SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

FEBRUARY 7, 2020

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

565

CA 18-00009

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

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

V MEMORANDUM AND ORDER

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

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

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

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered November 21, 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: In appeal No. 1, respondent appeals from an order pursuant to Mental Hygiene Law article 10 in which Supreme Court determined, upon respondent's admission, that he has a mental abnormality that predisposes him to commit sex offenses (*see* § 10.03 [i]) and, after a dispositional hearing, directed that he be committed to a secure treatment facility. In appeal No. 2, respondent appeals from an order of the same court that denied his pro se motion pursuant to CPLR 4404 and 5015 for judgment as a matter of law.

Initially, we note that the appeal from the final order in appeal No. 1 brings up for review the propriety of the order in appeal No. 2 insofar as it denied that part of respondent's motion pursuant to CPLR 4404 (*see* CPLR 5501 [a]; *see generally Matter of White v Byrd-McGuire*, 163 AD3d 1413, 1413-1414 [4th Dept 2018]). We further note that, inasmuch as respondent has not raised on appeal any issues with respect to the denial of that part of his motion pursuant to CPLR 5015, he has abandoned any contentions with respect thereto. We therefore dismiss the appeal from the order in appeal No. 2 (*see generally* CPLR 5501 [a]; *White*, 163 AD3d at 1413-1414; *Abasciano v Dandrea*, 83 AD3d 1542, 1545 [4th Dept 2011]).

Respondent's contention regarding the sufficiency of the evidence presented at the probable cause hearing is not properly before us

because no appeal lies from the order finding probable cause (*see Matter of State of New York v Stein*, 85 AD3d 1646, 1648 [4th Dept 2011], *affd* 20 NY3d 99 [2012], *cert denied* 568 US 1216 [2013]). Additionally, respondent waived his contention that a delay in holding the probable cause hearing violated his due process rights; respondent consented to that delay, which arose from his request for a change of venue (*see* Mental Hygiene Law § 10.06 [g]).

Respondent failed to preserve for our review his contention that he was denied due process because a jury trial was not held within 60 days of the probable cause hearing (*see Matter of State of New York v Trombley*, 98 AD3d 1300, 1302 [4th Dept 2012], *lv denied* 20 NY3d 856 [2013]).

We also reject respondent's contention that the court erred in denying his request to withdraw his waiver of the right to a jury trial on the issue whether he suffered 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]). The record establishes that the court conducted an on-the-record colloquy with respondent to determine that respondent, after an opportunity to consult with his attorney, was knowingly and voluntarily waiving his right to a jury trial (*see Matter of State of New York v Leslie L.*, 174 AD3d 1326, 1328 [4th Dept 2019], *lv denied* 34 NY3d 903 [2019]; *Clyde J.*, 141 AD3d at 723-724). Contrary to respondent's contention, the court's colloquy did not suggest that there was a predetermined outcome on the issue of mental abnormality, and indeed the court explained respondent's right to challenge that issue before a jury. We reject respondent's further contention that the court improperly induced him to waive his right to a jury trial and admit to a mental abnormality by denying his request for an adjournment for the purpose of obtaining an evaluation by a second expert. Although the Mental Hygiene Law allows a respondent to be examined by a psychiatric examiner of his or her choice, the statute does not contemplate serial examinations (*see* § 10.06 [e]) and, in any event, the court did not abuse its discretion in denying respondent's request for an adjournment on the eve of trial to secure an additional opinion (*see generally People v Maynard*, 30 AD3d 317, 318 [1st Dept 2006], *lv denied* 7 NY3d 815 [2006]; *People v Palmer*, 278 AD2d 821, 822 [4th Dept 2000], *lv denied* 96 NY2d 786 [2001]). We also reject respondent's contention that the court failed to conduct a sufficient inquiry into his alleged issues with counsel prior to accepting his waiver of the right to a jury trial. Under the circumstances presented here, respondent's assertions that he and his attorney disagreed on strategy and that his attorney had not spoken to him often enough were "insufficient to require any inquiry by the court" (*People v Barnes*, 156 AD3d 1417, 1418 [4th Dept 2017], *lv denied* 31 NY3d 1078 [2018]). We likewise reject respondent's contention that the court improperly denied his request to withdraw his waiver based on the allegedly ineffective assistance provided by counsel in connection with the waiver and admission to a mental abnormality. The record does not support respondent's contention that counsel was unprepared; rather, counsel properly presented multiple arguments through pretrial motions, and respondent failed to "demonstrate the

absence of strategic or other legitimate explanations" for counsel's decision not to present additional pretrial motions (*Matter of State of New York v Carter*, 100 AD3d 1438, 1439 [4th Dept 2012] [internal quotation marks omitted]).

We agree with respondent that the court erred in admitting in evidence during the dispositional hearing certain hearsay testimony regarding uncharged conduct with respect to which respondent did not admit his guilt (*see Matter of State of New York v John S.*, 23 NY3d 326, 343 [2014], *rearg denied* 24 NY3d 933 [2014]; *Matter of State of New York v Floyd Y.*, 22 NY3d 95, 109 [2013]). Nonetheless, we conclude that the error was harmless because "[t]he State's case against respondent rested primarily on admissible evidence; particularly, expert basis testimony about [crimes for which respondent was convicted or to which he admitted] . . . , and his refusal to participate in sex offender treatment while in prison" (*John S.*, 23 NY3d at 348; *see Matter of State of New York v Charada T.*, 23 NY3d 355, 362 [2014]; *Matter of State of New York v Fox*, 79 AD3d 1782, 1784 [4th Dept 2010]).

We reject respondent's further contention that petitioner failed to prove by clear and convincing evidence that he is a dangerous sex offender requiring confinement. The court's determination following the dispositional phase of the proceedings is supported by the written opinions and testimony of two experts (*see Matter of State of New York v Pierce*, 79 AD3d 1779, 1781-1782 [4th Dept 2010], *lv denied* 16 NY3d 712 [2011]).

For the reasons stated above with respect to respondent's challenge to the propriety of his admission to a mental abnormality, we likewise reject respondent's contention that the court erred in denying that part of his motion pursuant to CPLR 4404.

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

566

CA 18-01059

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

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

V MEMORANDUM AND ORDER

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

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

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

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), dated April 17, 2018 in a proceeding pursuant to Mental Hygiene Law article 10. The order denied respondent's motion pursuant to CPLR 4404 and CPLR 5015.

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

Same memorandum as in *Matter of State of New York v Daniel J.* ([appeal No. 1] — AD3d — [Feb. 7, 2020] [4th Dept 2020]).

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

832

CA 18-02363

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

CYNTHIA SMITH EDWARDS, INDIVIDUALLY,
AND AS ADMINISTRATRIX OF THE ESTATE OF
DAVID EDWARDS, JR., DECEASED,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DAVID MYERS, ERIE COUNTY MEDICAL CENTER
CORPORATION, DEFENDANTS-RESPONDENTS,
AMY KORTMAN, ET AL., DEFENDANTS.

SILBERSTEIN, AWAD & MIKLOS, PC, GARDEN CITY, POLLACK, POLLACK, ISAAC & DECICCO, LLP, NEW YORK CITY (CHRISTOPHER SOVEROW OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR DEFENDANT-RESPONDENT DAVID MYERS.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (JOHN P. DANIEU OF COUNSEL), FOR DEFENDANT-RESPONDENT ERIE COUNTY MEDICAL CENTER CORPORATION.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered May 30, 2018. The order granted that part of the motion of defendants Erie County Medical Center Corporation and Amy Kortman seeking summary judgment dismissing the complaint and all cross claims against defendant Erie County Medical Center Corporation and granted the motion of defendant David Myers seeking summary judgment dismissing the amended complaint and all cross claims against him.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion of defendants Erie County Medical Center Corporation and Amy Kortman is denied in part and the complaint and any cross claims are reinstated against Erie County Medical Center Corporation, and the motion of defendant David Myers is denied and the amended complaint and any cross claims are reinstated against him.

Memorandum: Plaintiff commenced an action against defendant Erie County Medical Center Corporation (ECMC) and a separate action against, among others, defendant David Myers and defendant Amy Kortman, seeking damages for, inter alia, medical malpractice and wrongful death arising from the death of her husband (decedent).

After the two actions were consolidated, ECMC and Kortman moved for summary judgment dismissing the complaint against ECMC, the amended complaint against Kortman, and any cross claims against them. Myers moved for summary judgment dismissing the amended complaint and any cross claims against himself. Plaintiff now appeals from an order that granted in part the motion of ECMC and Kortman and dismissed the complaint and any cross claims against ECMC, and granted the motion of Myers and dismissed the amended complaint and any cross claims against him. Plaintiff did not appeal from a separate order that, inter alia, granted that part of the motion of ECMC and Kortman seeking to dismiss the amended complaint and any cross claims against Kortman.

This case arises from the events occurring when decedent presented at ECMC for arthroscopic shoulder surgery. Decedent's surgery was canceled after Kortman, who was a nurse employed by ECMC, and Myers, an anesthesiologist, were unable to intubate decedent. Decedent was subsequently discharged from ECMC. He returned a few hours later with difficulty breathing and angioedema of the neck and tongue, and an emergency tracheostomy was performed. Decedent, however, sustained a hypoxic anoxic brain injury and remained in the hospital for over one month before he suffered acute respiratory failure and died.

Plaintiff contends that Supreme Court erred in granting the motion of ECMC and Kortman with respect to ECMC and in granting Myers' motion. We agree. On a motion for summary judgment, " 'a defendant in a medical malpractice action bears the initial burden of establishing either that there was no deviation or departure from the applicable standard of care or that any alleged departure did not proximately cause the plaintiff's injuries' " (*Kubera v Bartholomew*, 167 AD3d 1477, 1479 [4th Dept 2018]). To meet that burden, a defendant must submit in admissible form "factual proof, generally consisting of affidavits, deposition testimony and medical records, to rebut the claim of malpractice by establishing that [the defendant] complied with the accepted standard of care or did not cause any injury to the patient" (*Groff v Kaleida Health*, 161 AD3d 1518, 1520 [4th Dept 2018] [internal quotation marks omitted]; *see Cole v Champlain Val. Physicians' Hosp. Med. Ctr.*, 116 AD3d 1283, 1285 [3d Dept 2014]). The defendant must "address each of the specific factual claims of negligence raised in the plaintiff's bill of particulars" (*Wulbrecht v Jehle*, 89 AD3d 1470, 1471 [4th Dept 2011] [internal quotation marks omitted]; *see Groff*, 161 AD3d at 1521-1522; *Larsen v Banwar*, 70 AD3d 1337, 1338 [4th Dept 2010]).

Contrary to plaintiff's contention, the submissions in support of the motions of ECMC and Kortman and Myers (collectively, defendants), which included medical records, deposition testimony, and expert affidavits, "established their prima facie entitlement to judgment as a matter of law by . . . demonstrating that [ECMC and Myers] did not deviate or depart from accepted medical practice or proximately cause [decedent's] injuries" (*Quille v New York City Health & Hosp. Corp.*, 152 AD3d 808, 809 [2d Dept 2017]). The affidavits of defendants' experts were "detailed, specific and factual in nature and [did] not

assert in simple conclusory form that [ECMC and Myers] acted within the accepted standards of medical care" (*Toomey v Adirondack Surgical Assoc.*, 280 AD2d 754, 755 [3d Dept 2001]; *cf. Wulbrecht*, 89 AD3d at 1471). Thus, the burden shifted to plaintiff to " 'submit evidentiary facts or materials to rebut the prima facie showing by the defendant[s] . . . that [ECMC and Myers were] not negligent in treating [decedent] so as to demonstrate the existence of a triable issue of fact' " (*Moyer v Roy*, 152 AD3d 1188, 1189 [4th Dept 2017], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

We agree with plaintiff that she raised a triable issue of fact in opposition to defendants' motions. Contrary to the contention of ECMC and Myers, the affidavit of plaintiff's expert should not be deemed inadmissable on the ground that it failed to comply with CPLR 2309 (c), inasmuch as "such a defect is not fatal, and no substantial right of [defendants] was prejudiced" (*Voskoboinyk v Trebisovsky*, 154 AD3d 997, 998 [2d Dept 2017]). With respect to the merits, plaintiff's expert anesthesiologist opined that, based on, inter alia, decedent's baseline oxygen saturation, his oxygen saturation at the time of discharge from ECMC, and decedent's personal risk factors, ECMC and Myers deviated from the appropriate standard of care by discharging decedent. Plaintiff's expert anesthesiologist further opined that the deviation from the standard of care proximately caused the decedent's death because decedent's hypoxic event could have been avoided had decedent not been discharged because he would have received a more timely tracheostomy. Thus, we conclude that " '[t]he conflicting opinions of the experts for plaintiff and defendant[s] with respect to . . . [ECMC's and Myers'] alleged deviation[s] from the accepted standard of medical care, present credibility issues that cannot be resolved on a motion for summary judgment' " (*Lamb v Stephen M. Baker, O.D., P.C.*, 152 AD3d 1230, 1230 [4th Dept 2017]).

Finally, ECMC correctly concedes that an issue of fact exists whether Myers was its employee and thus whether ECMC may be held vicariously liable for Myers' conduct (*see generally Keesler v Small*, 140 AD3d 1021, 1022 [2d Dept 2016]).

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

1007

CA 19-00526

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

TAMRA A. CARROLL, PLAINTIFF,

V MEMORANDUM AND ORDER

WILLOW BEND FARM LLC, KENNETH R. KUPERUS,
DEFENDANTS-APPELLANTS,
AND SUSAN L. KRULL, AS ADMINISTRATRIX OF THE
ESTATE OF JACK MOSES BAKER, DECEASED,
DEFENDANT-RESPONDENT.

COUGHLIN & GERHART, LLP, BINGHAMTON (CAROLINE L. MYRDEK OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WHITEMAN OSTERMAN & HANNA LLP, ALBANY (TARA MACNEILL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered September 4, 2018. The order, insofar as appealed from, granted that part of the motion of defendant Susan L. Krull, as administratrix of the Estate of Jack Moses Baker for summary judgment dismissing the cross claim asserted against her.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, that part of the motion seeking summary judgment dismissing the cross claim of defendants Willow Bend Farm LLC and Kenneth R. Kuperus is denied and that cross claim is reinstated.

Memorandum: This appeal arises out of a collision that occurred when a dump truck owned by defendant Willow Bend Farm LLC and operated by defendant Kenneth R. Kuperus (collectively, Willow Bend defendants) was traveling northbound on Darby's Corners Road through an intersection and was struck by a motorcycle operated by Jack Moses Baker that was traveling westbound on Italy Hill Road. The intersection where the collision occurred was controlled by a stop sign on Darby's Corners Road. Plaintiff was a passenger on the motorcycle, and she and Baker sustained injuries in the collision. Plaintiff brought an action against Baker and the Willow Bend defendants, alleging that her injuries were caused by their negligence, and the Willow Bend defendants asserted a cross claim against Baker for indemnification and contribution. Baker died during the litigation and was substituted by defendant Susan L. Krull, as administratrix of his estate (Baker Estate). The Baker Estate moved for summary judgment dismissing the complaint and all cross claims

against it. Supreme Court granted the motion and the Willow Bend defendants appeal.

