing Talarico's complaint and all cross claims against her. We affirm.

We reject defendant's contention that Supreme Court erred in denying her motions. In her motions, defendant had the initial burden of establishing as a matter of law either that she was not negligent or that any negligence on her part was not a proximate cause of the accident (*see Darnley v Randazzo*, 159 AD3d 1578, 1578-1579 [4th Dept 2018]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). We conclude in both appeals that defendant failed to meet that burden (*see Deering v Deering*, 134 AD3d 1497, 1498-1499 [4th Dept 2015]; *see generally Daniels v Rumsey*, 111 AD3d 1408, 1410 [4th Dept 2013]).

Here, defendant submitted in support of her motions her own deposition testimony, in which she initially testified that her minivan *did* collide with plaintiffs' motorcycle, but then also testified that her minivan *did not* collide with plaintiffs' motorcycle. Inasmuch as defendant's own submissions raise questions of fact whether her vehicle came into contact with plaintiffs or their motorcycle, defendant failed to meet her initial burden on the motions with respect to that issue (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Sauter v Calabretta*, 90 AD3d 1702, 1703-1704 [4th Dept 2011]). Even assuming, arguendo, that defendant met her prima facie burden on her motions, we conclude that each plaintiff raised a triable issue of fact in opposition. Each plaintiff submitted, inter alia, an affidavit of Gilkerson with supporting photographs depicting extensive damage to the rear of plaintiffs' motorcycle, damage to the front of defendant's minivan, and a saddlebag and luggage rack from the motorcycle located on the pavement beside defendant's minivan. That evidence, although circumstantial, supports the inference that the front of defendant's minivan came into contact with the rear of plaintiffs' motorcycle (*cf. Cardy v Garretson*, 277 AD2d 1039, 1040 [4th Dept 2000]; *see generally Luttrell v Vega*, 162 AD3d 1637, 1637-1638 [4th Dept 2018]), and we reject defendant's contention that such evidence was insufficient to raise a question of fact without the support of an affidavit from an expert accident reconstructionist (*see generally De Long v County of Erie*, 60 NY2d 296, 307 [1983]).

Furthermore, viewing the evidence in the light most favorable to plaintiffs, as we must (*see Esposito v Wright*, 28 AD3d 1142, 1143 [4th Dept 2006]), we conclude that defendant failed to make a prima facie showing of entitlement to judgment as a matter of law based on the emergency doctrine. " '[T]he emergency doctrine does not automatically absolve a person from liability for his or her conduct' " (*Colangelo v Marriott*, 120 AD3d 985, 987 [4th Dept 2014]), and defendant's submissions in support of her motions raised issues of fact whether she was operating her minivan lawfully and prudently

prior to the accident.

In determining whether the actions of a driver are reasonable in light of an emergency situation, both the driver's awareness of the situation and his or her actions prior to the occurrence of the emergency must be considered (*see Ferrer v Harris*, 55 NY2d 285, 292-293 [1982], *remittitur amended* 56 NY2d 737 [1982]). Here, defendant's deposition testimony established that she saw Buck's car on the access road approaching the stop sign "very, very fast," "like he was still on the Thruway," and that she also observed Matthew's pick-up truck approaching the intersection. Defendant was "very conscious . . . because [she knew] there [were] a lot of accidents that happen on this road because people do not pay attention to the stop sign at that [a]ccess [r]oad," and she "start[ed] to get nervous" that Buck's vehicle was moving too fast to stop for the stop sign. Despite defendant's awareness that the intersection presented a particular danger and her observations of Buck's vehicle, however, defendant did not slow down, move over, or apply her brakes until *after* she saw Buck's vehicle "smash into the truck." At that point, defendant did not know where the motorcycle was in relation to her minivan. We thus conclude that issues of fact exist whether defendant, in taking no evasive action and in making no effort to slow down, or move over, or otherwise attempt to avert the impending collision, responded reasonably under the circumstances (*see Dalton v Lucas*, 96 AD3d 1648, 1649 [4th Dept 2012]; *see also Andrews v County of Cayuga*, 96 AD3d 1477, 1479 [4th Dept 2012]) and whether her failure to observe that plaintiffs' motorcycle was slowing down in front of her minivan contributed to the emergency situation (*see Stewart v Ellison*, 28 AD3d 252, 254 [1st Dept 2006]).

Entered: July 5, 2019

Mark W. Bennett
Clerk of the Court

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

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CA 18-00596

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

AMBER M. TALARICO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JASON L. BUCK, MATTHEW J. SILE, JAMES W. SILE, ET AL., DEFENDANTS, AND ASHLEY E. EVANS, DEFENDANT-APPELLANT. (APPEAL NO. 2.)

LAW OFFICES OF JENNIFER S. ADAMS, YONKERS (NICOLE PALMERTON OF COUNSEL), FOR DEFENDANT-APPELLANT.

STEPHEN BOYD, P.C., WILLIAMSVILLE (STEPHEN BOYD OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Sara Sheldon, A.J.), entered November 28, 2017. The order denied the motion of defendant Ashley E. Evans for summary judgment dismissing the complaint of plaintiff Amber M. Talarico and cross claims against her.

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

Same memorandum as in *Gilkerson v Buck* (— AD3d — [July 5, 2019] [4th Dept 2019]).

Entered: July 5, 2019

Mark W. Bennett
Clerk of the Court

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

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CA 18-00571

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

JAMIE ANGELHOW, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FAYEZ CHAHFE, M.D., CHAHFE MEDICAL PROFESSIONAL RECRUITMENT, LLC, DOING BUSINESS AS THE CHAHFE CENTER, AND ST. ELIZABETH MEDICAL CENTER, DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (EDWARD J. SMITH, III, OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DARREN JAY EPSTEIN, ESQ., P.C., NEW CITY (DARREN J. EPSTEIN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Erin P. Gall, J.), entered January 24, 2018. The order denied defendants' motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part, dismissing the complaint against defendants Chahfe Medical Professional Recruitment, LLC, doing business as The Chahfe Center, and St. Elizabeth Medical Center, and dismissing the complaint against defendant Fayez Chahfe, M.D., as amplified by the bill of particulars, insofar as it relates to claims arising from the 2005 surgery, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries allegedly caused during a near-total thyroidectomy performed by defendant Fayez Chahfe, M.D. (Dr. Chahfe) in 2005 and a total thyroidectomy performed by Dr. Chahfe in 2010. Plaintiff asserted causes of action for malpractice and lack of informed consent based on allegations that Dr. Chahfe deviated from the appropriate standard of care and failed to obtain informed consent, and that defendant Chahfe Medical Professional Recruitment, LLC, doing business as The Chahfe Center (Chahfe Center) and defendant St. Elizabeth Medical Center (St. Elizabeth) are vicariously liable for Dr. Chahfe's conduct. In appeal No. 1, defendants appeal from an order of Supreme Court (Gall, J.) that denied their motion for summary judgment dismissing the complaint. In appeal No. 2, defendants appeal from an order of Supreme Court (Gilbert, J.) that denied their motion seeking leave to renew and/or reargue their prior motion for summary

judgment.

We agree with defendants in appeal No. 1 that the court erred in denying that part of their motion seeking summary judgment dismissing the complaint against the Chahfe Center and St. Elizabeth, and we therefore modify the order in appeal No. 1 accordingly. Defendants met their initial burden on their motion by submitting the affidavit of Dr. Chahfe, who explained that he was not employed by either the Chahfe Center or St. Elizabeth, and that the Chahfe Center was an entity focused on physician recruitment and was not involved in plaintiff's care (*see generally Moran v Muscarella*, 85 AD3d 1579, 1580 [4th Dept 2011]; *Brown v DePuy AcroMed, Inc.*, 21 AD3d 1431, 1433 [4th Dept 2005]). Plaintiff failed to raise an issue of fact in opposition to that part of the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). To the extent that plaintiff now relies on quotations from the Chahfe Center's website, that contention is not properly before us inasmuch as it is raised for the first time on appeal (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]) and relies on material outside of the record on appeal (*see Macri v Kotrys*, 164 AD3d 1642, 1643 [4th Dept 2018]). To the extent that plaintiff contends that Dr. Chahfe held various positions at St. Elizabeth and that those positions raised an issue of fact regarding St. Elizabeth's vicarious liability for Dr. Chahfe's conduct, that contention is improperly raised for the first time on appeal (*see Ciesinski*, 202 AD2d at 985) and, in any event, lacks merit (*see Demming v Denk*, 48 AD3d 1207, 1209-1210 [4th Dept 2008], *lv denied* 10 NY3d 710 [2008]).

We reject defendants' contention in appeal No. 1 that the court erred in denying defendants' motion with respect to the claim that plaintiff's injuries were caused by Dr. Chahfe's negligence during the 2010 surgical procedure. Defendants failed to meet their initial burden on their motion because they failed to establish that Dr. Chahfe " 'complied with the accepted standard of care or did not cause an injury to [plaintiff]' " (*Groff v Kaleida Health*, 161 AD3d 1518, 1520 [4th Dept 2018]). Although defendants who move for summary judgment in a medical malpractice action may submit the affirmation of a defendant physician in order to meet their initial burden, the affirmation must be "detailed, specific and factual in nature . . . and must address each of the specific factual claims of negligence raised in [the] plaintiff's bill of particulars" (*Boland v Imboden*, 163 AD3d 1408, 1409 [4th Dept 2018], *lv denied* 32 NY3d 912 [2019] [internal quotation marks omitted]; *see Macaluso v Pilcher*, 145 AD3d 1559, 1560 [4th Dept 2016]). Here, defendants submitted the affirmation of Dr. Chahfe, in which he averred that he did not deviate from the standard of care and did not cut plaintiff's laryngeal nerve. Dr. Chahfe also stated in his affirmation, however, that he could not rule out that a complication occurred by a means other than cutting the laryngeal nerve. Dr. Chahfe did not explain in his affirmation why those other possible complications would not be a deviation from the standard of care or be the result of malpractice. Thus, Dr. Chahfe's affirmation did not sufficiently refute the allegations in plaintiff's bill of particulars that Dr. Chahfe negligently damaged the laryngeal nerve by a process other than cutting.

We also reject defendants' contention in appeal No. 1 that the court erred in denying defendants' motion with respect to the claim that Dr. Chahfe did not obtain plaintiff's informed consent for the 2010 surgical procedure. Defendants failed to meet their initial burden on their motion with respect to that issue because their submissions included plaintiff's deposition, wherein plaintiff disputed that Dr. Chahfe informed her of the risks, benefits, and alternatives to surgery in 2010 (*see Tirado v Koritz*, 156 AD3d 1342, 1344-1345 [4th Dept 2017]). We further reject defendants' contention that Dr. Chahfe established that a fully informed and reasonable individual would have proceeded with the surgery, inasmuch as Dr. Chahfe stated in his affirmation that non-surgical options may have also been appropriate for plaintiff, thus raising an issue of fact whether plaintiff would have opted for surgery had she been fully informed (*see generally Gray v Williams*, 108 AD3d 1085, 1086 [4th Dept 2013]). Defendants' contention that the statute of limitations bars plaintiff's claim that there was a lack of informed consent for the 2010 surgery is improperly raised for the first time on appeal (*see Ciesinski*, 202 AD2d at 985).

We agree with defendants in appeal No. 1, however, that the court erred in denying defendants' motion with respect to plaintiff's claims arising from the 2005 surgical procedure, and we therefore further modify the order in appeal No. 1 accordingly. Defendants established that those claims are time-barred inasmuch as more than 2½ years elapsed between the date of the alleged conduct and the commencement of the action (*see Bruno v Gosy*, 48 AD3d 1147, 1148 [4th Dept 2008]), and plaintiff failed to raise an issue of fact in opposition. Contrary to plaintiff's contention, the continuous treatment doctrine does not apply. It is undisputed that plaintiff did not treat with Dr. Chahfe in relation to the 2005 surgery after her final follow-up appointment in 2005, and that she did not return to Dr. Chahfe until 2010. The surgical procedures in 2005 and 2010 were " 'discrete and complete' events that cannot be linked by way of the continuous treatment doctrine" (*Shanahan v Sung*, 75 AD3d 1132, 1134 [4th Dept 2010]), and there was no evidence of anticipated further treatment related to the 2005 procedure at the time plaintiff left Dr. Chahfe's care in 2005 (*see generally Sofia v Jimenez-Rueda*, 35 AD3d 1247, 1249 [4th Dept 2006]).

Finally, we conclude that appeal No. 2 must be dismissed inasmuch as that part of defendants' motion seeking leave to renew was actually seeking leave to reargue, and no appeal lies from an order denying leave to reargue. A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR 2221 [e] [2]). In the context of a motion for leave to renew, "new facts" means "facts that were unavailable at the time of [the] prior motion" (*Hill v Milan*, 89 AD3d 1458, 1458 [4th Dept 2011]).

Here, following the denial of defendants' summary judgment motion, defendants moved for recusal of the Justice who decided that motion based on an allegation that she was biased against Dr. Chahfe.

That Justice denied the allegation of bias, but nevertheless granted the motion and recused herself, citing a desire to prevent further delay of the proceedings. Defendants then moved for leave to renew and/or reargue their motion for summary judgment before the subsequently assigned Justice. We conclude that the recusal of the Justice who ruled on the motion for summary judgment, in and of itself, was not a "new fact . . . that would change the prior determination" (CPLR 2221 [e] [2]), especially where, as here, that Justice categorically denied any bias and granted the recusal motion for reasons other than alleged bias. Furthermore, defendants' papers establish that Dr. Chahfe was aware of the facts underlying his allegation of bias prior to the filing of defendants' motion for summary judgment, and thus the allegation of bias was not a "new fact" at the time defendants moved for leave to renew and/or reargue their motion for summary judgment. Thus, defendants' motion for leave to renew and/or reargue did not present any "new facts not offered on the prior motion that would change the prior determination" (CPLR 2221 [e] [2]), and the motion was therefore actually only a motion for leave to reargue, the denial of which is not appealable (*see Hill*, 89 AD3d at 1458).

Entered: July 5, 2019

Mark W. Bennett
Clerk of the Court

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

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CA 18-00572

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

JAMIE ANGELHOW, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FAYEZ CHAHFE, M.D., CHAHFE MEDICAL PROFESSIONAL RECRUITMENT, LLC, DOING BUSINESS AS THE CHAHFE CENTER, AND ST. ELIZABETH MEDICAL CENTER, DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (EDWARD J. SMITH, III, OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DARREN JAY EPSTEIN, ESQ., P.C., NEW CITY (DARREN J. EPSTEIN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Gregory R. Gilbert, J.), entered March 8, 2018. The order denied defendants' motion for leave to reargue and/or renew their motion for summary judgment.

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

Same memorandum as in *Angelhow v Chahfe* ([appeal No. 1] — AD3d — [July 5, 2019] [4th Dept 2019]).

Entered: July 5, 2019

Mark W. Bennett
Clerk of the Court

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

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TP 18-01530

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

IN THE MATTER OF PATRICIA L. ANSLEY, PETITIONER,

V MEMORANDUM AND ORDER

JAMESVILLE-DEWITT CENTRAL SCHOOL DISTRICT,
RESPONDENT.

O'HARA, O'CONNELL & CIOTOLI, FAYETTEVILLE (STEPHEN CIOTOLI OF COUNSEL), FOR PETITIONER.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (SUBHASH VISWANATHAN 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, Onondaga County [Gregory R. Gilbert, J.], entered June 18, 2018) to review a determination of respondent. The determination terminated the employment of petitioner.

It is hereby ORDERED that the determination is modified on the law and the petition is granted in part by vacating the penalty imposed, and as modified the determination is confirmed without costs and the matter is remitted to respondent for further proceedings in accordance with the following memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul respondent's determination finding petitioner guilty of disciplinary charges and terminating her employment as a school bus driver after an incident in which petitioner slapped a student.

At a hearing conducted by respondent pursuant to Civil Service Law § 75, petitioner testified that she had been employed as a bus driver for 20 years, including 18 years with respondent, had driven special education students for five years, and had been struck or injured by students on more than 20 prior occasions. Petitioner testified that, although she had to "separate or corral"—students on occasion, she had never previously made physical contact with a student and was never reprimanded for her actions. The record reflects that, before the incident giving rise to this proceeding, petitioner's disciplinary record was unblemished.

On the day of the incident, at school dismissal time, a nine-year-old special needs student, who was known to frequently run off the bus, ran away from the bus. A social worker then provided

assistance to help the child board the bus. Once he boarded, the student started to yell and scream when his assigned bus attendant offered him only a book instead of the toy truck that he was accustomed to receiving upon boarding the bus. The attendant could not restrain him, and the student tried to run off the bus. The attendant followed him down the bus aisle while the social worker and petitioner came down the aisle from the front of the bus, blocking the student's way. It is undisputed that, at this point, the student became very aggressive and started to swing his arms at the social worker and punch petitioner. Petitioner testified that, when the student hit her, she became concerned that a nearby student might also be hit by him. Also on the bus during the incident was another student who was prone to kicking, and who was becoming increasingly upset and agitated by the situation.

