SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

NOVEMBER 13, 2020

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

DECISIONS FILED NOVEMBER 13, 2020

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

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CA 19-01231

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

KEVIN M. CUNNINGHAM, AS ADMINISTRATOR OF
THE ESTATE OF PATRICK CUNNINGHAM, DECEASED,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARY AGNES MANOR MANAGEMENT, L.L.C., MARY
AGNES MANOR REALTY, L.L.C., NEIL ZYSKIND,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

FRIEDLANDER & MOSHER, P.C., ITHACA (WILLIAM S. FRIEDLANDER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (PATRICK B. CURRAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered May 9, 2019. The order granted the motion of defendants Mary Agnes Manor Management, L.L.C., Mary Agnes Manor Realty, L.L.C., and Neil Zyskind to dismiss plaintiff's first amended complaint against them and denied plaintiff's cross motion for leave to file a second amended 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 first cause of action in the first amended complaint against defendants Mary Agnes Manor Management, L.L.C., Mary Agnes Manor Realty, L.L.C., and Neil Zyskind insofar as it is based on theories of vicarious liability, and reinstating the second and fifth causes of action in the first amended complaint against those defendants, and granting the cross motion upon condition that plaintiff shall serve the proposed second amended complaint within 30 days of the date of entry of the order of this Court, and as modified the order is affirmed without costs.

Memorandum: Plaintiff, as administrator of decedent's estate, commenced this action to recover damages arising from injuries decedent suffered while he was a patient at a nursing home facility and was assaulted by another resident of the facility, who had a history of, inter alia, mental illness and violent behavior. Plaintiff's first amended complaint asserted causes of action against, among others, defendants Mary Agnes Manor Management, L.L.C., and Mary Agnes Manor Realty, L.L.C., (collectively, MAM defendants), and Neil

Zyskind (collectively, defendants), and alleged that defendants owned and operated the facility where decedent was injured. In lieu of answering the first amended complaint, defendants moved pursuant to CPLR 3211 (a) (7) to dismiss the first amended complaint against them. Plaintiff opposed the motion and cross-moved for leave to file a second amended complaint that would include additional factual allegations with respect to the cause of action for negligence and the causes of action based on violations of the Public Health Law. Supreme Court granted defendants' motion, dismissed the first amended complaint against defendants in its entirety, and denied plaintiff's cross motion. Plaintiff appeals.

With respect to the first cause of action in the first amended complaint, we agree with plaintiff that he adequately stated a cause of action for negligence premised on a theory of vicarious liability based on the doctrine of piercing the corporate veil or alter ego. "[T]o withstand a motion to dismiss, [a] plaintiff must plead sufficient facts to reflect that the defendant's domination and control over the corporation was so complete that the corporation had no separate mind, will, or existence of its own" (Robert L. Haig, Commercial Litigation in New York State Courts § 8:67.50 [4th ed 2 West's NY Prac Series Sept. 2019 Update]; *see Sky-Track Tech. Co. Ltd. v HSS Dev., Inc.*, 167 AD3d 964, 965 [2d Dept 2018]). The plaintiff must allege that the domination and control constituted a fraud or an "abuse[of] the privilege of doing business in the corporate form to perpetrate a wrong or injustice" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 142 [1993]; *see Abbott v Crown Mill Restoration Dev., LLC*, 109 AD3d 1097, 1101 [4th Dept 2013]). Here, plaintiff alleges that the MAM defendants were operated in such a way "as if they were one by commingling them on an interchangeable basis or convoluted separate properties, records or control." Significantly, plaintiff alleged that the corporate formalities were conduits to avoid obligations to the facility's residents, and thus the allegations are sufficient to state a cause of action for negligence under a theory of piercing the corporate veil or alter ego (*see generally Abbott*, 109 AD3d at 1102).

Similarly, plaintiff's claims in the negligence cause of action that defendants are vicariously liable under theories of agency and joint venture are also sufficiently stated. "The elements of a joint venture are an agreement of the parties manifesting their intent to associate as joint venturers, mutual contributions to the joint undertaking, some degree of joint control over the enterprise, and a mechanism for the sharing of profits and losses" (*Clarke v Sky Express, Inc.*, 118 AD3d 935, 935 [2d Dept 2014]). "Agency . . . is a fiduciary relationship which results from the manifestation of consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other so to act" (*Maurillo v Park Slope U–Haul*, 194 AD2d 142, 146 [2d Dept 1993]). Plaintiff alleges in the first amended complaint that defendants acted as agents for one another and, as relevant here, that they ratified the acts of one another regarding, inter alia, operation of the facility, allocation of resources, and mismanagement of the facility. Thus, we conclude the court erred in granting defendants' motion with respect

to the negligence cause of action insofar as it is based on theories of vicarious liability, and we modify the order accordingly.

With respect to the second and fifth causes of action in the first amended complaint, for violation of Public Health Law §§ 2801-d and 2808-a, we conclude that plaintiff alleged sufficient facts that defendants were controlling persons or entities of a residential health care facility (*see generally Boykin v 1 Prospect Park ALF, LLC*, 993 F Supp 2d 264, 273 [ED NY 2014]). Plaintiff alleged that in addition to residential care, the facility provided "health-related services," including specialized dementia care, dietary supervision, hygiene and on-site medical and psychological care. Accepting those facts as alleged in the first amended complaint as true, and affording every possible favorable inference to plaintiff, we conclude that plaintiff sufficiently alleged facts to overcome defendants' argument that the facility is an assisted living facility and not subject to those sections of the Public Health Law (*see generally Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). We therefore further modify the order by denying defendants' motion with respect to the second and fifth causes of action in the first amended complaint and reinstating those causes of action against defendants.

Plaintiff's brief does not address the court's determination with respect to the causes of action for breach of contract, fraud and estate costs, and thus plaintiff has abandoned any challenge to the dismissal of those causes of action (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

We also conclude that the court erred in denying plaintiff's cross motion for leave to file a second amended complaint that would include additional factual allegations with respect to the cause of action for negligence and causes of action based on violations of the Public Health Law (*see Greenberg v Wiesel*, 186 AD3d 1336, 1339 [2d Dept 2020]; *A.W. v County of Oneida*, 34 AD3d 1236, 1238 [4th Dept 2006]). We therefore further modify the order by granting the cross motion upon condition that plaintiff serve the proposed second amended complaint within 30 days of the date of entry of the order of this Court.

Entered: November 13, 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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CA 19-00461

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

IN THE MATTER OF JOSEPH M.W., AN INCAPACITATED PERSON.

RYAN J. MULDOON, PETITIONER;

CAYUGA COUNTY DEPARTMENT OF SOCIAL SERVICES, NEW YORK STATE OFFICE OF MEDICAID INSPECTOR GENERAL AND MICHAEL J. MCDERMOTT, RESPONDENTS-RESPONDENTS;

MEMORANDUM AND ORDER

TERRY J. BLAKE, RESPONDENT-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (CORY J. SCHOONMAKER OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered February 1, 2019. The order, among other things, adjudged that respondent Cayuga County Department of Social Services had a valid claim (Medicaid lien) against the existing J.M.W. Supplemental Needs Trust corpus in the amount of $2,822,650.99.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the 12th and 17th adjudicatory paragraphs and the first, fourth, and fifth ordering paragraphs and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Cayuga County, for further proceedings in accordance with the following memorandum: Terry J. Blake (respondent), the former trustee and a remainder beneficiary of a supplemental needs trust (SNT) created on behalf of her incapacitated brother, appeals from an order that, inter alia, determined that a Medicaid lien in an amount exceeding the value of the SNT corpus existed and directed respondent Michael J. McDermott, the trustee appointed after respondent (trustee), to use the SNT corpus to satisfy that lien following the payment of certain trust expenses. In 1998, respondent's brother, a developmentally disabled individual, had been rendered a quadriplegic after falling down a flight of stairs at a state-operated residential facility. Following the accident, medical malpractice and premises liability actions (tort actions) were commenced on behalf of respondent's brother, who received significant proceeds as a result of those actions. Meanwhile, the Cayuga County Health and Human Services Department interposed a personal injury Medicaid lien pursuant to Social Services Law § 104-b (Section 104-b lien) with respect to the cost of assistance and care that respondent's brother had received as a result

of the accident.

After the Section 104-b lien was fully satisfied, the remaining proceeds from the tort actions were placed in the SNT, which allowed respondent's brother to remain eligible for Medicaid (*see generally* 42 USC § 1396p [d] [4] [A]; Social Services Law § 366 [2] [b] [2] [iii] [A]). Per its terms, the SNT would terminate upon the death of respondent's brother and, following an accounting, any existing Medicaid liens would be paid from the SNT corpus to the State "or its designated Social Services District" in an amount that was "the lesser of (1) the total amount of Medicaid payments made on behalf of [respondent's brother] for services that were provided, to the extent required by law; or (2) the entire balance of the [t]rust [e]state." Any remaining balance of the SNT's corpus would be paid to respondent, as a remainder beneficiary.

Respondent's brother died in 2016. Thereafter, petitioner, the Court Examiner, commenced this proceeding seeking, inter alia, to compel the trustee to file a judicial settlement of the SNT. The trustee moved by order to show cause for an order determining the amount of the SNT's corpus that was needed to satisfy any existing Medicaid liens. In response, respondent sought an order determining that, inter alia, any Medicaid liens against the SNT had been fully satisfied and discharged, and that she was therefore entitled to the remainder of the SNT corpus. Respondent Cayuga County Department of Social Services (DSS), which represented respondent New York State Office of the Medicaid Inspector General, argued that the existing Medicaid lien on the SNT was substantially greater than the remaining trust corpus. Several months later, respondent served a judicial subpoena duces tecum on DSS seeking, inter alia, the production of documents necessary to determine the amounts paid for all treatment provided to her brother from 1989 until his death. DSS moved to quash the subpoena.

Supreme Court conducted a hearing to ascertain the value of the alleged Medicaid lien during which DSS submitted, in relevant part, a historical claim detail report (CDR), which listed the expenditures made for health care provided to respondent's brother from 1996 to 2016. DSS sought to have the CDR admitted as a business record via the certification of an employee of the New York State Department of Health (SDOH), Office of Health Insurance Programs. Respondent objected, arguing that the CDR could not be admitted as a business record because the certification provided by DSS failed to establish the proper foundation. The court overruled the objection and admitted the CDR in evidence.

Following the hearing, the court determined that DSS had an existing Medicaid lien against the SNT in an amount exceeding the value of the trust corpus, and directed the trustee—after first paying certain other expenses—to pay DSS the remaining balance of the SNT in full settlement and satisfaction of the Medicaid lien. In light of that determination, the court denied as moot DSS's motion to quash the judicial subpoena duces tecum. Respondent now appeals from the

ensuing order.

Contrary to respondent's contention, we conclude that the court properly determined that there was an existing Medicaid lien on the SNT. It is well settled that an SNT established under 42 USC § 1396p (d) (4) (A) and Social Services Law § 366 (2) (b) (2) (iii) (A), grants the State "a right to recover the *total* Medicaid paid on behalf of a [disabled] individual. There is no temporal limitation. The sole, though substantial, stated limitation on the State's recovery is the existence of remaining assets in the [SNT] upon the beneficiary's death. If the assets are available, according to the words of the statute the State may recover the total amount of benefits paid throughout the beneficiary's lifetime" (*Matter of Abraham XX.*, 11 NY3d 429, 436 [2008]). "The Medicaid SNT reflects a policy decision to balance the needs of the severely disabled and the State's need for funds to sustain the system" (*id.* at 437).

Here, we conclude that the SNT, established pursuant to federal and state law, specifically contemplated that the State could potentially recoup some of its Medicaid expenditures upon the death of respondent's brother. Its plain language stated that DSS could recover, upon the death of respondent's brother, "the lesser of (1) the *total* amount of Medicaid payments made on behalf of [respondent's brother] for services *that were provided*, to the extent required by law; or (2) the entire balance of the [t]rust [e]state" (emphasis added). Thus, the terms of the SNT and the relevant statutes demonstrate that DSS was entitled to a Medicaid lien for the total Medicaid expenditures paid on behalf of respondent's brother up to the amount of the SNT's corpus at the time his death (*see id.* at 436-437; *see generally* 42 USC § 1396p [d] [4] [A]; Social Services Law § 366 [2] [b] [2] [iii] [A]).

We reject respondent's contention that the Section 104-b lien was the only lien against the SNT and that, because it had already been satisfied, DSS could not recover any of the remaining SNT corpus. "A Medicaid lien pursuant to Social Services Law § 104-b on the proceeds of a settlement in a personal injury action must be satisfied *before* the funds may be transferred to a[n] [SNT]" (*Link v Town of Smithtown*, 267 AD2d 284, 284 [2d Dept 1999] [emphasis added]; *see Calvanese v Calvanese*, 93 NY2d 111, 115-116 [1999]; *Cricchio v Pennisi*, 90 NY2d 296, 302-303 [1997]). Because the Section 104-b lien had to be satisfied before creation of the SNT, DSS is not precluded from seeking upon the death of respondent's brother repayment of Medicaid expenditures made on his behalf after the creation of the SNT. Indeed, to accept respondent's argument, we would have to ignore the plain text of the SNT, which expressly contemplates the existence of a Medicaid lien. Such a position would vitiate the entire purpose of the SNT and the "bargain struck" between the State and respondent's brother in creating the SNT (*Abraham XX.*, 11 NY3d at 436).

We agree with respondent, however, that the court erred in admitting the CDR as a business record under CPLR 4518. A document may be admitted as a business record upon proof that "it was made in the regular course of any business and . . . it was the regular course

of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter" (CPLR 4518 [a]; *see generally People v Kennedy*, 68 NY2d 569, 579-580 [1986]). "[A] proper foundation may . . . be provided where an entity shows that it routinely relies upon the business records of another entity in the performance of its own business" (*West Val. Fire Dist. No. 1 v Village of Springville*, 294 AD2d 949, 950 [4th Dept 2002]), and where the entity "is familiar with the practices of [the] company that produced the records at issue" (*People v Brown*, 13 NY3d 332, 341 [2009]; *see generally People v Cratsley*, 86 NY2d 81, 90-91 [1995]). " '[T]he mere filing of [data] received from other entities, even if [it is] retained in the regular course of business, is insufficient to qualify [it] as [a] business[] record' " (*Cratsley*, 86 NY2d at 90).

Here, as noted, DSS sought to lay the requisite foundation for admission of the CDR as a business record by way of the certification of an SDOH employee (*see* CPLR 2307, 4518 [c]). The certification stated, in relevant part, "that the annexed [CDR] is a true and accurate copy of the original [CDR], which was generated from data contained in the Adjudicated Claim File. The Adjudicated Claim File, a comprehensive computer data file, is created, maintained and transported in the form of magnetic media to the [SDOH] by CSRA, Inc. [(CSRA)], a fiscal intermediary which contracts with the [SDOH]." Thus, the certification clearly states that the data sought to be admitted in evidence via the CDR was "created" and "maintained" by CSRA, a third-party entity. The SDOH employee who certified the CDR did not, however, work for CSRA, i.e., the entrant of the information upon which the CDR is based. Further, although the certification stated that the CDR was "produced" in the regular course of SDOH's business and that the data entries were "transported" to SDOH "at or about the time that such data [was] received and incorporated into the Adjudicated Claim File," the SDOH employee did not establish that CSRA, as "entrant[,] was under a business duty to obtain and record the" data reflected in the Adjudicated Claim File (*People v Jones*, 158 AD3d 1103, 1104 [4th Dept 2018] [internal quotation marks omitted]), or that he was familiar with the record-keeping practices of CSRA and that SDOH generally relied upon CSRA's records (*cf. Brown*, 13 NY3d at 341). At best, the certification demonstrated only that SDOH filed and retained the data created and maintained by CSRA, which fails to establish the requisite foundation (*see Cratsley*, 86 NY2d at 90). We therefore conclude that the CDR should not have been admitted in evidence at the hearing pursuant to CPLR 4518 based on the SDOH employee's certification.

Inasmuch as the CDR was the critical piece of evidence establishing the value of the Medicaid lien—particularly that it exceeded the value of the remaining SNT corpus—we cannot say that admitting the CDR was harmless error (*see generally West Val. Fire Dist. No. 1*, 294 AD2d at 950). Thus, we modify the order by vacating the 12th and 17th adjudicatory paragraphs and the fourth and fifth ordering paragraphs, and we remit the matter to Supreme Court for a new hearing to determine the amount of the Medicaid lien only.

Given our determination, DSS's motion to quash respondent's judicial subpoena duces tecum is no longer moot. We therefore further modify the order by vacating the first ordering paragraph, and we also remit the matter to Supreme Court for a determination of that motion on the merits (*see Weiss v Zellar Homes, Ltd.*, 169 AD3d 1491, 1495 [4th Dept 2019]).