We agree with the Willow Bend defendants that the court erred in granting that part of the motion seeking summary judgment dismissing the Willow Bend defendants' cross claim. In moving for summary judgment, the Baker Estate had the initial burden of establishing, as a matter of law, that Baker "was operating [the motorcycle] in a lawful and prudent manner and that there was nothing that [Baker] could have done to avoid the collision" (*Cooley v Urban*, 1 AD3d 900, 901 [4th Dept 2003] [internal quotation marks omitted]; *see generally Deering v Deering*, 134 AD3d 1497, 1499 [4th Dept 2015]). "[I]t is well settled that drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident" (*Deering*, 134 AD3d at 1499 [internal quotation marks omitted]). "[U]nder the doctrine of comparative negligence, a driver who lawfully enters an intersection may still be found partially at fault for an accident if he or she fails to use reasonable care to avoid a collision with another vehicle in the intersection" (*Nevarez v S.R.M. Mgt. Corp.*, 58 AD3d 295, 298 [1st Dept 2008] [internal quotation marks omitted]; *see Gilkerson v Buck*, 167 AD3d 1470, 1471-1472 [4th Dept 2018]). We conclude that the Baker Estate failed to meet that burden, inasmuch as its own submissions in support of the motion raised a triable issue of fact (*see Deering*, 134 AD3d at 1498).

Although the Baker Estate established that Baker had the right-of-way as he approached the intersection, the Baker Estate submitted the deposition testimony of Baker and plaintiff, who each testified that, before the collision, Baker applied his brakes but did not attempt to steer around the dump truck. Baker further testified that he did not use his horn. Viewed in the light most favorable to the Willow Bend defendants, that testimony raises an issue of fact whether Baker exercised reasonable care under the circumstances to avoid an accident (*see Pagels v Mullen*, 167 AD3d 185, 188-189 [4th Dept 2018]; *Luttrell v Vega*, 162 AD3d 1637, 1637-1638 [4th Dept 2018]; *Cooley*, 1 AD3d at 901).

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

1016

KA 19-00924

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

GILBERTO NAZARIO, DEFENDANT-RESPONDENT.

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

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ERIN A. KULESUS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), dated February 19, 2019. The order granted those parts of defendant's omnibus motion seeking to suppress the physical evidence seized, the statements allegedly made by him and the identifications of him.

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

Memorandum: The People appeal from an order granting those parts of defendant's omnibus motion seeking to suppress physical evidence, statements, and identifications on the ground that the police lacked the requisite justification for detaining defendant, searching his bag, and transporting him to the scene of the crime for a showup identification procedure (*see generally People v De Bour*, 40 NY2d 210, 222-223 [1976]). We affirm.

The evidence at the suppression hearing established that the officer who initiated the encounter with defendant was responding to a radio dispatch of a burglary in progress. Because other officers were already at the scene of the burglary when he arrived, the officer canvassed the nearby area in his patrol car. Shortly thereafter, the officer noticed defendant three blocks from the burglary scene, walking alone and carrying a bag and a cell phone. The officer approached defendant, exited his vehicle, and asked defendant what he was doing, and defendant stated that he was looking through garbage cans. The officer then searched defendant's bag in order to check for weapons and informed defendant that he was going to drive defendant back to the scene of the burglary in order to determine whether defendant was a suspect. The officer placed defendant in the back of the patrol car and drove him to the scene of the crime, where a showup identification was conducted and defendant was identified as the

burglar and arrested. The evidence also established that, prior to beginning his shift on the day of the encounter, the officer received a "be on the lookout" (BOLO) photograph depicting defendant and reflecting that defendant may have been involved in a prior burglary.

Contrary to the People's contention, we perceive no basis in the record for disturbing the court's finding that the officer did not recognize defendant as the individual depicted in the BOLO until after he drove defendant to the scene of the burglary for the showup identification (*see generally People v Fletcher*, 130 AD3d 1063, 1064 [2d Dept 2015], *affd* 27 NY3d 1177 [2016]; *People v Jemison*, 158 AD3d 1310, 1310-1311 [4th Dept 2018], *lv denied* 31 NY3d 1083 [2018]), and therefore the information in the BOLO cannot be used to justify the officer's conduct.

We conclude that the court properly determined that the officer was not justified in searching defendant's bag or in detaining him and transporting him to the scene of the burglary. Although the officer justified the search of defendant's bag as a check for weapons, the record does not reflect that, at any time during the encounter, the officer "reasonably suspected that defendant was armed and posed a threat to [his] safety" (*People v Solivan*, 156 AD3d 1434, 1435 [4th Dept 2017] [internal quotation marks omitted]; *see generally People v Nichols*, 117 AD3d 881, 881-882 [2d Dept 2014]). Further, all the officer could definitively recall of the initial radio dispatch reporting the burglary in progress was that it described the suspect as a male, although the officer also testified that the dispatch might have identified the suspect as Hispanic and wearing a dark hooded sweatshirt. The vague description of the suspect provided by the radio dispatch, as recounted by the officer at the suppression hearing, did not provide the officer with the requisite reasonable suspicion to effect what was at least a forcible detention of defendant and to transport him to take part in a showup identification (*see People v Jones*, 174 AD3d 1532, 1533-1534 [4th Dept 2019], *lv denied* 34 NY3d 982 [2019]; *People v Riddick*, 269 AD2d 471, 471 [2d Dept 2000]; *see generally People v Balkum*, 71 AD3d 1594, 1595-1596 [4th Dept 2010], *lv denied* 14 NY3d 885 [2010]).

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

1077

KA 18-00757

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARION THOMPSON, DEFENDANT-APPELLANT.

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

TODD J. CASELLA, DISTRICT ATTORNEY, PENN YAN (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (Jason L. Cook, J.), rendered December 5, 2017. The judgment convicted defendant upon his plea of guilty of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of, inter alia, criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). Contrary to defendant's contention, County Court "adequately apprised defendant that 'the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Saddler*, 155 AD3d 1679, 1680 [4th Dept 2017], *lv denied* 30 NY3d 1108 [2018], quoting *People v Lopez*, 6 NY3d 248, 256 [2006]). Defendant's waiver of the right to appeal encompasses his challenge to the severity of his sentence (*see Lopez*, 6 NY3d at 255-256).

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

1081

KA 16-01581

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHANE M. BENNETT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Ontario County (Craig J. Doran, J.), rendered July 25, 2016. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (six counts), criminal possession of a weapon in the third degree (10 counts) and criminal possession of marihuana in the fourth degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Ontario County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of six counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [2], [3]), 10 counts of criminal possession of a weapon in the third degree (§ 265.02 [8]), and one count of criminal possession of marihuana in the fourth degree (§ 221.15).

We conclude that Supreme Court properly refused to suppress statements defendant made to the police after his arrest. Contrary to defendant's contention, the court did not err in crediting the suppression hearing testimony of the police officer who issued *Miranda* warnings to defendant because of the officer's inability to recall certain details about the morning in question, such as what he first said to defendant during the encounter or whether his patrol vehicle's dome light was illuminated at that time. Although the officer's inability to recall certain details about the encounter is a factor to consider in determining his credibility, we conclude that there is "no basis to disturb the court's credibility assessments of the officer[] inasmuch as [n]othing about the officer[']s testimony was unbelievable as a matter of law, manifestly untrue, physically impossible, contrary to experience, or self contradictory" (*People v Clanton*, 151 AD3d 1576, 1577 [4th Dept 2017] [internal quotation marks omitted]; *see People v Walker*, 128 AD3d 1499, 1500 [4th Dept 2015], *lv denied* 26

NY3d 936 [2015]).

Defendant further contends that the evidence is legally insufficient to support the conviction with respect to the weapon possession counts and that the court thus erred in denying his motion for a trial order of dismissal. At the close of the People's case, defendant moved for a trial order of dismissal on the ground that the evidence was legally insufficient to establish his possession of certain weapons, and the court reserved decision. Defendant renewed his motion at the conclusion of all the evidence, and the court again reserved decision. There is no indication in the record that the court ruled on defendant's motion. We do not address defendant's contention because, "in accordance with *People v Concepcion* (17 NY3d 192, 197-198 [2011]) and *People v LaFontaine* (92 NY2d 470, 474 [1998], *rearg denied* 93 NY2d 849 [1999]), we cannot deem the court's failure to rule on the . . . motion as a denial thereof" (*People v Moore*, 147 AD3d 1548, 1548 [4th Dept 2017] [internal quotation marks omitted]; *see People v White*, 134 AD3d 1414, 1415 [4th Dept 2015]; *see generally People v Spratley*, 96 AD3d 1420, 1421 [4th Dept 2012]). We therefore hold the case, reserve decision, and remit the matter to Supreme Court for a ruling on defendant's motion (*see Moore*, 147 AD3d at 1548; *White*, 134 AD3d at 1415).

Finally, we note—as the People correctly concede—that the indeterminate term of incarceration imposed on the criminal possession of a weapon in the third degree counts is illegal (*see* Penal Law §§ 70.02 [1] [c]; 265.02 [8]; *People v Goston*, 9 AD3d 905, 907 [4th Dept 2004], *lv denied* 3 NY3d 706 [2004]).

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

1144

CA 19-00210

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

KERRIN CONKLIN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STACY LAXEN, DVM, AND BOARD OF DIRECTORS OF THE CENTRAL NEW YORK SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, INDIVIDUALLY, AND AS AGENTS AND SERVANTS, OF AND DOING BUSINESS AS THE CENTRAL NEW YORK SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS (CNYSPCA), DEFENDANTS-RESPONDENTS.

COTE & VAN DYKE, LLP, SYRACUSE (JOSEPH S. COTE, III, OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARCLAY DAMON LLP, SYRACUSE (ROBERT J. THORPE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered August 10, 2018. The order, among other things, granted defendants' motion insofar as it sought to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the causes of action for tortious interference with employment and defamation against defendant Stacy Laxen, DVM, and vacating the second sentence of the ordering paragraph, and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following memorandum: Plaintiff commenced this action to recover damages for tortious interference with employment, defamation, and intentional infliction of emotional distress (IIED). According to the complaint, at all times relevant to this appeal, plaintiff was the Executive Director of the Central New York Society for the Prevention of Cruelty to Animals (CNYSPCA) and defendant Stacy Laxen, DVM was a veterinarian for the CNYSPCA. During her tenure with the CNYSPCA, plaintiff directed that several cats be euthanized due to an outbreak of ringworm. Soon thereafter, and based on plaintiff's decision to approve euthanasia without input from a veterinarian, defendant Board of Directors of the CNYSPCA terminated plaintiff's employment. Plaintiff appeals from an order that, inter alia, granted defendants' motion insofar as it sought to dismiss the complaint against Laxen.

On this motion to dismiss, we accept the facts alleged in the complaint as true and accord plaintiff the benefit of every possible favorable inference (*see J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013]). "Whether the plaintiff 'can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss' " (*id.*).

We agree with plaintiff that Supreme Court erred in granting the motion with respect to the tortious interference with employment cause of action against Laxen, and we therefore modify the order accordingly. "[A]n at-will employee may assert a cause of action alleging tortious interference with employment where he or she can demonstrate that the defendant utilized wrongful means to effect his or her termination . . . In such cases, the plaintiff is required to show: (1) the existence of a business relationship between the plaintiff and a third party; (2) the defendants' interference with that business relationship; (3) that the defendants acted with the sole purpose of harming plaintiff or used dishonest, unfair, improper or illegal means that amounted to a crime or an independent tort; and (4) that such acts resulted in the injury to the plaintiff's relationship with the third party" (*McHenry v Lawrence*, 66 AD3d 650, 651 [2d Dept 2009], *lv denied* 15 NY3d 703 [2010] [internal quotation marks omitted]). "[I]n order for a claim of tortious interference with an employment relationship to lie, it must be alleged that defendant coemployees acted outside the scope of their authority" (*Marino v Vunk*, 39 AD3d 339, 340 [1st Dept 2007]). Here, we conclude that the complaint sufficiently alleged that Laxen was acting outside the scope of her duties as an employee or agent of the CNYSPCA. Specifically, the complaint alleged, inter alia, that Laxen worked to interfere with plaintiff's business relationship with the CNYSPCA for the purpose of maliciously injuring plaintiff and insulating herself from repercussions for her own misconduct and veterinary malpractice (*cf. McHenry*, 66 AD3d at 652). The complaint also sufficiently alleged that Laxen made statements regarding plaintiff that amounted to an independent tort, i.e., defamation (*see generally Carvel Corp. v Noonan*, 3 NY3d 182, 190 [2004]; *Sprecher v Thibodeau*, 148 AD3d 654, 656 [1st Dept 2017]; *Stapleton Studios, LLC v City of New York*, 26 AD3d 236, 237 [1st Dept 2006]).

We further agree with plaintiff that the court erred in granting the motion with respect to the defamation cause of action against Laxen, and we therefore further modify the order accordingly. It is well established that " '[t]he elements of a cause of action for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se' " (*D'Amico v Correctional Med. Care, Inc.*, 120 AD3d 956, 962 [4th Dept 2014]). "A plaintiff in a defamation action must allege that he or she suffered special damages—the loss of something having economic or pecuniary value . . . , unless the defamatory statement falls within one of the four per se exceptions, which consist of statements (i) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that plaintiff has a loathsome disease;

or (iv) imputing unchastity to a woman" (*Spring v County of Monroe*, 151 AD3d 1694, 1696-1697 [4th Dept 2017] [internal quotation marks omitted]). Here, we conclude that plaintiff sufficiently alleged that Laxen's statements constituted defamation per se inasmuch as they purportedly injured plaintiff in her "professional standing" (*id*. at 1697). Furthermore, despite the court's determination that plaintiff was a limited purpose public figure and Laxen was protected by the common interest qualified privilege, accepting the facts as alleged in the complaint as true, and according plaintiff the benefit of every possible favorable inference, we conclude that the complaint sufficiently alleged that Laxen acted with the requisite malice necessary to overcome those defenses (*see Ferrara v Bank*, 153 AD3d 671, 673 [2d Dept 2017]; *Kondo-Dresser v Buffalo Pub. Schools*, 17 AD3d 1114, 1115 [4th Dept 2005]; *cf. Kipper v NYP Holdings Co., Inc*., 47 AD3d 597, 597 [1st Dept 2008], *affd* 12 NY3d 348 [2009]).

We further agree with plaintiff that the court erred in concluding that the alleged defamatory comments were not actionable inasmuch as they were statements of opinion. "While a pure opinion cannot be the subject of a defamation claim, an opinion that implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, . . . is a mixed opinion and is actionable" (*Davis v Boeheim*, 24 NY3d 262, 269 [2014] [internal quotation marks omitted]). "What differentiates an actionable mixed opinion from a privileged, pure opinion is 'the implication that the speaker knows certain facts, unknown to [the] audience, which support [the speaker's] opinion and are detrimental to the person' being discussed" (*id.*). Here, at this early stage of the litigation, we cannot state as a matter of law that the allegedly defamatory statements are pure opinion (*see id*. at 274).

To the extent that Laxen and the court relied on CPLR 3211 (a) (1) in evaluating the exhibits attached to plaintiff's complaint, we agree with plaintiff that the court erred in relying on those exhibits to conclude that they established that Laxen's statements were true as a matter of law. "[I]nasmuch as truth is an absolute defense to an action based on defamation, 'documentary evidence' may . . . be offered to establish that the allegedly defamatory statement is substantially true" (*Greenberg v Spitzer*, 155 AD3d 27, 45 [2d Dept 2017]). "In this context, however, if the 'documentary evidence' is submitted specifically to establish the truth of its contents, it must be of such nature and reliability as to be 'essentially undeniable' . . . and must 'utterly refute[ ]' . . . the plaintiff's factual allegation that the allegedly defamatory statement is false. This is an exacting standard, which is not easily met at the pre-answer stage" (*id.* at 45-46). Here, we cannot conclude that the exhibits utterly refuted plaintiff's factual allegations that Laxen's allegedly defamatory statements were false.

Contrary to plaintiff's final contention, the court properly dismissed the IIED cause of action against Laxen. "The tort [of IIED] has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and

injury; and (iv) severe emotional distress" (*Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]). Here, even accepting plaintiff's allegations as true and granting her every possible favorable inference, we conclude that the alleged conduct of Laxen cannot be deemed "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 56 [2016] [internal quotation marks omitted]).