Testimony at the hearing also established that as petitioner and the social worker tried to calm the student, he punched petitioner in the stomach. Petitioner then allegedly slapped the student on the face with her open hand. The student was later observed to have a hand-shaped red mark on his face. He declined medical attention, and the record is devoid of any evidence of medical treatment for the student or testimony from the student describing his pain. As a result of the incident, petitioner was subjected to criminal charges, which were ultimately dismissed in furtherance of justice (*see* CPL 170.30 [1] [g]; 170.40).

Contrary to petitioner's contention, the determination finding her guilty of three disciplinary charges is supported by substantial evidence. "It is well established that substantial evidence is generally the applicable evidentiary standard for disciplinary matters involving public employees under Civil Service Law § 75" (*Matter of Marentette v City of Canandaigua*, 159 AD3d 1410, 1412 [4th Dept 2018], *lv denied* 31 NY3d 912 [2018]). Substantial evidence "means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]; *see Matter of Marine Holdings, LLC v New York City Commn. on Human Rights*, 31 NY3d 1045, 1047 [2018], *rearg denied* 32 NY3d 903 [2018]) and, given that the Hearing Officer was entitled to resolve any issues of credibility whether petitioner deliberately slapped the student (*see Marentette*, 159 AD3d at 1412), we conclude that there is substantial evidence to support respondent's determination.

With respect to the penalty, however, in light of petitioner's otherwise unblemished disciplinary record during her 20 years as a school bus driver, including five years driving special needs students, we conclude that termination, absent any other previous progressive disciplinary steps, is so disproportionate to the offense committed as to shock one's sense of fairness (*see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233-234 [1974]). Although we are mindful of our limited role in evaluating the discipline imposed here (*see generally Matter of Bolt v New York*

City Dept. of Educ., 30 NY3d 1065, 1068 [2018]), we nevertheless conclude that the circumstances of this unfortunate occurrence, viewed in the specific context of petitioner's background, establish that the harsh penalty of termination was disproportionate and shocking to our sense of fairness. Petitioner was confronted by a student who, due to his special needs, lost control of his behavior and was significantly disrupting the other students on the bus, some of whom were also struggling to behave. Petitioner's conduct was not premeditated and, under these circumstances, appears to be the result of a momentary lapse of judgment. There is nothing in petitioner's employment history to suggest that she will ever engage in similar conduct again.

Although termination in these circumstances shocks our sense of fairness, we do not condone petitioner's behavior, and only conclude that some form of discipline short of termination would be appropriate. We therefore modify the determination by granting the petition in part and vacating the penalty imposed, and we remit the matter to respondent for the imposition of an appropriate penalty less severe than termination (*see Matter of Smith v Board of Educ., Onteora Cent. School Dist.*, 221 AD2d 755, 758 [3d Dept 1995], *lv denied* 87 NY2d 810 [1996]; *Matter of Ross v Oxford Academy & Cent. School Dist.*, 187 AD2d 898, 898 [3d Dept 1992], *lv denied* 81 NY2d 705 [1993]; *Matter of Borkhuis v Quinn*, 158 AD2d 917, 917 [4th Dept 1990]).

All concur except CARNI and TROUTMAN, JJ., who dissent in part and vote to confirm in the following memorandum: We respectfully dissent. Although we agree with the majority that the record contains substantial evidence to support the finding that petitioner committed the misconduct alleged, we conclude that the penalty is appropriate. Therefore, we would confirm the determination.

Petitioner was a school bus driver. After notice and a hearing pursuant to Civil Service Law § 75, she was found to have committed three acts of misconduct. The first charge was that she slapped a student across the face severely enough to leave a red mark on his skin. The second was that, in doing so, she violated respondent's policy on "Child Abuse in an Educational Setting" by intentionally or recklessly inflicting physical injury on the student. In recommending termination, the hearing officer noted that petitioner displayed no remorse for her misconduct, but rather blamed the student for running into her, causing incidental contact with her hand.

"Judicial review of an administrative penalty is limited to whether the measure or mode of penalty or discipline imposed constitutes an abuse of discretion as a matter of law" (*Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001], *rearg denied* 96 NY2d 854 [2001]; *see Matter of Bolt v New York City Dept. of Educ.*, 30 NY3d 1065, 1069 [2018, Rivera, J., concurring]). Unlike in criminal sentencing (*see* CPL 470.15 [6] [b]), we lack the authority to review an administrative penalty as a matter of discretion in the interest of justice (*see Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]). Instead, we must uphold an administrative penalty unless it " 'is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness' " (*Matter*

of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 233 [1974]). "This calculus involves consideration of whether the impact of the penalty on the individual is so severe that it is disproportionate to the misconduct, or to the harm to the agency or the public in general" (*Kelly*, 96 NY2d at 38, citing *Pell*, 34 NY2d at 234).

The majority upholds, as we would, the finding that petitioner violated respondent's child abuse policy by striking a student across the face using an open hand (*see generally Matter of Marine Holdings, LLC v New York City Commn. on Human Rights*, 31 NY3d 1045, 1047 [2018], *rearg denied* 32 NY3d 903 [2018]). Contrary to the majority, however, in light of the seriousness of that misconduct, we conclude that termination "d[oes] not shock the conscience, despite [petitioner's 20] years of unblemished service" (*Bolt*, 30 NY3d at 1071 [Rivera, J., concurring], citing *Matter of Lozinak v Board of Educ. of the Williamsville Cent. Sch. Dist.*, 24 NY3d 1048, 1049 [2014]; *see Kelly*, 96 NY2d at 39-40).

Entered: July 5, 2019

Mark W. Bennett
Clerk of the Court

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

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CA 18-00328

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

TERENCE WINTERS AND MAUREEN WINTERS,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

UNILAND DEVELOPMENT CORPORATION, UNILAND
CONSTRUCTION CORPORATION, COZZWILL, INC.,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.

UNILAND DEVELOPMENT CORPORATION AND
UNILAND CONSTRUCTION CORPORATION
THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V

J&N SERVICES CORPORATION, THIRD-PARTY
DEFENDANT-RESPONDENT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (RUSSELL T. QUINLAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BROWN & KELLY, LLP, BUFFALO (PAUL J. CALLAHAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS UNILAND DEVELOPMENT CORPORATION AND UNILAND CONSTRUCTION CORPORATION AND THIRD-PARTY PLAINTIFFS-RESPONDENTS.

LIPPMAN O'CONNOR, BUFFALO (GERARD E. O'CONNOR OF COUNSEL), FOR DEFENDANT-RESPONDENT COZZWILL, INC.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (MELISSA A. FOTI OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered May 18, 2017 in a personal injury action. The order, among other things, dismissed plaintiffs' complaint in its entirety.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion of defendants-third-party plaintiffs Uniland Development Corporation and Uniland Construction Corporation (defendants) with respect to the Labor Law § 241 (6) claim insofar as that claim is predicated on alleged violations of 12 NYCRR 23-1.13 (b) (4) and 23-3.2 (a) (2) and (3) and reinstating the Labor Law § 241 (6) claim against them to that

extent, reinstating the third-party complaint, and vacating those parts of the order that denied as moot defendants' motion with respect to discovery and the note of issue and third-party defendant's motion, and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Terence Winters (plaintiff), an electrician employed by third-party defendant, was assigned to work on a demolition project in a certain building. Defendants-third-party plaintiffs Uniland Development Corporation and Uniland Construction Corporation (defendants) were the owners of the building and the general contractor. Plaintiff's job was to make the wiring in the office safe. When he arrived, there were plastic, sheathed wires lying on the floor and hanging from the ceiling. Plaintiff had to determine the voltage of the wires on the floor but, before he could do that, he had to strip away two or three inches of the plastic sheathing. After he accomplished that task, plaintiff separated the black, white, and copper wires inside using pliers. In order to use his multimeter to test the voltage, plaintiff had to strip one quarter inch of insulation from the black wire. Using a pair of wire strippers, he cut into the black wire and suffered an electric shock. Plaintiffs then commenced this Labor Law and common-law negligence action seeking damages for the injuries that plaintiff sustained as a result of that electric shock, and defendants filed a third-party complaint seeking, inter alia, contractual and common-law indemnification from third-party defendant.

Thereafter, defendants made two motions. They moved for, inter alia, summary judgment dismissing the complaint against them in the first motion. They sought discovery from plaintiffs and vacatur of the note of issue in the main action in the second motion. In addition, third-party defendant moved for, inter alia, summary judgment dismissing the third-party complaint. Supreme Court granted defendants' first motion insofar as it sought summary judgment dismissing the complaint against them. Because it had dismissed the complaint against defendants in the main action, the court also dismissed the third-party complaint and denied the remaining motions as moot. Plaintiffs appeal.

We agree with plaintiffs that the court erroneously granted defendants' motion with respect to the Labor Law § 241 (6) claim against them insofar as that claim is predicated upon alleged violations of 12 NYCRR 23-1.13 (b) (4) and 23-3.2 (a) (2) and (3), and we therefore modify the order accordingly. The first of those provisions of the Industrial Code states that "[n]o employer shall suffer or permit an employee to work in such proximity to any part of an electric power circuit that he may contact such circuit in the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means" (12 NYCRR 23-1.13 [b] [4]; *see O'Leary v S&A Elec. Contr. Corp.*, 149 AD3d 500, 502 [1st Dept 2017]). The latter provisions state, inter alia, that electric lines must be "shut off and capped or otherwise sealed" before any demolition project begins (12 NYCRR 23-3.2 [a] [2]; *see Pino v Robert Martin Co.*, 22 AD3d 549, 552 [2d Dept 2005]) and, if it is necessary

to maintain an electric line during demolition, "such lines shall be so protected with substantial coverings or shall be so relocated as to protect them from damage and to afford protection to any person" (12 NYCRR 23-3.2 [a] [3]). Defendants failed to meet their initial burden of establishing that they "did not violate the regulations, that the regulations are not applicable to the facts of this case, or that such violation was not a proximate cause of the accident" (*Piazza v Frank L. Ciminelli Constr. Co., Inc.*, 2 AD3d 1345, 1349 [4th Dept 2003]; *see Caudill v Rochester Inst. of Tech.*, 125 AD3d 1392, 1394 [4th Dept 2015]). We conclude that there are issues of fact whether, inter alia, defendants' failure in their nondelegable duty to shut off the electricity was a proximate cause of the accident (*see generally Morris v Pavarini Constr.*, 9 NY3d 47, 50 [2007]).

In light of our determination, we further modify the order by reinstating the third-party complaint (*see Easton Telecom Servs., LLC v Global Crossing Bandwidth, Inc.*, 62 AD3d 1235, 1237 [4th Dept 2009]; *Pelow v Tri-Main Dev.*, 303 AD2d 940, 941-942 [4th Dept 2003]), and by vacating those parts of the order that denied as moot defendants' discovery motion and third-party defendant's motion, and we remit the matter to Supreme Court for a determination on the merits of those motions and plaintiffs' cross motion for a protective order (*see Weiss v Zellar Homes, Ltd.*, 169 AD3d 1491, 1495 [4th Dept 2019]). We have reviewed plaintiffs' remaining contentions and conclude that none warrants reversal or further modification of the order.

Entered: July 5, 2019

Mark W. Bennett
Clerk of the Court

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

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KA 17-00401

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUSTIN HYMES, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (NATHANIEL V. RILEY 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 (Thomas J. Miller, J.), rendered April 29, 2016. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of predatory sexual assault against a child (Penal Law § 130.96) and endangering the welfare of a child (§ 260.10 [1]). Defendant contends that he was denied his *Antommarchi* right to be present during material sidebar conferences (*see People v Antommarchi*, 80 NY2d 247, 250 [1992], *rearg denied* 81 NY2d 759 [1992]). County Court advised defendant at the start of jury selection that he had an absolute right to be present at the sidebar conferences, and defendant said that he would invoke that right. Nevertheless, he did not accompany his counsel during the first sidebar conference and, when the court asked defense counsel if defendant wished to be present, counsel stated that defendant waived his right to be present. The record shows that defendant was not present during some additional sidebar conferences. It is well settled that "a lawyer may waive the *Antommarchi* right of his or her client" (*People v Flinn*, 22 NY3d 599, 602 [2014], *rearg denied* 23 NY3d 940 [2014]; *see People v Velasquez*, 1 NY3d 44, 49 [2003]). Furthermore, defendant also implicitly waived those rights by choosing not to accompany his counsel during the sidebar conferences after being advised that he had the absolute right to attend them (*see Flinn*, 22 NY3d at 601; *People v Williams*, 15 NY3d 739, 740 [2010]; *People v Tortorice*, 136 AD3d 1284, 1284-1285 [4th Dept 2016], *lv denied* 27 NY3d 1140 [2016]). We therefore conclude that defendant's contention is without merit.

Defendant next contends that the victim testified regarding an uncharged crime and that the court should have given an appropriate *Molineux* limiting instruction. Specifically, defendant contends that the first four counts of the indictment alleged anal and oral sexual conduct and not any vaginal contact and, therefore, when the victim testified that she awoke one time to find defendant "on top of [her]," she gave testimony of an uncharged crime. Contrary to defendant's contention, the testimony was not *Molineux* evidence but, rather, was testimony that defendant engaged in sexual contact with the victim to support the fifth count of the indictment charging endangering the welfare of a child. Defendant's further contention that admission of that evidence resulted in the jury convicting him of endangering the welfare of a child based on an uncharged theory is also without merit. For that charge, the indictment stated that defendant "engaged in a course of conduct which included sexual contact with [the victim]." The bill of particulars did not narrow the scope of the alleged sexual contact with respect to that charge (*cf. People v Graves*, 136 AD3d 1347, 1349-1350 [4th Dept 2016], *lv denied* 27 NY3d 1069 [2016]; *see generally People v Bradley*, 154 AD3d 1279, 1280 [4th Dept 2017]). The language in the indictment and bill of particulars was therefore broad enough to encompass all the sexual contact as testified to by the victim.

We reject defendant's contention that the court erred in failing to suppress his statements. Viewing "the totality of the circumstances surrounding the confession," we agree with the court that defendant's statements were voluntary and not the product of coercion (*People v Deitz*, 148 AD3d 1653, 1653 [4th Dept 2017], *lv denied* 29 NY3d 1125 [2017] [internal quotation marks omitted]; *see generally People v Thomas*, 22 NY3d 629, 641-642 [2014]). Further, any alleged deception was not "so fundamentally unfair as to deny [defendant] due process" (*People v Clyburn-Dawson*, 128 AD3d 1350, 1351 [4th Dept 2015], *lv denied* 26 NY3d 966 [2015] [internal quotation marks omitted]).

Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we reject defendant's contention that the evidence is legally insufficient (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Further, upon viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant further contends that certain testimony was improperly admitted because it bolstered the victim's testimony regarding the abuse, and the court failed to issue an appropriate limiting instruction. By way of background, defendant was accused of engaging in anal sexual conduct with the victim in 2009. Shortly after it occurred, the victim disclosed the abuse to her aunt, who did not believe her. In 2014, the victim disclosed the abuse to a school social worker/counselor but, when interviewed by the police, the victim denied that any abuse occurred. In 2015, however, the victim

reported to the police that the incident had occurred, and defendant was arrested.

The People moved in limine to introduce the 2009 disclosure to the aunt on the ground that such testimony was admissible as a prompt outcry. In a letter decision, the court ruled that it would allow such testimony. The court further held that, with respect to disclosures that the victim made in 2014, the People could elicit testimony "about the timing of the [victim's] revelations for the purpose of explaining the events kicking off the investigative process that led to the charges against the defendant." Finally, the court held that, "[i]f the aunt testifies in *that* regard," she would not be allowed to recite precise details of the disclosure, but could explain what actions she took as a result. The court indicated that it would issue an appropriate limiting instruction regarding "[t]he aunt's testimony on *that* subject" (emphases added). At the start of the trial, defense counsel informed the court that he recalled that the 2014 disclosure was made at the victim's school, and the aunt was made aware of that disclosure. Defense counsel asked for clarification as to the court's final reference to the aunt's testimony, and the court responded that it had been referencing the 2014 disclosure.

At trial, the victim testified that defendant sexually abused her in the spring of 2009 and that she immediately told her aunt about the abuse. After the victim testified to another incident where defendant had sexually abused her that occurred around that same time, the prosecutor asked the victim if she told anyone "after that about that time." The victim responded affirmatively, that she told "my Aunt. I told [the school social worker/counselor]. I told a Detective. I told my Dad, my Step-Mom, and then my two Step-Sisters." It appeared from subsequent testimony that the disclosure to the school social worker/counselor was made in 2014. The victim explained that, after telling the school social worker/counselor, she met with a police officer and someone from Child Protective Services. She further testified, however, that because her aunt told her not to "run[her] mouth," the victim "took [the allegation] back" when she talked to the officer in 2014. The aunt testified that the victim disclosed the abuse to her in the spring of 2009, and the aunt spoke with detectives in 2014 and 2015 regarding the victim's allegations. The detective who interviewed the victim in 2015 also testified at trial and explained that the victim made certain disclosures to him. Notably, there was no testimony from the victim, her aunt, or the detective regarding the specifics of the victim's disclosures.