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

Entered: November 13, 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 18-00282

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAVARIUS BUMPERS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered January 2, 2015. The judgment convicted defendant, upon a plea of guilty, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of robbery in the first degree (Penal Law § 160.15 [3]). Contrary to defendant's contention, he validly waived his right to appeal (*see People v Thomas*, 34 NY3d 545, 559-560 [2019], *cert denied* — US — , 140 S Ct 2634 [2020]). Defendant's challenge to the severity of his sentence is foreclosed by his valid waiver of the right to appeal (*see People v Lopez*, 6 NY3d 248, 255 [2006]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

528

CA 19-00643

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

IN THE MATTER OF ELDERWOOD AT AMHERST,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

HOWARD A. ZUCKER, M.D., AS COMMISSIONER OF
NEW YORK STATE DEPARTMENT OF HEALTH, AND
DENNIS ROSEN, AS MEDICAID INSPECTOR GENERAL OF
STATE OF NEW YORK, RESPONDENTS-APPELLANTS.

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

HARTER SECREST & EMERY LLP, ROCHESTER (BRIAN M. FELDMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (William K. Taylor, J.), entered September 20, 2018 in a proceeding pursuant to CPLR article 78. The judgment granted the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination of the Administrative Law Judge (ALJ), made after a hearing, affirming the determination of the New York State Office of the Medicaid Inspector General (OMIG) after a final audit of Medicaid claims paid to petitioner. Specifically, the ALJ affirmed OMIG's determination finding that the New York State Department of Health is entitled to recover from petitioner Medicaid overpayments for certain therapy services determined not to be medically necessary. Supreme Court granted the petition on the ground that the ALJ's decision was, inter alia, affected by an error of law and was arbitrary and capricious, annulled the decision of the ALJ, and remitted the matter to the ALJ for a new determination in accordance with the court's judgment. We now reverse the judgment and dismiss the petition.

We agree with respondents that the court erred in concluding that the ALJ applied an impermissible "expectation of improvement" standard in rendering his decision. Rather, the ALJ's decision is based on the fact that petitioner failed to establish that the medical basis and specific need for therapy services for two of petitioner's residents

were "fully and properly documented" in the residents' respective medical records (18 NYCRR 518.3 [b]; *see Matter of Hurlbut, LLC v New York State Off. of Medicaid Inspector Gen.*, 174 AD3d 1303, 1303-1304 [4th Dept 2019]; *see also Matter of Zuttah v Wing*, 243 AD2d 765, 766 [3d Dept 1997]). The ALJ's remarks concerning the incremental changes in the physical and functional conditions of the two residents before and after receiving the therapy services were made in the context of his observation that the residents received the therapy services only during a certain evaluation period relevant to the calculation of Medicaid reimbursement rates applicable to those residents, after which the therapy services were discontinued.

We further agree with respondents that the court erred in holding that the ALJ improperly determined that petitioner was required to produce interdisciplinary documentation in the residents' medical records to establish the medical basis and specific need for the therapy services. The ALJ properly recognized that respondents' interpretation of their own regulations to require such documentation was entitled to deference inasmuch as the interpretation was not irrational or unreasonable (*see Andryeyeva v New York Health Care, Inc.*, 33 NY3d 152, 174 [2019]; *Matter of County of Oneida v Zucker*, 147 AD3d 1338, 1339 [4th Dept 2017]). In light of that interpretation, we conclude that respondents' determination is supported by a rational basis (*see Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]; *see also Andryeyeva*, 33 NY3d at 174). We reject petitioner's position, accepted by the court, that respondents' interpretation constitutes an unpromulgated rule (*see Bloomfield v Cannavo*, 123 AD3d 603, 606 [1st Dept 2014]; *see also Matter of Elcor Health Servs. v Novello*, 100 NY2d 273, 279 [2003]). We likewise reject petitioner's position, also accepted by the court, that petitioner did not have fair notice that respondents would seek interdisciplinary notes in the residents' medical records as part of the auditing process. Indeed, before the audit took place, OMIG advised petitioner that it would need documentation to support the medical necessity of the services underlying the reimbursement rates applicable to the residents, reports of the residents' activities of daily living, and nurse's notes, and it more specifically advised that it would "need any nurse's notes if the [resident] was not a new admission and required restorative services."

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

530

CA 19-01226

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

IN THE MATTER OF JOHN DOE 1, ET AL., PETITIONERS,
JOHN DOE 3, JOHN DOE 7 AND JOHN DOE 8,
PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

SYRACUSE UNIVERSITY, RESPONDENT-RESPONDENT.

DANIELLE C. WILD, ROCHESTER, FOR PETITIONERS-APPELLANTS.

HANCOCK ESTABROOK, LLP, SYRACUSE (JOHN G. POWERS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

RANDAZZA LEGAL GROUP, PLLC, LONG ISLAND CITY (JAY M. WOLMAN OF COUNSEL), FOR FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, AMICUS CURIAE.

Appeal from a judgment (denominated order) of the Supreme Court, Jefferson County (James P. McClusky, J.), entered January 8, 2019 in a CPLR article 78 proceeding. The judgment denied in part the petition.

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

Memorandum: John Doe 3, John Doe 7, and John Doe 8 (petitioners) were among several other pledging members of the Theta Tau fraternity chapter (Chapter) at respondent, Syracuse University, who, in late March 2018, participated in a videotaped roast of current members before an assembled group of fraternity members in the basement of the Chapter house. The skits performed as part of this event, which were apparently attempts at satire, included dialogue in which students professed hatred for persons of certain races, ethnicities, and religions while using slurs to refer to those groups, and depictions of simulated sexual activity and sexual violence directed at persons imitating women and a disabled individual. The videotaped performances were subsequently posted online to the Chapter's private Facebook group. A few weeks later, a female student was granted access to the Facebook group, viewed and recorded the videos, and sent the videos to respondent's administrators and its student-run newspaper. The announcement of respondent's Chancellor disclosing the existence and describing the content of the videos and the subsequent release of an edited video clip by media outlets, including the student-run newspaper, resulted in campus-wide demonstrations, protests, and outrage. Open forums were held the same day—including

one in the evening during which time the first video clip was released by the media—in which students, many of whom identified with marginalized groups, expressed the effect that petitioners' reported and depicted conduct had on them. Campus unrest continued over the following days, and a second edited video clip was also released by the media.

Following an investigation, petitioners and other pledging members of the Chapter were charged with various violations of respondent's Code of Student Conduct (Code). Petitioners appeared before the University Conduct Board (UCB) for a group disciplinary hearing, and the UCB thereafter found petitioners responsible for certain violations of the Code and recommended sanctions that included indefinite suspensions of one or two years with eligibility for readmission requiring a petition and completion of certain conditions. On administrative appeal, the University Appeals Board (UAB) upheld the UCB's decision, and the UAB determination was confirmed by respondent's representative.

Petitioners thereafter commenced this CPLR article 78 proceeding seeking to annul respondent's final determinations. Supreme Court granted the petition in part and denied the petition in part by upholding the final determinations to the extent that respondent found petitioners responsible for Code violations under Section 3 prohibiting conduct that threatens the mental health, physical health, or safety of any person or persons and under Section 15 prohibiting the violation of other university policies such as the guidelines of the Office of Fraternity and Sorority Affairs (FASA). The court also upheld the sanctions imposed against petitioners. Petitioners now appeal, and we affirm.

It is well settled that "the relationship between a private university and its students is essentially a private one such that, absent some showing of State involvement, [its] disciplinary proceedings do not implicate the full panoply of due process guarantees" (*Matter of A.E. v Hamilton Coll.*, 173 AD3d 1753, 1754 [4th Dept 2019] [internal quotation marks omitted]; *see Matter of Kickertz v New York Univ.*, 25 NY3d 942, 944 [2015]). " 'Judicial scrutiny of the determination of disciplinary matters between a university and its students, or student organizations, is limited to determining whether the university substantially adhered to its own published rules and guidelines for disciplinary proceedings so as to ascertain whether its actions were arbitrary or capricious' " (*Matter of Al-Khadra v Syracuse Univ.*, 291 AD2d 865, 866 [4th Dept 2002], *lv denied* 98 NY2d 603 [2002]; *see A.E.*, 173 AD3d at 1754-1755; *see generally Tedeschi v Wagner Coll.*, 49 NY2d 652, 660 [1980]). "Perfect adherence to every procedural requirement is not necessary to demonstrate substantial compliance" (*Matter of Doe v Skidmore Coll.*, 152 AD3d 932, 935 [3d Dept 2017] [hereafter, *Skidmore Coll.*]). "A university's determination will be annulled only where it has failed to substantially comply with its procedures or where its determination lacks a rational basis" (*Matter of Doe v Cornell Univ.*, 163 AD3d 1243, 1245 [3d Dept 2018] [hereafter, *Cornell Univ.*]; *see Matter of Ponichtera v State Univ. of N.Y. at Buffalo*, 149 AD3d 1565, 1565-1566

[4th Dept 2017]).

We reject petitioners' contention that respondent failed to substantially adhere to its own published rules and guidelines for disciplinary proceedings. Contrary to petitioners' assertion, the record establishes that respondent substantially complied with its procedures in providing petitioners timely and adequate notice of the charges against them (*see Matter of Lampert v State Univ. of N.Y. at Albany*, 116 AD3d 1292, 1294 [3d Dept 2014], *lv denied* 23 NY3d 908 [2014]). Petitioners' contentions with respect to the use of a group disciplinary hearing format are likewise without merit because petitioners were provided notice that there would be a single hearing for all pledging members identified in the investigation (*see Matter of Beilis v Albany Med. Coll. of Union Univ.*, 136 AD2d 42, 44 [3d Dept 1988]), and the Code does not preclude respondent from conducting the hearing in the group manner employed here (*see Matter of Shah v Union Coll.*, 97 AD3d 949, 951 [3d Dept 2012]).

Petitioners also contend that respondent failed to substantially comply with its procedures by improperly applying the rules governing the questioning of the investigator at the hearing. That contention is without merit. Here, "the right of confrontation or cross-examination is not directed or guaranteed under respondent's procedures"; instead, the Code provides a limited right to submit proposed questions to witnesses indirectly through the UCB, which is granted discretion via its chairperson to determine whether and the extent to which, based on reasonableness and relevance, such questions are posed to witnesses (*Cornell Univ.*, 163 AD3d at 1245; *see Matter of Weber v State Univ. of N.Y., Coll. at Cortland*, 150 AD3d 1429, 1432 [3d Dept 2017]). Contrary to petitioners' contention, the record establishes that respondent substantially complied with this procedure inasmuch as petitioners were permitted to pose many questions to the investigator, even though the UCB exercised its discretion in precluding certain questions (*see Cornell Univ.*, 163 AD3d at 1245).

Petitioners further contend that respondent failed to substantially comply with its procedures when the UCB denied their request to call certain witnesses. That contention lacks merit. The Code provides that "[e]ach party will have the opportunity to present relevant testimony" and that the "[r]elevance of testimony will be determined by the respective [UCB] chairperson." Here, the UCB determined that the information sought to be elicited from petitioners' proposed witnesses was "procedural and not factual" and that, inasmuch as the UCB's function was to hear factual information relevant to the subject events to determine whether the Code was violated, the opinions of anyone else about what charges should apply were "not relevant." That evidentiary determination was a discretionary one reserved by the Code for the UCB and, therefore, petitioners' contention that respondent failed to substantially comply with its procedures in that regard is without merit (*see Matter of Hyman v Cornell Univ.*, 82 AD3d 1309, 1310 [3d Dept 2011]).

Contrary to petitioners' additional contention, respondent substantially complied with its procedures when petitioners were

permitted to "present objections to the participation of any [UCB] member for reason of conflict of interest" (*see generally Weber*, 150 AD3d at 1433). Moreover, the UCB adequately ruled on those objections, and there is no indication in the record that any of the UCB members had predetermined the issues (*see Skidmore Coll.*, 152 AD3d at 933-934; *Weber*, 150 AD3d at 1433-1434; *Shah*, 97 AD3d at 951).

Petitioners also contend that respondent did not substantially comply with its procedures because the UAB failed to timely render a decision on their administrative appeals or timely indicate in writing that its decision would be delayed. Although we agree with petitioners that the UAB failed to respond within the requisite three business days, we nonetheless conclude that respondent " 'substantially adhered to the time frame' of its [appeal] resolution process by responding to the [administrative appeals] within [eight business] days of [their] submission" with letters indicating that, in light of the quantity of the materials it had to review, the UAB required additional time to make a final decision (*Matter of Krysty v State Univ. of N.Y. at Buffalo*, 39 AD3d 1220, 1220 [4th Dept 2007], *lv denied* 9 NY3d 805 [2007]).

Petitioners failed to preserve for our review their remaining contentions regarding respondent's alleged failure to adhere to its procedures, and we have no discretionary authority to review those contentions in this CPLR article 78 proceeding (*see Matter of Khan v New York State Dept. of Health*, 96 NY2d 879, 880 [2001]; *Matter of Sharma v State Univ. of N.Y. at Buffalo*, 170 AD3d 1565, 1567 [4th Dept 2019]; *Krupa v Stanford*, 145 AD3d 1656, 1656 [4th Dept 2016]).

Next, petitioners correctly note that respondent promises its students a general "right to fundamental fairness" in the disciplinary process. However, "[t]he 'fundamental fairness' promised by this private university's disciplinary rules is circumscribed by the . . . processes and limitations described therein, and was not intended to afford petitioner[s] the full panoply of due process rights" (*Matter of Ebert v Yeshiva Univ.*, 28 AD3d 315, 315 [1st Dept 2006]). Petitioners take issue with the Chancellor's initial statements to the university community in which he, among other things, advised that respondent had "launched a formal investigation to identify individuals involved and to take additional legal and disciplinary action" against them, characterized the behavior purportedly depicted in the videos as "unacceptable" and contrary to respondent's moral standards, and warned that "[w]hat happened at [the Chapter] serves as a reminder that violations of codes of honor, behavior and values will be met with swift and appropriate consequences." Contrary to petitioners' contention, we conclude that, while aspects of the process were imperfect, including portions of the Chancellor's remarks that risked creating the appearance of predetermination in a pending investigation and disciplinary process, respondent nonetheless "proceeded in accordance with [its disciplinary] rules, which it 'substantially observed,' " and it cannot be said on this record that petitioners were deprived of the fundamentally fair process to which they were entitled (*id.*; *cf. Skidmore Coll.*, 152 AD3d at 939; *see generally Matter of Hill v State Univ. of N.Y. at Buffalo*, 163 AD3d

1454, 1455 [4th Dept 2018]). Petitioners' related assertion that respondent added the Title IX charges in order to manipulate in its favor the procedures that would apply is, as petitioners acknowledge, based on speculation, and that assertion thus provides petitioners with no basis for obtaining relief (*see Ebert*, 28 AD3d at 316).

With respect to petitioners' contention regarding free speech, the parties agree that respondent, as a private university, is not directly bound by the protections afforded by the First Amendment of the United States Constitution (*see generally Rendell-Baker v Kohn*, 457 US 830, 837 [1982]; *Weise v Syracuse Univ.*, 553 F Supp 675, 681-682 [ND NY 1982]; *Mitchell v New York Univ. ["NYU"]*, 129 AD3d 542, 544 [1st Dept 2015], *lv denied* 26 NY3d 908 [2015]). Moreover, we conclude that the relevant policy governing student rights and responsibilities does "not expressly or impliedly adopt a First Amendment standard governed by [related] case law and make it applicable to the university as a private entity" (*Bilicki v Syracuse Univ.*, 67 Misc 3d 1230[A], 2019 NY Slip Op 52178[U], *6 [Sup Ct, Onondaga County 2019], *affd for reasons stated* 181 AD3d 1188 [4th Dept 2020]). Instead, the subject policy provides that respondent's "[s]tudents have the right to express themselves freely on any subject provided they do so in a manner that does not violate the Code of Student Conduct." Inasmuch as the right of free speech that respondent promises to its students is limited in that manner, the inquiry remains whether the speech at issue here violated the Code.

In that regard, petitioners contend that respondent's disciplinary determinations were arbitrary and capricious because there was no rational basis on which to conclude that their conduct threatened the mental health, physical health, or safety of any person as charged under Section 3 of the Code or that their individual conduct violated the FASA guidelines as charged under Section 15 of the Code. We reject that contention. Where, as here, " 'a university, in [suspending] a student, acts within its jurisdiction, not arbitrarily but in the exercise of an honest discretion based on facts within its knowledge that justify the exercise of discretion, a court may not review the exercise of its discretion' " (*Ponichtera*, 149 AD3d at 1566, quoting *Matter of Carr v St. John's Univ., N.Y.*, 17 AD2d 632, 634 [1962], *affd* 12 NY2d 802 [1962]; *see Matter of Powers v St. John's Univ. Sch. of Law*, 25 NY3d 210, 216 [2015]).