We note that the court, in light of its dismissal of the complaint against Laxen, denied as moot defendants' motion insofar as it sought to strike all scandalous and prejudicial matter from the complaint. In view of our decision herein, however, the motion insofar as it sought that relief is no longer moot. Thus, we further modify the order by vacating the second sentence of the ordering paragraph, and we remit the matter to Supreme Court to determine the motion to that extent (*see generally Weiss v Zellar Homes, Ltd.*, 169 AD3d 1491, 1495 [4th Dept 2019]).

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

1152

KA 17-01341

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LESLIE A. FINCH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cattaraugus County Court (M. William Boller, A.J.), rendered February 3, 2017. The judgment convicted defendant upon a nonjury verdict of manslaughter in the first degree, manslaughter in the second degree, reckless assault of a child, assault in the second degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting her following a nonjury trial of manslaughter in the first degree (Penal Law § 125.20 [4]), manslaughter in the second degree (§ 125.15 [1]), reckless assault of a child (§ 120.02 [1]), assault in the second degree (§ 120.05 [8]), and endangering the welfare of a child (§ 260.10 [1]), arising from the death of her one-year-old daughter.

With respect to defendant's contention that she did not validly waive the right to a jury trial, " '[d]efendant did not challenge the adequacy of the allocution related to that waiver . . . [and thus] failed to preserve for our review [her] challenge to the sufficiency of [County] [C]ourt's inquiry' " (*People v McCoy*, 174 AD3d 1379, 1381 [4th Dept 2019], *lv denied* 34 NY3d 982 [2019]; *see People v Adger*, 156 AD3d 1458, 1458 [4th Dept 2017], *lv denied* 31 NY3d 980 [2018], *reconsideration denied* 31 NY3d 1114 [2018], *cert denied* — US —, 139 S Ct 1563 [2019]).

Contrary to defendant's further contention, the conviction is supported by legally sufficient evidence (*see People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v McLain*, 80 AD3d 992, 993-996 [3d Dept 2011], *lv denied* 16 NY3d 897 [2011]). Moreover, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's

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

Defendant also contends that the allegedly improper admission of evidence of prior bad acts denied her a fair trial. Defendant failed to preserve for our review her contention with respect to the admission of evidence of certain prior bad acts inasmuch as defendant did not object to the evidence on that ground (*see* CPL 470.05 [2]; *People v Woods*, 72 AD3d 1563, 1564 [4th Dept 2010], *lv denied* 15 NY3d 811 [2010]). To the extent that defendant's contention is preserved, we conclude that the court properly admitted the evidence at issue (*see generally People v Henson*, 33 NY2d 63, 72 [1973]; *People v Molineux*, 168 NY 264, 293-294 [1901]). Even assuming, arguendo, that the court erred in admitting that evidence, we conclude that any error is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

We reject defendant's contention that she was denied effective assistance of counsel inasmuch as she failed to " 'demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712 [1998]; *see generally People v Baldi*, 54 NY2d 137, 147 [1981]). With respect to defendant's claim that defense counsel was ineffective for failing to produce an expert witness at trial to rebut the expert testimony introduced by the People, defendant has not established that " 'such expert testimony was available, that it would have assisted the [court] in its determination or that [she] was prejudiced by its absence' " (*People v Johnson*, 125 AD3d 1419, 1421 [4th Dept 2015], *lv denied* 26 NY3d 1089 [2015]). Contrary to defendant's further claim, she was not denied effective assistance of counsel based on defense counsel's failure to conduct an adequate cross-examination of certain prosecution witnesses. "[S]peculation that a more vigorous cross-examination might have [undermined the credibility of a witness] does not establish ineffectiveness of counsel" (*People v Lozada*, 164 AD3d 1626, 1628 [4th Dept 2018], *lv denied* 32 NY3d 1174 [2019]).

Finally, the sentence is not unduly harsh or severe.

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

1183

CA 19-01398

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

SETH OLNEY, INDIVIDUALLY, AND DOING BUSINESS
AS THE OLNEY PLACE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF BARRINGTON, JOHN GRIFFIN, AS CODE
ENFORCEMENT OFFICER OF TOWN OF BARRINGTON, AND
JOHN GRIFFIN, INDIVIDUALLY, DEFENDANTS-APPELLANTS.

BOYLAN CODE, LLP, ROCHESTER (ROBERT J. MARKS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LITTMAN & BABIARZ, ITHACA (PETER N. LITTMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Yates County (William F. Kocher, A.J.), entered January 10, 2019. The order, insofar as appealed from, denied that part of the motion of defendants seeking to dismiss plaintiff's first and fifth causes of action.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion seeking to dismiss the fifth cause of action as against defendant John Griffin, individually and as Code Enforcement Officer of Town of Barrington and as modified the order is affirmed without costs.

Memorandum: On appeal from an order that, inter alia, denied in part their motion to dismiss the second amended complaint, defendants contend that Supreme Court erred in denying the motion with respect to the first cause of action, for defamation, and the fifth cause of action, for negligence.

We reject defendants' contention that the court should have dismissed the first cause of action on the ground that the allegedly defamatory statements were true. "[S]ummary dismissal is appropriate under CPLR 3211 (a) (7) when the defendant's evidentiary submissions 'establish conclusively that plaintiff has no cause of action' " (*Liberty Affordable Hous., Inc. v Maple Ct. Apts.*, 125 AD3d 85, 87 [4th Dept 2015], quoting *Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]), and it is well established that truth constitutes a complete defense to a defamation claim (*see Ryan v New York Tel. Co.*, 62 NY2d 494, 503 [1984]). Here, however, defendants' evidentiary submissions in support of their motion failed to conclusively "establish[] the truth of the *specific libel [and slander] claimed by*

plaintiff" (*Russo v Padovano*, 84 AD2d 925, 926 [4th Dept 1981] [emphasis added]; *see Stega v New York Downtown Hosp.*, 31 NY3d 661, 674 [2018]). Indeed, the "entire thrust and purport" of defendants' defense of truth in this case "is to establish . . . the truth of a *different* charge than the one [alleged in the second amended complaint]," and a defense of truth "cannot stand" if it is "aimed at establishing the truth of a charge *different* from that [identified in the complaint]" (*Crane v New York World Tel. Corp.*, 308 NY 470, 478-479 [1955] [emphasis added]). To the contrary, a "plea of truth . . . must be as broad as the alleged libel [or slander] and must establish the truth of the *precise charge* therein made" (*id.* at 475 [emphasis added]), yet defendants do not assert that the *precise charges* identified in the second amended complaint are actually true. The court thus properly denied defendants' motion insofar as it sought to dismiss the first cause of action on the ground of truth.

Defendants' remaining grounds for dismissing the first cause of action are raised for the first time on appeal and are therefore not properly before us (*see Radiation Oncology Servs. of Cent. N.Y., P.C. v Our Lady of Lourdes Mem. Hosp., Inc.*, 148 AD3d 1418, 1420 [3d Dept 2017]; *Levy v Grandone*, 14 AD3d 660, 662 [2d Dept 2005]; *Taub v Amana Imports*, 140 AD2d 687, 689 [2d Dept 1988]). Defendants' reference in their notice of motion to the potential applicability of an "absolute and qualified privilege[]," without identifying the specific privilege or privileges upon which they sought to rely and without any legal argument to alert plaintiff or the court to the precise theory raised, was insufficient to preserve defendants' current reliance on the litigation privilege, the common interest privilege, and the governmental official privilege (*see Kuriansky v Bed-Stuy Health Care Corp.*, 73 NY2d 875, 876 [1988]; *see generally U.S. Bank N.A. v DLJ Mtge. Capital, Inc.*, 33 NY3d 84, 89 [2019]).

Finally, defendants contend that the fifth cause of action should be dismissed as duplicative of the first cause of action. Although that contention is unpreserved for appellate review (*see Wolkstein v Morgenstern*, 275 AD2d 635, 637 [1st Dept 2000]), it nevertheless presents a pure question of law appearing on the face of the record that could not have been avoided had it been raised in a timely manner (*see Coscia v Jamal*, 156 AD3d 861, 864 [2d Dept 2017]; *see generally Stranz v New York State Energy Research & Dev. Auth. [NYSERDA]*, 87 AD3d 1279, 1281 [4th Dept 2011]). We therefore reach the merits of defendants' argument on this issue and conclude that the fifth cause of action as asserted against defendant John Griffin is duplicative of the first cause of action because the fifth cause of action as against Griffin is based on the same facts, alleges the same wrongs, and seeks the same relief as the first cause of action, which is asserted only against Griffin (*see Themed Rests., Inc. v Zagat Survey, LLC*, 21 AD3d 826, 827 [1st Dept 2005]). Indeed, a "defamation cause of action is not transformed into one for negligence merely by casting it as [such]," and in circumstances "in which plaintiff alleges an injury to his reputation as a result of statements made or contributed to by defendants, plaintiff is relegated to whatever remedy he might have under the law of defamation and cannot recover under principles of

negligence" (*Colon v City of Rochester*, 307 AD2d 742, 744 [4th Dept 2003], *appeal dismissed and lv denied* 100 NY2d 628 [2003] [internal quotation marks omitted]; *see Iafallo v Nationwide Mut. Fire Ins. Co.*, 299 AD2d 925, 927 [4th Dept 2002]). We thus modify the order accordingly. The fifth cause of action as asserted against defendant Town of Barrington, however, is not duplicative of the first cause of action because the first cause of action is not asserted against the Town (*cf. Colon*, 307 AD2d at 744).

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

1186

CA 18-01588

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

DAWN STEFANIAK, PLAINTIFF,

V MEMORANDUM AND ORDER

NFN ZULKHARNAIN, DEFENDANT-APPELLANT.

ROBERTA L. REEDY, AS ADMINISTRATOR OF THE ESTATE OF KEVIN M. REEDY, DECEASED, RESPONDENT.

MICHAEL A. ROSENHOUSE, ROCHESTER, FOR DEFENDANT-APPELLANT.

MATTINGLY CAVAGNARO, LLP, BUFFALO (CHRISTOPHER S. MATTINGLY OF COUNSEL), FOR RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (John F. O'Donnell, J.), entered August 2, 2017. The order and judgment, among other things, awarded Roberta L. Reedy, as administrator of the estate of Kevin M. Reedy a money judgment against defendant in the amount of $70,890.00.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified in the exercise of discretion and on the law by striking from the first decretal paragraph the figure of 708.0 and replacing it with the figure 475.0, and by striking from the first and second decretal paragraphs the amount of $70,890.00 and replacing it with the amount of $47,500.00, and as modified the order and judgment is affirmed without costs.

Memorandum: In this action for divorce and ancillary relief, defendant appeals from an order and judgment that awarded $70,890.00 to Roberta L. Reedy, as administrator of the estate of Kevin M. Reedy (respondent) for Reedy's work as the Attorney for the Children (AFC). On a prior appeal, this Court concluded that Reedy should have been appointed as the AFC pursuant to 22 NYCRR part 36 nunc pro tunc and that defendant must pay Reedy's fees. We thus remitted the matter to Supreme Court to "determine the amount" of Reedy's fees following a hearing, if necessary (*Stefaniak v NFN Zulkharnain*, 119 AD3d 1418, 1419 [4th Dept 2014]). Upon remittal, the court concluded that this Court's order limited the remittal to a determination of the hourly rate to be used to calculate the amount of attorney's fees and that "the number of hours performed by Mr. Reedy cannot be questioned at this stage." The court then determined that the rate to be used was $100.00 per hour, applied that rate to the 708.90 hours that Reedy had previously claimed, and entered judgment accordingly. We agree with

defendant that the court erred in concluding that our prior order precluded defendant from challenging the number of hours for which Reedy sought compensation.

Our prior order unequivocally directed the court to calculate the amount of Reedy's fees. An award of attorney's fees must be "calculated on the basis of the . . . hours actually and reasonably spent on the matter by . . . counsel, multiplied by counsel's reasonable hourly rate" (*Hayes v Ontario Plastics*, 6 AD3d 1122, 1122 [4th Dept 2004]; *see generally Matter of Freeman*, 34 NY2d 1, 9 [1974]). In assessing the reasonableness of the hours spent by counsel, the issue "is not whether hindsight vindicates an attorney's time expenditures, but whether, at the time the work was performed, a reasonable attorney would have engaged in the same time expenditures" (*Grant v Martinez*, 973 F2d 96, 99 [2d Cir 1992]). Thus, upon remittal the court was required, inter alia, to determine an award of attorney's fees that adequately reflected both the time spent and whether such time "was reasonably related to the issues litigated" (*Brod v Brod*, 48 AD3d 499, 500 [2d Dept 2008]; *see e.g. Avildsen v Prystay*, 239 AD2d 131, 132 [1st Dept 1997]; *Bauin v Feinberg*, 6 Misc 3d 1038[A], 2005 NY Slip Op 50343[U], *10 [Civil Ct, NY County 2005]). Here, especially in light of Reedy's prior concession that the amount sought was excessive, we conclude that the court abused its discretion in fixing the amount of fees without determining the reasonableness of the number of hours included in Reedy's fee request (*see generally Owens v Tompkins Bank of Castile*, 170 AD3d 1683, 1685 [4th Dept 2019]; *542 E. 14th St. LLC v Lee*, 66 AD3d 18, 24-25 [1st Dept 2009]).

Contrary to respondent's contention, the court's statement in its earlier decision that "[n]o one has questioned the number of hours [Reedy] has claimed" did not become law of the case. The doctrine of law of the case "applies only to legal determinations that were necessarily resolved on the merits in a prior decision" (*Brownrigg v New York City Hous. Auth.*, 29 AD3d 721, 722 [2d Dept 2006]; *see Town of Angelica v Smith*, 89 AD3d 1547, 1550 [4th Dept 2011]). Consequently, the doctrine does not apply where, as here, the court makes statements that are "mere dicta" (*Donahue v Nassau County Healthcare Corp.*, 15 AD3d 332, 333 [2d Dept 2005], *lv denied* 5 NY3d 702 [2005]; *see Palmatier v Mr. Heater Corp.*, 163 AD3d 1228, 1230 [3d Dept 2018]; *Atlantic Aviation Invs. LLC v MatlinPatterson Global Advisers LLC*, 117 AD3d 415, 416 [1st Dept 2014]). Inasmuch as the court's ultimate ruling in its earlier decision was that Reedy was not entitled to compensation as a private pay AFC, the court's statement about the number of hours that he worked was dictum.

Under the circumstances of this case and in light of the fact that "this Court's discretion to award counsel fees is as broad as that of the trial court" (*Estate of Savage v Kredentser*, 167 AD3d 1344, 1345 [3d Dept 2018]; *see Greenfield v Greenfield*, 234 AD2d 60, 62 [1st Dept 1996]), we exercise our discretion to award respondent compensation for 475.0 hours of work reasonably performed on behalf of the children of the parties at the unchallenged rate of $100.00 per hour. Therefore the award should be reduced to $47,500.00, and we

modify the order and judgment accordingly.

We have considered defendant's remaining contention and we conclude that it is without merit (*see Pinto v Pinto*, 260 AD2d 622, 622 [2d Dept 1999], *lv denied* 93 NY2d 817 [1999], *rearg denied* 94 NY2d 876 [2000]; *Cameron v Cameron*, 238 AD2d 925, 926 [4th Dept 1997]).