Defendant first contends that the court erred in permitting the People to elicit testimony regarding the victim's disclosures of abuse. We reject that contention. "While it is generally improper to introduce testimony that the witness had previously made prior consistent statements to bolster the witness's credibility, the use of prior consistent statements is permitted to demonstrate a prompt outcry, rebut a charge of recent fabrication, or to assist in explaining the investigative process and completing the narrative of events leading to the defendant's arrest" (*People v Honghirun*, 29 NY3d 284, 289 [2017] [internal quotation marks omitted]). With respect to

the testimony regarding the victim's disclosure in 2009, that was admissible under the prompt outcry exception (*see People v McDaniel*, 81 NY2d 10, 16 [1993]). With respect to the testimony regarding the victim's disclosures in 2014 and 2015, that was admissible to explain the investigative process and complete the narrative of the events leading to defendant's arrest (*see People v Ludwig*, 24 NY3d 221, 231-232 [2014]; *People v Cullen*, 24 NY3d 1014, 1016 [2014]). The testimony of the victim, her aunt, and the detective therefore fell squarely within the above exceptions and did not constitute improper bolstering.

Although defendant recognizes the above exceptions to the rule against improper bolstering, he contends that the People indicated that they would introduce testimony regarding the 2009 disclosure only, and he was unfairly surprised by the testimony of the 2014 and 2015 disclosures. He further contends that the People went beyond the court ruling by introducing testimony regarding the 2015 disclosures. Those contentions are raised for the first time on appeal and are therefore unpreserved for our review (*see* CPL 470.05 [2]). In any event, we conclude that they are without merit. The court in its letter ruling clearly stated that any disclosures in 2014 would be admissible to explain the investigative process, and we therefore disagree with defendant that he was unfairly surprised by the testimony regarding those disclosures. The 2015 disclosure arguably went beyond the ruling of the court, but that testimony was connected with the testimony regarding the 2014 disclosure and also relevant and admissible to explain the investigative process (*see Ludwig*, 24 NY3d at 231-232).

Defendant next contends that the court erred in failing to give a limiting instruction with respect to the 2014 and 2015 disclosures despite the court's promise to do so. We conclude that defendant's contention is not preserved for our review inasmuch as he never objected to the court's failure to give that instruction (*see* CPL 470.05 [2]; *People v De La Cruz*, 44 AD3d 346, 347-348 [1st Dept 2007], *lv denied* 9 NY3d 1005 [2007]; *People v Hentley*, 155 AD2d 392, 394 [1st Dept 1989], *lv denied* 75 NY2d 919 [1990]). We decline to exercise our power to review the contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *see generally People v Williams*, 107 AD3d 1516, 1516 [4th Dept 2013], *lv denied* 21 NY3d 1047 [2013]).

Defendant also contends that defense counsel was ineffective in failing to object to the alleged bolstering testimony and failing to object to the court's failure to give a limiting instruction with respect to the 2014 and 2015 disclosures. To the extent that defendant contends that he was denied effective assistance of counsel based on counsel's failure to object to the testimony, we conclude that it is without merit inasmuch as any such objection would have been unsuccessful (*see People v Reed*, 151 AD3d 1821, 1822 [4th Dept 2017], *lv denied* 30 NY3d 952 [2017]). As explained above, the testimony did not constitute improper bolstering. With respect to counsel's failure to object to the court's failure to give a limiting instruction, that also did not constitute ineffective assistance of

counsel (*see People v Gross*, 26 NY3d 689, 696 [2016]). It is well settled that "a defendant must demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*Honghirun*, 29 NY3d at 289 [internal quotation marks omitted]). There were only two witnesses who gave testimony regarding the victim's disclosures in 2014 and 2015, and neither gave specifics about what was said to them. After hearing their testimony, counsel may have reasonably believed that a limiting instruction was not needed inasmuch as their testimony was only to show how the investigation began, and counsel could have concluded that the jury did not need a specific instruction on that. In rejecting our reliance upon *Gross*, the dissent concludes that there could have been no tactical basis for counsel's alleged error, citing *People v Jarvis* (113 AD3d 1058, 1059-1060 [4th Dept 2014], *affd* 25 NY3d 968 [2015]), a case where the defense counsel successfully sought to preclude testimony yet failed to object when it was later introduced. In this case, however, although the court indicated that it would issue a limiting instruction on the testimony, counsel had never requested such a limiting instruction in the first instance. In addition, defense counsel was *not* successful in his opposition to the People's motion seeking to introduce that testimony. Viewing the evidence, the law, and the circumstances of this case in their totality at the time of the representation, we conclude that counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, the sentence is not unduly harsh or severe.

All concur except SMITH, J.P., and CURRAN, J., who dissent and vote to reverse in accordance with the following memorandum: We conclude that defendant was deprived of a fair trial when County Court, despite stating that it would give a limiting instruction regarding the proper use of certain testimony that would otherwise constitute bolstering, failed to provide that instruction. We further conclude that defendant was deprived of effective assistance of counsel by his attorney's failure to object to that error. Therefore, we respectfully dissent.

Initially, we agree with the majority's resolution of defendant's contentions concerning *People v Antommarchi* (80 NY2d 247 [1992], *rearg denied* 81 NY2d 759 [1992]) and *People v Molineux* (168 NY 264 [1901]); his assertion that he was convicted of endangering the welfare of a child based on an uncharged theory; and his challenges to the admissibility of his statements to the police, to the sufficiency and weight of the evidence, and to the severity of his sentence. Nevertheless, we also conclude that, inasmuch as the evidence is not overwhelming and is based almost entirely on the testimony of the victim, who admittedly recanted several times and gave numerous versions of the events, a new trial is required due to the court's failure to give an instruction regarding the proper use of the bolstering testimony and counsel's failure to object to that error.

Prior to trial, the People moved in limine for permission to introduce evidence that the victim reported an incident of sexual

contact with defendant to her aunt in 2009, and that she again disclosed the incident in 2014. The court concluded that the People could introduce evidence that the victim made a prompt complaint in 2009 if they laid a proper foundation establishing that the complaint was made at the first suitable opportunity, and that they could introduce evidence that the victim reported the contact in 2014 for the sole purpose of establishing how the investigative process began at that time. The court indicated that it would provide an appropriate limiting instruction if the evidence was introduced.

At trial, the People introduced evidence that the victim reported the sexual contact to her aunt in 2009 and to several other people at various times in 2014 and 2015. Nevertheless, the court did not give a limiting instruction either when the testimony was given or at the end of the case. Although we agree with the majority that defendant failed to preserve for our review his contention that the court erred in failing to give the promised charge, we conclude that defendant was deprived of a fair trial by that error, and we would exercise our power to review that contention as a matter of discretion in the interest of justice.

It is well settled that nonspecific testimony about a child victim's report of sexual abuse does not " 'improperly bolster[ ] the victim's version of events [when] admitted not for its truth but for the narrow purpose of explaining an officer's actions and the sequence of events in an investigation, and the testimony is accompanied by an appropriate limiting instruction' " (*People v Ludwig*, 24 NY3d 221, 231-232 [2014]). Here, however, the prosecutor repeatedly commented in summation that the testimony should be taken as evidence of the truth of the victim's testimony, stating at one point that the victim "retelling that story over and over corroborates her [story]." Although defendant does not argue that the prosecutor made improper comments during summation, those comments exacerbated the prejudice caused by the court's failure to give the promised limiting instruction, and they demonstrate that the evidence was not utilized for the appropriate limited purpose. Thus, we conclude "that the court erred in failing to issue a limiting instruction to the jury when the evidence was admitted and during the final jury charge, to minimize the prejudicial effect of the admission of the evidence" (*People v Presha*, 83 AD3d 1406, 1407 [4th Dept 2011]). "In a case such as this, where the finding of guilt rests squarely on the jury's assessment of the credibility of the victim . . . , we cannot say that the error was harmless and did not affect the jury's verdict" (*People v Greene*, 306 AD2d 639, 643 [3d Dept 2003], *lv denied* 100 NY2d 594 [2003]; *see Presha*, 83 AD3d at 1407). The majority's reliance upon *Ludwig* and *People v Honghirun* (29 NY3d 284 [2017]) is unavailing inasmuch as, in both of those cases, the court gave limiting instructions regarding the use of the testimony. Indeed, in *Honghirun*, the court "twice instructed the jury during the [witness's] recitation of the victim's statements that the evidence was not admitted for its truth" (29 NY3d at 287-288), and gave further limiting instructions in the final charge (*id.* at 288).

We also agree with defendant's additional contention that he was

deprived of effective assistance by his attorney's failure to object the court's failure to give the promised limiting instruction. The majority concludes that defense counsel's failure to preserve that issue does not rise to the level of ineffective assistance, citing *People v Gross* (26 NY3d 689, 696 [2016]). We respectfully disagree. In *Gross*, the majority of the Court of Appeals concluded that defense counsel may not have objected to the prosecutor's comments on the evidence for tactical reasons. Here, there was no possible tactical basis for "defense counsel's inexplicable failure to object" when the court failed to give the promised limiting instruction (*People v Jarvis*, 113 AD3d 1058, 1059 [4th Dept 2014], *affd* 25 NY3d 968 [2015]).

We would therefore reverse the judgment and grant a new trial on counts one and five of the indictment.

Entered: July 5, 2019

Mark W. Bennett
Clerk of the Court

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

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TP 18-01460

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

IN THE MATTER OF THE HURLBUT, LLC, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF MEDICAID INSPECTOR GENERAL, DENNIS ROSEN, NEW YORK STATE MEDICAID INSPECTOR GENERAL, NEW YORK STATE DEPARTMENT OF HEALTH, AND HOWARD A. ZUCKER, NEW YORK STATE COMMISSIONER OF HEALTH, RESPONDENTS.

PULLANO & FARROW, ROCHESTER (MICHAEL P. SCOTT-KRISTANSEN OF COUNSEL), FOR PETITIONER.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (LAURA ETLINGER OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [J. Scott Odorisi, J.], entered July 26, 2018) to review a determination of respondent New York State Department of Health. The determination, among other things, adjudged that respondent New York State Department of Health is entitled to recover from petitioner overpayments of Medicaid benefits for certain services determined not to be medically necessary.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination of the Administrative Law Judge (ALJ), made after a hearing, insofar as it affirmed in part the determination of respondent New York State Office of Medicaid Inspector General (OMIG) after a final audit of Medicaid claims paid to petitioner. Specifically, the ALJ affirmed those parts of OMIG's determination finding that respondent New York State Department of Health (DOH) is entitled to recover from petitioner Medicaid overpayments for certain services determined not to be medically necessary. We confirm the determination and dismiss the petition.

Contrary to petitioner's contention, substantial evidence supports the ALJ's determination affirming OMIG's disallowance of Medicaid coverage for physical and/or occupational therapy provided to three nursing home residents based on a lack of medical necessity (*see*

CPLR 7803 [4]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230 [1974]). "Medical care, services or supplies . . . will be considered excessive or not medically necessary unless the medical basis and specific need for them are fully and properly documented in the client's medical record" (18 NYCRR 518.3 [b]).

Here, the ALJ relied on the subject residents' medical records in determining that petitioner is liable for the overpayment of medical funds disbursed "for inappropriate, improper, unnecessary or excessive care, services or supplies" (*id.*). Specifically, with respect to "Resident 32," although knee pain is listed on the occupational therapy evaluation form as the reason for the therapy, knee pain is not documented in the resident's medical record.

With respect to "Resident 29," who suffered from frequent falls associated with his dementia, a progress note in his record indicates that he was at "baseline" on one day, but a rehabilitation note from the therapist the following day indicates that the goal of therapy was to *return* the resident to baseline. Given those inconsistencies, the resident's record fails to demonstrate that the therapy was medically necessary. Further, even assuming, arguendo, that the ALJ's determination with respect to "Resident 21" changed that resident's classification and affected petitioner's rate of reimbursement, we conclude that the ALJ correctly determined that the medical record fails to document the resident's need for continued therapy. Here, the medical record reflects that the resident's improvement had begun to plateau, but does not document any goals for future therapy that would justify continuing the services. Thus, even if continued therapy was medically necessary, petitioner's recordkeeping failure supports the ALJ's determination that OMIG properly disallowed the services in question (*see* 18 NYCRR 515.2 [b] [6]; 518.3 [b]; *see also Matter of Enrico v Bane*, 213 AD2d 784, 785 [3d Dept 1995]).

Finally, we reject petitioner's contention that the ALJ's determination was arbitrary and capricious (*see* CPLR 7803 [3]; *see also Matter of Marzec v DeBuono*, 95 NY2d 262, 266 [2000], *rearg denied* 96 NY2d 731 [2001]).

Entered: July 5, 2019

Mark W. Bennett
Clerk of the Court

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

146

CA 18-01406

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

IN THE MATTER OF THE CAMPAIGN FOR BUFFALO HISTORY ARCHITECTURE & CULTURE, INC., DEREK BATEMAN AND LORNA C. HILL, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

ZONING BOARD OF APPEALS OF CITY OF BUFFALO, PLANNING BOARD OF CITY OF BUFFALO, RACHEL HECKL, INDIVIDUALLY AND AS PRINCIPAL MEMBER OF 467 RICHMOND AVENUE, LLC, AND 467 RICHMOND AVENUE, LLC, RESPONDENTS-RESPONDENTS.

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

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (CARIN S. GORDON OF COUNSEL), FOR RESPONDENTS-RESPONDENTS ZONING BOARD OF APPEALS OF CITY OF BUFFALO AND PLANNING BOARD OF CITY OF BUFFALO.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (MARK C. DAVIS OF COUNSEL), FOR RESPONDENTS-RESPONDENTS RACHEL HECKL, INDIVIDUALLY AND AS PRINCIPAL MEMBER OF 467 RICHMOND AVENUE, LLC, AND 467 RICHMOND AVENUE, LLC.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered March 13, 2018 in a CPLR article 78 proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination of respondent Zoning Board of Appeals of City of Buffalo (ZBA) granting two area variances and a use variance to respondents Rachel Heckl, individually and as a principal member of 467 Richmond Avenue, LLC, and 467 Richmond Avenue, LLC (collectively, Heckl respondents), and to annul the determination of respondent Planning Board of City of Buffalo (Planning Board) approving the Heckl respondents' site plan. The project in question involves demolishing a residence and garage behind a former church building in a residential neighborhood and constructing, in place of the garage, a three-story building that

would house an art gallery on the first floor and eight apartments on the second and third floors. The Heckl respondents previously obtained approvals to renovate the former church building for use as a visual and performing arts center. Petitioners appeal from a judgment that granted the motion of the Heckl respondents to dismiss the petition against them and granted the motion of the ZBA and Planning Board for summary judgment dismissing the petition against them, thereby dismissing the petition in its entirety. We affirm.

As a preliminary matter, we note that petitioners' claim that the ZBA failed to conduct the requisite review pursuant to the State Environmental Quality Review Act ([SEQRA] ECL art 8]) is untimely (*see* General City Law § 81-c [1]; *Matter of Cor Rte. 5 Co., LLC v Village of Fayetteville*, 147 AD3d 1432, 1433-1434 [4th Dept 2017]; *see also Matter of Young v Board of Trustees of Vil. of Blasdell*, 89 NY2d 846, 849 [1996]). The ZBA made its determination with respect to the subject variances on July 19, 2017 (*see Matter of 92 MM Motel, Inc. v Zoning Bd. of Appeals of Town of Newburgh*, 90 AD3d 663, 663-664 [2d Dept 2011]; *see also Matter of Kennedy v Zoning Bd. of Appeals of Vil. of Croton-on-Hudson*, 78 NY2d 1083, 1084-1085 [1991]), and that determination "committed the ZBA to a course of action which could affect the environment" (*Matter of Crepeau v Zoning Bd. of Appeals of Vil. of Cambridge*, 195 AD2d 919, 921-922 [3d Dept 1993]; *see Cor Rte. 5 Co., LLC*, 147 AD3d at 1433-1434). The petition was not filed, however, until November 22, 2017, months after the 30-day limitations period set forth in General City Law § 81-c (1) had expired. We therefore do not consider petitioners' contention regarding the ZBA's alleged noncompliance with SEQRA.