With respect to the particular violations at issue, a student violates Section 3 of the Code by engaging in "[c]onduct—whether physical, verbal or electronic, oral, written or video—which threatens the mental health, physical health, or safety of any person or persons including, but not limited to hazing, drug or alcohol abuse, bullying or other forms of destructive behavior." Here, respondent's determination that petitioners' conduct—i.e., participating in videotaped performances at a roast that included dialogue professing hatred for persons of certain races, ethnicities, and religions, the use of slurs to refer to those groups, and the depiction of simulated sexual activity and sexual violence directed at persons imitating women and a disabled individual—threatened the mental health of persons in the university community is rationally supported by the

record (*see Cornell Univ.*, 163 AD3d at 1246-1248; *Ponichtera*, 149 AD3d at 1566; *Hyman*, 82 AD3d at 1310). Petitioners' related contention that it was unreasonable for respondent to hold them responsible for conduct that they did not intend to cause harm is likewise without merit. Respondent's interpretation of Section 3 as containing no requirement that a student intend the conduct to cause a harmful result "is neither unreasonable nor irrational" (*Hyman*, 82 AD3d at 1310; *see generally Matter of Agudio v State Univ. of N.Y.*, 164 AD3d 986, 990 [3d Dept 2018]; *Matter of Katz v Board of Regents of the Univ. of the State of N.Y.*, 85 AD3d 1277, 1279 [3d Dept 2011], *lv denied* 17 NY3d 716 [2011]).

Contrary to petitioners' contention with respect to their violation of Section 15 of the Code, it "is neither unreasonable nor irrational" (*Hyman*, 82 AD3d at 1310) for respondent to interpret the FASA guidelines as proscribing *both* chapters and individual members from tolerating or condoning "any form of sexist or sexually abusive behavior," including "any actions, activities or events . . . which are demeaning to women or men," inasmuch as the FASA guidelines expressly provide that they "shall apply to all fraternity/sorority entities and all levels of fraternity/sorority membership." Further, respondent rationally concluded that petitioners violated the subject provision by participating in a production that included sexist portrayals of women and simulated sexual assault, thereby condoning a form of sexist and sexually abusive behavior during a fraternity activity or event that was demeaning to women (*see Cornell Univ.*, 163 AD3d at 1246-1248; *Ponichtera*, 149 AD3d at 1566; *Hyman*, 82 AD3d at 1310).

Finally, contrary to petitioners' contention, we conclude that the sanctions imposed on each of them are not "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974] [internal quotation marks omitted]; *see Powers*, 25 NY3d at 218; *Lampert*, 116 AD3d at 1294).

All concur except NEMOYER, J., who dissents in part and votes to modify in accordance with the following memorandum: At the outset, let me begin with an important disclaimer: in no way do I condone, support, or approve of the sentiments depicted on the videos that sparked this case. Petitioners' videotaped behavior is fairly characterized as offensive, boorish, immature and sophomoric, and a private university unconstrained by the First Amendment could rationally decide to penalize petitioners for the hazing manifested by such conduct (*see generally Mitchell v New York Univ. ["NYU"]*, 129 AD3d 542, 544 [1st Dept 2015], *lv denied* 26 NY3d 908 [2015]). And while petitioners' "trial" was little more than a sham proceeding convened to reach a pre-ordained result, any judicial relief on that basis is foreclosed by the absence of constitutional due process protections for private disciplinary proceedings, together with the rigorous standard of review applicable to CPLR article 78 petitions. I am therefore constrained to agree with my colleagues that

petitioners' suspensions for violating Section 15 of respondent's Student Code of Conduct (Code) should be upheld.

But there is one aspect of this case that I cannot reconcile with the applicable law, namely, respondent's decision to convict petitioners of violating Section 3 of the Code. Insofar as relevant here, Section 3 empowers respondent to punish any student for "[a]ssistance, participation in, promotion of, or perpetuation of conduct—whether physical, verbal[,] electronic, oral, written or video—which *threatens* the *mental health* . . . of any person or persons" (emphasis added). What on earth does that actually mean? More specifically, what does "mental health" mean in this context? Does it require some nexus to a recognized DSM condition diagnosed by a trained professional, or does the term "mental health" in Section 3 encompass any emotive discomfort or intellectual displeasure experienced by a person who objects to, disagrees with, or is offended by the "physical, verbal[,] electronic, oral, written or video" conduct at issue? Whatever it might encompass, the term "mental health" is clearly ambiguous and fails to provide any intelligible guidance by which reasonable students could tailor their conduct to avoid liability.

And what does Section 3 mean by "threaten"? Must the "threat" be directly communicated to or targeted at another person, or can a statement made in confidence between willing conversants be deemed to have "threatened" the mental health of a third person who learns of the statement months or years after the fact? Must the perpetrator have intended to "threaten" another person? Indeed, from whose perspective is the existence of a "threat" even measured? Is it an objective standard based on the understandings of a reasonable person, or is the accused guilty whenever anyone *feels* threatened based on his or her subjective impressions of the accused's conduct – even if the claimed *feeling* is wholly irrational and untethered from any objective conception of threatening conduct?

In practice, all of my concerns about Section 3 can be distilled to one essential point: does that provision create any distinction between speech that merely offends and speech that truly harms another person's psychological, psychiatric, or neuro-cognitive functioning? Assuming that respondent would even recognize such a distinction in the abstract (and unfortunately, given the complete absence of any proof in this record that petitioners' conduct actually harmed anyone, I cannot take that proposition for granted), then how does Section 3 channel the factfinder's discretion so as to punish only the latter and not the former? To my mind, Section 3 fails miserably at that critical task. Indeed, the staggering breadth of the provision is matched only by its indefiniteness, and it effectively serves as a systemic instrument for the suppression of any viewpoint that falls outside the zone of permissible opinion decreed by the most strident and self-righteous of the campus community. To convict petitioners under such a vague and standardless diktat is, to my mind, the very embodiment of arbitrary and capricious administrative decision-making that should be annulled under CPLR article 78 (*see Matter of Nicholas v Kahn*, 47 NY2d 24, 33-34 [1979]; *Matter of Law Enforcement Officers*

Union, Dist. Council 82, AFSCME, AFL-CIO v State of New York, 229 AD2d 286, 292 [3d Dept 1997], *lv denied* 90 NY2d 807 [1997]). Put simply, "[b]eing subjective and in the absence of objectivity, [Section 3 is] unreasonable and arbitrary and therefore invalid" as a predicate for disciplining petitioners (*Matter of Levine v Whalen*, 39 NY2d 510, 519 [1976]). I would therefore modify the judgment by granting that part of the petition seeking to annul respondent's determinations with respect to Section 3 of the Code. From the majority's contrary conclusion, I respectfully dissent.

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

533

CA 19-00633

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

IN THE MATTER OF ELDERWOOD AT CHEEKTOWAGA,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

HOWARD A. ZUCKER, M.D., AS COMMISSIONER OF
NEW YORK STATE DEPARTMENT OF HEALTH, AND
DENNIS ROSEN, AS MEDICAID INSPECTOR GENERAL OF
STATE OF NEW YORK, RESPONDENTS-APPELLANTS.

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

HARTER SECREST & EMERY LLP, ROCHESTER (BRIAN M. FELDMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (William K. Taylor, J.), entered January 28, 2019 in a CPLR article 78 proceeding. The judgment granted the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously vacated, the determination is confirmed without costs, and the petition is dismissed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination of the Administrative Law Judge (ALJ), made after a hearing, affirming two determinations of the New York State Office of the Medicaid Inspector General (OMIG) after two final audits of Medicaid claims paid to petitioner. Specifically, the ALJ affirmed OMIG's determinations finding that the New York State Department of Health is entitled to recover from petitioner Medicaid overpayments for certain therapy services determined not to be medically necessary. Supreme Court granted the petition on the ground that the ALJ's decision was, inter alia, affected by an error of law and was arbitrary and capricious, annulled the determination of the ALJ, and remitted the matter to the ALJ for a new determination in accordance with the court's judgment.

As a preliminary matter, we note that petitioner correctly concedes that the court should have transferred the entire proceeding to this Court, rather than first disposing of certain contentions of the parties. The petition raises a question of substantial evidence, and the remaining points made by the parties are not objections that could have terminated the proceeding within the meaning of CPLR 7804

(g). We therefore vacate the judgment, and we will treat the proceeding as if it had been properly transferred and review the parties' contentions de novo (*see Matter of Hope Day Care, LLC v New York State Off. of Children & Family Servs.*, 162 AD3d 1639, 1640 [4th Dept 2018], *lv denied* 32 NY3d 905 [2018]; *Matter of Quintana v City of Buffalo*, 114 AD3d 1222, 1223 [4th Dept 2014], *lv denied* 23 NY3d 902 [2014]).

We agree with respondents that their interpretation of 18 NYCRR 518.3 (b), accepted by the ALJ, as requiring petitioner to produce interdisciplinary documentation in the residents' medical records to establish the medical basis and specific need for the therapy services is not irrational or unreasonable (*see Andryeyeva v New York Health Care, Inc.*, 33 NY3d 152, 174 [2019]; *Matter of County of Oneida v Zucker*, 147 AD3d 1338, 1339 [4th Dept 2017]). We reject petitioner's position that respondents' interpretation constitutes an unpromulgated rule (*see Bloomfield v Cannavo*, 123 AD3d 603, 606 [1st Dept 2014]; *see also Matter of Elcor Health Servs. v Novello*, 100 NY2d 273, 279 [2003]), and we likewise reject petitioner's position that it did not have fair notice that respondents would seek interdisciplinary notes in the residents' medical records as part of the auditing process. Indeed, before the audits took place, OMIG advised petitioner that it would need documentation to support the medical necessity of the services underlying the reimbursement rates applicable to the residents, reports of the residents' activities of daily living, and nurse's notes, and it more specifically advised that it would "need any nurse's notes if the [resident] was not a new admission and required restorative services."

Finally, we agree with respondents that substantial evidence supports the ALJ's determination affirming OMIG's disallowance of Medicaid coverage for the therapy services provided to four residents based on a lack of medical necessity (*see* CPLR 7803 [4]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230 [1974]; *see also Matter of Hurlbut, LLC v New York State Off. of Medicaid Inspector Gen.*, 174 AD3d 1303, 1303-1304 [4th Dept 2019]). Petitioner failed to submit medical records of those residents that "fully and properly documented" the medical basis and specific need for the therapy services (18 NYCRR 518.3 [b]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

538

CA 19-00642

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

IN THE MATTER OF ELDERWOOD AT GRAND ISLAND,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

HOWARD A. ZUCKER, M.D., AS COMMISSIONER OF
NEW YORK STATE DEPARTMENT OF HEALTH, AND
DENNIS ROSEN, AS MEDICAID INSPECTOR GENERAL OF
STATE OF NEW YORK, RESPONDENTS-APPELLANTS.

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

HARTER SECREST & EMERY LLP, ROCHESTER (BRIAN M. FELDMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (William K. Taylor, J.), entered September 20, 2018 in a CPLR article 78 proceeding. The judgment granted the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination of the Administrative Law Judge (ALJ), made after a hearing, insofar as it affirmed in part the determination of the New York State Office of the Medicaid Inspector General (OMIG) after a final audit of Medicaid claims paid to petitioner. Specifically, the ALJ affirmed that part of OMIG's determination finding that the New York State Department of Health is entitled to recover from petitioner Medicaid overpayments for certain therapy services determined not to be medically necessary. Supreme Court granted the petition on the ground that the ALJ's determination was, inter alia, affected by an error of law and was arbitrary and capricious, annulled the determination of the ALJ, and remitted the matter to the ALJ for a new determination in accordance with the court's judgment. We now reverse the judgment and dismiss the petition.

We agree with respondents that the court erred in holding that the ALJ improperly determined that petitioner was required to produce interdisciplinary documentation in the subject resident's medical records to establish the medical basis and specific need for the

therapy services. The ALJ properly recognized that respondents' interpretation of their own regulations to require such documentation was entitled to deference inasmuch as the interpretation was not irrational or unreasonable (*see Andryeyeva v New York Health Care, Inc*., 33 NY3d 152, 174 [2019]; *Matter of County of Oneida v Zucker*, 147 AD3d 1338, 1339 [4th Dept 2017]). In light of that interpretation, we conclude that OMIG's determination, as affirmed in part by the ALJ, is supported by a rational basis (*see Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]; *see also Andryeyeva*, 33 NY3d at 174).

We reject petitioner's position, accepted by the court, that respondents' interpretation constitutes an unpromulgated rule (*see Bloomfield v Cannavo*, 123 AD3d 603, 606 [1st Dept 2014]; *see also Matter of Elcor Health Servs. v Novello*, 100 NY2d 273, 279 [2003]). The regulation relied on by respondents and the ALJ plainly states that "[m]edical care, services or supplies ordered or prescribed will be considered excessive or not medically necessary unless the medical basis and specific need for them are fully and properly documented in the [resident's] medical record" (18 NYCRR 518.3 [b]). We likewise reject petitioner's position, also accepted by the court, that petitioner did not have fair notice that respondents would seek interdisciplinary notes in the resident's medical records as part of the auditing process. Before the audit took place, OMIG advised petitioner that it would "review documentation in support of" the assessment instruments that petitioner compiles to determine a resident's reimbursement rate. Petitioner is guided by the "Long-Term Care Facility Resident Assessment Instrument User's Manual" (Manual) in compiling those assessment instruments, and the Manual explicitly requires documentation in a resident's medical record for skilled therapies. In more general terms, the Manual also emphasizes that the assessment instrument should be completed with the involvement of the nursing staff and the resident's physician and that the sources of information relied on in support of the assessment "must include the resident and direct care staff on all shifts, and should also include the resident's medical record."

We see no need to address whether the ALJ erred in applying an "expectation of improvement" standard. Petitioner's failure to produce any documentation from the resident's medical record renders the issue irrelevant. Even without application of that standard, the determination would be the same, and so we cannot conclude that the ALJ committed an error of law affecting his determination (*see generally* CPLR 7803 [3]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

549

CA 19-00479

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

STEVEN MANNA, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

RICCELLI ENTERPRISES, INC., DAVID BEACH,
DEFENDANTS-APPELLANTS-RESPONDENTS,
ET AL., DEFENDANTS.

MELVIN & MELVIN, PLLC, SYRACUSE (SUSAN E. OTTO OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

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

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered February 13, 2019. The order, among other things, granted in part a motion for summary judgment by defendants Riccelli Enterprises, Inc. and David Beach and denied plaintiff's cross motion for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that he allegedly sustained in April 2016 when the vehicle in which he was riding as a passenger was struck from behind by a vehicle operated by defendant David Beach and owned by defendant Riccelli Enterprises, Inc. (collectively, defendants). Plaintiff alleged that, as a result of the collision, he suffered a serious injury within the meaning of Insurance Law § 5102 (d) and incurred economic loss in excess of basic economic loss within the meaning of Insurance Law § 5102 (a). The complaint, as amplified by the bill of particulars, seeks recovery under four categories of serious injury, i.e., the fracture, permanent loss of use, permanent consequential limitation of use, and significant limitation of use categories (*see* § 5102 [d]). Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) that was causally related to the accident. Plaintiff cross-moved for summary judgment seeking an order that he sustained a causally-related serious injury and economic loss in excess of basic economic loss. Supreme Court denied plaintiff's cross motion and granted defendants' motion in part, and dismissed plaintiff's claim for serious injury under the fracture category. The court was silent on the permanent loss of use category, but determined

that there were questions of fact under an unpleaded claim of serious injury under the 90/180-day category, along with the permanent consequential and significant limitation of use categories. The court also determined that questions of fact precluded summary judgment on the issue whether plaintiff sustained economic loss in excess of basic economic loss. Finally, the court deemed plaintiff's amended bill of particulars a nullity inasmuch as it was served without court intervention and was merely attached to plaintiff's cross motion papers. Defendants appeal and plaintiff cross-appeals.

We note at the outset that plaintiff does not contend on his cross appeal that the court erred in deeming his amended bill of particulars a nullity and dismissing his claim of serious injury under the fracture category, and thus he has abandoned any such contention (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). Consequently, our assessment of the contentions on appeal and cross appeal with respect to the serious injury categories shall focus only on the other injuries alleged in plaintiff's original bill of particulars. Furthermore, the court's failure to rule on that part of the motions addressing the permanent loss of use category is deemed a denial thereof (*see Millard v City of Ogdensburg*, 274 AD2d 953, 954 [4th Dept 2000]). As a final preliminary note, the court found that there were questions of fact with respect to the 90/180-day category, but plaintiff has never alleged that he sustained a serious injury under that category, and the parties did not move for any relief with respect to that category. Consequently, the court's statements in its decision with respect to the 90/180-day category of serious injury are a nullity.

Defendants contend that the court erred in denying their motion with respect to the issue of serious injury because they established as a matter of law that plaintiff's injuries were not causally related to the subject accident but, rather, to a previous accident. We reject that contention. Although defendants submitted evidence that the alleged injuries were attributable to an accident that occurred in February 2016, they failed to submit evidence establishing as a matter of law that those injuries were entirely attributable to that prior accident and were not exacerbated by the subject April 2016 accident (*see Durante v Hogan*, 137 AD3d 1677, 1678 [4th Dept 2016]; *Benson v Lillie*, 72 AD3d 1619, 1620 [4th Dept 2010]; *see also Mays v Green*, 165 AD3d 1619, 1620 [4th Dept 2018]). Consequently, defendants failed to meet their initial burden (*see Durante*, 137 AD3d at 1678).