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

1196

KA 17-01911

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY WORK, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered February 1, 2017. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, and the matter is remitted to Supreme Court, Erie County, for further proceedings on the superior court information.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]), defendant contends that the plea should be vacated on the ground that it was not voluntarily, knowingly or intelligently entered as a result of the mistaken understanding shared by Supreme Court and defense counsel of the legally permissible sentencing options available to the court. We agree. Although defendant failed to preserve his contention for our review (*see People v Wilkes*, 160 AD3d 1491, 1491 [4th Dept 2018], *lv denied* 31 NY3d 1154 [2018]), we conclude that the narrow exception to the preservation requirement applies (*see generally People v Williams*, 27 NY3d 212, 221-222 [2016]; *People v Lopez*, 71 NY2d 662, 666 [1988]). Here, it is evident on the face of the record that defense counsel advocated for a sentence of parole supervision under CPL 410.91 if defendant pleaded guilty, and that the court indicated that it could and would consider imposing such a sentence. However, defendant was not eligible for a parole supervision sentence pursuant to CPL 410.91 because the crime to which defendant agreed to plead guilty was not a "specified offense" under the statute (CPL 410.91 [2]; *see* CPL 410.91 [5]). Moreover, it is clear on this record that the misunderstanding was not corrected by the court, defense counsel, or the prosecutor. Thus, preservation was not required "[i]nasmuch as defendant—due to the

inaccurate advice of his counsel and the trial court—did not know during the plea . . . proceedings that [a sentence under CPL 410.91] w[as] not [permitted] by law" (*People v Brooks*, 128 AD3d 1467, 1468 [4th Dept 2015] [internal quotation marks omitted]; *see People v Williams*, 123 AD3d 1376, 1377 [3d Dept 2014]). Under the circumstances of this case, "defendant [could] hardly be expected to move to withdraw his plea on a ground of which he ha[d] no knowledge" (*People v Peque*, 22 NY3d 168, 182 [2013], *cert denied* 574 US 840 [2014] [internal quotation marks omitted]). Even assuming, arguendo, that the narrow exception to the preservation requirement does not apply (*cf. Williams*, 27 NY3d at 225), we would nevertheless exercise our power to address defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]; *Brooks*, 128 AD3d at 1468).

On the merits, we conclude that defendant's plea should be vacated because "[i]t is impossible to have confidence, on a record like this, that defendant had a clear understanding of what he was doing when he entered his plea" (*People v Johnson*, 23 NY3d 973, 976 [2014]). In short, we "cannot countenance a conviction that seems to be based on complete confusion by all concerned" (*id.* at 975-976; *see People v Worden*, 22 NY3d 982, 985 [2013]; *Brooks*, 128 AD3d at 1468). Where, as here, "the prosecutor, defense counsel and the court all suffered from the same misunderstanding of the [court's sentencing discretion], it would be unreasonable to conclude that defendant understood it" (*Worden*, 22 NY3d at 985; *see Brooks*, 128 AD3d at 1468-1469). Although the court did not commit to a sentence of parole supervision under CPL 410.91, it erroneously indicated that defendant was eligible for such a sentence and stated that it would consider such a sentence, among all sentencing options, at sentencing—it did not qualify its statement or advise defendant that there was a possibility that he was not eligible for such a sentence (*cf*. *People v Copes*, 145 AD3d 1639, 1639-1640 [4th Dept 2016], *lv denied* 28 NY3d 1182 [2017]; *People v Hardy*, 32 AD3d 1317, 1318 [4th Dept 2006], *lv denied* 7 NY3d 925 [2006]). We therefore reverse the judgment, vacate the plea, and remit the matter to Supreme Court for further proceedings on the superior court information. In light of our determination, we do not reach defendant's remaining contentions.

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

1209

CA 19-00494

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

IN THE MATTER OF RICHARD S., A RESIDENT AT CENTRAL NEW YORK PSYCHIATRIC CENTER, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY NOWICKI, CHIEF OF MENTAL HEALTH SERVICES, CENTRAL NEW YORK PSYCHIATRIC CENTER, DANIELLE DILL, PSY.D., DEPUTY DIRECTOR, SEX OFFENDER TREATMENT PROGRAM, CENTRAL NEW YORK PSYCHIATRIC CENTER, DEBORAH MCCULLOCH, EXECUTIVE DIRECTOR, CENTRAL NEW YORK PSYCHIATRIC CENTER, AND ANN MARIE T. SULLIVAN, M.D., COMMISSIONER, NEW YORK STATE OFFICE OF MENTAL HEALTH, RESPONDENTS-APPELLANTS.

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

SARAH M. FALLON, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (BENJAMIN D. AGATA OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered August 29, 2018 in a CPLR article 78 proceeding. The judgment, inter alia, granted the petition, annulled an administrative determination, and determined that petitioner is entitled to order, possess and use licorice chew sticks.

It is hereby ORDERED that said appeal from the judgment insofar as it granted the petition and annulled the determination is dismissed, and the judgment is unanimously modified on the law by vacating the second and third decretal paragraphs, and as modified the judgment is affirmed without costs.

Memorandum: Petitioner, who is currently confined at the Central New York Psychiatric Center (CNYPC), commenced this CPLR article 78 proceeding seeking to annul a determination prohibiting him from possessing or using a miswak, which is a root traditionally used by practicing Muslims for oral hygiene. Respondents now appeal from a judgment that, inter alia, granted the petition and annulled the determination.

Initially, petitioner contends that this appeal has been rendered

moot because, under a new policy adopted by CNYPC subsequent to the entry of the judgment on appeal, he is permitted to possess and use a miswak. Insofar as the appeal concerns the first decretal paragraph of the judgment, in which Supreme Court granted the petition and annulled the determination, we agree, and we therefore dismiss the appeal to that extent. In light of CNYPC's new policy regarding miswak sticks, "enduring consequences" no longer flow from that decretal paragraph (*Matter of New York State Commn. on Jud. Conduct v Rubenstein*, 23 NY3d 570, 576 [2014]; *cf. Frederick v New York State Thruway Auth.*, 143 AD3d 1267, 1268 [4th Dept 2016]).

However, the appeal is not moot insofar as it concerns the second and third decretal paragraphs of the judgment, in which the court stated that petitioner is entitled to order, possess, and use "licorice chew sticks," and in which the court directed that any chew sticks confiscated from petitioner be returned to him (*see generally Frederick*, 143 AD3d at 1268). Although the court in the second decretal paragraph equated licorice chew sticks with miswak sticks, CNYPC's policy regarding miswak sticks does not allow petitioner to possess or use licorice. In addition, although petitioner alleged that CNYPC staff prohibited him from receiving miswak sticks that he had ordered, petitioner had in fact ordered licorice sticks, which CNYPC staff confiscated.

Furthermore, we agree with respondents that the court erred in granting petitioner relief with respect to the possession and use of licorice. Petitioner did not seek such relief in the petition (*see Matter of Hawkins v New York State Dept. of Corr. & Community Supervision*, 140 AD3d 34, 40 [3d Dept 2016]; *Matter of Krieger v Krieger*, 65 AD3d 1350, 1352 [2d Dept 2009]) and, although the court has the authority to grant relief on "terms as may be just" (CPLR 3017 [a]), we conclude that the relief granted in the second and third decretal paragraphs of the judgment "was not appropriate given the evidence presented here" (*Tarsel v Trombino*, 167 AD3d 1462, 1464 [4th Dept 2018]; *see Hawkins*, 140 AD3d at 40). Therefore, we modify the judgment by vacating those decretal paragraphs.

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

1214

CA 18-02006

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

THE PEOPLE OF THE STATE OF NEW YORK,
RESPONDENT,

V MEMORANDUM AND ORDER

DAVID T., DEFENDANT-APPELLANT.

MICHAEL D. NEVILLE, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, GARDEN CITY (LAURA ROTHSCHILD OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal, by permission of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an amended order of the Onondaga County Court (Matthew J. Doran, J.), entered June 27, 2017 in a proceeding pursuant to CPL 330.20. The amended order, among other things, committed defendant to the custody of the Commissioner of Mental Health for confinement in a secure facility to be designated by said Commissioner for care and treatment.

It is hereby ORDERED that the amended order so appealed from is unanimously reversed in the interest of justice and on the law without costs and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following memorandum: After defendant was charged with arson in the second degree (Penal Law § 150.15), County Court accepted his plea of not responsible by reason of mental disease or defect (*see* CPL 220.15 [1]). As a result, the court entered an order pursuant to CPL 330.20 requiring, inter alia, that defendant be examined by two qualified psychiatric examiners to determine whether he had a dangerous mental disorder or, if not, whether he was mentally ill (*see* CPL 330.20 [1] [c], [e]; [2]). The examiners thereafter completed their examinations and submitted respective examination reports in which they both concluded that defendant had a dangerous mental disorder. Defendant now appeals, by permission of this Court, from an amended order that, upon the court's finding that defendant suffered from a dangerous mental disorder, committed him to the custody of the Commissioner of Mental Health for confinement in a secure facility.

In pertinent part, CPL 330.20 (6) provides that, "[a]fter the examination reports are submitted, the court *must*, within [10] days of the receipt of such reports, conduct an initial hearing to determine the defendant's present mental condition" (emphasis added) (*see Matter*

of New York State Off. of Mental Health v Marco G., 167 AD3d 49, 51 [1st Dept 2018]; *People v Darryl T.*, 166 AD3d 68, 76 [1st Dept 2018]; *Matter of Matheson KK.*, 161 AD3d 1260, 1261 [3d Dept 2018]). In this case, however, the court did not conduct an initial hearing. We agree with defendant that, as the People correctly concede, the court's failure to conduct the requisite initial hearing constitutes reversible error (*see People v Shawn B.*, 135 AD3d 782, 782 [2d Dept 2016]). Although defendant failed to preserve his contention for our review (*see id.*; *see generally Darryl T.*, 166 AD3d at 78), we nevertheless review it in the interest of justice (*see generally Shawn B.*, 135 AD3d at 782; *Breitung v Canzano*, 238 AD2d 901, 902 [4th Dept 1997]). We therefore reverse the amended order and remit the matter to County Court to conduct an initial hearing pursuant to CPL 330.20 (6).

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

1228

CA 19-00693

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

ROSEANN MAURER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KENDALL COLTON, SHERRY COLTON, AND THOMAS COLTON,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (ELISE L. CASSAR OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), AND THE HIGGINS KANE LAW GROUP, P.C., FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered October 26, 2018. The order, among other things, granted plaintiff's motion seeking partial summary judgment on the issue of serious injury.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying plaintiff's motion for partial summary judgment with respect to the 90/180-day category of serious injury and with respect to the permanent consequential limitation of use and significant limitation of use categories insofar as they relate to the alleged injury to her right knee and as modified the order is affirmed without costs.

Same memorandum as in *Maurer v Colton* ([appeal No. 3] — AD3d — [Feb. 7, 2020] [4th Dept 2020]).

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

1229

CA 19-00694

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

ROSEANN MAURER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KENDALL COLTON, SHERRY COLTON, AND THOMAS COLTON,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (ELISE L. CASSAR OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), AND THE HIGGINS KANE LAW GROUP, P.C., FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered November 5, 2018. The order denied defendants' motion seeking leave to renew their opposition to plaintiff's motion for partial summary judgment.

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

Same memorandum as in *Maurer v Colton* ([appeal No. 3] — AD3d — [Feb. 7, 2020] [4th Dept 2020]).

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

1230

CA 19-01249

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

ROSEANN MAURER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KENDALL COLTON, SHERRY COLTON, AND THOMAS COLTON,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 3.)

LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (ELISE L. CASSAR OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), AND THE HIGGINS KANE LAW GROUP, P.C., FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered February 20, 2019. The order granted in part plaintiff's motion seeking to set aside the jury verdict and increase the award of damages.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when the vehicle she was operating was rear-ended by a vehicle operated by defendant Kendall Colton and owned by defendants Sherry Colton and Thomas Colton. By a consent order, defendants stipulated that they were negligent in causing the motor vehicle collision and that their negligence was the sole proximate cause of the collision. Plaintiff thereafter moved for partial summary judgment on the issue whether she sustained a serious injury under the significant limitation of use, permanent consequential limitation of use, and 90/180-day categories of Insurance Law § 5102 (d).

In appeal No. 1, defendants appeal from an order of Supreme Court granting plaintiff's motion and determining that she sustained serious injuries to her knee, neck and back as a matter of law under all three categories of serious injury. In appeal No. 2, defendants appeal from an order of the same court insofar as it denied that part of their subsequent motion seeking leave to renew their opposition to the prior motion.

Following a trial, the jury awarded plaintiff damages of $125,000

for future medical expenses, $108,695 for past pain and suffering, and $266,305 for future pain and suffering to cover a period of 20.3 years. Plaintiff thereafter moved to set aside the verdict and to increase each of the awards. In appeal No. 3, defendants appeal from an order insofar as it granted that part of plaintiff's motion with respect to the awards for future medical expenses and future pain and suffering and ordered a new trial on damages unless defendants agreed to increase those awards to $130,000 and $480,000, respectively.

We agree with defendants in appeal No. 1 that the court erred in granting plaintiff's motion for partial summary judgment with respect to the 90/180-day category of serious injury and with respect to the permanent consequential limitation of use and significant limitation of use categories insofar as they relate to the alleged injury to her right knee, and we therefore modify the order in that appeal accordingly.

Regarding the 90/180-day category, we agree with defendants that plaintiff failed to meet her initial burden of establishing any serious injury under that category. Neither plaintiff nor her medical experts specifically addressed the limitations to plaintiff's usual and customary activities as a result of the accident during the requisite time period (*cf. Limardi v McLeod*, 100 AD3d 1375, 1377 [4th Dept 2012]). Plaintiff also failed to demonstrate that any of her alleged injuries were "non-permanent" (Insurance Law § 5102 [d]; *see Martinez v City of Buffalo*, 149 AD3d 1469, 1472 [4th Dept 2017]; *Alcombrack v Swarts*, 49 AD3d 1170, 1171 [4th Dept 2008]). We thus conclude that the court erred in determining as a matter of law that plaintiff sustained a serious injury under that category.

"[I]n order to establish a permanent consequential limitation or a significant limitation of use, the medical evidence submitted by plaintiff must contain objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*John v Engel*, 2 AD3d 1027, 1029 [3d Dept 2003]; *see generally Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002], *rearg denied* 98 NY2d 728 [2002]). With respect to her alleged knee injury, plaintiff failed to meet her initial burden of "establishing a permanent consequential limitation of use or a significant limitation of use through either a quantitative determination of any limited range of motion or a qualitative assessment of [her] condition" (*Crane v Glover*, 151 AD3d 1841, 1842 [4th Dept 2017]). As a result, the burden never shifted to defendants to raise a triable issue of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), and the court erred in concluding as a matter of law that plaintiff suffered a serious injury related to her knee under those two categories.

We nevertheless conclude that the court properly determined that plaintiff sustained serious injuries to her neck and back under the permanent consequential limitation of use and significant limitation of use categories. Plaintiff submitted the requisite objective, quantitative evidence with respect to the diminished range of motion

in her neck and back (*see McHugh v Marfoglia*, 65 AD3d 828, 829 [4th Dept 2009]; *see generally Toure*, 98 NY2d at 353). Defendants, in opposition, submitted the report from their medical expert who confirmed that plaintiff "has a partial disability with respect to the neck and back as the incident of record seems to have aggravated a pre-existing condition." Their expert also provided a quantitative assessment of the limitations to plaintiff's cervical and lumbar range of motion. We thus conclude that defendants failed to raise a triable issue of fact whether plaintiff sustained serious injuries to her neck and back under the significant limitation of use and permanent consequential limitation of use categories (*see LaForte v Tiedemann*, 41 AD3d 1191, 1192 [4th Dept 2007]; *see generally Wojcik v Kent*, 21 AD3d 1410, 1412 [4th Dept 2005]).