Even assuming, arguendo, that petitioners' substantive contentions with respect to the variances granted by the ZBA are timely (*see generally Matter of County of Niagara v Daines*, 79 AD3d 1702, 1704 [4th Dept 2010], *lv denied* 17 NY3d 703 [2011]), we conclude that they are without merit. The ZBA is afforded broad discretion in determining whether to grant variances, and our review is limited to whether its determination was illegal, arbitrary, or an abuse of discretion (*see Matter of Conway v Town of Irondequoit Zoning Bd. of Appeals*, 38 AD3d 1279, 1280 [4th Dept 2007]). Where there is substantial evidence in the record to support the rationality of the ZBA's determination, the determination should be affirmed upon judicial review (*see Matter of Ifrah v Utschig*, 98 NY2d 304, 308 [2002]; *Matter of Sasso v Osgood*, 86 NY2d 374, 384 n 2 [1995]; *Matter of Expressview Dev., Inc. v Town of Gates Zoning Bd. of Appeals*, 147 AD3d 1427, 1428-1429 [4th Dept 2017]). Here, the ZBA properly took into account the relevant factors set forth in General City Law § 81-b (3) and (4) and made detailed findings with respect to those factors, and we conclude that its determination to grant the variances is not illegal, arbitrary, or an abuse of discretion (*see Conway*, 38 AD3d at 1280). Although there may be substantial evidence in the record to support the rationality of a contrary determination, we note that we may not substitute our own judgment for that of the ZBA (*see id.*).

Contrary to petitioners' further contention, we conclude that the

Planning Board's determination to issue a negative declaration pursuant to SEQRA is not in violation of lawful procedure, affected by an error of law, arbitrary and capricious, or an abuse of discretion (*see Matter of Dunk v City of Watertown*, 11 AD3d 1024, 1025-1026 [4th Dept 2004]; *Matter of Forman v Trustees of State Univ. of N.Y.*, 303 AD2d 1019, 1020 [4th Dept 2003]; *see also* CPLR 7803 [3]). Petitioners additionally contend that the Planning Board's determination to approve the site plan violated General City Law § 28-a (12) inasmuch as the site plan is inconsistent with the comprehensive plan adopted by the City of Buffalo in 2006. We reject that contention. Indeed, upon our review of the record, we conclude that the Planning Board's determination to approve the site plan is supported by substantial evidence and has a rational basis (*see Matter of Dietrich v Planning Bd. of Town of W. Seneca*, 118 AD3d 1419, 1420-1421 [4th Dept 2014]; *see generally Matter of Town of Bedford v Village of Mount Kisco*, 33 NY2d 178, 188 [1973], *rearg denied* 34 NY2d 668 [1974]).

We have examined petitioners' remaining contentions and conclude that they lack merit.

Entered: July 5, 2019

Mark W. Bennett
Clerk of the Court

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

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CA 18-01642

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

MATTHEW O'DELL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTY OF LIVINGSTON, LIVINGSTON COUNTY DISTRICT ATTORNEY'S OFFICE, VILLAGE OF MOUNT MORRIS POLICE DEPARTMENT, DEFENDANTS,
AND VILLAGE OF MOUNT MORRIS, DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, ROCHESTER (NICHOLAS J. PONTZER OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Supreme Court, Livingston County (Robert B. Wiggins, A.J.), entered December 14, 2017. The order, insofar as appealed from, denied that part of the motion of defendants Village of Mount Morris and Village of Mount Morris Police Department seeking summary judgment dismissing the complaint against defendant Village of Mount Morris.

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

Memorandum: Plaintiff commenced this action against the Village of Mount Morris (Village) and the Village of Mount Morris Police Department (Village Police Department) (collectively, Village defendants), and the County of Livingston and the Livingston County District Attorney's Office (collectively, County defendants) asserting, inter alia, causes of action for false arrest and malicious prosecution. In a notice of claim, plaintiff alleged that he had been intentionally harassed and arrested by members of the Village Police Department without justifiable cause or authority, and that the Livingston County District Attorney's Office, knowing that charges against plaintiff could not and should not be sustained, thereafter commenced a prosecution that was dismissed in June 2016 after a trial. The Village appeals from an order that, inter alia, denied that part of the Village defendants' motion for summary judgment seeking dismissal of the complaint against the Village. We reverse the order insofar as appealed from.

We agree with the Village that plaintiff's cause of action against it for false arrest is barred by his failure to serve a timely notice of claim pursuant to General Municipal Law § 50-e (1) (a).

"The 90-day period . . . for serving a notice of claim on a municipality in an action for false arrest commences the day that the claimant is released from custody" (*Hines v City of Buffalo*, 79 AD2d 218, 225 [4th Dept 1981]; *see Santiago v City of Rochester*, 19 AD3d 1061, 1061-1062 [4th Dept 2005], *lv denied* 5 NY3d 710 [2005]). Here, plaintiff was arrested on September 7, 2015 and was released from confinement that same date. Thus, the cause of action for false arrest accrued on September 7, 2015, and the 90-day period within which to file a notice of claim expired on December 7, 2015 (*see* § 50-e [1] [a]; *Molyneaux v County of Nassau*, 22 AD2d 954, 955 [2d Dept 1964], *affd* 16 NY2d 663 [1965]; *Boose v City of Rochester*, 71 AD2d 59, 65 [4th Dept 1979]). Plaintiff's notice of claim was served upon the Village in August 2016, and was therefore beyond the expiration of the 90-day period prescribed by statute with respect to the claim for false arrest.

Although the notice of claim was timely with respect to a claim for malicious prosecution, which arises upon the favorable termination of a criminal proceeding (*see Boose*, 71 AD2d at 65; *see generally Matter of Blanco v City of New York*, 78 AD3d 1048, 1048 [2d Dept 2010]), the notice of claim expressly states that the malicious prosecution claim was asserted against the County defendants only, and not against the Village. Inasmuch as the Village did not prosecute plaintiff, the Village cannot be sued for malicious prosecution (*see Roche v Village of Tarrytown*, 309 AD2d 842, 843 [2d Dept 2003]), and therefore the accrual of the malicious prosecution cause of action against the County defendants cannot be invoked to revive plaintiff's time-barred false arrest cause of action against the Village (*see id.*).

We also agree with the Village that it established its entitlement to summary judgment dismissing the other causes of action asserted against it in the complaint, including malicious prosecution, excessive force, assault and battery, and negligent training and supervision, on the ground that they were not set forth in the notice of claim. Although a notice of claim "need not state a precise cause of action" (*Gonzalez v Povoski*, 149 AD3d 1472, 1474 [4th Dept 2017] [internal quotation marks omitted]), a complaint may not assert a new theory of liability that was not raised in the notice of claim (*see Crew v Town of Beekman*, 105 AD3d 799, 800-801 [2d Dept 2013]; *Moore v County of Rockland*, 192 AD2d 1021, 1023 [3d Dept 1993]). Here, in his notice of claim plaintiff set forth a claim against the Village for false arrest, but plaintiff failed to assert a claim for malicious prosecution against the Village and failed to assert any of the additional theories of liability that were raised in the complaint. Furthermore, a late notice of claim asserting those theories of liability would now be time-barred (*see Miller v Howard*, 134 AD3d 1537, 1538 [4th Dept 2015]; *Clare-Hollo v Finger Lakes Ambulance EMS, Inc.*, 99 AD3d 1199, 1201 [4th Dept 2012]; *see generally Mojica v New York City Tr. Auth.*, 117 AD2d 722, 722 [2d Dept 1986]). We note that plaintiff's seventh cause of action against the Village, for punitive damages, must also be dismissed inasmuch as a demand for punitive damages is not a substantive cause of action (*see Preston v Northside*

Collision-DeWitt, LLC, 158 AD3d 1127, 1128-1129 [4th Dept 2018]).

Moreover, even assuming, arguendo, that plaintiff had served a timely notice of claim setting forth those additional theories of liability, we conclude that plaintiff's causes of action against the Village for excessive force, assault and battery, and negligent training and supervision are nevertheless time-barred by the statute of limitations (*see Broyles v Town of Evans*, 147 AD3d 1496, 1497 [4th Dept 2017]). General Municipal Law § 50-i (1) (c) provides, in pertinent part, that no action for personal injury sustained by reason of negligence or wrongful act shall be prosecuted or maintained against a municipality unless it is commenced within one year and 90 days after the happening of the event upon which the claim is based. With the exception of malicious prosecution, all of plaintiff's causes of action arose on the date of his arrest, September 7, 2015, and the statute of limitations began to run on that date. The complaint, however, was not filed until August 8, 2017, which was beyond the expiration of the statute of limitations on December 7, 2016.

In light of our determination, we do not address the Village's remaining contention.

Entered: July 5, 2019

Mark W. Bennett
Clerk of the Court

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

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CA 18-01809

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

MD3 HOLDINGS, LLC, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

AUGUST BUERKLE, DEFENDANT-APPELLANT-RESPONDENT.

MICHAEL J. KAWA, SYRACUSE, FOR DEFENDANT-APPELLANT-RESPONDENT.

HARRIS BEACH PLLC, SYRACUSE (DAVID M. CAPRIOTTI OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered August 8, 2018. The order denied in part and granted in part the motion of defendant for summary judgment.

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

Memorandum: Defendant contracted to purchase a commercial building from plaintiff. The contract included a standard mortgage contingency provision, and a bank subsequently issued defendant a conditional mortgage commitment letter. After receiving the mortgage commitment letter, however, defendant provided the bank with additional projections from his accountant that cast doubt on the financial viability of the planned use of the building. Upon reviewing the accountant's analysis, the bank determined that defendant's "project will be reliant upon the speculative acquisition of an acceptable tenant" and revoked the mortgage commitment. Without financing, the sale could not close.

Plaintiff then commenced this action and asserted two causes of action. The first cause of action alleges that defendant breached the sale contract by wrongfully inducing the bank to withdraw its mortgage commitment, thereby frustrating the contract's financing contingency. The second cause of action alleges that defendant breached his implied duty of good faith and fair dealing by wrongfully inducing the bank to withdraw its mortgage commitment, thereby frustrating the contract's financing contingency. Both causes of action sought identical damages.

Supreme Court, inter alia, initially granted plaintiff's motion for summary judgment on the complaint, but we reversed that order and denied plaintiff's motion, holding that "plaintiff failed to establish

as a matter of law that the lender's revocation of the mortgage commitment was attributable to bad faith on the part of [defendant] . . . , rather than to defendant's efforts to honor his duty of fair dealing to the bank by providing it with further information regarding the proposed transaction" (*MD3 Holdings, LLC v Buerkle*, 159 AD3d 1483, 1484 [4th Dept 2018] [internal quotation marks omitted]).

Defendant then moved for, inter alia, summary judgment dismissing the complaint. The court denied defendant's motion with respect to the first cause of action but granted the motion with respect to the second cause of action. Defendant now appeals only from that part of the order denying his motion for summary judgment dismissing the first cause of action, and plaintiff now cross-appeals from that part of the order granting defendant's motion for summary judgment dismissing the second cause of action. We affirm.

Contrary to defendant's contention on his appeal, the court properly denied his motion insofar as it sought summary judgment dismissing the first cause of action. Even assuming, arguendo, that defendant met his initial burden of demonstrating that he did not act in bad faith, we conclude that plaintiff raised a triable issue of fact in opposition by submitting defendant's deposition testimony, in which he stated that his "purpose" in providing the bank with his accountant's projections was "to have the commitment letter rescinded" (*see Grand Pac. Fin. Corp. v 97-111 Hale, LLC*, 123 AD3d 764, 766 [2d Dept 2014]; *Massa Constr., Inc. v George M. Bunk, P.E., P.C.*, 68 AD3d 1725, 1726 [4th Dept 2009]).

Contrary to defendant's further contention, the law of the case as established on the prior appeal does not compel the dismissal of the first cause of action. In holding that plaintiff had not proven, as a matter of law, that defendant acted in bad faith, we determined only that plaintiff had not met its initial burden on its own motion for summary judgment. Plaintiff's failure to establish its entitlement to summary judgment on the complaint does not correspondingly entitle defendant to summary judgment dismissing the complaint (*see Sweetman v Suhr*, 159 AD3d 1614, 1615-1616 [4th Dept 2018], *lv denied* 31 NY3d 913 [2018]).

Contrary to plaintiff's contention on its cross appeal, the second cause of action is duplicative of the first because it is "premised on the same conduct as the breach of contract claim and [is] intrinsically tied to the damages allegedly resulting from a breach of the contract" (*Art Capital Group, LLC v Carlyle Inv. Mgt. LLC*, 151 AD3d 604, 605 [1st Dept 2017] [internal quotation marks omitted]). Thus, the second cause of action was properly dismissed (*see Catlyn & Derzee, Inc. v Amedore Land Devs., LLC*, 166 AD3d 1137, 1140-1141 [3d Dept 2018]; *Utility Servs. Contr., Inc. v Monroe County Water Auth.*, 90 AD3d 1661, 1662 [4th Dept 2011], *lv denied* 19 NY3d 803 [2012]; *cf. Gutierrez v Government Empls. Ins. Co.*, 136 AD3d 975, 976-977 [2d Dept 2016]).

Finally, defendant's contention regarding restitution is outside

the scope of his notice of appeal (*see Haas v Haas*, 265 AD2d 887, 888 [4th Dept 1999]).

Entered: July 5, 2019

Mark W. Bennett
Clerk of the Court

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

251

KA 17-00057

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LARRY CROSS, DEFENDANT-APPELLANT.

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

LARRY CROSS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered February 17, 2016. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree, assault in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), arising from an incident in which he went to the residence of the victim and then shot the victim after he came to the front door. We affirm.

Defendant contends in his main brief that Supreme Court erred in denying his challenge for cause to a first prospective juror and further contends in his pro se supplemental brief that the court erred in denying his challenge for cause to a second prospective juror. Although defendant preserved those contentions for our review (*see* CPL 270.20 [2]; *People v Harris*, 19 NY3d 679, 685 [2012]), we conclude that they lack merit.

"A prospective juror may be challenged for cause on several grounds" (*People v Furey*, 18 NY3d 284, 287 [2011]), including that the prospective juror "bears some . . . relationship to [counsel for the People or for the defendant] of such nature that it is likely to preclude him [or her] from rendering an impartial verdict" (CPL 270.20 [1] [c]; *see People v Scott*, 16 NY3d 589, 592-593, 595 [2011]; *People v Thomas*, 166 AD3d 1499, 1501 [4th Dept 2018], *lv denied* 32 NY3d 1178

[2019]). " '[N]ot all relationships, particularly professional ones, between a prospective juror and relevant persons, including counsel for either side, require disqualification for cause as a matter of law' " (*Thomas*, 166 AD3d at 1501-1502; *see Furey*, 18 NY3d at 287). "Trial courts are directed to look at myriad factors surrounding the particular relationship in issue, such as the frequency, recency or currency of the contact, whether it was direct contact, and the nature of the relationship as personal and/or professional . . . or merely a nodding acquaintance" (*Thomas*, 166 AD3d at 1502 [internal quotation marks omitted]; *see Furey*, 18 NY3d at 287; *People v Provenzano*, 50 NY2d 420, 425 [1980]; *People v Greenfield*, 112 AD3d 1226, 1228-1229 [3d Dept 2013], *lv denied* 23 NY3d 1037 [2014]).

Here, the first prospective juror's mere status as an investigator with a law enforcement agency, without more, did not require her disqualification (*see People v Montford*, 145 AD3d 1344, 1348 [3d Dept 2016], *lv denied* 29 NY3d 999 [2017]; *Greenfield*, 112 AD3d at 1229; *People v Pickren*, 284 AD2d 727, 727-728 [3d Dept 2001], *lv denied* 96 NY2d 923 [2001]). Moreover, the first prospective juror had no professional or personal relationship, nor direct contact, with either of the trial prosecutors; instead, she had merely "heard of" one of the trial prosecutors from her former coworkers (*see Pickren*, 284 AD2d at 727-728; *cf. People v Branch*, 46 NY2d 645, 650-651 [1979]; *see also People v DeFreitas*, 116 AD3d 1078, 1080 [3d Dept 2014], *lv denied* 24 NY3d 960 [2014]). While the first prospective juror may also have seen defendant and a defense attorney in a courtroom on one prior occasion as part of her employment on a recent unrelated case, any such limited past contact and familiarity with appearance would show no more than a "nodding acquaintance," which does not constitute implied bias requiring her automatic exclusion from jury service (*Provenzano*, 50 NY2d at 425; *see generally Furey*, 18 NY3d at 287). In addition, although the first prospective juror had worked with other members of the District Attorney's Office in prosecuting the prior case and acknowledged her close working relationship with that office, the record establishes that the relationship was solely professional and that the single matter upon which she had worked with that office was unrelated to defendant's case (*see Greenfield*, 112 AD3d at 1228-1229; *People v Molano*, 70 AD3d 1172, 1174 [3d Dept 2010], *lv denied* 15 NY3d 776 [2010]; *cf. Montford*, 145 AD3d at 1347-1348). There is nothing in the record establishing that the first prospective juror was engaged in "*current, ongoing investigative work* on a pending matter in cooperation with and under the direction of the prosecuting agency" (*Greenfield*, 112 AD3d at 1229), and defendant's assertion that the first prospective juror would be expected to engage in such work in the future is based on mere speculation (*see People v Kennedy*, 78 AD3d 1477, 1478 [4th Dept 2010], *lv denied* 16 NY3d 798 [2011]).