Even assuming, arguendo, that defendants satisfied their initial burden with respect to the cause of plaintiff's injuries, we conclude that plaintiff raised a triable issue of fact by submitting the affirmation of plaintiff's treating orthopedic surgeon, who opined that the hardware used in a pre-accident surgery was damaged as a result of the subject April 2016 accident, and that plaintiff's pre-April 2016 condition, i.e., a right calcaneal fracture, was aggravated by the April 2016 accident and required, inter alia, further surgical intervention (*see Taylor v Kelly*, 178 AD3d 1382, 1382 [4th Dept 2019]; *Mays*, 165 AD3d at 1620-1621; *Croisdale v Weed*, 139 AD3d 1363, 1364 [4th Dept 2016]).

Our review of the record reveals that, in the proceedings before the motion court, defendants raised only one ground for the dismissal of plaintiff's claim that he sustained a serious injury within the meaning of Insurance Law § 5102 (d), i.e., that plaintiff's alleged serious injuries are not causally related to the subject April 2016 accident. Thus, defendants' current contention that the alleged injuries did not satisfy the statutory criteria for the alleged categories of serious injury is raised for the first time on appeal and is therefore not properly before us (*see Ciesinski*, 202 AD2d at 985).

On plaintiff's cross appeal, we conclude that the issues of fact precluding summary judgment in defendants' favor on the issue of serious injury also require denial of plaintiff's cross motion with respect to the issue of serious injury (*see generally Mays*, 165 AD3d at 1621).

Contrary to the contentions of defendants and plaintiff, we conclude that there are triable issues of fact whether plaintiff's alleged economic losses were caused by the accident. Thus, the court properly denied the motion and cross motion with respect to that issue (*see id.*). We have reviewed the remaining contentions of the parties and conclude that none warrants modification or reversal of the order.

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

552

CA 19-01018

PRESENT: SMITH, J.P., TROUTMAN, WINSLOW, BANNISTER, AND DEJOSEPH, JJ.

MARK C. LORQUET AND HELEN LORQUET,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

TIMONEY TECHNOLOGY INC., AND DEVON FACILITY
MANAGEMENT LLC, DEFENDANTS-APPELLANTS.

NASH CONNORS, P.C., BUFFALO (JAMES J. NASH OF COUNSEL), FOR DEFENDANT-APPELLANT TIMONEY TECHNOLOGY INC.

LAW OFFICES OF JOHN WALLACE, BUFFALO (JAMES J. NAVAGH OF COUNSEL), FOR DEFENDANT-APPELLANT DEVON FACILITY MANAGEMENT LLC.

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

Appeals from an order of the Supreme Court, Erie County (Emilio L. Colaiacovo, J.), entered April 22, 2019. The order denied the motions of defendants for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Mark C. Lorquet (plaintiff) when he slipped and twisted his knee while stepping over a “wind row” of snow in the parking lot at his place of work. Plaintiff’s employer had contracted with defendant Devon Facility Management LLC (Devon) for property maintenance services, including snow and ice removal from the parking lot, and Devon subcontracted the snow and ice removal work to defendant Timoney Technology Inc. (Timoney). Timoney moved for summary judgment dismissing the complaint and Devon’s cross claims against it, and Devon moved for summary judgment dismissing the complaint against it and, alternatively, for summary judgment on its second cross claim against Timoney, for contractual indemnification. Timoney and Devon now appeal from an order that denied both motions. We affirm.

Contrary to Timoney’s contention, Supreme Court properly determined that Timoney failed to meet its initial burden on its motion of establishing that it owed no duty to plaintiff based on a storm in progress at the time of the incident. The evidence submitted by Timoney in support of its motion failed to establish that Timoney’s

workers did not create or exacerbate the allegedly hazardous condition that caused plaintiff's injuries (*see Garrett v 1030 E. Genesee Co.*, 169 AD3d 1433, 1433-1434 [4th Dept 2019]; *DeMonte v Chestnut Oaks at Chappaqua*, 134 AD3d 662, 664 [2d Dept 2015]; *see generally Smith v United Ref. Co. of Pennsylvania*, 148 AD3d 1733, 1734 [4th Dept 2017]). Timoney's representative testified at his deposition that Timoney did not keep records or time sheets establishing what work was done, or by whom, on a particular day, and thus Timoney could not offer any evidence that its workers did not engage in snowplowing efforts on the day in question or, if they did so, that they kept the parking lot free of wind rows, as required by the subcontract (*see generally Rak v Country Fair, Inc.*, 38 AD3d 1240, 1241 [4th Dept 2007]).

Timoney likewise failed to meet its burden of establishing that it owed no duty of care to plaintiff on the ground that plaintiff is not a party to the subcontract. "As a general rule, a contractual obligation, standing alone, does not give rise to tort liability in favor of a third party" (*Grove v Cornell Univ.*, 151 AD3d 1813, 1815 [4th Dept 2017]). Timoney asserted that none of the *Espinal* exceptions to that general rule applies (*see generally Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]), but it is well settled that a contractor who creates or exacerbates a hazardous snow condition by plowing may be held liable to a third party under the first *Espinal* exception, for launching a force or instrument of harm (*see Chamberlain v Church of the Holy Family*, 160 AD3d 1399, 1403 [4th Dept 2018]; *Meyers-Kraft v Keem*, 64 AD3d 1172, 1173-1174 [4th Dept 2009]; *Rak*, 38 AD3d at 1241). In light of Timoney's failure to meet its initial burden, we do not examine the sufficiency of the plaintiffs' opposing submissions (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Rak*, 38 AD3d at 1241-1242).

Contrary to Timoney's further contention, the court properly denied that part of its motion seeking summary judgment dismissing Devon's cross claim for contractual indemnification. Timoney and Devon agree that the indemnification provision in the subcontract provides that Timoney will indemnify Devon for any claim or injury stemming from Timoney's snowplowing work, even if the claim or injury was partially caused by Devon's negligence. Timoney therefore has no contractual obligation to indemnify Devon for any claim or injury that is solely attributable to Devon's negligence. We agree with the court that Timoney failed to establish that its own negligence was not a cause of the accident, and thus that Timoney failed to establish as a matter of law that plaintiff's injuries were solely attributable to Devon's negligence (*see generally Chamberlain*, 160 AD3d at 1403-1404).

Contrary to Devon's contention on its appeal, the court properly determined that Devon is not entitled to summary judgment dismissing the complaint against it. Devon contends that it is entitled to summary judgment because it owed no duty of care to plaintiff, and its subcontract with Timoney did not give rise to such a duty. Although "[t]he general rule in New York is that a party who retains an independent contractor is not liable for the independent contractor's negligent acts" (*Tschetter v Sam Longs' Landscaping, Inc.*, 156 AD3d

1346, 1347 [4th Dept 2017], citing *Kleeman v Rheingold*, 81 NY2d 270, 273-274 [1993]), there is an exception to that rule where there has been negligent supervision on the part of the hiring party (*see Wendt v Bent Pyramid Prods., LLC*, 108 AD3d 1032, 1033 [4th Dept 2013]). Thus, while "the mere retention of general supervisory powers over an independent contractor cannot form a basis for the imposition of liability against the principal" (*Goodwin v Comcast Corp.*, 42 AD3d 322, 323 [1st Dept 2007]; *see Wendt*, 108 AD3d at 1033), here, we conclude that there is a question of fact whether Devon's alleged negligence in supervision goes beyond general supervisory authority. Devon's subcontract with Timoney expressly prohibited snow being piled in wind rows in walkways or parking lots, and that directive is also present in the contract between plaintiff's employer and Devon. And yet, contrary to the terms of the contract and subcontract, Devon's representative testified that the practice of creating wind rows was permissible inasmuch as Devon did not expect Timoney to clear the wind rows that were generated against the parked cars when Timoney plowed the driving lanes. The testimony of Devon's representative establishes that Devon affirmatively approved the existence of the wind rows, i.e., the hazardous condition that injured plaintiff, despite the fact that they were contractually prohibited. We cannot conclude, therefore, that Devon established that it had " 'no right to control the manner' " in which the work that created the wind rows was done (*Brothers v New York State Elec. & Gas Corp.*, 11 NY3d 251, 257 [2008], quoting *Kleeman*, 81 NY2d at 274).

We also conclude that the court properly denied that part of Devon's motion seeking summary judgment on its cross claim for contractual indemnification inasmuch as Devon failed to establish as a matter of law that plaintiff's injuries are attributable to negligence by Timoney (*see generally Winegrad*, 64 NY2d at 853). Indeed, there is no evidence in the record how or when the wind row on which plaintiff was injured was created, and any inference whether Timoney was responsible for creating the wind row is one to be made by a factfinder (*see generally Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 744 [1986]; *Seelinger v Town of Middletown*, 79 AD3d 1227, 1229-1230 [3d Dept 2010]; *Schuster v Dukarm*, 38 AD3d 1358, 1359 [4th Dept 2007]).

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

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

553

CA 19-00630

PRESENT: SMITH, J.P., TROUTMAN, WINSLOW, BANNISTER, AND DEJOSEPH, JJ.

CAROL J. MURPHY, AS SUCCESSOR-IN-INTEREST AND EXECUTRIX FOR THE ESTATE OF JAMES A. MURPHY, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CWR MANUFACTURING OF CENTRAL NEW YORK, LLC, AND SEAN A. MURPHY, DEFENDANTS-APPELLANTS.

BOUSQUET HOLSTEIN, PLLC, SYRACUSE (JAMES L. SONNEBORN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BARCLAY DAMON LLP, SYRACUSE (JON P. DEVENDORF OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered April 3, 2019. The amended order, among other things, granted plaintiff's cross motion for summary judgment dismissing the counterclaims.

It is hereby ORDERED that the amended order so appealed from is unanimously modified on the law by denying the cross motion in part and reinstating the 8th through 10th counterclaims, and as modified the amended order is affirmed without costs.

Memorandum: In 2009, Sean A. Murphy (defendant) and his father, James A. Murphy (decedent), formed defendant CWR Manufacturing of Central New York, LLC (CWR). Defendant and decedent each owned 50 percent of CWR and, under an operating agreement executed by defendant and decedent, decedent was the manager of CWR. CWR paid rent for its use of a portion of a building located on property owned by plaintiff, who was decedent's wife and defendant's step-mother. In 2013, decedent died and, pursuant to the terms of the operating agreement, defendant was entitled to purchase decedent's interest in CWR. Plaintiff, as decedent's successor-in-interest, and defendant, however, could not agree on a price. Thus, pursuant to the terms of the operating agreement, plaintiff and defendant agreed to hire an outside accountant to determine the fair and reasonable value of decedent's interest in CWR. Upon receipt of the accountant's valuation of decedent's interest in CWR, defendant attempted to pay that amount to plaintiff, but plaintiff rejected defendant's payments.

Thereafter, plaintiff commenced this action against defendants for, inter alia, breach of contract, unjust enrichment and an

accounting. Defendants' second amended answer asserted 10 counterclaims. Defendants now appeal from an amended order that, inter alia, granted plaintiff's cross motion for summary judgment dismissing the counterclaims. We conclude that plaintiff is entitled to summary judgment dismissing the first through seventh counterclaims, but we agree with defendants that Supreme Court erred in granting those parts of plaintiff's cross motion seeking summary judgment dismissing the 8th through 10th counterclaims, and we therefore modify the amended order accordingly.

The court properly granted the cross motion with respect to the first and second counterclaims, which are based on allegations that CWR made an overpayment of rent to plaintiff. Plaintiff submitted evidence that, while there was no formal written rental agreement, a verbal agreement existed before the decedent's death, and that defendant was the building manager and acquiesced to the terms of the verbal agreement. We conclude that the evidence of defendant's ratification of the rent agreement bars defendants' counterclaims for breach of fiduciary duty and "unjust enrichment/restitution" arising out of the rent agreement (*see generally 13th & 14th St. Realty LLC v Board of Mgrs. of the A Bldg. Condominium*, 132 AD3d 561, 561 [1st Dept 2015]; *Benedict v Whitman Breed Abbott & Morgan*, 110 AD3d 935, 937 [2d Dept 2013]), and defendants failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The court also properly granted the cross motion with respect to the third through seventh counterclaims, which are based on allegations that decedent, inter alia, failed to procure life insurance for himself with CWR as the beneficiary and failed to change an existing life insurance policy so that CWR would be the beneficiary, rather than a former company, AJ Murphy Company, Inc. (AJ Murphy), which had been owned by decedent's father. Plaintiff met her burden on the cross motion by submitting CWR's operating agreement, which provided that CWR may, but was not required to, obtain life insurance for each member of the company with CWR as the beneficiary, and her deposition testimony that AJ Murphy was a separate entity than CWR and that she left it up to the insurance company to determine who was entitled to be paid under that policy (*see generally Zuckerman*, 49 NY2d at 562). Defendants' submissions in opposition consist of merely speculative allegations and fail to raise a triable issue of fact (*see generally WILJEFF, LLC v United Realty Mgt. Corp.*, 82 AD3d 1616, 1617 [4th Dept 2011]).

We conclude, however, that the court erred in dismissing the 8th through 10th counterclaims. Those counterclaims are based on allegations that in the Spring of 2010 or 2011, oil was dumped into a storm water catch basin located on plaintiff's property at the direction of decedent. The spill was investigated by the Department of Environmental Conservation, which ordered CWR to perform remediation work. In the 8th through 10th counterclaims, defendants sought, inter alia, indemnification or contribution from decedent's estate for the costs of the remediation. Although plaintiff submitted evidence that, after decedent's death, defendant purchased the property from plaintiff and the purchase agreement provided that

defendant would receive the property “as is” and “with all faults,” such evidence does not overcome counterclaims against decedent’s estate because decedent was not a party to that agreement, and because the “as is” clause in a purchase agreement does not preclude counterclaims for indemnification or contribution based on statutory liability for petroleum discharges under the Navigation Law (*see Umbra U.S.A., Inc. v Niagara Frontier Transp. Auth.*, 262 AD2d 980, 981 [4th Dept 1999]). Thus, we conclude that triable issues of fact exist with respect to the 8th through 10th counterclaims that cannot be resolved on the summary judgment motion.

We have considered defendants’ remaining contention and conclude it is without merit.

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

560

TP 19-02267

PRESENT: SMITH, J.P., TROUTMAN, WINSLOW, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF DAVID STRONG, PETITIONER,

V MEMORANDUM AND ORDER

ANGELA FERNANDEZ, AS COMMISSIONER OF NEW YORK STATE DIVISION OF HUMAN RIGHTS AND R.L.E. CORP., DOING BUSINESS AS CASA IMPORTS, RESPONDENTS.

LEGAL SERVICES OF CENTRAL NEW YORK, SYRACUSE (JAMES M. WILLIAMS OF COUNSEL), FOR PETITIONER.

SAUNDERS KAHLER, LLP, UTICA (MERRITT S. LOCKE OF COUNSEL), FOR RESPONDENT R.L.E. CORP., DOING BUSINESS AS CASA IMPORTS.

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Oneida County [Patrick F. MacRae, J.], entered October 11, 2019 to review a determination of respondent Angela Fernandez, as Commissioner of New York State Division of Human Rights. The determination dismissed the complaint.

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

Memorandum: Petitioner commenced this proceeding pursuant to Executive Law § 298 seeking to annul the determination of the New York State Division of Human Rights (Division) that he failed to establish that his former employer, respondent R.L.E. Corp., doing business as Casa Imports (Casa), discriminated against him based on a disability. Contrary to petitioner's contentions, we conclude that the determination is supported by substantial evidence (*see generally Matter of State Div. of Human Rights [Granelle]*, 70 NY2d 100, 106 [1987]).

Petitioner filed a verified complaint with the Division, alleging that Casa engaged in an unlawful discriminatory practice when it discharged him rather than providing him with a reasonable accommodation after he was diagnosed with Hodgkin's lymphoma. Following a public hearing, the Administrative Law Judge (ALJ) issued a proposed decision and order, concluding that petitioner had failed to establish a prima facie case of discrimination and thus that the complaint should be dismissed. The Division adopted the ALJ's decision and order. Petitioner thereafter commenced this proceeding pursuant to Executive Law § 298 against Casa and respondent Angela

Fernandez, as Commissioner of New York State Division of Human Rights (Commissioner), which was transferred to this Court pursuant to Executive Law § 298.

Petitioner began working for Casa in 2011, and was diagnosed with Hodgkin's lymphoma in February 2016. From February 25, 2016 to May 19, 2016, Casa granted petitioner leave from work pursuant to the Family Medical Leave Act. In a letter to petitioner dated May 23, 2016, Casa's Human Resources (HR) director inquired about petitioner's status and requested that petitioner respond by May 31, 2016 about whether he was able to return to work. It is undisputed that petitioner obtained a letter from his physician, dated May 27, 2016, in which the physician wrote that petitioner required five more chemotherapy treatments, with the next treatment scheduled for June 7, 2016; that petitioner could not work on the days of his chemotherapy treatments (Tuesdays) or the following days; and that, during the remainder of the week, petitioner could work part-time, up to four or five hours per day, doing moderately intense work. The physician also noted in the letter that no heavy strenuous physical activity was advised. Petitioner testified at the hearing that he personally delivered the physician's letter to Casa on May 27, 2016, leaving one copy in a mailbox attached to his supervisor's office door and hand-delivering another copy to Casa's HR director. The supervisor and the HR director, however, denied that they had received the physician's letter. Petitioner was terminated on June 3, 2016.