Inasmuch as plaintiff established a serious injury as a matter of law, she "is entitled to recover damages for all injuries causally related to the accident, even those that do not meet the serious injury threshold" (*Amaro v American Med. Response of N.Y., Inc.*, 99 AD3d 563, 564 [1st Dept 2012]; *see Matula v Clement*, 132 AD2d 739, 740 [3d Dept 1987], *lv denied* 70 NY2d 610 [1987]; *Prieston v Massaro*, 107 AD2d 742, 743-744 [2d Dept 1985]; *see generally Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549-550 [1st Dept 2010]).

Contrary to defendants' contention in appeal No. 2, the court properly denied that part of their subsequent motion seeking leave to renew their opposition to plaintiff's motion for partial summary judgment. Defendants failed to establish that the information sought to be submitted in support of that renewal motion, i.e., a second report from the medical expert, could not have been submitted in opposition to the original motion (*see Heltz v Barratt*, 115 AD3d 1298, 1299-1300 [4th Dept 2014], *affd* 24 NY3d 1185 [2014]; *Jones v City of Buffalo School Dist.*, 94 AD3d 1479, 1479 [4th Dept 2012]). Moreover, that new information "would [not have] change[d] the prior determination" (CPLR 2221 [e] [2]; *see Croisdale v Weed*, 139 AD3d 1363, 1365 [4th Dept 2016]; *Fasolo v Scarafile*, 120 AD3d 929, 931 [4th Dept 2014], *lv denied in part and dismissed in part* 24 NY3d 992 [2014]).

Contrary to defendants' contentions in appeal No. 3, we conclude that the court properly granted plaintiff's posttrial motion and increased the awards for future medical expenses and future pain and suffering. The award of $125,000 for future medical expenses cannot " 'be reconciled with a reasonable view of the evidence' " (*Mecca v Buffalo Niagara Convention Ctr. Mgt. Corp.*, 158 AD3d 1161, 1162 [4th Dept 2018]; *see generally Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]). We further conclude that the jury's award for future pain and suffering, when compared to similar cases involving comparable injuries, deviated materially from what would be reasonable compensation (*see Castillo v MTA Bus Co.*, 163 AD3d 620, 622-623 [2d Dept 2018]; *Huff v Rodriguez*, 45 AD3d 1430, 1433-1434 [4th Dept 2007]; *Barrowman v Niagara Mohawk Power Corp.*, 252 AD2d 946, 948 [4th Dept 1998], *lv denied* 92 NY2d 817 [1998]; *Schwartz v Rosenthal*, 244 AD2d 325, 326 [2d Dept 1997], *lv denied* 92 NY2d 802 [1998]; *see also*

Stewart v New York City Tr. Auth., 82 AD3d 438, 438-441 [1st Dept 2011], *lv denied* 17 NY3d 712 [2011]). We thus conclude that the court properly granted plaintiff's posttrial motion with respect to the awards of future medical expenses and future pain and suffering.

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

1262

KA 17-01069

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEROY FAVORS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Michael M. Mohun, A.J.), rendered April 21, 2017. The judgment convicted defendant, upon a jury verdict, of rape in the first degree, assault in the second degree, and attempted aggravated sexual abuse in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of rape in the first degree (Penal Law § 130.35 [1]), assault in the second degree (§ 120.05 [2]), and attempted aggravated sexual abuse in the third degree (§§ 110.00, 130.66 [1] [a]). We affirm.

Contrary to defendant's contention, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). There is no basis for disturbing the jury's credibility determinations "notwithstanding minor inconsistencies in the testimony of the People's witnesses" (*People v Sommerville*, 159 AD3d 1515, 1516 [4th Dept 2018], *lv denied* 31 NY3d 1121 [2018]).

We reject defendant's contention that the court erred in refusing to suppress evidence seized from his apartment. Contrary to defendant's assertion, his written consent to search his apartment was not rendered involuntary by the fact that he was seated in a police car in close proximity to several police officers when he signed the consent form (*see People v Evans*, 157 AD3d 716, 717 [2d Dept 2018], *lv denied* 31 NY3d 1147 [2018]; *People v Fioretti*, 155 AD3d 1662, 1663

[4th Dept 2017], *lv denied* 30 NY3d 1104 [2018]; *see also People v McDonald*, 173 AD3d 1633, 1634-1635 [4th Dept 2019], *lv denied* 34 NY3d 934 [2019]). Moreover, at the time he signed the consent form, defendant was not handcuffed; was not under arrest; had not been subjected to threats, promises, or other coercive tactics; and had been informed of his right to refuse consent (*see generally Fioretti*, 155 AD3d at 1663).

Defendant argues that County Court erred in precluding him from introducing evidence concerning a pair of underwear recovered from the crime scene. Defendant sought to introduce such evidence in order to highlight the fact that his DNA was not found on the underwear. We agree with defendant that the court erred in invoking the Rape Shield Law (CPL 60.42) to preclude the evidence inasmuch as the absence of defendant's DNA from the underwear did not constitute "[e]vidence of a victim's sexual conduct" (*id.*). We nevertheless agree with the court's alternative rationale that the evidence was irrelevant inasmuch as the underwear did not contain DNA from either the victim or defendant. Thus, the evidence had "no logical connection" to any issue in the case (*People v Bent*, 160 AD2d 1176, 1178 [3d Dept 1990], *lv denied* 76 NY2d 937 [1990]).

Contrary to defendant's further contention, whether to admit or controvert the allegations in a predicate felony statement is a "fundamental" decision "comparable to how to plead and whether to waive a jury, take the stand or appeal," and it is "therefore reserved to the accused" personally (*People v Colville*, 20 NY3d 20, 28 [2012]; *see also McCoy v Louisiana*, — US —, —, 138 S Ct 1500, 1509 [2018]; *see generally* CPL 400.15 [4], [5]; 400.16 [2]). Thus, the court did not violate defendant's right to counsel by accepting his personal decision to controvert the allegations in the People's predicate felony statement notwithstanding defense counsel's contrary views and advice (*cf. Colville*, 20 NY3d at 32). Defendant's related assertion that defense counsel was ineffective for failing to adequately apprise him of the ramifications of contesting the predicate felony statement is belied by the record (*see People v Hodge*, 85 AD3d 1680, 1681 [4th Dept 2011], *lv denied* 18 NY3d 883 [2012]).

The sentence is not unduly harsh or severe. Defendant's remaining contentions do not require reversal or modification of the judgment.

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

1291

CAF 18-00964

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

IN THE MATTER OF ANTHONY J.A.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JASON A.A., SR., RESPONDENT-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, FOR RESPONDENT-APPELLANT.

CATHERINE J. PALERMO, BATAVIA, FOR PETITIONER-RESPONDENT.

DAVID J. PAJAK, ALDEN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered May 4, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated respondent's parental rights with respect to the subject child.

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

Memorandum: Respondent father appeals from an order that, inter alia, terminated his parental rights on the ground of abandonment. Contrary to the contention of the father, petitioner established by the requisite clear and convincing evidence that the father abandoned the subject child (*see* Social Services Law § 384-b [4] [b]; [5] [a]; *see generally Matter of Anthony C.S. [Joshua S.]*, 126 AD3d 1396, 1396-1397 [4th Dept 2015], *lv denied* 25 NY3d 911 [2015]). Although the father was incarcerated during the six months preceding the filing of the abandonment petition and was subject to an order of protection that precluded him from direct contact with the child, a "parent who has been prohibited from direct contact with the child, in the child's best interest[s], continues to have an obligation to maintain contact with the person having legal custody of the child" (*Matter of Lucas B.*, 60 AD3d 1352, 1352 [4th Dept 2009] [internal quotation marks omitted]; *see generally Matter of Miranda J. [Jeromy J.]*, 118 AD3d 1469, 1470 [4th Dept 2014]), in this case petitioner. Here, petitioner's caseworker testified that, although she provided the father with her contact information, sent the father regular updates regarding the child, and informed the father that he needed to plan for the child's future, she received only one letter from the father during the relevant period. That contact with petitioner "was insubstantial and thus does not preclude the finding of abandonment" (*Matter of Crystal M.*, 49 AD3d 1312, 1313 [4th Dept 2008] [internal

quotation marks omitted]; *see Matter of Rakim D.D.S.*, 50 AD3d 1521, 1522 [4th Dept 2008], *lv denied* 10 NY3d 717 [2008]; *Matter of Tonasia K.*, 49 AD3d 1247, 1248 [4th Dept 2008]). Similarly, the father's "expressions of subjective intent to care for the child at a future time do not preclude a finding of abandonment" (*Matter of Jasmine J.*, 43 AD3d 1444, 1445 [4th Dept 2007] [internal quotation marks omitted]). To the extent that the father asserted at the hearing that he sent additional letters to petitioner, that testimony presented an issue of credibility that Family Court was entitled to resolve against him (*see Rakim D.D.S.*, 50 AD3d at 1522; *Jasmine J.*, 43 AD3d at 1445).

We reject the father's contention that the court abused its discretion in denying his request, made on the day of the hearing, for an adjournment to substitute assigned counsel. "The right of an indigent party to assigned counsel under the Family Court Act is not absolute," and a party seeking the appointment of substitute counsel "must establish that good cause for release existed necessitating dismissal of assigned counsel" (*Matter of Destiny V. [Mark V.]*, 107 AD3d 1468, 1469 [4th Dept 2013]; *see generally Matter of Biskupski v McClellan*, 278 AD2d 912, 912 [4th Dept 2000]). The father failed to make that showing here. The court likewise did not abuse its discretion in failing to adjourn the hearing to permit the father's counsel to conduct further meetings with the father in preparation for the hearing (*see generally Matter of Steven B.*, 6 NY3d 888, 889 [2006]; *Matter of Michael S. [Brittany R.]*, 159 AD3d 1502, 1503 [4th Dept 2018], *lv denied* 31 NY3d 909 [2018]).

Finally, contrary to the father's contention, the record establishes that, "viewed in the totality of the proceedings, [the father] received meaningful representation" (*Michael S.*, 159 AD3d at 1504 [internal quotation marks omitted]).

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

1307

KA 16-00924

PRESENT: WHALEN, P.J., PERADOTTO, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERTO V. RAMIREZ, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered August 4, 2015. The judgment convicted defendant, upon a plea of guilty, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him of assault in the second degree (Penal Law § 120.05 [4]) upon his plea of guilty to a superior court information. Defendant contends that "his written waiver of indictment was jurisdictionally defective because, notwithstanding its substantial compliance with CPL 195.20 as to content, it did not state the date, approximate time and place of the specific offenses for which he was held for the action of the grand jury, in violation of that statute" (*People v Thomas*, — NY3d —, —, 2019 NY Slip Op 08545, *7 [2019]). Because defendant's contention is that the indictment waiver form omitted "non-elemental factual information," that contention is "forfeited by [his] guilty plea" inasmuch as defendant "lodges no claim that he lacked notice of the precise crime[] for which he waived prosecution by indictment" (*id.* at —, 2019 NY Slip Op 08545, *8). Defendant failed to preserve for our review his further contention that the failure of County Court to advise him that he could be subject to deportation if he pleaded guilty renders his plea involuntary (*see* CPL 470.05 [2]; *People v Peque*, 22 NY3d 168, 183 [2013], *cert denied* 574 US 840 [2014]). We conclude that, under the circumstances of this case, the narrow exception to the preservation doctrine does not apply (*see People v Chelley*, 120 AD3d 987, 988 [4th Dept 2014]; *cf. Peque*, 22 NY3d at 182-183).

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

1313

CA 19-01019

PRESENT: WHALEN, P.J., PERADOTTO, TROUTMAN, AND BANNISTER, JJ.

NATIONWIDE AFFINITY INSURANCE COMPANY OF AMERICA, NATIONWIDE GENERAL INSURANCE COMPANY, NATIONWIDE INSURANCE COMPANY OF AMERICA, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, NATIONWIDE MUTUAL INSURANCE COMPANY, NATIONWIDE ASSURANCE COMPANY, NATIONWIDE PROPERTY & CASUALTY, TITAN INDEMNITY COMPANY, VICTORIA FIRE & CASUALTY COMPANY AND VICTORIA AUTOMOBILE INSURANCE COMPANY, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JAMAICA WELLNESS MEDICAL, P.C., DEFENDANT-RESPONDENT.

HOLLANDER LEGAL GROUP, P.C., MELVILLE (ALLAN S. HOLLANDER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

KOPELEVICH & FELDSHEROVA, P.C., BROOKLYN (DAVID LANDFAIR OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered March 29, 2019. The order denied plaintiffs' motion for summary judgment and granted in part defendant's cross motion to compel discovery.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, the cross motion is dismissed, and judgment is granted in favor of plaintiffs as follows:

> It is ADJUDGED and DECLARED that plaintiffs are under no obligation to pay or reimburse any of the subject claims.

Memorandum: As we explained in a prior appeal (*Nationwide Affinity Ins. Co. of Am. v Jamaica Wellness Med., P.C.*, 167 AD3d 192 [4th Dept 2018]), defendant is a medical professional corporation that was assigned claims for no-fault benefits by individuals who purportedly received treatment for injuries allegedly sustained in motor vehicle accidents. Defendant submitted bills for the services it purportedly rendered, along with the assignment of benefit forms, to the insurance carrier plaintiffs (Nationwide plaintiffs) seeking reimbursement pursuant to the No-Fault Law and regulations (*see* Insurance Law art 51; 11 NYCRR part 65). The Nationwide plaintiffs

commenced this declaratory judgment action after defendant failed to appear at repeatedly requested examinations under oath (EUOs), alleging that defendant had breached a material condition precedent necessary to coverage. The Nationwide plaintiffs then moved for summary judgment declaring that, as a result of such breach, they were under no obligation to pay or reimburse any of the subject claims. Supreme Court granted the motion, declared, among other things, that defendant breached a condition precedent to coverage by failing to appear at the scheduled EUOs, and determined that the Nationwide plaintiffs therefore had the right to deny all claims retroactively to the date of loss, regardless of whether they had issued timely denials.

We reversed the judgment insofar as appealed from, denied the Nationwide plaintiffs' motion, and vacated the declarations. We held that a defense based on nonappearance at an EUO is subject to the preclusion remedy and that, therefore, the Nationwide plaintiffs were required to establish that they issued timely denials on that ground. We determined that the Nationwide plaintiffs failed to establish their prima facie entitlement to judgment as a matter of law on the issue of their timely and proper denial of coverage inasmuch as the assertions in the affidavit of their claims specialist that they issued timely denial forms to defendant for nonappearance at the EUOs were conclusory and unsupported by any such denial forms (*Nationwide Affinity Ins. Co. of Am.*, 167 AD3d at 198).

The Nationwide plaintiffs subsequently filed a second motion for summary judgment on the complaint and submitted, inter alia, a detailed affidavit of the claims specialist, the subject denial of claim forms, and affidavits of the operations manager of their third-party claims processor. Defendant cross-moved pursuant to CPLR 3124 to compel discovery. Supreme Court denied the motion on the ground that it was an improper successive motion for summary judgment and granted in part the cross motion. The Nationwide plaintiffs now appeal.

We agree with the Nationwide plaintiffs that the court erred in refusing to entertain their second summary judgment motion. "Although successive summary judgment motions generally are disfavored absent newly discovered evidence or other sufficient cause . . . , neither Supreme Court nor this Court is precluded from addressing the merits of such a motion" (*Giardina v Lippes*, 77 AD3d 1290, 1291 [4th Dept 2010], *lv denied* 16 NY3d 702 [2011]; *see Putrelo Constr. Co. v Town of Marcy*, 137 AD3d 1591, 1593 [4th Dept 2016]). Here, our intervening decision in the prior appeal, which clarified that the defense based on nonappearance at an EUO is subject to the preclusion remedy and that the Nationwide plaintiffs were therefore required to establish that they issued timely denials on that ground, constitutes sufficient cause to entertain the motion (*see Pludeman v Northern Leasing Sys., Inc.*, 106 AD3d 612, 616 [1st Dept 2013]).