The record also shows "little more than a nodding acquaintance" between the second prospective juror and one of the trial prosecutors (*Provenzano*, 50 NY2d at 425; *see Pickren*, 284 AD2d at 728). Moreover, "[n]either [the second prospective juror's] status as a law enforcement officer . . . nor his former, solely professional relationship with the District Attorney's [O]ffice, which was largely

remote in time . . . , required his disqualification for cause" (*Greenfield*, 112 AD3d at 1229; *see* CPL 270.20 [1] [c]; *Scott*, 16 NY3d at 595). With respect to actual bias, "[i]t is well settled that a prospective juror whose statements raise a serious doubt regarding the ability to be impartial must be excused unless the [prospective] juror states unequivocally on the record that he or she can be fair and impartial" (*People v Campanella*, 100 AD3d 1420, 1421 [4th Dept 2012], *lv denied* 20 NY3d 1060 [2013] [internal quotation marks omitted]). Here, the second prospective juror "never expressed any doubt concerning his ability to be fair and impartial" (*id.*; *see People v Odum*, 67 AD3d 1465, 1465 [4th Dept 2009], *lv denied* 14 NY3d 804 [2010], *reconsideration denied* 15 NY3d 755 [2010], *cert denied* 562 US 931 [2010]). In any event, even assuming, arguendo, that the initial statements of the second prospective juror raised a serious doubt regarding his ability to be impartial, we conclude that he ultimately stated unequivocally that he could be fair (*see Campanella*, 100 AD3d at 1422).

Defendant further contends in his main brief that the evidence is legally insufficient to support the conviction and that the verdict is against the weight of the evidence, primarily based on his challenge to the credibility of the victim regarding the identity of the shooter. We reject those contentions.

Even assuming, arguendo, that defendant's contention regarding the legal sufficiency of the evidence is preserved for our review (*cf. People v Hines*, 97 NY2d 56, 62 [2001], *rearg denied* 97 NY2d 678 [2001]), we conclude that his contention lacks merit. "Viewing the evidence in the light most favorable to the People, and giving them the benefit of every reasonable inference" (*People v Bay*, 67 NY2d 787, 788 [1986]; *see People v Delamota*, 18 NY3d 107, 113 [2011]), we conclude that the evidence is legally sufficient to support the conviction (*see People v Butler*, 140 AD3d 1610, 1610-1611 [4th Dept 2016], *lv denied* 28 NY3d 969 [2016]; *People v Kindred*, 60 AD3d 1240, 1241 [3d Dept 2009], *lv denied* 12 NY3d 926 [2009]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). "Although defendant [contends] that the testimony of the [victim and the other] eyewitness[ ] who identified him as the shooter should be discredited for various reasons—including [the traumatic nature of the shooting, the delay in reporting defendant's name during the 911 call despite the testimony suggesting that the other eyewitness had done so immediately, and purported overstatements by the victim of his familiarity with defendant and ability to identify him]—the jury was able to consider each of these issues now raised and chose to credit the identification of defendant as the shooter" (*People v Lanier*, 130 AD3d 1310, 1311 [3d Dept 2015], *lv denied* 26 NY3d 1009 [2015]). The issues of credibility and identification, including the weight to be given to any inconsistencies in the testimony of the victim and the

other eyewitness, "were properly considered by the jury and there is no basis for disturbing its determinations" (*People v Kelley*, 46 AD3d 1329, 1330 [4th Dept 2007], *lv denied* 10 NY3d 813 [2008]; *see Lanier*, 130 AD3d at 1311; *People v Concepcion*, 128 AD3d 612, 612 [1st Dept 2015], *lv denied* 26 NY3d 927 [2015]; *People v Moye*, 11 AD3d 1027, 1028 [4th Dept 2004], *lv denied* 3 NY3d 759 [2004], *reconsideration denied* 4 NY3d 746 [2004]).

Finally, contrary to defendant's contention in his main brief, the sentence is not unduly harsh or severe, and we decline defendant's request to exercise our power to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: July 5, 2019

Mark W. Bennett
Clerk of the Court

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

256

CAF 17-01647

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

IN THE MATTER OF THOMAS M. RAPP,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

PAMELA A. HORBETT, RESPONDENT-APPELLANT.

PAMELA A. HORBETT, RESPONDENT-APPELLANT PRO SE.

J. ADAMS & ASSOCIATES, PLLC, WILLIAMSVILLE (JOAN CASILIO ADAMS OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered June 16, 2017 in a proceeding pursuant to Family Court Act article 4. The order denied respondent's objections to an order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the objections in part and vacating that part of the order of the Support Magistrate awarding petitioner $125 per week in child support effective April 2, 2015 until January 1, 2016, and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Erie County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 4, respondent mother appeals from an order denying her objections to the order of the Support Magistrate that granted the petition of petitioner father by, among other things, awarding him child support. The mother contends that Family Court erred in denying her objection to that part of the Support Magistrate's order awarding the father $125 per week in child support effective April 2, 2015 until January 1, 2016 because the parties shared near equal access time with the child during that period and the father had the higher income. We agree, and we therefore modify the order accordingly.

It is well established that "[s]hared custody arrangements do not alter the scope and methodology of the [Child Support Standards Act (CSSA)]" (*Bast v Rossoff*, 91 NY2d 723, 732 [1998]; *see Matter of Jerrett v Jerrett*, 162 AD3d 1715, 1716 [4th Dept 2018]). A court must calculate the basic child support obligation under the CSSA, and then must order the noncustodial parent to pay his or her "pro rata share of the basic child support obligation, unless it finds that amount to be 'unjust or inappropriate' " (*Bast*, 91 NY2d at 727; *see* Family Ct Act § 413 [1] [f], [g]; *Jerrett*, 162 AD3d at 1716). "In most

instances, the court can determine the custodial parent for purposes of child support by identifying which parent has physical custody of the child for a majority of time" (*Bast*, 91 NY2d at 728). However, in instances "[w]here the parents' custodial arrangement splits the child[ ]'s physical custody so that neither can be said to have physical custody of the child[ ] for a majority of the time, the parent having the greater pro rata share of the child support obligation . . . should be identified as the noncustodial parent for the purpose of [child] support regardless of the labels employed by the parties" (*Eberhardt-Davis v Davis*, 71 AD3d 1487, 1487-1488 [4th Dept 2010] [internal quotation marks omitted]; *see Betts v Betts*, 156 AD3d 1355, 1355 [4th Dept 2017]; *Shamp v Shamp*, 133 AD3d 1213, 1214-1215 [4th Dept 2015]). Thus, where the parents share physical custody "with approximately an even distribution of parenting time," the parent with the higher income is deemed the noncustodial parent for purposes of the CSSA (*Shamp*, 133 AD3d at 1214; *see Ball v Ball*, 150 AD3d 1566, 1567 [3d Dept 2017]; *Matter of Mitchell v Mitchell*, 134 AD3d 1213, 1214 [3d Dept 2015]; *Barr v Cannata*, 57 AD3d 813, 814 [2d Dept 2008]; *Redder v Redder*, 17 AD3d 10, 13 [3d Dept 2005]).

Here, upon our review of the record, we conclude that there is no basis to disturb the Support Magistrate's finding that, in 2015, the parties followed the access schedule that provided for shared physical custody "with approximately an even distribution of parenting time" (*Shamp*, 133 AD3d at 1214; *see Ball*, 150 AD3d at 1567; *Redder*, 17 AD3d at 13). Based on that finding, however, "the parent with the higher income, who bears the greater share of the child support obligation, in this case the father, should [have] be[en] deemed the noncustodial parent for the purpose of support" (*Barr*, 57 AD3d at 814). Indeed, even assuming, arguendo, that the Support Magistrate properly imputed income to the mother, the record establishes that the father had the higher income in 2015 (*see Shamp*, 133 AD3d at 1215). Inasmuch as the parties shared near equal access time in 2015 and the father's income was higher than that of the mother, the Support Magistrate should have deemed the father the noncustodial parent for purposes of child support and denied his petition to the extent that it sought child support from the mother during that period (*see e.g. Shamp*, 133 AD3d at 1215; *Barr*, 57 AD3d at 814). Thus, we conclude that the court erred in denying the mother's objection to that part of the Support Magistrate's order awarding the father $125 per week in child support effective April 2, 2015 until January 1, 2016.

In light of the abovementioned modification, we further agree with the mother that she is entitled to a credit against any arrears from the order for the amount of child support erroneously awarded to the father from April 2, 2015 until January 1, 2016, and we therefore remit the matter to Family Court to determine the amount of arrears and the credit to be applied thereto. Although there is a strong public policy against recoupment of child support overpayments (*see Johnson v Chapin*, 12 NY3d 461, 466 [2009], *rearg denied* 13 NY3d 888 [2009]; *Weidner v Weidner*, 136 AD3d 1425, 1426-1427 [4th Dept 2016], *lv dismissed* 28 NY3d 1101 [2016], *rearg denied and lv dismissed* 29 NY3d 990 [2017]), we conclude that the requested credit is appropriate under the limited circumstances of this case. Here, the record

establishes that the mother had significantly less income and received certain public benefits, while the father received substantial disability and pension benefits and had significant assets (*see Weidner*, 136 AD3d at 1427). Moreover, granting the mother's request "will not detract from [the father] fulfilling the needs of the child[ ] while [he is] in [the father's] care" and, indeed, will relieve the mother of an erroneously-imposed financial obligation, thereby allowing her to use her funds to maintain a stable household for the child and meet his reasonable needs during visitation (*id.*).

The mother also contends that the court erred in denying her objection to the amount of the child support award effective January 1, 2016 because the Support Magistrate abused his discretion in imputing income to her. We reject that contention. We note initially that the Support Magistrate correctly found that, beginning in 2016, the mother did not diligently exercise her access time and the father spent far more time with the child and, thus, the record establishes that the mother was the noncustodial parent and the father was the custodial parent for purposes of child support inasmuch as the father then had "physical custody of the child for a majority of time" (*Bast*, 91 NY2d at 728). Furthermore, a support magistrate "possess[es] considerable discretion to impute income in fashioning a child support award . . . [, and such an] imputation of income will not be disturbed [where, as here,] there is record support for [it]" (*Matter of Muok v Muok*, 138 AD3d 1458, 1459 [4th Dept 2016] [internal quotation marks omitted]; *see Shamp*, 133 AD3d at 1214).

Entered: July 5, 2019

Mark W. Bennett
Clerk of the Court

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

262

CA 18-00588

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

PATRICIA PAGE AND JAMES PAGE,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

NIAGARA FALLS MEMORIAL MEDICAL CENTER,
DEFENDANT-APPELLANT-RESPONDENT,
ET AL., DEFENDANTS.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (SETH A. HISER OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

HOGANWILLIG, PLLC, AMHERST (SCOTT MICHAEL DUQUIN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Niagara County (Sara Sheldon, A.J.), entered January 3, 2018. The order, among other things, denied plaintiffs' motion for partial summary judgment and denied the motion of defendant Niagara Falls Memorial Medical Center for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendant Niagara Falls Memorial Medical Center and dismissing the amended complaint against it, and as modified the order is affirmed without costs.

Memorandum: Patricia Page (plaintiff) was admitted to Niagara Falls Memorial Medical Center (defendant) for surgery in August 2008. Following surgery, a patient-controlled analgesia infusion pump was connected to plaintiff's intravenous line. The pump allowed plaintiff to self-administer pain medication, i.e., morphine, by pressing a button, subject to a maximum dosage feature that permitted delivery of the next dose only after the expiration of a programmed delay period. While monitored by defendant's nursing staff, plaintiff used the pump for approximately 10 hours without incident. Plaintiff thereafter experienced an adverse respiratory event; received an emergency opioid-reversing medication; was transferred to the intensive care unit (ICU) for further treatment, including physical therapy; and was discharged therefrom a few days later.

Plaintiff and her husband commenced this action in February 2011 to recover damages for injuries allegedly sustained by plaintiff as a result of, inter alia, defendant's alleged medical malpractice and

negligence. This action has been before us on two prior appeals (*Page v Niagara Falls Mem. Med. Ctr.*, 167 AD3d 1428 [4th Dept 2018]; *Page v Niagara Falls Mem. Med. Ctr.*, 141 AD3d 1084 [4th Dept 2016]). Defendant now appeals, and plaintiffs cross-appeal, as limited by their brief, from an order denying defendant's motion for summary judgment dismissing the amended complaint against it and denying plaintiffs' motion for partial summary judgment on the issue of liability with respect to defendant.

Contrary to plaintiffs' contention on their cross appeal, we conclude that Supreme Court properly denied their motion for partial summary judgment on the issue of liability with respect to defendant on the theory of res ipsa loquitur. "[O]nly in the rarest of res ipsa loquitur cases may . . . plaintiff[s] win summary judgment . . . That would happen only when the plaintiff[s'] circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable" (*Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006]), and that is not the case here (*see Gagnon v St. Joseph's Hosp.*, 90 AD3d 1605, 1606-1607 [4th Dept 2011]; *Dengler v Posnick*, 83 AD3d 1385, 1386 [4th Dept 2011]).

Furthermore, we agree with defendant on its appeal that the court erred in denying its motion for summary judgment dismissing the amended complaint against it, and we therefore modify the order accordingly. "On a motion for summary judgment, [a] defendant[] in a medical malpractice case ha[s] 'the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby' " (*Gagnon*, 90 AD3d at 1605; *see Occhino v Fan*, 151 AD3d 1870, 1871 [4th Dept 2017]). Here, it is undisputed that defendant met its initial burden by establishing the absence of any departure from good and accepted medical practice and that any such departure was not a proximate cause of plaintiff's alleged injuries (*see Wilk v James*, 108 AD3d 1140, 1142 [4th Dept 2013]). Defendant submitted, among other things, the affidavit of its expert anesthesiologist who opined, to a reasonable degree of medical certainty, that defendant's staff involved in plaintiff's care and treatment complied at all times with the applicable standard of care and that, while plaintiff experienced an adverse respiratory event, such event was not caused by an excess administration of morphine and none of plaintiff's alleged injuries was proximately caused by any act or omission of defendant or its staff (*see id.*). The affidavit of defendant's expert anesthesiologist "directly address[ed] each of the allegations of [medical malpractice and] negligence in plaintiff[s'] bill[] of particulars . . . , and [his] opinion[is] supported by [plaintiff's] medical records," including a CT scan taken shortly after the adverse respiratory event that showed no evidence of acute brain injury (*id.*; *see Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]).

The burden thus shifted to plaintiffs to raise triable issues of fact by "submit[ting] a physician's affidavit establishing both that defendant[] deviated from the applicable standard of care and that such deviation was a proximate cause of plaintiff's injuries" (*Occhino*, 151 AD3d at 1871). Initially, we agree with plaintiffs that

they raised a triable issue of fact whether defendant deviated from the applicable standard of care. Plaintiffs submitted the affidavit of their expert neurologist/pharmacist who opined, among other things, that plaintiff had numerous risk factors that placed her at increased risk for respiratory depression, thereby requiring additional monitoring that defendant failed to provide, and that defendant deviated from the applicable standard of care given the delay between the discovery that plaintiff was experiencing an adverse respiratory event and the administration of the emergency opioid-reversing medication. The conflicting opinions of the experts for plaintiffs and defendant with respect to defendant's alleged deviations from the accepted standard of medical care " 'present credibility issues that cannot be resolved on a motion for summary judgment' " (*Fay v Satterly*, 158 AD3d 1220, 1221 [4th Dept 2018]; *see Lamb v Stephen M. Baker, O.D., P.C.*, 152 AD3d 1230, 1230 [4th Dept 2017]).