"Our review 'under the Human Rights Law is extremely narrow and is confined to the consideration of whether the Division's determination is supported by substantial evidence in the record' " (*Matter of Abram v New York State Div. of Human Rights*, 71 AD3d 1471, 1473 [4th Dept 2010]). As such, "[i]n reviewing the determination of [the] Commissioner, this Court may not substitute its judgment for that of the Commissioner . . . , and we must confirm the determination so long as it is based on substantial evidence" (*Matter of DiNatale v New York State Div. of Human Rights*, 77 AD3d 1341, 1342 [4th Dept 2010], *lv denied* 16 NY3d 711 [2011] [internal quotation marks omitted]). Thus, "[c]ourts may not weigh the evidence or reject the Division's determination where the evidence is conflicting and room for choice exists" (*Granelle*, 70 NY2d at 106). Here, petitioner alleged that he was subject to disability discrimination because Casa discharged him rather than making reasonable accommodations, and "[i]n so-called reasonable-accommodation cases, such as this one," a petitioner has the burden of establishing that "(1) [the petitioner] is a person with a disability under the meaning of the [Americans with Disabilities Act]; (2) an employer covered by the statute had notice of his [or her] disability; (3) with reasonable accommodation, [the petitioner] could perform the essential functions of the job at issue; and (4) the employer has refused to make such accommodations" (*Abram*, 71 AD3d at 1473 [internal quotation marks omitted]).

With respect to the fourth element, when an "employer is aware of the need for accommodation, both the employer and the employee are required to engage in an 'informal, interactive process' to identify the employee's needs and determine the appropriateness and feasibility

of the requested accommodations" (*Matter of Vinikoff v New York State Div. of Human Rights*, 83 AD3d 1159, 1162 [3d Dept 2011]). "[B]oth the employer and the employee have a duty to act in good faith once the interactive process begins . . . , and [a]n employee who is responsible for the breakdown of that interactive process may not recover for a failure to accommodate" (*id.* at 1163 [internal quotation marks omitted]). As relevant here, an employee's "lack of [a] meaningful response" to an employer's request for information has been held to have "caused a breakdown of the interactive process" (*Graham v New York State Off. of Mental Health*, 154 AD3d 1214, 1219 [3d Dept 2017]; *see Vinikoff*, 83 AD3d at 1162-1164).

Here, there was conflicting evidence in the record with respect to whether petitioner responded to the HR director's May 23, 2016 letter. The ALJ's determination, which was adopted by the Commissioner, included the finding that, "[b]y failing to respond to [his employer's] request for medical information, [petitioner] caused the breakdown of the interactive process. Therefore, [petitioner] cannot claim that [Casa] denied him a reasonable accommodation." Given our limited review power in this proceeding, and giving deference to the ALJ's determinations regarding witness credibility (*see generally Matter of Scheuneman v New York State Div. of Human Rights*, 147 AD3d 1523, 1524 [4th Dept 2017]), we conclude that substantial evidence supports the ALJ's determination that petitioner was responsible for the breakdown of the interactive process and thus that Casa did not improperly refuse to make a reasonable accommodation (*see generally Vinikoff*, 83 AD3d at 1163-1164).

We further conclude that petitioner also failed to establish the third element, i.e., whether he could have performed the essential functions of his job with a reasonable accommodation. "Whether a job function is essential depends on multiple factors, including the employer's judgment, written job descriptions, the amount of time spent on the job performing the function, the consequences of not requiring the [petitioner] to perform the function, mention of the function in any collective bargaining agreement, the work experience of past employees on the job, and the work experience of current employees in similar jobs" (*Gill v Maul*, 61 AD3d 1159, 1160-1161 [3d Dept 2009] [internal quotation marks omitted]). Here, the evidence in the record supports the conclusion that, even if petitioner timely provided Casa with the physician's May 27, 2016 letter, the limitations placed on petitioner by his physician rendered him incapable of performing his essential job functions (*see generally id.* at 1161).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

569

KA 17-01095

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CRISTOBAL MARTINEZ-GONZALEZ, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered May 15, 2017. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, that part of the omnibus motion seeking to suppress evidence relating to the third, fourth, fifth, sixth, and seventh counts of the indictment is granted, the third, fourth, fifth, sixth, and seventh counts of the indictment are dismissed, and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of two counts of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [1]), arising from separate incidents, defendant contends that Supreme Court erred in refusing to suppress evidence obtained following the illegal stop of the vehicle in which defendant was a passenger. We agree.

The evidence adduced at the suppression hearing established that, on the day of defendant's arrest, officers were conducting further surveillance of a residence suspected to be a location for drug sales, immediately prior to the execution of a search warrant at the residence. A detective who could see only the front area of the residence to be searched observed multiple people whom he suspected to be customers arrive at and depart from the back area of the residence through the driveway. The detective also twice saw defendant come to the front yard of the residence to smoke a cigarette then return to the back area. Defendant eventually left the residence as a passenger in a vehicle. The detective conveyed the vehicle's plate number and direction of travel to an officer in a "take down" car, who followed defendant and attempted to effect a stop of the vehicle by activating

the patrol vehicle's lights. The vehicle in which defendant was a passenger slowed and defendant jumped out and fled on foot into his own residence, where he was arrested soon after and found to be in possession of cocaine and heroin. We conclude that the information available to the detaining officer did not provide reasonable suspicion to justify the vehicle stop, and thus the court erred in refusing to suppress both the tangible property seized from defendant (*see People v Stock*, 57 AD3d 1424, 1424-1425 [4th Dept 2008]) and the showup identification that took place after defendant's arrest (*see People v Spinks*, 163 AD3d 1452, 1454 [4th Dept 2018]).

Based on defendant's proximity to a suspected drug house and his otherwise innocuous behavior (*see generally People v De Bour*, 40 NY2d 210, 216 [1976]; *People v Riddick*, 70 AD3d 1421, 1422 [4th Dept 2010], *lv denied* 14 NY3d 844 [2010]), the officer had, at most, a "founded suspicion that criminal activity [was] afoot," which permitted him to approach defendant and make a common-law inquiry (*People v Moore*, 6 NY3d 496, 498 [2006]). The mere fact that defendant was located in an alleged high crime area "does not supply that requisite reasonable suspicion, in the absence of 'other objective indicia of criminality' . . . , and no such evidence was presented at the suppression hearing" (*Riddick*, 70 AD3d at 1423; *see People v Holmes*, 81 NY2d 1056, 1058 [1993]). Because our determination "results in the suppression of all evidence in support of the crimes charged" in counts three through seven of the indictment, those counts must be dismissed (*People v Lee*, 110 AD3d 1482, 1484 [4th Dept 2013] [internal quotation marks omitted]; *see People v Tisdale*, 140 AD3d 1759, 1760-1761 [4th Dept 2016]; *People v Finch*, 137 AD3d 1653, 1655 [4th Dept 2016]). Further, although defendant's conviction of a second count of criminal possession of a controlled substance in the fifth degree arises from a separate incident, his plea of guilty "was expressly conditioned on the negotiated agreement that [he] would receive concurrent sentences on the separate counts to which he pleaded," and thus the plea must be vacated in its entirety (*People v Clark*, 45 NY2d 432, 440 [1978], *rearg denied* 45 NY2d 839 [1978]; *see People v Massey* [appeal No. 1], 112 AD2d 731, 731 [4th Dept 1985]). We therefore reverse the judgment, vacate the plea, grant that part of defendant's omnibus motion seeking to suppress all evidence arising from his February 11, 2016 arrest, dismiss the third, fourth, fifth, sixth, and seventh counts of the indictment, and remit the matter to Supreme Court for further proceedings on the remaining counts.

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

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

572

KA 20-00161

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

DARNELL ALLEN, DEFENDANT-RESPONDENT.

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

Appeal from an order of the Erie County Court (Suzanne Maxwell Barnes, J.), dated September 18, 2019. The order granted that part of defendant's omnibus motion seeking to suppress physical evidence and statements.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, that part of defendant's omnibus motion seeking to suppress physical evidence and statements is denied, and the matter is remitted to Erie County Court for further proceedings on the indictment.

Memorandum: On appeal from an order granting that part of defendant's omnibus motion seeking to suppress physical evidence—i.e., a handgun—and his subsequent oral statements to the police, the People contend that County Court erred in suppressing the handgun and statements on the ground that they resulted from unlawful police pursuit. We agree.

The evidence at the suppression hearing established that a police officer responding to the sound of gunshots observed a person walking towards him a few blocks away from the location of the incident. The officer lost sight of the person before he was able to speak with him to determine whether the person had heard the gunshots, but he relayed over the police radio a generic physical description of the person he had encountered and that person's location. Shortly thereafter, a second police officer encountered defendant not far from the radioed position. The second officer engaged defendant in a brief conversation from her patrol vehicle, after which defendant entered a nearby cut-through—i.e., a pedestrian pathway that connected two streets. When defendant first entered the cut-through, the second officer did not consider him a suspect in the shooting and he was not engaged in any unlawful activity. Nonetheless, the second officer, still in her patrol vehicle and now accompanied by another officer in a separate patrol vehicle, followed defendant along the pathway, maintaining a distance of about five feet from defendant. The cut-

through was so narrow at one point that the officers would not have been able to open the doors of their patrol vehicles. When defendant reached the end of the cut-through, he removed a handgun from his pocket and ran. As he ran, defendant discarded the handgun and was thereafter arrested.

"In evaluating police conduct, a court must determine whether the action taken was justified in its inception and at every subsequent stage of the encounter" (*People v Savage*, 137 AD3d 1637, 1638 [4th Dept 2016] [internal quotation marks omitted]; *see People v Nicodemus*, 247 AD2d 833, 835 [4th Dept 1998], *lv denied* 92 NY2d 858 [1998]; *see generally People v De Bour*, 40 NY2d 210, 222-223 [1976]). "In determining whether an officer had the requisite basis to support the level of intrusion that occurred, the suppression court must consider the totality of circumstances" (*People v Wallace*, 181 AD3d 1214, 1215 [4th Dept 2020]).

At the first level of a police-civilian encounter, i.e., a request for information, a police officer may approach an individual "when there is some objective credible reason for that interference not necessarily indicative of criminality" (*De Bour*, 40 NY2d at 223) and may engage in unobtrusive observation that does not limit the individual's freedom of movement (*see People v Howard*, 50 NY2d 583, 592 [1980]). In contrast, a seizure or detention of a person takes place where "police action results in a significant interruption [of the] individual's liberty of movement" (*People v Bora*, 83 NY2d 531, 534 [1994] [internal quotation marks omitted]; *see People v Feliciano*, 140 AD3d 1776, 1777 [4th Dept 2016], *lv denied* 28 NY3d 1027 [2016]). A detention or a pursuit of a person for the purpose of detention amounts to a level three encounter and must be supported by reasonable suspicion that a crime has been, is being, or is about to be committed (*see People v Moore*, 6 NY3d 496, 498-499 [2006]; *People v Martinez*, 80 NY2d 444, 447 [1992]; *People v Leung*, 68 NY2d 734, 736 [1986]). An officer may use his or her vehicle to unobtrusively follow and observe an individual without elevating the encounter to a level three pursuit (*see People v Baldwin*, 156 AD3d 1356, 1357 [4th Dept 2017], *lv denied* 31 NY3d 981 [2018]; *People v Owens*, 147 AD3d 1312, 1313 [4th Dept 2017], *lv denied* 29 NY3d 1035 [2017]).

Here, we agree with the People that, based on the testimony adduced at the suppression hearing, the police were, at all relevant times, engaged merely in unobtrusive observation of defendant and did not engage in pursuit by following him down the pedestrian path in their patrol vehicles (*see People v Brown*, 142 AD3d 1373, 1374-1375 [4th Dept 2016], *lv denied* 28 NY3d 1123 [2016]; *Feliciano*, 140 AD3d at 1777; *see generally Howard*, 50 NY2d at 592). The police did not activate their vehicles' overhead lights or sirens, exit their vehicles, or significantly limit defendant's freedom of movement along the pedestrian path (*see Baldwin*, 156 AD3d at 1357; *Brown*, 142 AD3d at 1375). Indeed, defendant remained free to keep walking down the path, even if at one point on the path he could not have turned around and traveled in the opposite direction. Thus, we conclude that the handgun was properly seized by the police because defendant did not

discard the handgun in response to unlawful police conduct (*see Baldwin*, 156 AD3d at 1357-1358). Inasmuch as the police conduct was lawful, defendant's statements to the police are not subject to suppression as fruit of the poisonous tree (*see Feliciano*, 140 AD3d at 1777).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

584

CA 19-01338

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

WILLIAM D. MALDOVAN, PUBLIC ADMINISTRATOR, AS ADMINISTRATOR OF THE ESTATE OF LAURA CUMMINGS, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTY OF ERIE AND TIMOTHY B. HOWARD, ERIE COUNTY SHERIFF, DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

WALSH, ROBERTS & GRACE, BUFFALO (ROBERT P. GOODWIN OF COUNSEL), AND MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered April 12, 2019. The order denied the motion of defendants for summary judgment.

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

Memorandum: Plaintiff commenced actions, later consolidated, against defendants, County of Erie (County) and Timothy B. Howard, Erie County Sheriff (Sheriff), seeking, inter alia, to recover damages for the pain and suffering of plaintiff's decedent, and for her wrongful death, after she was killed by her mother, Eva Cummings. An investigation after decedent's death revealed that she had suffered from physical and sexual abuse by her half-brother, Luke Wright, and her mother in the months leading up to her death in January 2010. Both the mother and Wright were convicted of their crimes and sentenced to lengthy prison terms. As outlined in our prior appeal upon defendants' motions to dismiss the complaints (*Mosey v County of Erie*, 117 AD3d 1381, 1382-1383 [4th Dept 2014]), plaintiff asserted various negligence claims against the County based, among other things, on the investigations by child protective services (CPS) and adult protective services (APS) of complaints of possible abuse of decedent in her home in June 2009 and September 2009. Plaintiff asserted that the Sheriff was liable for, inter alia, negligently hiring, training, supervising, and retaining two deputies who found decedent in November 2009 after she ran away from her home and returned her to her home.

In appeal No. 1, defendants appeal from an order denying their motion for summary judgment dismissing the complaints and, in appeal No. 2, plaintiff appeals from an order denying his motion for summary judgment on the issue of liability.

We address first the County's contentions in appeal No. 1. We agree with the County that it is entitled to summary judgment dismissing the complaints against it on the ground that no special duty exists as a matter of law. When a negligence claim is asserted against a municipality, the court must first determine whether the municipality was engaged in a proprietary function or acted in a governmental capacity (*see Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 425 [2013]; *Preaster v City of Syracuse*, 160 AD3d 1423, 1423 [4th Dept 2018], *lv denied* 32 NY3d 902 [2018]). Here, there is no dispute that the County, through the actions of CPS and APS, was acting in a governmental capacity (*see Applewhite*, 21 NY3d at 425). When a municipality acts in a governmental capacity, it is subject to tort liability only if it owed a special duty to the injured party (*see id.* at 426). Plaintiff asserts that a special relationship was formed based on the County's voluntary assumption of a duty to keep decedent safe, a duty on which decedent and others justifiably relied (*see generally Coleson v City of New York*, 24 NY3d 476, 481 [2014]; *Applewhite*, 21 NY3d at 426; *Pelaez v Seide*, 2 NY3d 186, 199-200 [2004]). To establish that special relationship, plaintiff must show "(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking" (*Cuffy v City of New York*, 69 NY2d 255, 260 [1987]; *see Applewhite*, 21 NY3d at 430-431; *Valdez v City of New York*, 18 NY3d 69, 80 [2011]).

We agree with the County that it established as a matter of law that the fourth element, justifiable reliance, cannot be met in this case and that plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The justifiable reliance factor is " 'critical' because it 'provides the essential causative link between the "special duty" assumed by the municipality and the alleged injury' " (*Valdez*, 18 NY3d at 81, quoting *Cuffy*, 69 NY2d at 261; *see Coleson*, 24 NY3d at 481). Here, the evidence establishes that decedent's brother Richard Cummings, who was living out of state at the time, made complaints of possible abuse of decedent that were relayed to CPS in June 2009 and to APS in September 2009. Both agencies investigated the reports, determined that they were unfounded, and closed the investigations. Plaintiff contends that Cummings justifiably relied on the County to keep decedent safe, but we conclude that, inasmuch as he was aware that the agencies had closed their investigations, he could not have relied upon any " 'affirmative undertaking' " by them (*Valdez*, 18 NY3d at 80). "[A]t the heart of most of these 'special duty' cases is the unfairness that the courts have perceived in precluding recovery when a municipality's voluntary undertaking has lulled the injured party into a false sense of security and has thereby induced him [or her]

either to relax his [or her] own vigilance or to forego other available avenues of protection" (*Cuffy*, 69 NY2d at 261). Here, Cummings did not in fact relax his own vigilance inasmuch as he made two follow-up calls to the APS caseworker asking her to reopen the investigation, and he was not induced to forego other avenues of relief (*see Miles v Town/Village of E. Rochester*, 138 AD3d 1465, 1466-1467 [4th Dept 2016]; *Rivera v City of New York*, 82 AD3d 647, 648 [1st Dept 2011]).