We further agree with the Nationwide plaintiffs that they are entitled to summary judgment. Contrary to defendant's contentions, we conclude upon our review of the record that the Nationwide plaintiffs

met their burden as movant and that defendant failed to raise a triable issue of fact (*see Nationwide Affinity Ins. Co. of Am. v Beacon Acupuncture, P.C.*, 175 AD3d 1836, 1837 [4th Dept 2019]). In addition, defendant's " 'mere hope or speculation' that further discovery will lead to evidence sufficient to defeat [the Nationwide plaintiffs'] motion is insufficient to warrant denial thereof" (*Kaufmann's Carousel, Inc. v Carousel Ctr. Co. LP*, 87 AD3d 1343, 1345 [4th Dept 2011], *lv dismissed* 18 NY3d 975 [2012], *rearg denied* 19 NY3d 938 [2012]; *see Austin v CDGA Natl. Bank Trust & Canandaigua Natl. Corp.*, 114 AD3d 1298, 1301 [4th Dept 2014]; *see generally* CPLR 3212 [f]). In light of our determination, defendant's cross motion to compel discovery is dismissed as moot (*see Clark C.B. v Fuller*, 59 AD3d 1030, 1031 [4th Dept 2009]). We therefore reverse the order by granting the motion, dismissing the cross motion, and granting judgment in favor of the Nationwide plaintiffs declaring that they are under no obligation to pay or reimburse any of the subject claims.

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

1318

CA 19-01021

PRESENT: WHALEN, P.J., PERADOTTO, TROUTMAN, AND BANNISTER, JJ.

NATIONWIDE AFFINITY INSURANCE COMPANY OF AMERICA, NATIONWIDE GENERAL INSURANCE COMPANY, NATIONWIDE INSURANCE COMPANY OF AMERICA, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, NATIONWIDE MUTUAL INSURANCE COMPANY, NATIONWIDE ASSURANCE COMPANY, NATIONWIDE PROPERTY & CASUALTY, TITAN INDEMNITY COMPANY, VICTORIA FIRE & CASUALTY COMPANY AND VICTORIA AUTOMOBILE INSURANCE COMPANY, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

PFJ MEDICAL CARE, P.C., DEFENDANT-RESPONDENT.

NATIONWIDE AFFINITY INSURANCE COMPANY OF AMERICA, NATIONWIDE GENERAL INSURANCE COMPANY, NATIONWIDE INSURANCE COMPANY OF AMERICA, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, NATIONWIDE MUTUAL INSURANCE COMPANY, NATIONWIDE ASSURANCE COMPANY, NATIONWIDE PROPERTY & CASUALTY, TITAN INDEMNITY COMPANY, VICTORIA FIRE & CASUALTY COMPANY AND VICTORIA AUTOMOBILE INSURANCE COMPANY, PLAINTIFFS-APPELLANTS,

V

FJL MEDICAL SERVICES, P.C., DEFENDANT-RESPONDENT.

HOLLANDER LEGAL GROUP, P.C., MELVILLE (ALLAN S. HOLLANDER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered April 24, 2019. The order denied plaintiffs' motions for leave to renew their motions seeking summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motions for leave to renew are granted and, upon renewal, the motions for summary judgment are granted, and judgment is granted in favor of plaintiffs as follows:

It is ADJUDGED and DECLARED that plaintiffs are under no obligation to pay or reimburse any of the subject claims.

Memorandum: Defendants are medical professional corporations that were assigned claims for no-fault benefits by individuals who purportedly received treatment for injuries allegedly sustained in motor vehicle accidents. Defendants submitted bills for the services they purportedly rendered, along with the assignment of benefit forms, to the insurance carrier plaintiffs (Nationwide plaintiffs) seeking reimbursement pursuant to the No-Fault Law and regulations (*see* Insurance Law art 51; 11 NYCRR part 65). The Nationwide plaintiffs commenced these declaratory judgment actions after defendants failed to appear at requested examinations under oath (EUOs), alleging that each defendant had breached a material condition precedent necessary to coverage. The Nationwide plaintiffs then moved in both actions for summary judgment declaring that, as a result of such breach, they were under no obligation to pay or reimburse any of the subject claims. Supreme Court denied the motions without prejudice to renew upon completion of discovery. After the Nationwide plaintiffs moved for leave to renew those motions and defendants filed opposition thereto, we issued a decision on an appeal in a related case in which we held that a defense based on nonappearance at an EUO is subject to the preclusion remedy and that, therefore, the Nationwide plaintiffs were required to establish that they issued timely denials on that ground (*Nationwide Affinity Ins. Co. of Am. v Jamaica Wellness Med., P.C.*, 167 AD3d 192, 198 [4th Dept 2018] [*Jamaica Wellness*]). The Nationwide plaintiffs were thus limited to raising that decision in their reply papers, and the court denied the motions. Thereafter, the Nationwide plaintiffs moved for leave to renew the motions pursuant to CPLR 2221 (e) in light of our intervening decision in *Jamaica Wellness* and submitted, inter alia, a detailed affidavit of a claims specialist, the subject denial of claim forms, and affidavits of the operations manager of their third-party claims processor. The court denied the motions for leave to renew, and the Nationwide plaintiffs now appeal.

We agree with the Nationwide plaintiffs that the court abused its discretion in denying the motions for leave to renew. 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]). "Although a court has discretion to 'grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made' . . . , it may not exercise that discretion unless the movant establishes a 'reasonable justification for the failure to present such facts on the prior motion' " (*Robinson v Consolidated Rail Corp.*, 8 AD3d 1080, 1080 [4th Dept 2004]; *see* CPLR 2221 [e] [3]). Here, to establish their entitlement to summary judgment by making the requisite showing with respect to their defense to payment of the subject claims based upon defendants' nonappearance at the EUOs, the Nationwide plaintiffs submitted facts that were known to them but not offered on the prior motions for summary judgment (*see* CPLR 2221 [e] [2]). The Nationwide plaintiffs also established a reasonable justification for failing to present such facts on the prior motions inasmuch as this Court, in our intervening decision in *Jamaica Wellness*, held for the first time and in contrast to established precedent in another department that the defense based on nonappearance at an EUO is subject to the preclusion

remedy and, therefore, that an insurance carrier seeking a declaration that it is not obligated to pay claims due to such nonappearance must establish, inter alia, that it issued timely and proper denials (167 AD3d at 197-198; *see generally Foxworth v Jenkins*, 60 AD3d 1306, 1307 [4th Dept 2009]).

We further agree with the Nationwide plaintiffs that they are entitled to summary judgment. Upon our review of the record, we conclude that the Nationwide plaintiffs met their burden as movants and that defendants failed to raise a triable issue of fact (*see Nationwide Affinity Ins. Co. of Am. v Beacon Acupuncture, P.C.*, 175 AD3d 1836, 1837 [4th Dept 2019]).

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

20.1

CA 18-01827

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

WILMINGTON TRUST, NATIONAL ASSOCIATION, AS TRUSTEE FOR BENEFIT OF THE REGISTERED HOLDERS OF JPMBB COMMERCIAL MORTGAGE SECURITIES TRUST, 2014-C21, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2014-C21, PLAINTIFF-APPELLANT,

V ORDER

LOCKPORT PROFESSIONAL PARK REALTY LLC, BENTON B. KENDIG, III, GEORGE DAGRACA, JAMES MARTIN, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

THOMPSON & KNIGHT LLP, NEW YORK CITY (VIVIAN M. ARIAS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Henry J. Nowak, J.), entered August 27, 2018. The order, among other things, denied in part plaintiff's motion for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 3 and 26, 2020,

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

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

22

KA 18-01046

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL BURGESS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered April 17, 2018. The judgment convicted defendant upon a plea of guilty of attempted burglary in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted burglary in the third degree (Penal Law §§ 110.00, 140.20), defendant contends that his waiver of the right to appeal is not valid, and he challenges the severity of the sentence. Although we agree with defendant that the waiver of the right to appeal is invalid (*see generally People v Hamilton*, 49 AD3d 1163, 1164 [4th Dept 2008]; *People v Brown*, 296 AD2d 860, 860 [4th Dept 2002], *lv denied* 98 NY2d 767 [2002]), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

25

KA 17-02209

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WADE SANDERS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered December 13, 2017. The judgment convicted defendant, upon a plea of guilty, of leaving the scene of an incident resulting in death without reporting.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of leaving the scene of an incident resulting in death without reporting (Vehicle and Traffic Law § 600 [2] [a], [c] [ii]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. The record establishes that his oral waiver, coupled with the written waiver of the right to appeal, was knowing, intelligent, and voluntary (*see generally People v Thomas*, — NY3d —, 2019 NY Slip Op 08545, *4-6 [2019]; *People v Lopez*, 6 NY3d 248, 256 [2006]; *People v Allen*, 174 AD3d 1456, 1456-1457 [4th Dept 2019], *lv denied* 34 NY3d 978 [2019]), and that valid waiver forecloses his challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 255).

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

27

KA 17-01096

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

OTIS SIMMONS, DEFENDANT-APPELLANT.

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

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Onondaga County Court (Thomas J. Miller, J.), entered April 10, 2017. The order denied defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting him upon a jury verdict of rape in the first degree, criminal sexual act in the first degree (two counts), aggravated sexual abuse in the third degree, and sexual abuse in the first degree (two counts), and pursuant to CPL 440.30 (1-a) for DNA testing of physical evidence.

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

Memorandum: Defendant appeals by permission of this Court from an order denying without a hearing his motion seeking, pursuant to CPL 440.10 (1) (h), to vacate the judgment convicting him of various sex crimes on the ground of actual innocence and seeking, pursuant to CPL 440.30 (1-a), the performance of DNA testing on a pubic hair that was admitted in evidence at his underlying trial. We affirm.

County Court properly denied without a hearing defendant's motion with respect to DNA testing inasmuch as that issue was previously raised and addressed on the merits on defendant's prior motion seeking the same relief (*see* CPL 440.10 [3] [b]; *People v Simmons*, 63 AD3d 1605, 1606 [4th Dept 2009], *lv denied* 12 NY3d 929 [2009]). In any event, the court also properly denied that part of the motion on the merits because "even if the mitochondrial DNA testing sought by defendant had been performed on the pubic hair, there is no reasonable probability that the verdict would have been more favorable to defendant" (*Simmons*, 63 AD3d at 1606).

Defendant contends that the court erred in summarily denying his

motion with respect to his claim of actual innocence. Although we may refuse to consider the issue because it could have been raised on defendant's prior motions but was not, we nevertheless exercise our discretion to reach the merits (*see People v Pett*, 148 AD3d 1524, 1524 [4th Dept 2017]; *People v Hamilton*, 115 AD3d 12, 20-21 [2d Dept 2014]), and we conclude that the court properly denied that part of defendant's motion without a hearing inasmuch as defendant failed to make a prima facie showing of actual innocence warranting a hearing (*cf. People v Pottinger*, 156 AD3d 1379, 1380-1381 [4th Dept 2017]).

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

33

CAF 18-01639

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

IN THE MATTER OF JOHN AVENT, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MARIA AVENT, RESPONDENT-RESPONDENT.

CARR SAGLIMBEN LLP, OLEAN (JAY D. CARR OF COUNSEL), FOR PETITIONER-APPELLANT.

LEGAL ASSISTANCE OF WESTERN NEW YORK, INC., OLEAN (JESSICA L. ANDERSON OF COUNSEL), FOR RESPONDENT-RESPONDENT.

LYLE T. HAJDU, LAKEWOOD, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Cattaraugus County (Moses M. Howden, J.), entered July 17, 2018 in a proceeding pursuant to Family Court Act article 6. The order granted respondent's motion to dismiss the petition.

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

Memorandum: In this proceeding pursuant to article 6 of the Family Court Act, petitioner father appeals from an order that dismissed his petition seeking to modify an existing custody order by awarding him visitation with the parties' child. The custody order, which was entered on consent of the parties, granted sole custody to respondent mother and permitted the father, who is incarcerated, to send correspondence to the child. The order also directed, inter alia, that the mother "shall provide said correspondence [to] the minor child as she deems appropriate." Approximately one month after the order was entered, the father filed the instant petition, alleging, among other things, that there had been a change in circumstances because the mother had failed to send him letters or photographs of the child. Family Court granted the mother's motion to dismiss the petition, and we affirm.

"To survive a motion to dismiss, a petition seeking to modify a prior order of custody and visitation must contain factual allegations of a change in circumstances warranting modification to ensure the best interests of the child" (*Matter of Gelling v McNabb*, 126 AD3d 1487, 1487 [4th Dept 2015] [internal quotation marks omitted]). We reject the father's contention that the mother's alleged failure to send letters or photographs constituted a change in circumstances

inasmuch as she was not obligated to send such items under the existing custody order (*cf. Matter of Fox v Fox*, 93 AD3d 1224, 1225 [4th Dept 2012]). Although "[i]t is presumed that visitation with a noncustodial parent is in the child's best interests, even when that parent is incarcerated" (*Matter of Ruple v Cullen*, 115 AD3d 1123, 1123 [3d Dept 2014]), the father's petition was insufficient to survive the mother's motion to dismiss, and an inquiry into the best interests of the child was therefore unwarranted (*see generally Matter of Perry v Perry*, 52 AD3d 906, 907 [3d Dept 2008], *lv denied* 11 NY3d 707 [2008]).

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

35

CA 19-01270

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

PATRICIA GLOSEK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BELLA PIZZA, DEFENDANT-APPELLANT.

WALSH, ROBERTS & GRACE, BUFFALO (KEITH N. BOND OF COUNSEL), FOR DEFENDANT-APPELLANT.

BROWN CHIARI LLP, BUFFALO (TIMOTHY HUDSON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered July 9, 2019. The order denied the motion of defendant for summary judgment dismissing plaintiff's complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she allegedly tripped and fell on a rug while walking through a restaurant owned and operated by defendant. We agree with defendant that Supreme Court erred in denying its motion seeking summary judgment dismissing the complaint. We therefore reverse the order, grant the motion, and dismiss the complaint. "Although the issue 'whether a certain condition qualifies as dangerous or defective is usually a question of fact for the jury to decide . . . , summary judgment in favor of a defendant is appropriate where a plaintiff fails to submit any evidence that a particular condition is actually defective or dangerous' " (*Langgood v Carrols, LLC*, 148 AD3d 1734, 1734-1735 [4th Dept 2017]; *see Slattery v Tops Mkts., LLC*, 147 AD3d 1504, 1504 [4th Dept 2017]). Here, defendant established its entitlement to judgment as a matter of law by submitting evidence that the placement of the rug in the restaurant did not constitute a dangerous condition, and in opposition plaintiff failed to raise a triable issue of fact (*see Langgood*, 148 AD3d at 1735; *Slattery*, 147 AD3d at 1504).

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

47

KA 19-01535

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TODD CORRON, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO 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 (Stephen J. Dougherty, J.), rendered September 21, 2017. The judgment convicted defendant upon his plea of guilty of assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the first degree (Penal Law § 120.10 [1]). We agree with defendant that his waiver of the right to appeal is invalid inasmuch as County Court conflated the right to appeal with those rights automatically forfeited by the guilty plea (*see People v Chambers*, 176 AD3d 1600, 1600 [4th Dept 2019], *lv denied* — NY3d — [2019]; *People v Rogers*, 159 AD3d 1558, 1558-1559 [4th Dept 2018], *lv denied* 31 NY3d 1152 [2018]; *People v Holmes*, 147 AD3d 1367, 1367 [4th Dept 2017], *lv denied* 29 NY3d 998 [2017]).