We nonetheless agree with defendant that plaintiffs' submissions are insufficient to raise a triable issue of fact whether any such deviation was a proximate cause of plaintiff's alleged injuries. Here, plaintiffs' expert did not adequately address defendant's prima facie showing that there was no evidence of a brain injury resulting from the adverse respiratory event (*see Fernandez v Moskowitz*, 85 AD3d 566, 567-568 [1st Dept 2011]). In particular, plaintiffs' expert failed to address or explain the results of the CT scan performed shortly after the adverse respiratory event that showed "no evidence of acute brain injury," and he did not address the results of an MRI taken a few days after plaintiff's discharge from the ICU that was "[u]nremarkable" and "fail[ed] to demonstrate an acute ischemic event" (*see Callistro v Bebbington*, 94 AD3d 408, 411 [1st Dept 2012], *affd* 20 NY3d 945 [2012]; *Montilla v St. Luke's-Roosevelt Hosp.*, 147 AD3d 404, 407 [1st Dept 2017]; *Fernandez*, 85 AD3d at 568). Instead, plaintiffs' expert asserted that "it is *likely* that [plaintiff] underwent brain damage . . . due to lack of oxygen to her brain" during the period between the discovery of her respiratory distress and the administration of the emergency opioid-reversing medication, and then assumed the existence of such an injury in opining that an immediate administration of such medication would have "lessen[ed] *the* injury to [plaintiff's] brain" (emphases added). We conclude that the conclusory and speculative theory of plaintiffs' expert that the adverse respiratory event resulted in brain damage that could therefore explain plaintiff's clinically observed symptoms is insufficient to raise an issue of fact (*see Callistro*, 94 AD3d at 411). Indeed, plaintiffs' expert "failed to support [his] opinion with a radiological study of plaintiff's brain or any other medical record demonstrating brain damage other than [the subsequent symptoms]" (*id.*; *see also Montilla*, 147 AD3d at 407). Moreover, while plaintiffs' expert relied on a physical therapy note stating that plaintiff's gait was unsteady and referenced later reevaluations by her treating neurologist, he failed to address the medical evidence submitted by defendant that plaintiff, upon her discharge from the ICU, had no complaints, was ambulatory with assistance, was alert and orientated, and was deemed in stable condition, and he further failed to explain the preliminary neurologic consultation report from a few days after discharge that was included in plaintiffs' own papers, in

which plaintiff's treating neurologist noted that the MRI was normal, that plaintiff was intact neurologically, and that her symptoms could be attributable to postoperative myelopathy, i.e., a spinal cord disorder (*see Callistro*, 94 AD3d at 411). Based on the foregoing, we conclude that plaintiffs' submissions are insufficient to raise a triable issue of fact to defeat defendant's motion for summary judgment (*see e.g. Montilla*, 147 AD3d at 407; *Callistro*, 94 AD3d at 410-411).

Entered: July 5, 2019

Mark W. Bennett
Clerk of the Court

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

306

CA 18-00865

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

KARI ANN FULL, AS ASSIGNEE OF LEBEAU, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF MONROE AND MONROE COUNTY AIRPORT
AUTHORITY, DEFENDANTS-RESPONDENTS.

HOGANWILLIG, PLLC, AMHERST (SCOTT MICHAEL DUQUIN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MICHAEL E. DAVIS, COUNTY ATTORNEY, ROCHESTER (MATTHEW D. BROWN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered July 12, 2017. The order granted the motion of defendants to dismiss the complaint and for sanctions.

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

Memorandum: Plaintiff, individually and as guardian for her now-deceased husband, previously commenced a negligence action against defendants, among others, to recover for injuries sustained by her husband when he was struck by a motor vehicle on his way to an air show. We affirmed a judgment that, as relevant here, granted defendants' motion for summary judgment dismissing the complaint against them on the ground, inter alia, that defendants established as a matter of law that any negligent operation of the air show on their part was not a proximate cause of the husband's injuries (*Full v Monroe County Sheriff's Dept.* [appeal No. 3], 152 AD3d 1237 [4th Dept 2017]).

Thereafter, plaintiff settled with LeBeau, Inc., another defendant in that action and the company responsible for managing all aspects of the air show. As part of the settlement, LeBeau assigned to plaintiff all of its rights under its agreement with defendants to manage the air show. That agreement included a provision requiring defendants to "indemnify and hold harmless and defend against all costs, damages, claims, liabilities and expenses (including reasonable attorney fees) suffered by or claimed against [LeBeau] directly based on claims or causes arising from . . . any negligent act or omission" of defendants. Defendants refused plaintiff's demand for indemnification under the agreement and plaintiff, in her capacity as

LeBeau's assignee, subsequently commenced this action against defendants, asserting causes of action for breach of the duty to indemnify under the agreement and breach of the duty to defend under the agreement. Plaintiff appeals from an order that, inter alia, granted defendants' motion to dismiss the complaint. We affirm.

We conclude that Supreme Court properly determined that plaintiff's claims against defendants in this action were precluded by collateral estoppel based on the dismissal of the negligence claims asserted against them in the prior action. Specifically, there is "an identity of issue which has necessarily been decided in the prior action and is decisive of the present action" (*Buechel v Bain*, 97 NY2d 295, 303-304 [2001], *cert denied* 535 US 1096 [2002]), i.e., whether defendants were negligent in causing the accident that injured decedent. Moreover, we conclude that plaintiff and LeBeau, as plaintiff's assignor, had a full and fair opportunity to litigate this issue in the prior action given the extensive discovery and motion practice therein (*see id.* at 304; *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999]).

In light of the foregoing, we conclude that plaintiff's remaining contentions are academic.

Entered: July 5, 2019

Mark W. Bennett
Clerk of the Court

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

312

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 appeal was held by this Court by order entered July 6, 2018, decision was reserved and the matter was remitted to Erie County Court for further proceedings (163 AD3d 1462). The proceedings were held and completed.

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 murder in the second degree (Penal Law § 125.25 [1]). We previously held the case, reserved decision, and remitted the matter to County Court to allow the People, in response to defendant's *Batson* application, to articulate a nondiscriminatory reason for striking an African-American juror and for the court to determine whether the proffered reason was pretextual (*People v Herrod*, 163 AD3d 1462 [4th Dept 2018]). Upon remittal, the court determined that the People offered a non-pretextual, race-neutral reason for excluding the prospective juror at issue. We now affirm.

We conclude that the People met their burden at step two of the *Batson* analysis to articulate a "race-neutral reason" for striking the prospective juror (*People v Hecker*, 15 NY3d 625, 655 [2010], *cert denied* 563 US 947 [2011]; *see Batson v Kentucky*, 476 US 79, 98 [1986]). At the remittal hearing, the prosecutor testified that he struck the prospective juror because he was a crime victim who expressed some dissatisfaction with the manner in which the crime against him had been prosecuted and because he made statements suggesting that he might be receptive to defendant's potential justification defense. We conclude that this was sufficient to satisfy the People's "quite minimal" burden of providing a race-

neutral reason for striking the juror (*People v Payne*, 88 NY2d 172, 183 [1996]; *see People v Grant*, 128 AD3d 1088, 1090 [2d Dept 2015]; *People v Ramos*, 124 AD3d 1286, 1287 [4th Dept 2015], *lv denied* 25 NY3d 1076 [2015], *reconsideration denied* 26 NY3d 933 [2015]).

We further conclude that the court did not abuse its discretion in determining that the prosecutor's explanation for the peremptory challenge was not pretextual (*see People v Farrare*, 118 AD3d 1477, 1477-1478 [4th Dept 2014], *lv denied* 23 NY3d 1061 [2014]). It is immaterial that the prospective juror stated that he would not hold against the People any dissatisfaction he had with the manner in which the crime against him was handled. "[A]ssurances from a challenged prospective juror that he or she could assess the evidence in a fair manner even though he or she was a crime victim are irrelevant to the determination of whether the basis of a peremptory challenge is pretextual" (*Grant*, 128 AD3d at 1090). Moreover, the court did not err in crediting the prosecutor's proffered explanation given his testimony that he did not use a peremptory challenge against an African-American juror who, despite being a crime victim, was satisfied with the resolution of her case and that he did use peremptory challenges to strike several Caucasian prospective jurors for reasons similar to those offered in support of his decision to strike the prospective juror at issue here (*see Ramos*, 124 AD3d at 1287). The court was in the best position to evaluate the demeanor of the prospective juror, the prosecutor, and defense counsel, and we conclude that its determination that the prosecutor's proffered reasons for striking the prospective juror were not pretextual is entitled to great deference (*see People v Hernandez*, 75 NY2d 350, 356 [1990], *affd* 500 US 352 [1991]; *People v Dandridge*, 26 AD3d 779, 780 [4th Dept 2006]).

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

Entered: July 5, 2019

Mark W. Bennett
Clerk of the Court

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

326

CA 18-02028

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

IN THE MATTER OF ARBITRATION BETWEEN THE PROFESSIONAL, CLERICAL, TECHNICAL EMPLOYEES ASSOCIATION, PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

BOARD OF EDUCATION FOR BUFFALO CITY SCHOOL DISTRICT, RESPONDENT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (BETHANY A. CENTRONE OF COUNSEL), FOR RESPONDENT-APPELLANT.

BARTLO, HETTLER, WEISS & TRIPI, KENMORE (PAUL D. WEISS OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered June 18, 2018 in a proceeding pursuant to CPLR article 75. The order granted the petition to confirm an arbitration award and denied the cross petition to vacate an arbitration award.

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

Memorandum: In this proceeding pursuant to CPLR article 75, respondent appeals from an order that granted the petition to confirm an arbitration award and denied respondent's cross petition to vacate that award. Andrea Teresi was employed as a security officer for respondent until respondent terminated her in July 2013 because she did not possess the valid registration card required by General Business Law § 89-g (1) (a) for employment as a security guard. Petitioner filed a grievance on Teresi's behalf and then filed a demand for arbitration. Respondent did not move to stay arbitration (*cf. Matter of New York State Off. of Children & Family Servs. v Lanterman*, 14 NY3d 275, 281-282 [2010]), and the matter proceeded to arbitration. The arbitrator issued an award that, inter alia, directed respondent to rescind the termination of Teresi and reimburse her for her loss of pay from July 31, 2014, the date her registration card as a security guard was renewed.

We reject respondent's contention that the award violates public policy requiring the registration of security guards. "[T]he public policy exception to an arbitrator's power to resolve disputes is extremely narrow" (*Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d

72, 80 [2003]). The Court of Appeals has set forth "a two-prong test for determining whether an arbitration award violates public policy. First, where a court can conclude without engaging in any extended factfinding or legal analysis that a law prohibits, in an absolute sense, the particular matters to be decided . . . by arbitration . . . , an arbitrator cannot act. Second, an arbitrator cannot issue an award where the award itself violates a well-defined constitutional, statutory or common law of this State" (*id.* [internal quotation marks and brackets omitted]; *see Matter of State of N.Y., Off. of Children & Family Servs. [Civil Serv. Empls. Assn., Inc.]*, 79 AD3d 1438, 1439 [3d Dept 2010], *lv denied* 17 NY3d 706 [2011]). A court "may not vacate an award on public policy grounds when vague or attenuated considerations of a general public policy are at stake. Courts shed their cloak of noninterference[, however,] . . . where the final result creates an *explicit* conflict with other laws and their attendant policy concerns" (*Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 327 [1999]). "The focus of inquiry is on the *result*, the award itself" (*id.*).

We conclude that the first prong of the public policy exception has not been met here because nothing in General Business Law § 89-g prohibits the resolution of this matter by arbitration, particularly considering an arbitrator's " 'broad power to fashion appropriate relief' " (*Matter of Professional, Clerical, Tech. Empls. Assn. [Buffalo Bd. of Educ.]*, 90 NY2d 364, 373 [1997]). We further conclude that the second prong of the test has not been met either. Contrary to respondent's contention, the award did not compel respondent to employ Teresi as a security officer during the period that she did not have the required registration card. Rather, the arbitrator ordered that Teresi's termination be rescinded and that she be awarded back pay only from the time when she received her renewed registration card.

We reject respondent's further contention that the arbitrator exceeded his authority by finding that the collective bargaining agreement (CBA) allowed arbitration of this dispute. Although respondent couches its argument in terms of the arbitrator exceeding his authority, in reality respondent is contending that " 'the arbitrator did not have the power to decide the question at issue and, therefore, there was nothing to arbitrate' " (*Matter of Jandrew [County of Cortland]*, 84 AD3d 1616, 1618 [3d Dept 2011]). By submitting to arbitration, however, respondent ran the risk that the arbitrator would find the dispute covered under the CBA, as he did, notwithstanding respondent's position that the termination of an employee for failing to maintain a required registration card was outside the agreement's scope (*see United Fedn. of Teachers, Local 2, AFT, AFL-CIO*, 1 NY3d at 83; *Jandrew [County of Cortland]*, 84 AD3d at 1618).

We have considered respondent's remaining contentions and

conclude that they are without merit.

Entered: July 5, 2019

Mark W. Bennett
Clerk of the Court

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

328

CA 18-00724

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

IN THE MATTER OF THE APPLICATION OF STATE OF NEW YORK, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LESLIE L., RESPONDENT-APPELLANT, FOR CIVIL MANAGEMENT PURSUANT TO ARTICLE 10 OF THE MENTAL HYGIENE LAW.

VAHEY MULDOON RESTON GETZ LLP, ROCHESTER (GARY MULDOON OF COUNSEL), FOR RESPONDENT-APPELLANT.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (FREDERICK A. BRODIE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Orleans County (James P. Punch, A.J.), entered July 26, 2017 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, committed respondent to a secure treatment facility.

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

Memorandum: Respondent appeals from an order pursuant to Mental Hygiene Law article 10 determining, following a nonjury trial, that he is a dangerous sex offender requiring confinement (*see* § 10.03 [e]) and committing him to a secure treatment facility. We affirm.

We reject respondent's contention that he was denied effective assistance of counsel. Respondent was entitled to meaningful representation in the context of the Mental Hygiene Law article 10 proceeding (*see Matter of State of New York v Campany*, 77 AD3d 92, 93, 98-99 [4th Dept 2010], *lv denied* 15 NY3d 713 [2010]), but it is his burden on appeal to demonstrate the absence of strategic or other legitimate explanations for his attorney's alleged deficiencies (*see Matter of State of New York v Carter*, 100 AD3d 1438, 1439 [4th Dept 2012]; *see also People v Caban*, 5 NY3d 143, 154 [2005]). Respondent has failed to meet that burden here.

We note, in particular, that respondent asserts that his attorney was ineffective for failing to move to replace the psychiatric examiner appointed by Supreme Court when it became clear that there would be a delay of many months before the psychiatric examiner would issue his written findings (*see generally* Mental Hygiene Law § 10.06

[e]). We conclude, however, that permitting the delay could have been a strategic decision on the part of respondent's attorney. At the time of the proceeding herein, respondent was a nearly 72-year-old pedophilic sex offender who had committed multiple sex offenses over the course of his lifetime and had never successfully completed sex offender treatment. Indeed, the record establishes that respondent was expelled twice from sex offender treatment while he was incarcerated. The delay in the issuance of the written findings of the court-appointed psychiatric examiner afforded respondent an opportunity to make progress in sex offender treatment at the mental health facility where he was temporarily residing while this matter was pending. Had respondent successfully completed sex offender treatment, or made progress therein, during the disputed period, respondent's attorney would have had a better chance of persuading the court in the disposition phase of the proceedings that respondent should not be confined to a secure treatment facility, but instead should be released to the community under a regimen of strict and intensive supervision and treatment ([SIST]; *see* § 10.07 [f]). Given "the evidence, the law, and the circumstances of [this] particular case, viewed in totality and as of the time of the representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]; *see Campany*, 77 AD3d at 100), we conclude that respondent received meaningful representation.

Respondent failed to preserve for our review his further contention that he did not validly waive his right to a jury trial on the issue whether he suffers from a mental abnormality as defined by Mental Hygiene Law article 10 (*see Matter of State of New York v Clyde J.*, 141 AD3d 723, 723 [2d Dept 2016], *lv denied* 28 NY3d 907 [2016]; *cf. Matter of State of New York v Robert C.*, 113 AD3d 937, 939-940 [3d Dept 2014]; *see generally Matter of State of New York v Reeve*, 87 AD3d 1378, 1378 [4th Dept 2011], *lv denied* 18 NY3d 804 [2012]). In any event, respondent's contention is without merit. The record establishes that the court conducted an on-the-record colloquy with respondent to determine that respondent, after an opportunity for consultation with counsel, was knowingly and voluntarily waiving his right to a jury trial on the issue of mental abnormality (*see Clyde J.*, 141 AD3d at 723-724; *Matter of State of New York v Ted B.*, 132 AD3d 28, 37 [2d Dept 2015]; *see also* §§ 10.07 [b]; 10.08 [f]).

Finally, we reject respondent's contention that the court's determination that he is a dangerous sex offender requiring confinement is against the weight of the evidence (*see Matter of State of New York v Nathaniel W.*, 166 AD3d 1523, 1524 [4th Dept 2018], *lv dismissed* 33 NY3d 1010 [2019]). All of the experts who evaluated respondent's case opined that respondent could not safely be managed in the community under a regimen of SIST (*see* Mental Hygiene Law § 10.07 [f]), and we see no reason to disturb the court's decision to credit the opinions of those experts (*see Matter of State of New York v Parrott*, 125 AD3d 1438, 1439 [4th Dept 2015], *lv denied* 25 NY3d 911 [2015]).

Entered: July 5, 2019

Mark W. Bennett
Clerk of the Court

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

374

KA 18-01621

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

THOMAS A. RAFFERTY, DEFENDANT-RESPONDENT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (JEFFERY R. FRIESEN OF COUNSEL), FOR APPELLANT.