Alternatively, we agree with the County that it met its burden of establishing that it was entitled to governmental function immunity, and that plaintiff failed to raise a triable issue in opposition. " '[A] public employee's discretionary acts—meaning conduct involving the exercise of reasoned judgment—may not result in the municipality's liability even when the conduct is negligent' " (*Valdez*, 18 NY3d at 76, quoting *Lauer v City of New York*, 95 NY2d 95, 99 [2000]; *see Mon v City of New York*, 78 NY2d 309, 313 [1991], *rearg denied* 78 NY2d 1124 [1991]). " 'Whether an action of a governmental employee or official is cloaked with any governmental immunity requires an analysis of the functions and duties of the actor's particular position and whether they inherently entail the exercise of some discretion and judgment. If these functions and duties are essentially clerical or routine, no immunity will attach' " (*Valdez*, 18 NY3d at 79). Stated differently, "discretionary . . . acts involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result" (*Tango v Tulevech*, 61 NY2d 34, 41 [1983]).

Defendants established that the actions of the CPS and APS caseworkers "resulted from discretionary decision-making" (*Valdez*, 18 NY3d at 79-80; *see Hines v City of New York*, 142 AD3d 586, 586-587 [2d Dept 2016]; *Rivera*, 82 AD3d at 648; *Weitzner v New York City Dept. of Social Servs.*, 212 AD2d 414, 415 [1st Dept 1995]). While the caseworkers may have been negligent, they were exercising their discretion throughout the investigations (*see Weitzner*, 212 AD2d at 415). Moreover, we agree with the County that a cause of action for negligent investigation is not recognized in New York, which provides an additional reason for dismissal of the claims against the County to the extent the claims make those allegations (*see Juerss v Millbrook Cent. Sch. Dist.*, 161 AD3d 967, 968 [2d Dept 2018], *lv denied* 32 NY3d 903 [2018]; *Hines*, 142 AD3d at 587; *Santiago v City of Rochester*, 19 AD3d 1061, 1062 [4th Dept 2005], *lv denied* 5 NY3d 710 [2005]).

Addressing the Sheriff's contentions in appeal No. 1, we agree with the Sheriff that he is entitled to summary judgment dismissing the complaint against him. The essence of plaintiff's claims against the Sheriff is that his alleged negligence in training the deputies resulted in their failure to conduct an adequate investigation. However, " 'a claim for negligent training in investigative procedures is akin to a claim for negligent investigation or prosecution, which is not actionable in New York' " (*Juerss*, 161 AD3d at 968-969). Further, inasmuch as the allegations of negligent hiring, training,

and supervision against the Sheriff all involved conduct requiring the exercise of the Sheriff's discretion and judgment, the Sheriff established his entitlement to the governmental function immunity defense (*see Mon*, 78 NY2d at 314-315), and plaintiff failed to raise a triable issue of fact in opposition. The Sheriff also established as a matter of law that his alleged negligence was not a proximate cause of decedent's death two months later, and plaintiff failed to raise a triable issue of fact in opposition (*see generally Mazella v Beals*, 27 NY3d 694, 706 [2016]).

In light of our determination, we do not address defendants' remaining contentions in appeal No. 1. In addition, based on our determination in appeal No. 1, we conclude in appeal No. 2 that Supreme Court properly denied plaintiff's motion for summary judgment.

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

585

CA 19-01339

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

WILLIAM D. MALDOVAN, PUBLIC ADMINISTRATOR, AS ADMINISTRATOR OF THE ESTATE OF LAURA CUMMINGS, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF ERIE AND TIMOTHY B. HOWARD, ERIE COUNTY SHERIFF, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

CONNORS LLP, BUFFALO (JOHN T. LOSS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WALSH, ROBERTS & GRACE, BUFFALO (ROBERT P. GOODWIN OF COUNSEL), AND MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered April 11, 2019. The order denied the motion of plaintiff for summary judgment.

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

Same memorandum as in *Maldovan v County of Erie* ([appeal No. 1] — AD3d — [Nov. 13, 2020] [4th Dept 2020]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

588

OP 20-00086

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

IN THE MATTER OF COURT STREET DEVELOPMENT PROJECT, LLC, PETITIONER,

V MEMORANDUM AND ORDER

UTICA URBAN RENEWAL AGENCY, RESPONDENT.

E. STEWART JONES HACKER MURPHY LLP, LATHAM (PATRICK L. SEELY, JR., OF COUNSEL), FOR PETITIONER.

WHITEMAN OSTERMAN & HANNA LLP, ALBANY (CHRISTOPHER M. MCDONALD OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to Eminent Domain Procedure Law § 207 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) to annul the determination of respondent to condemn certain real property.

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

Memorandum: Petitioner commenced this original proceeding pursuant to EDPL 207 seeking to annul the determination of respondent authorizing the condemnation of petitioner's real property. The property is one of four parcels on which the Northland Building (building) on Court Street in Utica, New York is situated. The building has been vacant since 2016.

Pursuant to EDPL 207, the scope of this Court's review of a determination to condemn property is " 'very limited' " (*Matter of Syracuse Univ. v Project Orange Assoc. Servs. Corp.*, 71 AD3d 1432, 1433 [4th Dept 2010], *appeal dismissed and lv denied* 14 NY3d 924 [2010], quoting *Matter of City of New York [Grand Lafayette Props. LLC]*, 6 NY3d 540, 546 [2006]). We must either confirm or reject the condemnor's determination, and our review is "confined to whether (1) the proceeding was constitutionally sound; (2) the condemnor had the requisite authority; (3) its determination complied with [the State Environmental Quality Review Act ([SEQRA] ECL art 8)] and EDPL article 2; and (4) the acquisition will serve a public use" (*Grand Lafayette Props. LLC*, 6 NY3d at 546). "The burden is on the party challenging the condemnation to establish that the determination was without foundation and baseless. . . . Thus, [i]f an adequate basis for a determination is shown and the objector cannot show that the determination was without foundation, the [condemnor's] determination

should be confirmed" (*Matter of GM Components Holdings, LLC v Town of Lockport Indus. Dev. Agency*, 112 AD3d 1351, 1352 [4th Dept 2013], *appeal dismissed* 22 NY3d 1165 [2014], *lv denied* 23 NY3d 905 [2014] [internal quotation marks omitted]; *see Matter of Eisenhauer v County of Jefferson*, 122 AD3d 1312, 1312 [4th Dept 2014]).

Initially, we reject the contention of petitioner that condemnation is beyond respondent's statutory authority because there has been no finding that petitioner's parcel is blighted. Areas of economic underdevelopment and stagnation may be considered blighted so as to support the taking of vacant and underutilized properties located therein (*see Matter of Haberman v City of Long Beach*, 307 AD2d 313, 313-314 [2d Dept 2003], *appeal dismissed* 1 NY3d 535 [2003], *lv denied* 3 NY3d 601 [2004], *cert dismissed* 543 US 1086 [2005]; *see also Matter of Glen Cove Community Dev. Agency [Ardaas, Inc.]*, 259 AD2d 750, 751 [2d Dept 1999]). Here, respondent determined that the building is economically underutilized and has experienced deterioration since it became vacant in 2016. Respondent owns two of the four parcels on which the building is situated and has negotiated a transfer of title with respect to a third parcel, but its redevelopment and reuse of the building is not feasible unless it owns all four parcels. Condemnation of petitioner's parcel will allow respondent to hold complete title to the building and will thus foster the redevelopment of the building, which is an adequate basis for respondent's determination to exercise its legislatively conferred power to acquire real property in order to eliminate blighting influences (*see* General Municipal Law §§ 501, 554, 616).

We also reject petitioner's contention that the condemnation will not serve a public purpose. "What qualifies as public purpose or public use is broadly defined as encompassing virtually any project that may confer upon the public a benefit, utility, or advantage" (*Syracuse Univ.*, 71 AD3d at 1433 [internal quotation marks omitted]). In its determination, respondent stated that the public use, benefit, or purpose of the acquisition is to eliminate any dispute over title and access to the building so as to facilitate the rehabilitation and reuse of the building, with an intention of securing investment in the building and creating jobs and encouraging economic development. Redevelopment is a valid public purpose (*see Matter of United Ref. Co. of Pa. v Town of Amherst*, 173 AD3d 1810, 1811 [4th Dept 2019], *lv denied* 34 NY3d 913 [2020]; *see also Matter of Bendo v Jamestown Urban Renewal Agency*, 291 AD2d 859, 860 [4th Dept 2002], *lv denied* 98 NY2d 603 [2002]; *Sunrise Props. v Jamestown Urban Renewal Agency*, 206 AD2d 913, 913 [4th Dept 1994], *lv denied* 84 NY2d 809 [1994]), and respondent's condemnation of petitioner's property serves the valid public purpose of clearing title in order to promote redevelopment and adaptive reuse.

Petitioner further contends that respondent failed to satisfy the requirements of SEQRA. Our review of respondent's SEQRA determination "is limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (*Akpan v Koch*, 75 NY2d 561, 570 [1990] [internal

quotation marks omitted]). Petitioner contends that, by considering only the impact of the condemnation of petitioner's property without considering the impact of future unknown aspects of the rehabilitation or reuse project, respondent improperly "segmented" its SEQRA review. We reject that contention. "Segmentation occurs when the environmental review of a single action is broken down into smaller stages or activities, addressed as though they are independent and unrelated," which is prohibited in order to prevent "a project with potentially significant environmental effects from being split into two or more smaller projects, each falling below the threshold requiring full-blown review" (*Matter of Long Is. Pine Barrens Socy. v Planning Bd. of Town of Brookhaven*, 204 AD2d 548, 550 [2d Dept 1994], *lv dismissed in part and denied in part* 85 NY2d 854 [1995]; *see Sun Co. v City of Syracuse Indus. Dev. Agency*, 209 AD2d 34, 47 [4th Dept 1995], *appeal dismissed* 86 NY2d 776 [1995]). Here, no specific future use had been identified prior to the acquisition of petitioner's property, and thus respondent was not required to consider the environmental impact of anything beyond the acquisition (*see GM Components Holdings, LLC*, 112 AD3d at 1353).

We also reject petitioner's contention that the determination did not comply with the procedures set forth in EDPL article 2 because respondent failed to provide a map at the public hearing. Although EDPL 203 lists a map as one of the items that a condemnor may provide at the public hearing, if pertinent, a condemnor is not required to provide a map (*see Matter of River St. Realty Corp. v City of New Rochelle*, 181 AD3d 676, 678 [2d Dept 2020]; *Matter of Richards v Tompkins County*, 82 AD3d 1323, 1326 [3d Dept 2011]). Petitioner's parcel was identified at the public hearing by its tax parcel identification number and was also described, in relevant part, as "the building commonly referred to as the former Northland Communications building." The building has been located in downtown Utica for 40 years, and there is no evidence in the record to suggest that the lack of a map created any confusion. The location of the project was adequately identified for purposes of EDPL 203, and thus petitioner has not demonstrated a basis, within the limited review identified by EDPL 207, on which to set aside the determination (*see Richards*, 82 AD3d at 1326).

We have considered petitioner's remaining contentions and conclude that none warrants annulment of the determination.

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

600

CA 19-02086

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

GUY BASILE, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ED RILEY, DEFENDANT-APPELLANT, ET AL., DEFENDANTS. (APPEAL NO. 1.)

LITTLER MENDELSON, P.C., FAIRPORT (JACQUELINE PHIPPS POLITO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered April 26, 2019. The order denied in part the motion of defendant-appellant to dismiss the complaint against him.

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

Same memorandum as in *Basile v Riley* ([appeal No. 2] — AD3d — [Nov. 13, 2020] [4th Dept 2020]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

604

CA 19-01308

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

THALIA WRIGHT-PERKINS AND CHARZELL PERKINS,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ALBERT LYON, M.D., DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

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

BOTTAR LEONE, PLLC, SYRACUSE, POWERS & SANTOLA, LLP, ALBANY (MICHAEL J. HUTTER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered June 3, 2019. The judgment, among other things, awarded plaintiffs damages as against defendant Albert Lyon, M.D.

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

Memorandum: Plaintiffs commenced this medical malpractice action asserting direct and derivative causes of action based on injuries sustained by Thalia Wright-Perkins (plaintiff) as a result of a caesarian section (c-section) performed by Albert Lyon, M.D. (defendant). The jury reached a verdict finding that defendant's negligence was a substantial factor in causing injury to plaintiff and awarded plaintiffs damages. Defendant moved pursuant to CPLR 4404 (a) to, inter alia, set aside the verdict and for judgment in his favor. Supreme Court denied the motion, defendant appeals, and we affirm.

We reject defendant's initial contention that the evidence is legally insufficient to support the jury's verdict that defendant's negligence was a substantial factor in causing plaintiff's injuries. It is well settled that, "[i]n order to find that a jury verdict is not supported by sufficient evidence as a matter of law, there must be 'no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial' " (*Doucette v Cuviello*, 159 AD3d 1528, 1529 [4th Dept 2018]). "Th[at] is a 'basic assessment of the jury verdict' and prohibits a holding of insufficiency 'in any case in which it can be said that the evidence is such that it would not be utterly irrational for a jury to reach

the result it has determined upon' " (*Mazella v Beals*, 27 NY3d 694, 705 [2016]). Here, it was plaintiffs' burden at trial " 'to show that defendant['s] conduct was a substantial causative factor in the sequence of events that led to [plaintiff's] injury' . . . [and] [t]hat showing need not be made with absolute certitude nor exclude every other possible cause of injury" (*Koester v State of New York*, 90 AD2d 357, 361 [4th Dept 1982]; *see Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 550 [1998]).

At trial, plaintiffs' expert testified generally that a bowel can perforate when there is trauma or when there is an underlying condition or disease that may affect the bowel. According to plaintiffs' expert, plaintiff did not have any such underlying condition and did not have a surgery between the c-section and the time plaintiff's bowel perforation was discovered. Plaintiffs' expert opined that plaintiff's bowel was injured when defendant manipulated preexisting adhesions thereto by lifting plaintiff's uterus outside of her abdomen and/or by bluntly dissecting the adhesions. He testified that defendant's actions were a deviation from the standard of care and, either independently or in combination, were a substantial factor in causing plaintiff's injuries.

Contrary to defendant's contention, plaintiffs' expert had an adequate factual foundation for his opinion inasmuch as defendant's own operative report stated that defendant exteriorized plaintiff's uterus and that he removed adhesions (*see generally Lugo v New York City Health & Hosps. Corp.*, 89 AD3d 42, 63 [2d Dept 2011]). Additionally, the failure of plaintiffs' expert to state with "exact specificity" whether plaintiff's injuries were caused only by exteriorizing the uterus or by removing the adhesions, or by a combination of both, was not fatal to plaintiffs' prima facie case (*Turcsik v Guthrie Clinic, Ltd.*, 12 AD3d 883, 887 [3d Dept 2004]). The expert "offer[ed] sufficient evidence from which reasonable [people] might conclude that it is more probable th[a]n not that the injury was caused by . . . defendant" (*id.* [internal quotation marks omitted]). Indeed, plaintiffs' expert opined that plaintiff's injuries resulted from trauma, and specifically the surgery performed by defendant. Thus, on this record, we cannot conclude that the jury's verdict was utterly irrational with respect to the issue of proximate cause. To the extent that defendant's motion sought, in the alternative, to set aside the verdict as against the weight of the evidence and a new trial, we similarly cannot conclude that the verdict is against the weight of the evidence, i.e., that the evidence so preponderated in favor of defendant that the verdict " 'could not have been reached on any fair interpretation of the evidence' " (*Dennis v Massey*, 134 AD3d 1532, 1533 [4th Dept 2015]).

Although we agree with defendant that reversal generally is required when a general verdict sheet has been used and there is an error affecting only one theory of liability, "reversal is not required [here] because defendant[], as the part[y] asserting an error resulting from the use of the general verdict sheet, failed to request a special verdict sheet or to object to the use of the general verdict sheet" (*Wild v Catholic Health Sys.*, 85 AD3d 1715, 1718 [4th Dept

2011], *affd* 21 NY3d 951 [2013]). Contrary to defendant's contention, he did not make the argument on his posttrial motion that he is making now, i.e., that even if plaintiffs offered legally sufficient proof of causation, that proof related to only one of plaintiffs' theories of liability and therefore rendered the use of a general verdict sheet improper. Thus, we conclude that defendant "may not now rely on the use of the general verdict sheet as a basis for reversal" (*id.*).