Defendant's challenge to the voluntariness of his plea, based on the court's alleged failure to inquire about defendant's mental health status at the time of the plea and failure to require defendant to provide a "personal recitation" of the elements of the crime, is not preserved for our review because defendant did not move to withdraw his plea or to vacate the judgment of conviction (*see People v Reddick*, 175 AD3d 1788, 1789 [4th Dept 2019]). We decline to exercise our power to review that challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). To the extent that defendant's contention that he was denied effective assistance of counsel survives his plea of guilty (*see People v Robinson*, 39 AD3d 1266, 1267 [4th Dept 2007], *lv denied* 9 NY3d 869 [2007]), we conclude that it is without merit. The record establishes that defendant received "an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397,

404 [1995]). Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

55

CAF 18-00019

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

IN THE MATTER OF EMMA D.

ONTARIO COUNTY DEPARTMENT OF SOCIAL SERVICES,
CHILD PROTECTIVE UNIT, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KELLY V.(D.), RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

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

TERESA M. PARE, CANANDAIGUA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Ontario County (William F. Kocher, J.), entered November 24, 2017 in a proceeding pursuant to Family Court Act article 10. The order, among other things, placed the subject child in the custody of her grandmother.

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

Memorandum: Petitioner in appeal No. 1, the Ontario County Department of Social Services, Child Protective Unit (Ontario DSS), commenced a neglect proceeding against respondent mother pursuant to Family Court Act article 10. Petitioner in appeal No. 2, Margarita D. (grandmother), commenced a custody proceeding against the mother pursuant to Family Court Act article 6. The mother now appeals from orders entered in the respective proceedings that, inter alia, granted custody of the subject child to the grandmother. We affirm in both appeals.

With respect to appeal No. 1, we reject the mother’s contention that Family Court erred in dismissing her motion seeking to change venue to Monroe County. When the mother gave birth to the child in a hospital in Monroe County, the mother listed only a post office box in Ontario County as her address. While the child was still in the hospital, a report of child abuse or maltreatment was made by a hospital worker to the New York State Central Register of Child Abuse and Maltreatment, which assigned the matter to Ontario DSS based on the address that the mother had given to the hospital. During the ensuing investigation, the mother refused to provide Ontario DSS with

the address where she actually resided. After Ontario DSS commenced this neglect proceeding, the mother moved to change venue to Monroe County, arguing that the proceeding should have been brought in that county because she resided there. However, at the hearing on the motion, the mother testified and again refused to state where she resided at the time she gave birth to the child. We therefore conclude that Family Court did not abuse its discretion in dismissing the mother's motion inasmuch as she failed to show "good cause" to transfer venue (Family Ct Act § 174; *see Matter of Rice v Wightman*, 167 AD3d 1529, 1530 [4th Dept 2018], *lv denied* 33 NY3d 903 [2019]; *Matter of Carter v Van Zile*, 162 AD3d 1127, 1128 [3d Dept 2018]).

With respect to appeal No. 2, we reject the mother's contention that the record does not support a finding of extraordinary circumstances. The finding of neglect in appeal No. 1, which the mother does not contest, supplied the threshold showing that extraordinary circumstances exist to warrant an inquiry into whether an award of custody to the grandmother is in the child's best interests (*see Matter of Jackson v Euson*, 153 AD3d 1655, 1656 [4th Dept 2017]; *Matter of North v Yeagley*, 96 AD3d 949, 950 [2d Dept 2012]; *see generally Matter of Donna KK. v Barbara I.*, 32 AD3d 166, 169 [3d Dept 2006]). Moreover, the evidence at the combined dispositional/custody hearing established that the mother had an unstable living situation, had mental health problems, and failed to address the child's special needs (*see North*, 96 AD3d at 950; *Matter of Brault v Smugorzewski*, 68 AD3d 1819, 1819 [4th Dept 2009]).

Finally, we reject the mother's contention in appeal No. 2 that the court erred in failing to establish a regular and frequent visitation schedule between her and the child and instead ordering supervised visitation as agreed and arranged between the mother and the grandmother. "Although '[a] court cannot delegate its authority to determine visitation to either a parent or a child' . . . it may order visitation as the parties may mutually agree so long as such an arrangement is not untenable under the circumstances" (*Matter of Kelley v Fifield*, 159 AD3d 1612, 1613 [4th Dept 2018]). The record here does not show that the visitation arrangement is untenable under the circumstances (*see Matter of Pierce v Pierce*, 151 AD3d 1610, 1611 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017]). If the mother is unable to obtain visitation, she may file a petition seeking to enforce or modify the order (*see Kelley*, 159 AD3d at 1613; *Pierce*, 151 AD3d at 1611; *Matter of Thomas v Small*, 142 AD3d 1345, 1346 [4th Dept 2016]).

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

56

CAF 18-00020

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

IN THE MATTER OF MARGARITA D.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KELLY V., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

TERESA M. PARE, CANANDAIGUA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Ontario County (William F. Kocher, J.), entered November 21, 2017 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner sole legal custody and primary physical placement of the subject child.

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

Same memorandum as in *Matter of Emma D. (Kelly V.[D.])* (— AD3d — [Feb. 7, 2020] [4th Dept 2020]).

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

71

KA 17-00596

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KIRA KASTENHUBER, DEFENDANT-APPELLANT.

EMILY P. TROTT, BUFFALO, FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, SPECIAL DISTRICT ATTORNEY, BATAVIA, AND NEW YORK PROSECUTORS TRAINING INSTITUTE, INC., ALBANY (KAREN FISHER MCGEE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered December 1, 2016. The judgment convicted defendant upon a plea of guilty of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of murder in the second degree (Penal Law § 125.25 [1]). We agree with the People that the record establishes that defendant validly waived her right to appeal. County Court engaged defendant in "an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Suttles*, 107 AD3d 1467, 1468 [4th Dept 2013], *lv denied* 21 NY3d 1046 [2013] [internal quotation marks omitted]). In addition, defendant's oral waiver of the right to appeal was accompanied by a written waiver stating, inter alia, that her appellate rights were fully explained to her by the court and defense counsel (*see People v Ramos*, 7 NY3d 737, 738 [2006]). Defendant's valid waiver of the right to appeal forecloses her challenges to the court's suppression ruling (*see People v Gibson*, 147 AD3d 1507, 1508 [4th Dept 2017], *lv denied* 29 NY3d 1032 [2017]; *People v Braxton*, 129 AD3d 1674, 1675 [4th Dept 2015], *lv denied* 26 NY3d 965 [2015]).

Finally, defendant's contention that she was denied effective assistance of counsel "does not survive [her] guilty plea or [her] waiver of the right to appeal because there was no showing that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [her] attorney[']s allegedly poor performance" (*People v Ayala*, 117 AD3d 1447, 1448 [4th Dept 2014], *lv denied* 23 NY3d 1033 [2014] [internal

quotation marks omitted]).

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

77

CA 19-01269

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

MICHAEL TURNER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BETH HIGGINS, ET AL., DEFENDANTS.

FARMERS NEW CENTURY INSURANCE COMPANY,
INTERVENOR-RESPONDENT.

VAN HENRI WHITE, ROCHESTER, FOR PLAINTIFF-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, ROCHESTER (AMY L. DIFRANCO OF COUNSEL), FOR INTERVENOR-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered December 18, 2018. The order, among other things, denied plaintiff's motion to vacate a prior judgment.

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

Memorandum: Plaintiff, as limited by his brief, appeals from that part of an order that denied his motion pursuant to CPLR 5015 (a) (3) to vacate the default judgment he previously obtained against Beth Higgins (defendant). We conclude that Supreme Court did not abuse its discretion in denying the motion (*see generally Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]). Although defendant failed to respond to the complaint or subsequent discovery requests seeking information regarding her insurance carrier, there is no evidence that defendant engaged in fraud, misrepresentation or other misconduct that induced plaintiff to obtain the default judgment in the absence of such information (*see Matter of Renaissance Economic Dev. Corp. v Jin Hua Lin*, 126 AD3d 465, 465 [1st Dept 2015], *lv dismissed* 26 NY3d 953 [2015]; *Shaw v Shaw*, 97 AD2d 403, 403 [2d Dept 1983]). Instead, plaintiff's motion papers confirm that he was aware at the time that he sought the default judgment of the likelihood that defendant had insurance coverage in connection with an existing mortgage, but plaintiff failed to take further steps to compel the production of that information prior to the entry of the judgment.

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

94

KA 18-00079

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOYCE LEWIS, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Stephen D. Aronson, A.J.), rendered August 3, 2017. The judgment convicted defendant upon a plea of guilty of aggravated driving while intoxicated, as a class E felony, and driving while intoxicated, as a class E felony.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of, inter alia, felony aggravated driving while intoxicated (Vehicle and Traffic Law §§ 1192 [2-a] [a]; 1193 [1] [c] [i] [A]). We affirm.

Defendant contends that she is entitled to suppression of evidence allegedly seized as the result of an unlawful traffic stop, notwithstanding this Court's determination on the People's prior appeal denying that part of defendant's omnibus motion seeking to suppress evidence (*People v Lewis*, 147 AD3d 1481, 1481 [4th Dept 2017]). Our determination on the prior appeal, however, "constitutes the law of the case, and, absent a showing of manifest error in the prior decision or that exceptional circumstances exist warranting departure from the law of the case doctrine, . . . defendant is precluded from having this issue reconsidered" (*People v Breazil*, 110 AD3d 913, 913 [2d Dept 2013], *lv denied* 22 NY3d 1039 [2013] [internal quotation marks omitted]; *see People v Wells*, 93 AD3d 1172, 1173 [4th Dept 2012]; *see generally People v Evans*, 94 NY2d 499, 502-503 [2000], *rearg denied* 96 NY2d 755 [2001]). Defendant has made no such showing here (*see Breazil*, 110 AD3d at 913; *Wells*, 93 AD3d at 1173).

Finally, we conclude that the sentence is not unduly harsh or

severe.

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

115

CA 19-01521

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

STATE OF NEW YORK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SUGAR CREEK STORES, INC., DEFENDANT-APPELLANT.

ROBERT J. SANT, ROCHESTER, FOR DEFENDANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered January 4, 2019. The order, among other things, granted that part of plaintiff's motion seeking leave to amend the complaint and denied defendant's cross motion for summary judgment dismissing the complaint.

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

Memorandum: In this action pursuant to Navigation Law article 12, defendant appeals from an order that, inter alia, denied its cross motion insofar as it sought summary judgment dismissing the complaint or, in the alternative, preclusion of certain evidence as a spoliation sanction. We affirm.

Contrary to defendant's contention, Supreme Court properly denied defendant summary judgment dismissing the complaint because, while defendant met its initial burden of establishing its entitlement to judgment as a matter of law, plaintiff raised triable issues of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Contrary to defendant's further contention, the court did not abuse its discretion in denying preclusion as a spoliation sanction because defendant failed to establish that the underground storage tank at issue was damaged with a "culpable state of mind" (*Estate of Smalley v Harley-Davidson Motor Co. Group LLC*, 170 AD3d 1549, 1550 [4th Dept 2019] [internal quotation marks omitted]). Finally, we reject defendant's contention that the court abused its discretion in granting plaintiff's motion insofar as it sought leave to amend the ad damnum clause of the complaint (*see Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23-24 [1981], *rearg denied* 55 NY2d

801 [1981]).

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

122

KA 16-00979

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOMINIC PARTON, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered May 13, 2016. The judgment convicted defendant upon a jury verdict of assault in the first degree and criminal possession of a weapon in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the first degree (Penal Law § 120.10 [1]) and criminal possession of a weapon in the fourth degree (§ 265.01 [2]), arising from defendant's shooting of the victim with a sawed-off shotgun. As defendant correctly concedes, he failed to preserve for our review his contention that his conviction is not supported by legally sufficient evidence inasmuch as he failed to move for a trial order of dismissal on the grounds raised on appeal (*see People v Gray*, 86 NY2d 10, 19 [1995]). 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]), including the charge on the defense of justification, we reject defendant's further contention that the verdict is against the weight of the evidence with respect to the issues of his identity as the shooter, his intent to cause serious physical injury, and his justification defense (*see generally* § 120.10 [1]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). With respect to identity and intent, the victim and another witness testified that defendant pointed the gun at the victim and fired. There was no evidence suggesting that someone other than defendant shot the victim or that the gun discharged by accident. With respect to justification, the only evidence supporting that defense came from a 12-year-old defense witness, who testified that she had seen another man with a gun around the time of the shooting. No other witnesses saw another gun at the scene, and the People presented testimony that

the police never found another gun. The jury was entitled to reject the account of the defense witness and to credit the testimony of the People's witnesses (*see People v Webster*, 114 AD3d 1170, 1171 [4th Dept 2014], *lv denied* 23 NY3d 1026 [2014]).

Contrary to defendant's contention, the verdict sheet did not result in juror confusion warranting resubmission of the case to the jury pursuant to CPL 310.50 (2). Although the jury, contrary to County Court's written instructions on the verdict sheet, found defendant guilty of both assault in the first degree and the lesser included offense of assault in the second degree, where, as here, there is no "indication of confusion clouding the jury's intent in returning a verdict, [there is] no reason why the trial court cannot dismiss . . . lesser inclusory concurrent counts of an indictment upon the return of a verdict finding the defendant guilty of a greater count" (*People v Robinson*, 45 NY2d 448, 454 [1978]; *see People v Loughlin*, 76 NY2d 804, 806-807 [1990]). We reject defendant's additional contention that he did not receive effective assistance of counsel. Defendant failed to meet his burden of establishing " 'the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712 [1998]). Rather, upon viewing the evidence, the law, and the circumstances of this case in totality and as of the time of representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). The sentence is not unduly harsh or severe.

Finally, defendant's remaining contentions are not preserved for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

124

KA 15-02014

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HENRY J. NEWSOME, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BENJAMIN L. NELSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered October 20, 2015. The judgment convicted defendant upon a jury verdict of burglary in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of burglary in the third degree (Penal Law § 140.20), we agree with defendant that Supreme Court erred in admitting in evidence testimony that defendant had committed a theft years prior to the instant offense on the grounds that it was relevant to establish defendant's intent, identity based on modus operandi, and absence of mistake. Inasmuch as defendant's identity was "conclusively established" by the evidence at trial (*People v Condon*, 26 NY2d 139, 142 [1970]; *see People v Kindred*, 60 AD3d 1240, 1242 [3d Dept 2009], *lv denied* 12 NY3d 926 [2009]), the testimony regarding the prior theft was not properly admitted to establish the identity of defendant based on his modus operandi (*see generally People v Denson*, 26 NY3d 179, 185 [2015]). Further, that testimony was not properly admitted to demonstrate intent because " '[e]vidence of prior criminal acts to prove intent will often be unnecessary, and therefore should be precluded even though marginally relevant, where[, as here,] intent may be easily inferred from the commission of the act itself' " (*People v Valentin*, 29 NY3d 150, 156 [2017]). The testimony was also not relevant to absence of mistake (*see generally Denson*, 26 NY3d at 185), and thus it was error to admit it. Nevertheless, we conclude that any error with respect to the admission of that testimony was harmless inasmuch as the evidence of defendant's guilt is overwhelming and there is no significant probability that defendant would have been acquitted but for the error (*cf. People v Stubbs*, 78 AD3d 1665, 1665-

1666 [4th Dept 2010]; *see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

133

CA 19-00283

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

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

V MEMORANDUM AND ORDER

RICHARD F., RESPONDENT-APPELLANT, FOR CIVIL MANAGEMENT PURSUANT TO MENTAL HYGIENE LAW ARTICLE 10.