THOMAS A. RAFFERTY, DEFENDANT-RESPONDENT PRO SE.

Appeal from an order of the Ontario County Court (Frederick G. Reed, A.J.), dated June 4, 2018. The order granted defendant's motion to dismiss the indictment and dismissed the indictment.

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

Memorandum: The People appeal from an order granting that part of defendant's omnibus motion seeking to dismiss the indictment in the furtherance of justice pursuant to CPL 210.40 (1). We affirm.

" 'While the question of whether to dismiss an indictment in the furtherance of justice is addressed to the discretion of the trial court, this discretion is not absolute' " (*People v Coomey*, 144 AD3d 1583, 1583 [4th Dept 2016]; *see People v Hirsch*, 85 AD2d 902, 902 [4th Dept 1981]). Here, contrary to the People's contention, we conclude that there is no basis for reversal inasmuch as County Court did not abuse its discretion in dismissing the indictment charging defendant, an employee of the County of Ontario, with three counts of falsifying business records in the second degree (Penal Law § 175.05 [1]) and three counts of offering a false instrument for filing in the first degree (§ 175.35 [1]; *cf. People v Scott*, 284 AD2d 899, 900 [4th Dept 2001], *lv denied* 96 NY2d 924 [2001]; *People v Wright*, 278 AD2d 820, 820 [4th Dept 2000], *lv denied* 96 NY2d 789 [2001]; *see generally People v Stranahan*, 237 AD2d 920, 920 [4th Dept 1997], *lv denied* 89 NY2d 1101 [1997]). The court " 'carefully review[ed] . . . all of the criteria listed in CPL 210.40 (1) and [properly found] several of them applicable and compelling' " (*Coomey*, 144 AD3d at 1583, quoting *People v Herman L.*, 83 NY2d 958, 959 [1994]).

Entered: July 5, 2019

Mark W. Bennett
Clerk of the Court

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

402

KA 16-01656

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID A. BROWN, DEFENDANT-APPELLANT.

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

DAVID A. BROWN, DEFENDANT-APPELLANT PRO SE.

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH (JOHN C. TUNNEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Mathew K. McCarthy, A.J.), rendered June 27, 2016. The judgment convicted defendant, upon a jury verdict, of burglary in the third degree (three counts), criminal possession of stolen property in the third degree, criminal possession of stolen property in the fourth degree and possession of burglar's tools.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by vacating the finding that defendant is a persistent felony offender, reducing the sentences imposed for burglary in the third degree under counts one, four, and five of the indictment to indeterminate terms of incarceration of 3½ to 7 years, reducing the sentence imposed for criminal possession of stolen property in the third degree under count two of the indictment to an indeterminate term of incarceration of 3½ to 7 years, reducing the sentence imposed for criminal possession of stolen property in the fourth degree under count six of the indictment to an indeterminate term of incarceration of 2 to 4 years, and directing that the sentences on counts two and six run consecutively to each other and that the sentences on counts one, three, four, and five run concurrently with each other and consecutively to the sentences imposed on counts two and six, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment that convicted him, following a jury trial, of three counts of burglary in the third degree (Penal Law § 140.20) and one count each of criminal possession of stolen property in the third degree (§ 165.50), criminal possession of stolen property in the fourth degree (§ 165.45 [5]), and possession of burglar's tools (§ 140.35). The charges arose after defendant

stole a car, drove it to a motor home dealership that was closed for the day, entered three motor homes, and removed the wall-mounted televisions inside two of them. Although defendant had been offered the opportunity to plead guilty to one count of burglary in the third degree in return for a sentencing promise of an indeterminate term of 2½ to 5 years' incarceration, he rejected that offer and proceeded to trial pro se, where the jury returned a guilty verdict on all six counts in the indictment. County Court thereafter adjudicated defendant a persistent felony offender and sentenced him to indeterminate terms of incarceration of 15 years to life on each felony count and to a definite term of incarceration of one year on the misdemeanor count, i.e., possession of burglar's tools. All sentences are concurrent.

Defendant contends in his main brief that he was deprived of a fair trial because the court conducted a *Buford* inquiry during an ex parte colloquy with a sworn juror. Although defendant had a right to be present during the court's in camera inquiry into an impaneled juror's continuing fitness to serve because defendant was acting pro se (*see generally People v Harris*, 99 NY2d 202, 212 [2002]), he waived that right by expressly agreeing to the court's proposal that it conduct an in camera interview alone with the juror (*see People v Pennisi*, 217 AD2d 562, 563 [2d Dept 1995], *lv denied* 86 NY2d 800 [1995]) and also failed to object when the court described that interview and determined that no further action was necessary.

Contrary to defendant's further contention in his main brief, the court did not commit reversible error by purportedly failing to accurately read the contents of a jury note to the parties before recalling the jury. A trial court's failure to disclose the contents of a jury note to a defendant is a mode of proceedings error that requires reversal where the error "deprived [the defendant] of the opportunity to have input, through counsel or otherwise, into the court's response to an important, substantive juror inquiry" (*People v O'Rama*, 78 NY2d 270, 279-280 [1991]). Here, the note was first read into the record in the presence of the jury, and the jury was then dismissed for the day so that the requested testimony could be prepared. Defendant therefore had opportunities after the jury's dismissal and before they were called back the following day to give input on the court's response to the jury's request and "was not prejudiced by the fact that the *O'Rama* steps may have occurred out of sequence" (*People v James*, 162 AD3d 1746, 1747 [4th Dept 2018], *lv denied* 32 NY3d 1112 [2018]; *see People v McMahon*, 275 AD2d 670, 670 [1st Dept 2000], *lv denied* 96 NY2d 761 [2001]; *see also People v Sykes*, 135 AD3d 535, 535 [1st Dept 2016], *lv denied* 27 NY3d 969 [2016]).

Defendant also argues in his main brief that the court's jury charge with respect to the burglary counts improperly expanded the prosecution's theory, i.e., it referred to his intent to commit "a crime inside" the motor homes rather than to the theory in the indictment—that he intended to commit larceny. Defendant asserts that reversal is therefore required because he may have been convicted on the unindicted theory of criminal mischief (*see generally People v*

Graves, 136 AD3d 1347, 1348-1349 [4th Dept 2016], *lv denied* 27 NY3d 1069 [2016]). We reject that contention. None of the evidence presented at trial suggested that defendant had any intent other than to commit larceny. Indeed, the testimony established that there was no damage to the motor homes that he entered or to the televisions therein, that defendant was arrested while in the process of removing one of the televisions from a motor home, and that another television had been removed and "staged" near the door of the motor home for easy removal. Thus, this is not a case in which the evidence might have established uncharged theories (*cf. id.*).

Viewing the evidence in light of the elements of burglary in the third degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention in his main and pro se supplemental briefs that the verdict on the burglary count regarding the motor home from which no television was taken is against the weight of the evidence with respect to the element of intent (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude that the jury did not fail to give the evidence the weight it should be accorded (*see id.*). "Larcenous intent . . . is rarely susceptible of proof by direct evidence, and must usually be inferred from the circumstances surrounding the defendant's actions" (*People v Russell*, 41 AD3d 1094, 1096 [3d Dept 2007], *lv denied* 10 NY3d 964 [2008]). Here, the People presented evidence that defendant's footprints led from the stolen vehicle to three separate motor homes, including the one in which he was apprehended, and that defendant did not have permission to be inside any of the motor homes. Although the first motor home that defendant entered was not equipped with a television, the jury was entitled to infer his larcenous intent based on the evidence that defendant removed a television from the second motor home and was apprehended in the act of removing a television from the third motor home while carrying a bag containing tools commonly associated with burglaries.

Contrary to defendant's further contention in his main and pro se supplemental briefs, when viewing the evidence in light of the elements of criminal possession of stolen property in the fourth degree as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that the verdict on that crime is not against the weight of the evidence with respect to the element of knowledge (*see generally Bleakley*, 69 NY2d at 495). " '[D]efendant's knowledge that property is stolen may be proven circumstantially, and the unexplained or falsely explained recent exclusive possession of the fruits of a crime allows a [factfinder] to draw a permissible inference that defendant knew the property was stolen' " (*People v Jackson*, 66 AD3d 1415, 1416 [4th Dept 2009]; *see People v Waterford*, 124 AD3d 1246, 1247 [4th Dept 2015], *lv denied* 26 NY3d 972 [2015]). Here, the People presented evidence that defendant did not have permission to use the vehicle, that the vehicle had been left unlocked at the dealership with the key fob inside, and that defendant was found in possession of the key fob when he was arrested. We conclude that the jury was entitled to infer from the circumstantial evidence presented by the People that

defendant knowingly possessed the stolen vehicle for his own benefit (*see* Penal Law § 165.45 [5]; *Waterford*, 124 AD3d at 1247; *Jackson*, 66 AD3d at 1416), and it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495).

We agree with defendant, however, that the imposition of persistent felony offender status is unduly harsh and severe. The sentencing court's determination to sentence a defendant as a persistent felony offender "cannot be held erroneous as a matter of law, unless [that] court acts arbitrarily or irrationally" (*People v Rivera*, 5 NY3d 61, 68 [2005], *cert denied* 546 US 984 [2005]). Even where the sentencing court does not err as a matter of law in adjudicating a defendant to be a persistent felony offender, "[t]he Appellate Division, in its own discretion, may conclude that a persistent felony offender sentence is too harsh or otherwise improvident" (*id.*). "In this way, the Appellate Division can and should mitigate inappropriately severe applications of the statute" (*id.*). "A determination by the Appellate Division to vacate a harsh or severe persistent felony offender finding is authorized by CPL 470.20 (6), which grants the Appellate Division discretion to modify sentences in the interest of justice 'without deference to the sentencing court' " (*People v Ellison*, 167 AD3d 1552, 1553 [4th Dept 2018], quoting *People v Delgado*, 80 NY2d 780, 783 [1992]; *see also People v Meacham*, 151 AD3d 1666, 1670 [4th Dept 2017], *lv denied* 30 NY3d 981 [2017]).

Here, although defendant's extensive criminal record provided a basis for sentencing him as a persistent felony offender, we nevertheless exercise our discretion in the interest of justice to vacate that finding (*see People v Lusby*, 2 AD3d 1332, 1333 [4th Dept 2003]; *People v Beckwith*, 309 AD2d 1253, 1254 [4th Dept 2003]; *People v Collazo*, 273 AD2d 93, 93 [1st Dept 2000], *lv denied* 95 NY2d 889 [2000]). Despite defendant's frequent involvement with law enforcement, nothing in the presentence report indicates that he has ever been violent or involved in drugs, and he has never been convicted of any crime more serious than a class D felony. Moreover, a sentence of 15 years to life is a particularly harsh penalty in light of the People's final pretrial plea offer of 2½ to 5 years' incarceration. We conclude that "[s]uch a disparity between the plea offer and the ultimate sentence militates in favor of a sentence reduction, especially for a nonviolent offender such as defendant" (*Ellison*, 167 AD3d at 1554).

Thus, as a matter of discretion in the interest of justice, we modify the judgment by vacating the finding that defendant is a persistent felony offender, reducing the sentences imposed for burglary in the third degree under counts one, four, and five of the indictment to indeterminate terms of incarceration of 3½ to 7 years, reducing the sentence imposed for criminal possession of stolen property in the third degree under count two of the indictment to an indeterminate term of incarceration of 3½ to 7 years, reducing the sentence imposed for criminal possession of stolen property in the

fourth degree under count six of the indictment to an indeterminate term of incarceration of 2 to 4 years, and directing that the sentences on counts two and six run consecutively to each other and that the sentences on counts one, three, four, and five run concurrently with each other and consecutively to the sentences imposed on counts two and six. Those are the maximum sentences that may be imposed upon a second felony offender for the subject crimes (*see* Penal Law § 70.06 [3] [d], [e]; [4] [b]). The aggregate sentence as modified is 9 to 18 years.

We have reviewed defendant's remaining contentions in his main and pro se supplemental briefs and conclude that none warrants further modification or reversal of the judgment.

Entered: July 5, 2019

Mark W. Bennett
Clerk of the Court

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

418

CA 18-02115

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

ABDUKADIR ABDULLAHI, AS ADMINISTRATOR OF THE ESTATE OF MARYAN M. ISSA, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SADASHIV S. SHENOY, M.D., ET AL., DEFENDANTS, AND KALEIDA HEALTH, DEFENDANT-RESPONDENT.

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

CONNORS LLP, BUFFALO (JOHN LOSS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered April 6, 2018. The order, among other things, granted that part of the motion of defendant Kaleida Health seeking a protective order precluding a nonparty physician from providing testimony about matters privileged under Public Health Law § 2805-m (2) and Education Law § 6527 (3).

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion insofar as it sought to preclude nonparty Robert N. Sawyer, Jr., M.D. from testifying with respect to his written report regarding his neurological examination of defendant Sadashiv S. Shenoy, M.D., and as modified the order is affirmed without costs.

Memorandum: Plaintiff appeals from an order insofar as it granted that part of the motion of defendant Kaleida Health (defendant) seeking a protective order precluding a nonparty physician (physician) from providing testimony about matters privileged under Public Health Law § 2805-m (2) and Education Law § 6527 (3). The physician previously conducted a neurological examination of defendant Sadashiv S. Shenoy, M.D. and produced a written report with his findings. There is no dispute that the physician examined Shenoy on behalf of defendant for the purpose of reviewing Shenoy's "credentials, physical and mental capacity and competence in delivering health services of all persons who are employed or associated with the hospital" (Public Health Law § 2805-j [1] [c]). The written report and the physician's testimony regarding that report and regarding the examination of Shenoy therefore fall within the statutory prohibition against disclosure (*see* § 2805-m [2]; Education Law § 6527 [3]).

We agree with plaintiff, however, that defendant waived the statutory privilege with respect to the written report and conclude that Supreme Court therefore abused its discretion by granting defendant's motion insofar as it sought to preclude the physician from testifying regarding the report. Thus, we modify the order accordingly. "Disclosure of a privileged document generally waives that privilege unless the client intended to retain the confidentiality of the printed document and took reasonable steps to prevent its disclosure" (*Baliva v State Farm Mut. Auto. Ins. Co.*, 275 AD2d 1030, 1031 [4th Dept 2000]). Here, the written report was initially disclosed by Shenoy, and not defendant, in a separate lawsuit (*Shenoy v Kaleida Health*, 162 AD3d 1703 [4th Dept 2018]). However, defendant's own later filing of the written report in that litigation, as well as its failure to take any reasonable steps to have that document filed under seal at either the trial level or on appeal in that litigation, permitted the disclosure of the written report to the public at large, i.e., to unlimited "disinterested third part[ies]" (*Little v Hicks*, 236 AD2d 794, 795 [4th Dept 1997]; *see generally Manufacturers & Traders Trust Co. v Client Server Direct, Inc.*, 156 AD3d 1364, 1365 [4th Dept 2017]). Therefore, by making its own disclosure of the written report, defendant intentionally relinquished the statutory privilege with respect to that report (*cf. Nga Le v Stea*, 286 AD2d 939, 939 [4th Dept 2001]).

Contrary to plaintiff's contention, we cannot determine on this record whether defendant waived its right to assert the statutory privilege at the physician's deposition with respect to any information that may fall within the statutory privilege but was not previously disclosed in the written report. Any dispute whether the information sought by a particular deposition question falls within the statutory privilege is not properly before this Court and should be resolved by the trial court in the first instance on a proper objection (*see generally Jousma v Kolli*, 149 AD3d 1520, 1522 [4th Dept 2017]).

Entered: July 5, 2019

Mark W. Bennett
Clerk of the Court

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

520

KA 15-01447

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARL J. FULLER, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered July 2, 2015. The judgment convicted defendant, upon a jury verdict, of criminal mischief in the third degree and resisting arrest.