We further reject defendant's contention that the court erred in limiting the testimony of his expert. It is well settled that the " 'admissibility and bounds of expert testimony are addressed primarily to the sound discretion of the trial court' " (*Price v New York City Hous. Auth.*, 92 NY2d 553, 558 [1998]; *see generally Mazella*, 27 NY3d at 709). Here, upon our review of the record, including the court's discussion with the parties outside the presence of the jury, we conclude that the court did not abuse its discretion in limiting the expert's testimony inasmuch as the proposed testimony was based on conjecture and speculation (*see generally Zammiello v Senpike Mall Co.*, 5 AD3d 1001, 1002 [4th Dept 2004]).

Finally, we have reviewed defendant's remaining contention and conclude that it does not warrant modification or reversal of the judgment.

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

605

CA 19-02237

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

GUY BASILE, ON BEHALF OF HIMSELF AND ALL OTHERS SIMULARLY SITUATED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ED RILEY, SYRACUSE COMMUNITY HOTEL RESTORATION COMPANY 1, LLC, SYRACUSE COMMUNITY HOTEL RESTORATIONS COMPANY LLC, DOING BUSINESS AS MARRIOTT SYRACUSE DOWNTOWN, CRESCENT HOTELS & RESORTS, LLC, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.
(APPEAL NO. 2.)

LITTLER MENDELSON, P.C., FAIRPORT (JACQUELINE PHIPPS POLITO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GARDY & NOTIS, LLP, NEW YORK CITY (ORIN KURTZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered November 25, 2019. The order denied the motion of defendants-appellants seeking, inter alia, to compel arbitration.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed and the order is modified on the law by granting those parts of the motion seeking to dismiss the amended complaint against defendant Syracuse Community Hotel Restorations Company LLC, doing business as Marriott Syracuse Downtown and to compel arbitration of the claims against the remaining defendants and to stay the action pending arbitration, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action asserting, inter alia, a cause of action for the alleged unlawful retention of gratuities in violation of Labor Law § 196-d on behalf of himself and a putative class of waiters, bartenders, and other individuals who provided food and drink services during banquet events at a hotel. In appeal No. 1, defendant Ed Riley appeals from an order that denied in part his motion to, among other things, dismiss the complaint against him. After the decision on Riley's motion was rendered, plaintiff filed an amended complaint against Riley and additional defendants, including Syracuse Community Hotel Restoration Company 1, LLC (RC1), Syracuse Community Hotel Restorations Company LLC doing business as

Marriott Syracuse Downtown (RC), and Crescent Hotels & Resorts, LLC (Crescent) (collectively, defendants). Defendants moved, inter alia, to compel arbitration of the claims in the amended complaint and to stay the action pending arbitration, for leave to reargue Riley's motion to dismiss the complaint against him, and to dismiss the amended complaint against RC. In appeal No. 2, defendants appeal from an order denying their motion in its entirety.

The amended complaint superseded the original complaint and became the only operative complaint in the action (*see Morrow v MetLife Invs. Ins. Co.*, 177 AD3d 1288, 1288 [4th Dept 2019]; *D'Amico v Correctional Med. Care, Inc.*, 120 AD3d 956, 957 [4th Dept 2014]; *Re-Poly Mfg. Corp. v Dragonides*, 109 AD3d 532, 535 [2d Dept 2013]). Thus, we dismiss appeal No. 1 as moot (*see Morrow*, 177 AD3d at 1288; *Re-Poly Mfg. Corp.*, 109 AD3d at 535). In addition, we dismiss the appeal from the order in appeal No. 2 to the extent it denied that part of defendants' motion seeking leave to reargue because no appeal lies from an order denying reargument (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]).

We agree with defendants that Supreme Court erred in denying that part of their motion seeking to dismiss the amended complaint against RC, and we therefore modify the order in appeal No. 2 accordingly. Defendants established in support of their motion that such an entity does not legally exist, and plaintiff failed to raise a triable issue of fact in opposition (*see Gorbatov v Tsirelman*, 155 AD3d 836, 839-840 [2d Dept 2017]).

We further agree with defendants that the court erred in denying that part of their motion seeking to compel arbitration of the claims against the remaining defendants and to stay the action pending arbitration, and we therefore further modify the order in appeal No. 2 accordingly. Plaintiff signed an arbitration agreement with Crescent when he began his employment at the hotel. The arbitration agreement explicitly stated that it was governed by the Federal Arbitration Act (FAA) (9 USC § 1 *et seq*.). Under 9 USC § 2, an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract" (*see Matter of Diamond Waterproofing Sys., Inc. v 55 Liberty Owners Corp.*, 4 NY3d 247, 252 [2005]). " 'Th[at] text reflects the overarching principle that arbitration is a matter of contract' and, 'consistent with that text, courts must "rigorously enforce" arbitration agreements according to their terms' " (*Matter of Monarch Consulting, Inc. v National Union Fire Ins. Co. of Pittsburgh, PA*, 26 NY3d 659, 665 [2016], quoting *American Express Co. v Italian Colors Rest.*, 570 US 228, 233 [2013]; *see Henry Schein, Inc. v Archer & White Sales, Inc.*, — US —, 139 S Ct 524, 529 [2019]).

Parties may agree to arbitrate "gateway" or "threshold" questions of arbitrability, including whether the parties agreed to arbitrate or whether their agreement covers the controversy (*see Henry Schein, Inc.*, — US at —, 139 S Ct at 529; *Rent-A-Center, West, Inc. v Jackson*, 561 US 63, 68-69 [2010]; *Monarch Consulting, Inc.*, 26 NY3d at 675).

Such delegation clauses are enforceable where there is clear evidence that the parties intended to arbitrate threshold arbitrability issues (*see Monarch Consulting, Inc.*, 26 NY3d at 675). Here, the arbitration agreement contained such a delegation clause. It provided that the arbitrator "shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement." Thus, we agree with defendants that the arbitration agreement demonstrated a clear intent by the parties to arbitrate gateway questions of arbitrability (*see generally id.*).

The only challenge, therefore, that plaintiff could raise in opposition to that part of defendants' motion seeking to compel arbitration is whether a valid arbitration agreement exists, which is for a court to determine (*see Henry Schein, Inc.*, — US at —, 139 S Ct at 530; *Rent-A-Center, W., Inc.*, 561 US at 71; *Gingras v Think Finance, Inc.*, 922 F3d 112, 126 [2d Cir 2019], *cert denied* — US —, 140 S Ct 856 [2020]; *see also* 9 USC § 4). The challenge must be directed "specifically to the agreement to arbitrate" (*Rent-A-Center, W., Inc.*, 561 US at 71; *see Monarch Consulting, Inc.*, 26 NY3d at 675-676). The validity and enforceability of arbitration agreements is governed by the rules applicable to contracts generally (*see Matter of Belzberg v Verus Invs. Holdings Inc.*, 21 NY3d 626, 630 [2013]; *Sablosky v Gordon Co.*, 73 NY2d 133, 136-137 [1989]). "[A] party may resist enforcement of an agreement to arbitrate on any basis that could provide a defense to or grounds for the revocation of any contract, including fraud, unconscionability, duress, overreaching conduct, violation of public policy, or lack of contractual capacity" (*Matter of Teleserve Sys. [MCI Telecom. Corp.]*, 230 AD2d 585, 592 [4th Dept 1997]; *see Gingras*, 922 F3d at 126).

We agree with defendants that plaintiff failed to raise any challenge to the validity of the agreement to arbitrate. In opposing defendants' motion, plaintiff relied on a provision in the arbitration agreement that stated that it would not apply "to any employee represented by a labor organization, or to [Crescent] regarding any such employee, except to the extent permitted in any applicable collective bargaining agreement," which plaintiff contends shows that there was no valid agreement to arbitrate. Of note, the relevant time period in the amended complaint was before plaintiff even became a member of a union. In any event, plaintiff's contention conflates the issue of whether there is a valid agreement to arbitrate, which is for a court to decide, with the issue of the arbitrability of the dispute, which is for the arbitrator to determine. The arbitrability issue includes the interpretation of any contract provision, such as the provision exempting union employees from the arbitration agreement under certain circumstances (*see Matter of WN Partner, LLC v Baltimore Orioles L.P.*, 179 AD3d 14, 16 [1st Dept 2019]; *Matter of Port Auth. of N.Y. & N.J. v Office of Contr. Arbitrator*, 241 AD2d 353, 354 [1st Dept 1997]; *see generally Henry Schein, Inc.*, — US at —, 139 S Ct at 529-530). To the extent plaintiff raised an issue regarding whether Riley and RC1 are third-party beneficiaries of the arbitration agreement between plaintiff and Crescent, that is also an issue for the arbitrator to determine (*see Matter of Long Is. Power Auth. Hurricane*

Sandy Litig., 165 AD3d 1138, 1142 [2d Dept 2018]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

606

CA 19-00699

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

CHRISTIANA T. BRENON, EXECUTRIX OF THE ESTATE OF THOMAS A. HENDERSON, DECEASED, AND EXECUTRIX OF THE ESTATE OF SHARON L. HENDERSON, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ASBESTOS CORPORATION, LTD., ET AL., DEFENDANTS, AND SPECIAL ELECTRIC COMPANY, INC., DEFENDANT-RESPONDENT.
(ACTION NO. 1.)

MARJORIE A. SCHREIBER, EXECUTRIX OF THE ESTATE OF DENNIS C. SCHREIBER, DECEASED, AND INDIVIDUALLY AS SURVIVING SPOUSE OF DENNIS C. SCHREIBER, PLAINTIFF-APPELLANT,

V

AJAX MAGNATHERMIC CORP., ET AL., DEFENDANTS, AND SPECIAL ELECTRIC COMPANY, INC., DEFENDANT-RESPONDENT.
(ACTION NO. 2.)

SHIRLEY J. THRUSH, EXECUTRIX OF THE ESTATE OF TERRY W. THRUSH, DECEASED, AND INDIVIDUALLY AS THE SURVIVING SPOUSE OF TERRY W. THRUSH, PLAINTIFF-APPELLANT,

V

ASBESTOS CORPORATION, LTD., ET AL., DEFENDANTS, AND SPECIAL ELECTRIC COMPANY, INC., DEFENDANT-RESPONDENT.
(ACTION NO. 3.)

LIPSITZ & PONTERIO, LLC, BUFFALO (JOHN LIPSITZ OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

THE COOK GROUP PLLC, NEW YORK CITY (ALYSA B. KOLOMS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered March 14, 2019. The order granted the motions

of defendant Special Electric Company, Inc. to dismiss plaintiffs' complaints against it.

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

Memorandum: Defendant Special Electric Company, Inc. (Special Electric), a Wisconsin corporation, allegedly imported and distributed a carcinogenic form of asbestos to various businesses, some of which were located in New York. Eventually, Special Electric declared bankruptcy and was administratively dissolved on September 11, 2012 after it failed to comply with Wisconsin reporting and filing requirements. Notice of that dissolution was published in May 2014. Pursuant to Wisconsin Statutes Annotated § 180.1407 (2) and as relevant here, a claim against a dissolved corporation is barred unless the plaintiff brings an action to enforce the claim within two years after the publication date of the newspaper notice. It is undisputed that plaintiffs' actions were not commenced within two years of the publication date.

In these actions, Special Electric moved to dismiss the complaints against it, contending that Wisconsin law applied and that it was therefore immune from suit because these actions were not commenced within the applicable two-year period. In opposition to the motions, plaintiffs asserted that Supreme Court should apply Business Corporation Law §§ 1005 and 1006, which contain no time limit on actions against dissolved corporations. The court granted the motions, and plaintiffs appeal.

Contrary to plaintiffs' contention, we conclude that the court properly applied Wisconsin law and thus properly granted the motions. "At common law, the dissolution of a corporation ended its existence, thus annulling all pending actions by and against it and terminating its capacity thereafter to sue or be sued" (*McCagg v Schulte Roth & Zabel LLP*, 74 AD3d 620, 626 [1st Dept 2010], citing *Oklahoma Natural Gas Co. v Oklahoma*, 273 US 257 [1927]; *see generally Matter of National Sur. Co.*, 283 NY 68, 74 [1940], *remittitur amended* 284 NY 593 [1940], *cert denied* 311 US 707 [1940]). In order to "balance the important interest of ensuring that [the plaintiffs] have adequate time to bring claims against the corporation against the equally important concern for allowing the corporation's directors, officers, and stockholders to wind up the corporate affairs," many states enacted legislation to prolong the life of dissolved corporations for designated purposes (*McCagg*, 74 AD3d at 626). That "survivability period" is different for different states.

It is well settled that New York applies the law of the state of creation when determining whether an action by or against a dissolved corporation is viable (*see Bayer v Sarot*, 51 AD2d 366, 368-369 [1st Dept 1976], *affd* 41 NY2d 1070 [1977]; *Matter of Republique Francaise [Cellosilk Mfg. Co.]*, 309 NY 269, 277-278 [1955], *rearg denied* 309 NY 803 [1955]; *Martyne v American Union Fire Ins. Co. of Phila.*, 216 NY 183, 196-197 [1915]; *Sinnott v Hanan*, 214 NY 454, 458-459 [1915]; *McCagg*, 74 AD3d at 626-627; *Westbank Contr., Inc. v Rondout Val. Cent.*

School Dist., 21 Misc 3d 1135[A], 2007 NY Slip Op 52579[U], *6 [Sup Ct, Ulster County 2007], *affd* 46 AD3d 1187 [2007]; *Mock v Spivey*, 167 AD2d 230, 230-231 [1st Dept 1990], *lv denied* 77 NY2d 809 [1991]). Here, there is no dispute that Special Electric was a corporation created in Wisconsin.

Thus, Wisconsin law applied unless plaintiffs met the "heavy burden" of proving that enforcement of the relevant Wisconsin statute " 'would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal' " expressed in our State Constitution, statutes or judicial decisions, which they failed to do (*Schultz v Boy Scouts of Am.*, 65 NY2d 189, 202 [1985], quoting *Loucks v Standard Oil Co. of N.Y.*, 224 NY 99, 111 [1918]; *see Cooney v Osgood Mach.*, 81 NY2d 66, 78-79 [1993]). "[P]lainly not every difference between foreign and New York law threatens our public policy. Indeed, if New York statutes or court opinions were routinely read to express fundamental policy, choice of law principles would be meaningless" (*Cooney*, 81 NY2d at 79).

Inasmuch as the instant actions were not commenced within two years after the published notice of Special Electric's dissolution as required by Wisconsin law, the actions insofar as asserted against Special Electric are not viable and the complaints to that extent were properly dismissed.

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

619

CA 19-02004

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

JOHN J. GEORGE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, BY AND THROUGH ITS OFFICERS, AGENTS AND/OR EMPLOYEES, AND ROBERT E. BLOODOUGH, INDIVIDUALLY AND AS AN OFFICER, AGENT AND/OR EMPLOYEE OF CITY OF SYRACUSE, DEFENDANTS-APPELLANTS.

KRISTEN E. SMITH, CORPORATION COUNSEL, SYRACUSE (SOPHIE WEST OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BOTTAR LAW, PLLC, SYRACUSE (SAMANTHA C. RIGGI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered October 1, 2019. The order, insofar as appealed from, denied defendants' motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when his vehicle was struck by a vehicle operated by defendant Robert E. Bloodough during the course of Bloodough's employment with defendant City of Syracuse. Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). Defendants now appeal from an order that, inter alia, denied their motion. We affirm.

Defendants met their initial burden on the motion with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury by submitting "competent medical evidence establishing as a matter of law that plaintiff did not sustain a serious injury" under either of those categories (*Robinson v Polasky*, 32 AD3d 1215, 1216 [4th Dept 2006]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In opposition, however, plaintiff raised a triable issue of fact whether he sustained a serious injury with respect to each of those categories (*see Strangio v Vasquez*, 144 AD3d 1579, 1580 [4th Dept 2016]; *Pastuszynski v Lofaso*, 140 AD3d 1710, 1711 [4th Dept 2016]). "Whether a limitation of use or function is 'significant' or

'consequential' (i.e., important . . .) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Dufel v Green*, 84 NY2d 795, 798 [1995]). A claim of serious injury must be supported by objective proof (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002], *rearg denied* 98 NY2d 728 [2002]). "[S]ubjective complaints alone are not sufficient" (*id.*). Here, in opposition to the motion, plaintiff submitted the affirmed report of an expert physician and the affirmation of his treating physician, and both physicians "relied upon objective proof of plaintiff's injury, provided quantifications of plaintiff's loss of range of motion along with qualitative assessments of plaintiff's condition, and concluded that plaintiff's injur[ies] [were] significant, permanent, and causally related to the accident" (*Stamps v Pudetti*, 137 AD3d 1755, 1757 [4th Dept 2016] [internal quotation marks omitted]).