SARAH M. FALLON, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (PATRICK T. CHAMBERLAIN OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered December 27, 2018 in a proceeding pursuant to Mental Hygiene Law article 10. The order, insofar as appealed from, determined that respondent is a dangerous sex offender requiring confinement and committed respondent to a secure treatment facility.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the determination that respondent is a dangerous sex offender requiring confinement is vacated, and the matter is remitted to Supreme Court, Oneida County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Mental Hygiene Law article 10, respondent, as limited by his brief, appeals from that part of an order finding him to be a dangerous sex offender requiring confinement. We agree with respondent that the evidence is legally insufficient to establish that he required confinement. We therefore reverse the order insofar as appealed from, vacate the determination that respondent is a dangerous sex offender requiring confinement, and remit the matter to Supreme Court for the imposition of a regimen of strict and intensive supervision and treatment in accordance with Mental Hygiene Law § 10.11.

It is well established that, in the dispositional phase of a Mental Hygiene Law article 10 proceeding, petitioner State of New York (State) bears the burden of proving by clear and convincing evidence that the respondent offender has “such a strong predisposition to commit sex offenses, and such an inability to control behavior, that [he or she] is likely to be a danger to others and to commit sex

offenses if not confined" (Mental Hygiene Law § 10.03 [e]; *see Matter of State of New York v Floyd Y.*, 22 NY3d 95, 105 [2013]; *Matter of State of New York v James R.C.*, 165 AD3d 1612, 1615 [4th Dept 2018]; *see generally* § 10.07 [f]). Put simply, "[t]he State may not civilly confine a sex offender in a locked treatment facility unless it proves that he or she has an 'inability' to control sexual misconduct" (*Matter of State of New York v George N.*, 160 AD3d 28, 29 [4th Dept 2018]). To hold that the State has no burden of proof at the dispositional phase of an article 10 proceeding, as the State asks us to in this appeal, would create grave doubt concerning the constitutionality of the entire article 10 process (*see generally Kansas v Crane*, 534 US 407, 412-413 [2002]), and it is beyond cavil that a statute—in this case, section 10.07 (f)—should "be construed so as to avoid grave doubts concerning its constitutionality" (*Fantis Foods v Standard Importing Co.*, 49 NY2d 317, 327 [1980]).

Here, given the unrefuted testimony from both the State's expert and respondent's expert that the 76-year-old respondent was not unable to control his sexual misconduct, we agree with respondent that the court's contrary determination was without foundation in the record and was thus unsupported by legally sufficient evidence (*see generally George N.*, 160 AD3d at 33-34). Contrary to the court's conclusion, there was no reason to disregard the unanimous expert testimony. Indeed, the court itself remarked that the State "has no case," and its determination to order respondent's confinement notwithstanding that fact was improper and without any legal basis.

Finally, we are compelled to express our deep concern with the trial judge's abandonment of her neutral judicial role in this case by calling a witness, aggressively cross-examining that witness, and repeatedly overruling respondent's objections to such questions. We reiterate that "it is the function of the judge to protect the record at trial, not to make it[, and] the line is crossed when," as here, "the judge takes on either the function or appearance of an advocate at trial" (*People v Arnold*, 98 NY2d 63, 67 [2002]). We therefore direct that the further proceedings in this matter be conducted before a different judge.

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

144

KA 18-00171

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERALD BROWN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered June 5, 2017. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We agree with defendant that he did not validly waive his right to appeal because County Court's oral colloquy "utterly 'mischaracterized the nature of the right' " to appeal (*People v Thomas*, — NY3d —, —, 2019 NY Slip Op 08545, *6 [2019]), inasmuch as "the court's advisement as to the rights relinquished [by defendant] was incorrect and irredeemable under the circumstances" (*id.* at —, 2019 NY Slip Op 08545, *5). Specifically, the court erroneously informed defendant that, by waiving the right to appeal, he could obtain no further review of the conviction or sentence by a higher court—crucially omitting any mention of the several rights that survive the waiver of the right to appeal (*see id.* at —, 2019 NY Slip Op 08545, *6-7). Thus, the colloquy was insufficient to ensure that the waiver was voluntary, knowing, and intelligent (*see id.* at —, 2019 NY Slip Op 08545, *6-7). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

152

CAF 19-01287

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

IN THE MATTER OF JENNIFER LESINSKI,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JASON CIAMAGA, RESPONDENT-APPELLANT.

IN THE MATTER OF JASON CIAMAGA,
PETITIONER-APPELLANT,

V

JENNIFER LESINSKI, RESPONDENT-RESPONDENT.

GAUGHAN & FRIEDMAN ATTORNEYS, HAMBURG (R.J. FRIEDMAN OF COUNSEL), FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

WYOMING COUNTY-LEGAL AID BUREAU, WARSAW (MARK A. ADRIAN OF COUNSEL), FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

JOHN F. WHITING, LEROY, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Wyoming County (Michael F. Griffith, J.), entered December 21, 2018 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted the parties joint custody of the subject children.

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

Memorandum: In this custody proceeding pursuant to article 6 of the Family Court Act, respondent-petitioner father appeals from an order that, inter alia, granted the father and petitioner-respondent mother joint custody of their two children with primary physical residence with the mother. The father contends that Family Court's determination is not in the children's best interests and that he should be awarded sole custody of the children or, alternatively, that he should be awarded primary physical custody. We reject that contention. "The court's determination in a custody matter is entitled to great deference and will not be disturbed where, as here, it is based on a careful weighing of appropriate factors" (*Matter of Stevenson v Smith*, 145 AD3d 1598, 1598 [4th Dept 2016] [internal quotation marks omitted]; *see generally Eschbach v Eschbach*, 56 NY2d 167, 172-174 [1982]). Contrary to the father's further contention

that the court improperly relied on allegations that were not substantiated during the custody hearing, we conclude that the court's determination is supported by a sound and substantial basis in the hearing record (*see generally Matter of Cross v Caswell*, 113 AD3d 1107, 1107 [4th Dept 2014]).

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

153

CAF 18-02044

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

IN THE MATTER OF SHANE D. MCGEE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JENNIFER H. MCGEE, RESPONDENT-APPELLANT.

BETH A. RATCHFORD, CANANDAIGUA, FOR RESPONDENT-APPELLANT.

STEPHEN R. WARNER, SODUS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Wayne County (Daniel G. Barrett, J.), entered August 10, 2018 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner physical custody of the subject child.

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

Memorandum: Respondent mother appeals from an order entered after a hearing that, inter alia, modified a prior custody order by awarding the parties joint custody of the subject child with physical custody to petitioner father. Contrary to the mother's contention, we conclude that Family Court properly determined that the father made the requisite showing of a change in circumstances to warrant an inquiry into whether the child's best interests would be served by modifying the existing custody arrangement (*see Matter of Brewer v Soles*, 111 AD3d 1403, 1403 [4th Dept 2013]). The evidence at the hearing established that, since entry of the prior custody order, which awarded the mother physical custody of the child, the child has had a significant decline in her school grades resulting in her failing three of her classes. In addition, she has had multiple instances of tardiness and unexcused absences from school while residing with the mother. Also since entry of the prior custody order, the child's anxiety and depression had significantly increased, in part as a result of living in the mother's home. Thus, the father established a change in circumstances sufficient to warrant an inquiry into the child's best interests (*see Brewer*, 111 AD3d at 1403; *see generally Matter of Little v Little*, 175 AD3d 1070, 1072 [4th Dept 2019]).

We further conclude that, contrary to the mother's contention, there is a sound and substantial basis in the record to support the court's determination that it was in the child's best interests to

award physical custody to the father (*see Matter of Noble v Gigon*, 165 AD3d 1640, 1640-1641 [4th Dept 2018], *lv denied* 33 NY3d 902 [2019]; *Matter of Marino v Marino*, 90 AD3d 1694, 1695-1696 [4th Dept 2011]). As noted above, while the mother had physical custody, the child performed poorly at school and experienced a significant increase in her anxiety and depression. Also, the mother works six nights a week and the child is alone at the mother's home during those times. The father, in contrast, is able to provide a more stable home for the child. Since the child has been living with the father pursuant to the temporary custody order, the child's school grades have risen significantly. The father has also provided the child with a tutor and transported her to summer school and a part-time job. While the father is at work, his wife is able to be with the child. Under the circumstances, and considering that "a court's determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record" (*Marino*, 90 AD3d at 1695 [internal quotation marks omitted]), we perceive no basis upon which to set aside the court's determination. We have considered the mother's remaining contention and conclude that it does not require a different result.

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

164

KA 15-01390

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDWARD L. RODRIGUEZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered May 28, 2015. The judgment convicted defendant upon a jury verdict of endangering the welfare of a child and criminal possession of a weapon in the fourth degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, two counts of criminal possession of a weapon in the fourth degree (Penal Law § 265.01 [4]), defendant argues that County Court erred in refusing to suppress physical evidence on *Payton* grounds. We affirm.

"The evil to which the [*Payton*] rule is addressed is the unsupervised invasion of a citizen's privacy in his [or her] own home" (*People v Minley*, 68 NY2d 952, 953 [1986]). Thus, *Payton* is not violated when a warrantless arrest occurs "in the threshold of a residence . . . , provided that the suspect has voluntarily answered the door and the police have not crossed the threshold" (*People v Garvin*, 30 NY3d 174, 177 [2017], *cert denied* — US — , 139 S Ct 57 [2018]; *see People v Reynoso*, 2 NY3d 820, 821 [2004]). Here, the record supports the suppression court's determination that defendant was arrested at the threshold of his apartment after having voluntarily answered the door and that the police did not cross into defendant's home in order to effectuate the arrest. Thus, defendant was not arrested without a warrant in violation of the *Payton* rule (*see Reynoso*, 2 NY3d at 821; *People v Evans*, 132 AD3d 1398, 1399 [4th Dept 2015], *lv denied* 26 NY3d 1087 [2015]; *People v Schiavo*, 212 AD2d 816, 816 [2d Dept 1995], *lv denied* 85 NY2d 942 [1995]).

Contrary to defendant's contention, the fact that the police

immediately "pushed or guided" him three feet inside the apartment *after* he was arrested in order to search him does not establish that the arrest itself occurred inside the house in violation of the *Payton* rule (*see People v Correa*, 55 AD3d 1380, 1380 [4th Dept 2008], *lv denied* 11 NY3d 924 [2009]; *see also People v Rosario*, 179 AD2d 442, 442 [1st Dept 1992], *lv denied* 79 NY2d 1053 [1992]). "The location of [the] arrest is dispositive of [a *Payton*] claim" (*People v Pearson*, 82 AD3d 475, 475 [1st Dept 2011], *lv denied* 17 NY3d 809 [2011]), and as noted above, the court properly found that defendant was arrested, i.e., subjected to "a significant interruption of [his] liberty of movement as a result of police action" (*People v Brown*, 142 AD3d 1373, 1375 [4th Dept 2016], *lv denied* 28 NY3d 1123 [2016] [internal quotation marks omitted]), at the threshold of his apartment. Contrary to defendant's further contention, the officer's incorrect belief that an arrest is complete only after the suspect is searched incident to arrest is irrelevant to the objective legality of the officer's conduct (*see generally Garvin*, 30 NY3d at 186).

The officer's subsequent entry into defendant's bedroom occurred only because defendant asked the officer to retrieve his wallet and keys from that bedroom, and the contraband was in plain view in that room. Thus, defendant's motion to suppress such contraband was properly denied (*see People v Burke*, 24 AD3d 129, 130 [1st Dept 2005], *lv denied* 6 NY3d 846 [2006]).

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

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KA 16-00799

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALVIN B. SCOTT, ALSO KNOWN AS ALVIN NEAL,
DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BENJAMIN L. NELSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered December 17, 2015. The judgment convicted defendant upon a plea of guilty of assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the first degree (Penal Law § 120.10 [1]). Contrary to defendant's contention, he knowingly, intelligently, and voluntarily waived his right to appeal (*see generally People v Thomas*, — NY3d —, —, 2019 NY Slip Op 08545, *4-6 [2019]). That valid waiver encompasses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]). In any event, the sentence is not unduly harsh or severe.

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

168

KA 15-01446

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY S. HOYT, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John E. Elliott, A.J.), rendered July 10, 2015. The judgment convicted defendant upon his plea of guilty of criminal contempt in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal contempt in the second degree (Penal Law § 215.50 [3]), defendant contends that the judgment must be reversed because City Court (Castro, J.) failed to comply strictly with the requirements of CPL 180.50 (3) (a) (iii), and thus the felony complaint was not validly converted to a misdemeanor complaint upon which he could plead guilty. We affirm.

Defendant, by his guilty plea, "forfeited any claim that [the court] failed to [follow the procedural steps] required by CPL 180.50" (*People v Hunter*, 5 NY3d 750, 751 [2005]). In reaching that conclusion, we reject defendant's contention that the court's failure to follow the dictates of that statute is a jurisdictional defect that we must consider notwithstanding his plea and waiver of the right to appeal (*see generally People v Iannone*, 45 NY2d 589, 600 [1978]). We conclude that the complaint is not jurisdictionally defective inasmuch as it passes the test for facial sufficiency, which is simply whether the accusatory instrument supplied defendant with "sufficient notice of the charged crime to satisfy the demands of due process and double jeopardy" (*People v Dreyden*, 15 NY3d 100, 103 [2010]; *see People v Aragon*, 28 NY3d 125, 128 [2016]; *cf. generally People v Alejandro*, 70 NY2d 133, 135-136 [1987]). Here, any error in the amended complaint with respect to the title of the accusatory instrument or the full name of the charge "is a technical defect rather than a jurisdictional

defect vital to the sufficiency of the [misdemeanor complaint] or the guilty plea entered thereto" (*People v Cox*, 275 AD2d 924, 925 [4th Dept 2000], *lv denied* 95 NY2d 962 [2000] [internal quotation marks omitted]). Because the misdemeanor complaint is not jurisdictionally defective, defendant's challenges to it "are forfeited by defendant's plea of guilty . . . , and in any event the valid waiver of the right to appeal encompasses those nonjurisdictional challenges" (*People v Rossborough*, 101 AD3d 1775, 1775-1776 [4th Dept 2012]).

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

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

171

CAF 19-00160

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

IN THE MATTER OF JEWELS J. AND JUSTIN J.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JUSTIN J., RESPONDENT-APPELLANT.

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

MICHAEL E. DAVIS, COUNTY ATTORNEY, ROCHESTER (CAROL L. EISENMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

ELIZABETH deV. MOELLER, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered October 5, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject children.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order that, inter alia, terminated his parental rights with respect to the subject children on the ground of permanent neglect. Contrary to the father's contention, the record supports Family Court's determination that termination of his parental rights, rather than a suspended judgment, is in the children's best interests (*see Matter of Deon M. [Vernon B.]*, 170 AD3d 1586, 1587 [4th Dept 2019]; *Matter of Kendalle K. [Corin K.]*, 144 AD3d 1670, 1672 [4th Dept 2016]). The record establishes that the father failed to complete his service plan and made inadequate efforts to exercise visitation with the children when he was able to do so (*see Deon M.*, 170 AD3d at 1587). Moreover, the children have been in foster care nearly their entire lives and have developed a "strong and loving bond" with their foster parents, who want to adopt them (*Matter of Alexander Z. [Jimmy Z.]*, 149 AD3d 1177, 1180 [3d Dept 2017]; *see Matter of Burke H. [Richard H.]*, 134 AD3d 1499, 1502 [4th Dept 2015]). Any progress made by the father during the period of his most recent incarceration is insufficient to warrant further prolongation of the children's unsettled familial status (*see Alexander Z.*, 149 AD3d at

1180; *Kendalle K.*, 144 AD3d at 1672).

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court