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, inter alia, criminal mischief in the third degree (Penal Law § 145.05 [2]). Defendant contends that County Court erred in ruling, as part of a *Sandoval* compromise, that the People would be allowed, if defendant chose to testify, to cross-examine him fully regarding his prior felony conviction of aggravated unlicensed operation of a motor vehicle in the first degree (Vehicle and Traffic Law § 511 [3] [a] [ii]; [b]). Initially, contrary to the People's assertion, defendant's contention is preserved for our review. Defendant expressly requested, without success on the ground now advanced on appeal, a ruling that the People not be permitted to cross-examine him regarding the prior conviction, and he "is deemed to have thereby protested the court's ultimate disposition of the matter or failure to rule . . . accordingly sufficiently to raise a question of law with respect to such disposition or failure regardless of whether any actual protest thereto was registered" (CPL 470.05 [2]; *see People v Pritchard*, 149 AD3d 1479, 1479-1480 [4th Dept 2017]; *People v Lessane*, 142 AD3d 562, 563 [2d Dept 2016]). We nevertheless conclude that defendant's contention lacks merit. "The extent to which prior convictions bear on the issue of a defendant's credibility is a question entrusted to the sound discretion of the court, reviewable only for clear abuse of discretion" (*People v Williams*, 98 AD3d 1234, 1235 [4th Dept 2012], *lv denied* 21 NY3d 947 [2013] [internal quotation marks omitted]), and there was no such abuse of

discretion here (*see People v Newland*, 83 AD3d 1202, 1203 [3d Dept 2011], *lv denied* 17 NY3d 798 [2011]; *People v Pomales*, 49 AD3d 962, 964 [3d Dept 2008], *lv denied* 10 NY3d 938 [2008]; *People v Brown*, 39 AD3d 1207, 1207 [4th Dept 2007], *lv denied* 9 NY3d 921 [2007]). Defendant's additional contention that the court should have conducted an evidentiary hearing regarding his explanation for the prior conviction is not preserved for our review (*see* CPL 470.05 [2]; *People v Jackson*, 221 AD2d 254, 255 [1st Dept 1995], *lv denied* 87 NY2d 974 [1996]; *People v Henderson*, 212 AD2d 1031, 1031-1032 [4th Dept 1995], *lv denied* 86 NY2d 736 [1995]), 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]).

Finally, viewing the evidence in light of the elements of criminal mischief in the third degree 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 People v Miranda*, 119 AD3d 1421, 1421-1422 [4th Dept 2014], *lv denied* 24 NY3d 1045 [2014]; *see also People v De Chellis*, 265 AD2d 735, 735 [3d Dept 1999]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Entered: July 5, 2019

Mark W. Bennett
Clerk of the Court

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

532

CAF 18-00023

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

IN THE MATTER OF MARLYN MARTINEZ-SAROFF,
AND DAVID SAROFF, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

KYLA MARTINEZ-SAROFF, RESPONDENT-APPELLANT.

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

LAW OFFICE OF REBECCA J. TALMUD, WILLIAMSVILLE (REBECCA J. TALMUD OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

WILLIAM D. BRODERICK, JR., ELMA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered November 21, 2017 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioners custody of the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that, inter alia, granted custody of the subject child to petitioners, the child's maternal grandparents, with visitation to the mother. "It is well established that, as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of 'surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances' " (*Matter of Gary G. v Roslyn P.*, 248 AD2d 980, 981 [4th Dept 1998], quoting *Matter of Bennett v Jeffreys*, 40 NY2d 543, 544 [1976]). Here, contrary to the mother's sole contention on appeal, we conclude that Family Court properly determined that petitioners met their burden of proving the existence of extraordinary circumstances and, thus, that they had standing to seek custody of the child (*see Matter of Thomas v Armstrong*, 144 AD3d 1567, 1568 [4th Dept 2016], *lv denied* 28 NY3d 916 [2017]; *Matter of Thomas v Small*, 142 AD3d 1345, 1345 [4th Dept 2016]; *Matter of Van Dyke v Cole*, 121 AD3d 1584, 1585-1586 [4th Dept 2014]; *Matter of Braun v Decicco*, 117 AD3d 1453, 1454 [4th Dept 2014], *lv denied in part and*

dismissed in part 24 NY3d 927 [2014]).

Entered: July 5, 2019

Mark W. Bennett
Clerk of the Court

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

547

KA 18-01501

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

V MEMORANDUM AND ORDER

DAVID MANGAN, DEFENDANT-APPELLANT.

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (BRITTANY GROME ANTONACCI OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Cayuga County Court (Mark H. Fandrich, A.J.), dated May 10, 2018. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). The Board of Examiners of Sex Offenders determined that defendant was a level one risk with a total risk factor score of 30, but it recommended an upward departure to a level two risk. At the People's request, County Court assessed additional points under risk factor 7 for conduct directed at a stranger, bringing defendant to a total risk factor score of 50, still a level one risk. The court thereafter ordered an upward departure to a level two risk. We affirm.

Defendant contends that there was insufficient evidence for the court to assess points against him under risk factors 5 and 7. We disagree. The People provided clear and convincing evidence supporting an assessment of points for risk factors 5 and 7, properly relying on the case summary to show that the victim in the image of child pornography in defendant's possession was younger than the age of 10 and was a stranger to defendant (*see People v Vasquez*, 149 AD3d 1584, 1585 [4th Dept 2017], *lv denied* 29 NY3d 916 [2017]; *see generally* Correction Law § 168-n [3]; *People v Mingo*, 12 NY3d 563, 571-572 [2009]; *People v Johnson*, 11 NY3d 416, 420 [2008]).

Contrary to defendant's additional contention, we conclude that "[t]he court's discretionary upward departure [to a level two risk] was based on clear and convincing evidence of aggravating factors to a

degree not taken into account by the risk assessment instrument" (*People v McCabe*, 142 AD3d 1379, 1380 [4th Dept 2016] [internal quotation marks omitted]; *see People v Tidd*, 128 AD3d 1537, 1537 [4th Dept 2015], *lv denied* 25 NY3d 913 [2015]). In particular, the People presented evidence of defendant's contemporaneous conviction of a separate sex offense involving a police investigator posing as a minor victim, which "provides the basis for an upward departure inasmuch as it is indicative that the offender poses an increased risk to public safety" (*People v Colsrud*, 155 AD3d 1601, 1602 [4th Dept 2017] [internal quotation marks omitted]; *see People v Ryan*, 96 AD3d 1692, 1693 [4th Dept 2012], *lv denied* 20 NY3d 929 [2012]). The People also presented evidence of other aggravating factors justifying an upward departure, including defendant's interest in role-playing as a minor and his practice of having a sexual partner pretend to be a minor child during intercourse (*see People v Sczerbaniewicz*, 126 AD3d 1348, 1349 [4th Dept 2015]; *see generally People v Hands*, 37 AD3d 441, 441 [2d Dept 2007]).

To the extent that defendant established the existence of valid mitigating factors not taken into account by the risk assessment instrument, we conclude that they were plainly outweighed by the aggravating factors (*see Sczerbaniewicz*, 126 AD3d at 1349-1350).

Entered: July 5, 2019

Mark W. Bennett
Clerk of the Court

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

634

CA 19-00067

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

PAMELA A. SHATTUCK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SHIRLEY A. ANAIN, M.D., DEFENDANT-RESPONDENT.

FREID AND KLAWON, WILLIAMSVILLE (WAYNE I. FREID OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CONNORS LLP, BUFFALO (JOHN T. LOSS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered July 16, 2018. The order granted defendant's motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action alleging that she suffered serious and permanent injuries as a result of defendant's alleged medical malpractice during and following plaintiff's bilateral reduction mammoplasty. We conclude that Supreme Court properly granted defendant's motion for summary judgment dismissing the complaint.

Contrary to plaintiff's contention, defendant met her initial burden on the motion by " 'present[ing] 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' " (*Webb v Scanlon*, 133 AD3d 1385, 1386 [4th Dept 2015]; *see Macaluso v Pilcher*, 145 AD3d 1559, 1560 [4th Dept 2016]). Here, defendant submitted her own affidavit to meet her burden of proof, and we reject plaintiff's contention that the affidavit was insufficient. "A defendant physician may submit his or her own affidavit to meet that [initial] burden, but that affidavit must be 'detailed, specific and factual in nature' . . . and must 'address each of the specific factual claims of negligence raised in [the] plaintiff's bill of particulars' " (*Webb*, 133 AD3d at 1386; *see Macaluso*, 145 AD3d at 1560). Contrary to plaintiff's contention, we conclude that defendant, a board certified plastic and reconstructive surgeon, was qualified to render an opinion on post-surgical wound care (*see generally Fay v Satterly*, 158 AD3d 1220, 1221 [4th Dept 2018]; *Chipley v Stephenson*, 72 AD3d 1548, 1549 [4th Dept 2010]).

In opposition to the motion, plaintiff failed to raise a triable issue of fact. We conclude that nothing in the medical records submitted by plaintiff raised a triable issue of fact regarding defendant's alleged deviation from the standard of care. Plaintiff also submitted the affidavit of a "Registered Professional Nurse - certified as a Wound Care Specialist" in opposition to defendant's motion. Even assuming, arguendo, that a registered nurse is qualified to render a medical opinion with respect to the relevant standards of wound care (*see Carthon v Buffalo Gen. Hosp. Deaconess Skilled Nursing Facility Div.*, 83 AD3d 1404, 1405 [4th Dept 2011]; *see generally Meiselman v Crown Hgts. Hosp.*, 285 NY 389, 398-399 [1941]; *People v Rice*, 159 NY 400, 410 [1899]; *Zarnoch v Williams*, 83 AD3d 1373, 1373 [4th Dept 2011], *lv denied* 17 NY3d 708 [2011]), we conclude that the affidavit failed to establish that the affiant possessed the requisite skill, training, education, knowledge, or experience from which it can be assumed that the information or opinion in the affidavit is reliable (*see Gates v Longden*, 120 AD3d 980, 981 [4th Dept 2014]; *Daum v Auburn Mem. Hosp.*, 198 AD2d 899, 899 [4th Dept 1993]).

Entered: July 5, 2019

Mark W. Bennett
Clerk of the Court

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

642

CA 18-02148

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

JAMES M. ALLYN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

FIRST CLASS SIDING, INC., JEFFREY BISCARO, INDIVIDUALLY AND DOING BUSINESS AS FIRST CLASS ROOFING SPECIALISTS AND DOING BUSINESS AS FIRST CLASS EXTERIORS AND DOING BUSINESS AS FIRST CLASS WINDOWS, AND KATHLEEN M. RIPPEL, INDIVIDUALLY AND DOING BUSINESS AS FIRST CLASS EXTERIORS, DEFENDANTS-RESPONDENTS.

LEARNED, REILLY, LEARNED & HUGHES, LLP, ELMIRA (MATTHEW C. GAGLIARO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BRYAN J. MAGGS LAW OFFICES, PLLC, ELMIRA (BRYAN J. MAGGS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered April 27, 2018. The order denied the cross motion of plaintiff for partial summary judgment, granted the motion of defendants for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff, an employee of a roofing supplier, commenced this action to recover damages for injuries that he sustained in a forklift accident that occurred while he was delivering supplies to a prospective worksite four days before any construction work began. First Class Siding, Inc. (defendant), the contractor that bought the supplies and was to perform the work, was not yet present on the site when the accident occurred. On appeal, plaintiff contends that Supreme Court erred in granting that part of defendants' motion for summary judgment seeking dismissal of the Labor Law § 240 (1) claim against defendant. We affirm.

Defendants met their initial burden on the motion with respect to the Labor Law § 240 (1) claim against defendant by establishing that plaintiff was not " 'hired to take any part in the repair work' " (*Bagshaw v Network Serv. Mgt.*, 4 AD3d 831, 832 [4th Dept 2004]; *see generally* § 240 [1]). More particularly, the activity in which plaintiff was engaged was not " 'performed *during*' " the repair of a structure, nor was it " 'ancillary' to . . . ongoing renovation work"

(*Foots v Consolidated Bldg. Contrs., Inc.*, 119 AD3d 1324, 1325-1326 [4th Dept 2014]; *see generally Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 881 [2003]). In opposition, plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Entered: July 5, 2019

Mark W. Bennett
Clerk of the Court

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

672

KA 17-01072

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VICTOR J. GRIMES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Michael F. Pietruszka, A.J.), rendered August 16, 2016. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]). Although defendant preserved for our review his contention that the evidence is legally insufficient to establish that he committed the burglary as a principal by entering the victim's dwelling with intent to commit a crime therein, he failed to preserve his further contention that the evidence is not legally sufficient to establish his liability as an accomplice because his motion for a trial order of dismissal was not specifically directed at that alleged insufficiency (*see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Goodrum*, 72 AD3d 1639, 1639 [4th Dept 2010], *lv denied* 15 NY3d 773 [2010]). In any event, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to establish defendant's liability as an accomplice inasmuch as there is " 'a valid line of reasoning and permissible inferences from which a rational jury' " could have found that defendant intentionally aided another in the conduct constituting the offense while acting with the mental culpability required for the commission of the crime (*People v Danielson*, 9 NY3d 342, 349 [2007]; *see* § 20.00; *People v Murray*, 221 AD2d 930, 930 [4th Dept 1995], *lv denied* 87 NY2d 905 [1995]; *People v Poppel*, 143 AD2d 854, 854 [2d Dept 1988]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Furthermore, viewing the evidence in light of the elements of the crime as charged to the jury (*see Danielson*, 9 NY3d at 349), we reject defendant's contention that the

verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

As defendant contends and the People correctly concede, however, reversal is required as a result of " 'the absence of record proof that the trial court complied with its [meaningful notice obligation] under CPL 310.30' " in response to two substantive jury notes (*People v Morrison*, 32 NY3d 951, 952 [2018]; *see People v Parker*, 32 NY3d 49, 60-61 [2018]). Here, the stenographer was unable to transcribe the final day of the trial that included County Court's handling of the jury notes due to an error that rendered the subject electronic stenographic notes unrecoverable, and a reconstruction hearing failed to establish the court's on-the-record handling of those notes. We "cannot assume that the proper procedure was utilized when the record is devoid of information as to how jury notes were handled" (*People v Silva*, 24 NY3d 294, 300 [2014], *rearg denied* 24 NY3d 1216 [2015] [internal quotation marks omitted]; *see Parker*, 32 NY3d at 60). We therefore reverse the judgment and grant a new trial. In light of our determination, defendant's challenge to the propriety of holding a reconstruction hearing under these circumstances is moot, and we reject defendant's contention that his challenge falls within the exception to the mootness doctrine (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Finally, given our determination, we do not address defendant's challenge to the severity of the sentence.

Entered: July 5, 2019

Mark W. Bennett
Clerk of the Court

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

763

CA 18-01447

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

IN THE MATTER OF JAMES S. LAGO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KEVIN M. WELLS, SHERIFF, ST. LAWRENCE COUNTY,
AND ANTHONY ANNUCCI, ACTING COMMISSIONER,
NEW YORK STATE DEPARTMENT OF CORRECTIONS AND
COMMUNITY SUPERVISION, RESPONDENTS-RESPONDENTS.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT-RESPONDENT ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION.

SUGARMAN LAW FIRM, LLP, SYRACUSE (CORY J. SCHOONMAKER OF COUNSEL), FOR RESPONDENT-RESPONDENT KEVIN M. WELLS, SHERIFF, ST. LAWRENCE COUNTY.

Appeal from a judgment (denominated order) of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered July 13, 2018 in a CPLR article 78 proceeding. The judgment dismissed the petition.

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

Memorandum: In this CPLR article 78 proceeding challenging the calculation of his prison sentence, petitioner appeals from a judgment dismissing his petition. Petitioner was convicted of several felony offenses in 2008 and 2010 and was sentenced to an aggregate maximum prison term of nine years. Following his release to parole supervision, petitioner was charged with a new felony offense and was held in a local jail during the pendency of that action. In 2016, petitioner was convicted of the new felony and was sentenced, as a second felony offender, to a prison term of 3½ to 7 years, to run consecutively to the undischarged sentence (*see* Penal Law § 70.25 [2-a]). The St. Lawrence County Sheriff and the Department of Corrections and Community Supervision applied to petitioner's undischarged sentence a jail time credit for a period of approximately three months that petitioner spent in the local jail during the pendency of the 2016 action and after he was restored to parole supervision. Petitioner contends that Supreme Court erred in dismissing the petition because that time was improperly credited

against the undischarged parole sentence rather than the 2016 sentence. We affirm.

As a preliminary matter we note that, contrary to the contention of respondent Kevin M. Wells, Sheriff, St. Lawrence County, petitioner's appeal is properly taken as of right because the proceeding below culminated in a judgment (*see* CPLR 411, 5701 [a] [1]; 7806).

A person is prohibited from receiving jail time credit against a subsequent sentence when such credit has already been applied against the maximum term of a previously imposed sentence to which that person is subject (*see* Penal Law § 70.30 [3]; *Matter of Graham v Walsh*, 108 AD3d 1230, 1230 [4th Dept 2013]). Petitioner contends that the credit cannot be applied against his prior sentence because he is no longer incarcerated on that sentence. We reject that contention. A person continues to serve his or her sentence while on parole (§ 70.40 [1] [a]). Moreover, a person who is on parole remains on parole even when that person is incarcerated in a local jail (*see People ex rel. Hayes v New York State Dept. of Correctional Servs.*, 78 AD3d 1591, 1592 [4th Dept 2010], *lv denied* 16 NY3d 705 [2011]). Here, the jail time credit was properly applied to reduce petitioner's undischarged sentence of parole, which had resumed running (*see* Penal Law § 70.30 [3]), and "that time period may not also be credited to the [2016] sentence" (*Matter of Maldonado v Howard*, 148 AD3d 1501, 1502 [3d Dept 2017], *lv denied* 29 NY3d 916 [2017]).

Entered: July 5, 2019

Mark W. Bennett
Clerk of the Court