With respect to the other category of serious injury at issue on this appeal, i.e., the 90/180-day category, we conclude that defendants failed to meet their initial burden on the motion. Defendants' own submissions raised triable issues of fact whether plaintiff sustained "a medically determined injury or impairment of a non-permanent nature which prevent[ed] [him] from performing substantially all of the material acts which constitute[d] [his] usual and customary daily activities for not less than [90] days during the [180] days immediately following the occurrence of the injury or impairment" (Insurance Law § 5102 [d]). Moreover, even assuming, arguendo, that defendants met their initial burden with respect to that category, we conclude that plaintiff raised an issue of fact by submitting his own affidavit, which described his limitations, and his treating physician's affirmation and attached office notes, which confirmed that plaintiff was placed on work restrictions during the six months after the accident (*see Felton v Kelly*, 44 AD3d 1217, 1219-1220 [3d Dept 2007]; *see also Limardi v McLeod*, 100 AD3d 1375, 1376-1377 [4th Dept 2012]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

620

OP 19-02250

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

IN THE MATTER OF BRIAN SEILER, PETITIONER,

V MEMORANDUM AND ORDER

HON. JOHN H. CRANDALL, AS ACTING HERKIMER COUNTY COURT JUDGE, LETITIA JAMES, NEW YORK STATE ATTORNEY GENERAL, JEFFREY S. CARPENTER, AS HERKIMER COUNTY DISTRICT ATTORNEY AND SCHUYLER TOWN COURT, RESPONDENTS.

THE LAW OFFICES OF ZEV GOLDSTEIN, PLLC, MONSEY (ZEV GOLDSTEIN OF COUNSEL), FOR PETITIONER.

LORRAINE H. LEWANDROWSKI, COUNTY ATTORNEY, HERKIMER, FOR RESPONDENT JEFFREY S. CARPENTER, AS HERKIMER COUNTY DISTRICT ATTORNEY.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to compel respondent Hon. John H. Crandall, Acting Herkimer County Court Judge, to reconsider his denial of petitioner's request for leave to appeal from the denial of his coram nobis application by Schuyler Town Court.

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

Memorandum: In this original CPLR article 78 proceeding, petitioner seeks to compel Herkimer County Court to reconsider its denial of petitioner's request for leave to appeal from the denial of his coram nobis application by Schuyler Town Court. We conclude that the petition must be dismissed.

The parties agree that in 1996 petitioner pleaded guilty in Town Court to a charge of speeding (Vehicle and Traffic Law § 1180 [d]), and that his driver's license was thereafter assessed with four points. Petitioner contends that, at an undisclosed later date, his driver's license was revoked and, pursuant to 15 NYCRR 136.5 (b) (2), the Commissioner of Motor Vehicles denied his application for relicensing. Insofar as relevant here, that regulation mandates that an application for relicensing be denied where the applicant has been convicted of three or four alcohol-related driving convictions and accumulated "20 or more points from any violations" (15 NYCRR 136.5 [a] [2] [iv]) during a 25-year look-back period. After that denial,

petitioner moved in Town Court for a writ of error coram nobis that would permit him to withdraw his guilty plea to the 1996 speeding infraction. Town Court denied coram nobis relief, and then petitioner moved for leave to appeal to County Court, which declined to grant leave in a letter order issued July 9, 2019. Petitioner now seeks a judgment pursuant to CPLR article 78 directing County Court to reconsider its denial of petitioner's motion for leave to appeal.

Initially, we note that this proceeding seeks relief concerning a County Court Judge, among others, and thus it was properly commenced in this Court (*see* CPLR 506 [b] [1]; *cf. Matter of Tonawanda Seneca Nation v Noonan*, 27 NY3d 713, 715 [2016], *affg* 122 AD3d 1334 [4th Dept 2014]).

It is well settled that "[t]he extraordinary remedy either of prohibition or mandamus lies only where there is a clear legal right, and in the case of prohibition only when a court . . . acts or threatens to act without jurisdiction in a matter of over which it has no power over the subject matter or where it exceeds its authorized powers in a proceeding over which it has jurisdiction" (*Matter of State of New York v King*, 36 NY2d 59, 62 [1975]; *see Matter of Morgenthau v Erlbaum*, 59 NY2d 143, 147 [1983], *cert denied* 464 US 993 [1983]). Furthermore, a "court cannot be said to be acting without power merely because it issues an arguably erroneous ruling in a case that is otherwise properly before it . . . Prohibition, therefore, may be used for collateral review of an error of law 'only where the very jurisdiction and power of the court are in issue' " (*Morgenthau*, 59 NY2d at 149-150; *see generally Matter of O'Neill v Beisheim*, 39 NY2d 924, 925 [1976]). Because petitioner does not allege that County Court lacks the power to review the issue and, indeed, he seeks to compel the exercise of that power, prohibition does not lie. In addition, prohibition does not lie where there is "an adequate 'ordinary' remedy," i.e., a direct appeal (*Morgenthau*, 59 NY2d at 147; *see Matter of Coffee v Argento*, 169 AD3d 1354, 1355 [4th Dept 2019]; *Matter of Dale v Burns*, 103 AD3d 1243, 1244-1245 [4th Dept 2013], *appeal dismissed* 21 NY3d 968 [2013]). Here, the petition seeks to expand the statutory scheme for appeals in criminal matters by, in effect, asking this Court to grant further review of an appeal in a manner inconsistent with the statutory scheme. Because "[t]he right of review by appeal in criminal matters . . . is determined exclusively by statute" (*King*, 36 NY2d at 63), and any further appeal of the denial of his coram nobis petition would occur, if at all, in the Court of Appeals (*see* CPL 450.90), we have no power to effectively grant further appellate review of his coram nobis application.

Furthermore, petitioner commenced this CPLR article 78 proceeding by verified petition filed in this Court on December 9, 2019. Consequently, even assuming, arguendo, that petitioner's application is properly before this Court, the petition must be dismissed as untimely under the applicable four-month statute of limitations (*see* CPLR 217 [1]; *Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 195 [2007]; *Matter of Holtzman v Marrus*, 74 NY2d 865, 866 [1989]). Finally, "petitioner's request for leave to reargue neither extended nor tolled the statute of limitations" (*Matter of Silvestri v*

Hubert, 106 AD3d 924, 926 [2d Dept 2013]; *see Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000]; *Matter of Lubin v Board of Educ. of City of N.Y.*, 60 NY2d 974, 976 [1983], *rearg denied* 61 NY2d 905, 62 NY2d 803 [1984], *cert denied* 469 US 823 [1984]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

626

OP 19-02281

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

IN THE MATTER OF ROBERT HORVATH, PETITIONER,

V MEMORANDUM AND ORDER

HON. SUSAN EAGAN, AS ERIE COUNTY COURT JUDGE, LETITIA JAMES, AS NEW YORK STATE ATTORNEY GENERAL, JOHN J. FLYNN, AS ERIE COUNTY DISTRICT ATTORNEY AND HON. EDWARD PACE, AS ORCHARD PARK TOWN COURT JUDGE, RESPONDENTS.

THE LAW OFFICES OF ZEV GOLDSTEIN, PLLC, MONSEY (ZEV GOLDSTEIN OF COUNSEL), FOR PETITIONER.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (MICHELLE PARKER OF COUNSEL), FOR RESPONDENT JOHN J. FLYNN, AS ERIE COUNTY DISTRICT ATTORNEY.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to compel respondent Hon. Susan Eagan, Erie County Court Judge, to reconsider her denial of petitioner's request for leave to appeal from the denial of his coram nobis application by Orchard Park Town Court.

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

Memorandum: In this original CPLR article 78 proceeding, petitioner seeks to compel Erie County Court to reconsider its denial of petitioner's request for leave to appeal from the denial of his coram nobis application by Orchard Park Town Court. We conclude that the petition must be dismissed.

In 2004, petitioner was operating a motor vehicle in the Town of Orchard Park when he allegedly struck a boy on a bicycle, continued driving, and did not return to the scene of the accident. According to Orchard Park Town Court records, petitioner pleaded guilty to leaving the scene of an incident without reporting personal injury in violation of Vehicle and Traffic Law § 600 (2) (a). In 2019, petitioner retained an attorney to seal his past criminal convictions pursuant to CPL 160.59. When petitioner's attorney discovered petitioner's Vehicle and Traffic Law § 600 (2) (a) conviction, petitioner moved for a writ of error coram nobis in Town Court seeking

to correct the record on the ground that petitioner never pleaded guilty to a violation of section 600 (2) (a) and thus was never convicted of that offense. Town Court denied his application. Petitioner thereafter moved for leave to appeal to County Court, which declined to grant leave. Petitioner now seeks a judgment pursuant to CPLR article 78 directing County Court to grant his motion for leave to appeal and consider the merits of his appeal.

CPLR article 78 proceedings exist "primarily to afford relief to parties personally aggrieved by governmental action" (6 NY Jur 2d, Article 78 § 1), and the CPLR article 78 proceeding effectively supersedes the "common law writs of mandamus, prohibition, and certiorari to review" (Siegel & Connors, NY Prac § 557 [6th ed 2018]; *see* CPLR 7801; *see generally* CPLR 7803). Generally speaking, a CPLR article 78 proceeding is not available for criminal matters (*see Matter of Hennessy v Gorman*, 58 NY2d 806, 807 [1983]), "unless it [is a challenge to] an order summarily punishing contempt committed in the presence of the court" (CPLR 7801 [2]). Thus, an article 78 proceeding brought in the nature of certiorari to review does not allow for review of an alleged error of law or procedure in a criminal matter (*see generally Hennessey*, 58 NY2d at 807). Nevertheless, an article 78 proceeding brought in the nature of mandamus allows for review in a criminal matter where it seeks to compel the performance of a clerical or ministerial act (*see Matter of Bloeth v Marks*, 20 AD2d 372, 374 [1st Dept 1964], *lv denied* 15 NY2d 481 [1964]), and an article 78 proceeding brought in the nature of prohibition allows for limited review of criminal matters (*see* Siegel & Connors, NY Prac § 559; *see e.g. Matter of Soares v Herrick*, 20 NY3d 139, 143-144 [2012]), where a court's exercise of jurisdiction "threatens fundamental constitutional rights" or where "the ordinary process of appeal" is unavailable or manifestly inadequate (Siegel & Connors, NY Prac § 559).

In this case, petitioner does not adequately state a ground upon which he may seek relief under CPLR article 78. In other words, petitioner does not allege that County Court failed to perform a duty enjoined upon it by law, i.e., he does not seek relief in the nature of mandamus, nor does he allege that County Court exceeded its jurisdiction or its authority, i.e., he does not seek prohibition, nor does he allege that County Court made a determination after a hearing that was not supported by substantial evidence, i.e., he does not seek certiorari to review. Rather, petitioner contends that County Court incorrectly denied his motion for leave to appeal and he now asks that this Court direct County Court to grant leave and consider the merits of his appeal from the Town Court order denying his motion for a writ of error coram nobis.

Here, because "[t]he right of review by appeal in criminal matters . . . is determined exclusively by statute" (*Matter of State of New York v King*, 36 NY2d 59, 63 [1975]) and there is no statutory authority allowing petitioner to appeal to this Court from County Court's denial of his motion for leave to appeal, petitioner is improperly seeking to use a CPLR article 78 proceeding as a vehicle to obtain relief to which he has no legal right. Thus, "any further

appeal of the denial of his coram nobis petition would occur, if at all, in the Court of Appeals (*see* CPL 450.90), [and] we have no power to effectively grant further appellate review of his coram nobis application" (*Matter of Seiler v Crandall*, — AD3d —, — [Nov. 13, 2020] [4th Dept 2020]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

630

CA 19-01066

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

ANTONIO JOSE VIRELLA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

245 NORTH STREET HOUSING DEVELOPMENT FUND CORP., 245 NORTH STREET, LLC, E. SQUARE CAPITAL, INC., DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (BETHANY A. RUBIN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (KEVIN J. KRUPPA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, III, J.), entered May 17, 2019. The order granted the motion of defendants 245 North Street Housing Development Fund Corp., 245 North Street, LLC, and E. Square Capital, Inc., for summary judgment and dismissed the complaint against those defendants.

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

Memorandum: Plaintiff, a tenant in a building owned by defendants 245 North Street Housing Development Fund Corp. and 245 North Street, LLC, and managed by defendant E. Square Capital, Inc. (collectively, defendants), commenced this action seeking damages for personal injuries that he allegedly sustained when he was assaulted by another tenant. The complaint, insofar as relevant here, alleged that defendants were negligent in failing to "keep the premises free from known dangerous conditions, namely the intoxicated and violent" cotenant. Plaintiff appeals from an order granting the motion of defendants for summary judgment dismissing the complaint against them. We affirm.

With respect to the cause of action against defendants, it is well settled that "[l]andlords have a 'common-law duty to take minimal precautions to protect tenants from foreseeable harm,' including a third party's foreseeable criminal conduct" (*Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 548 [1998], quoting *Jacqueline S. v City of New York*, 81 NY2d 288, 293-294 [1993], *rearg denied* 82 NY2d 749 [1993]). Nevertheless, "the necessary causal link between a landlord's culpable failure to provide adequate security and a tenant's injuries resulting

from a criminal attack in the building can be established only if the assailant gained access to the premises through a negligently maintained entrance. Since even a fully secured entrance would not keep out another tenant . . . , plaintiff can recover only if the assailant was an intruder. Without such a requirement, landlords would be exposed to liability for virtually all criminal activity in their buildings" (*Burgos*, 92 NY2d at 550-551; *see Williams v Utica Coll. of Syracuse Univ.*, 453 F3d 112, 120-121 [2d Cir 2006]; *Aminova v New York City Hous. Auth.*, 168 AD3d 651, 652 [2d Dept 2019]). Consequently, a "landlord has no duty to prevent one tenant from attacking another tenant unless it has the authority, ability, and opportunity to control the actions of the assailant" (*Britt v New York City Hous. Auth.*, 3 AD3d 514, 514 [2d Dept 2004], *lv denied* 2 NY3d 705 [2004]; *see Mills v Gardner*, 106 AD3d 885, 886 [2d Dept 2013]; *see also Cortez v Delmar Realty Co., Inc.*, 57 AD3d 313, 313 [1st Dept 2008], *lv dismissed in part and denied in part* 12 NY3d 774 [2009]), and "[a] reasonable opportunity or effective means to control a third person does not arise from the mere power to evict" (*Siino v Reices*, 216 AD2d 552, 553 [2d Dept 1995]; *see Britt*, 3 AD3d at 514). Thus, in general, landowners "ha[ve] no duty to control [their tenants'] conduct for the protection of other tenants" (*Torre v Burke Constr.*, 238 AD2d 941, 942 [4th Dept 1997]; *see Sobers v Roth Bros. Partnership Co.*, 284 AD2d 324, 324 [2d Dept 2001]). To the extent that our decision in *Jackson-Ott v Mack* (30 AD3d 1025, 1025-1026 [4th Dept 2006]) may be read to support the position that a landlord has a duty to control the behavior of its tenants outside those "special circumstances in which there is sufficient authority and ability to control the conduct of" those tenants (*Purdy v Public Adm'r of County of Westchester*, 72 NY2d 1, 8 [1988], *rearg denied* 72 NY2d 953 [1988]), it should no longer be followed.

Here, Supreme Court properly granted the motion inasmuch as defendants established that they had no ability or opportunity to control the cotenant who allegedly attacked plaintiff, and plaintiff failed to raise a triable issue of fact in opposition (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Additionally, a landlord is not liable for the conduct of a tenant unless "the harm complained of was foreseeable" (*Firpi v New York City Housing Auth.*, 175 AD2d 858, 859 [2d Dept 1991], *lv denied* 78 NY2d 864 [1991]; *see Britt*, 3 AD3d at 515), and we conclude that "defendants established on their motion for summary judgment that the conduct of the tenant-assailant in their building was not reasonably foreseeable" (*Perry v Northwestern Realty Co.*, 236 AD2d 378, 378 [2d Dept 1997]; *see Britt*, 3 AD3d at 515). Contrary to plaintiff's contention, the "[e]vidence tending to show [defendants'] awareness of possible harassment of [another tenant] by the [co]tenant did not tend to show [their] awareness of the [co]tenant's alleged violent propensities and there was otherwise no showing that the assault was foreseeable" (*Bonano v XYZ Corp.*, 261 AD2d 280, 280-281 [1st Dept 1999]; *see also Cortez*, 57 AD3d at 313-314; *see generally Belinkie v Zucker*, 255 AD2d 219, 219-220 [1st Dept 1998], *lv denied* 93 NY2d 802 [1999]).

With respect to the allegations in the complaint that the

cotenant was intoxicated, the Court of Appeals has stated that, although "a landowner may have responsibility for injuries caused by an intoxicated guest[,] . . . that liability may be imposed only for injuries that occurred[, insofar as relevant here], where [the] defendant had the opportunity to supervise the intoxicated guest . . . That duty emanated not from the provision of alcohol but from the obligation of a landowner to keep its premises free of known dangerous conditions, which may include intoxicated guests" (*D'Amico v Christie*, 71 NY2d 76, 85 [1987]; *see Parslow v Leake*, 117 AD3d 55, 65 [4th Dept 2014]). Here, the court properly granted the motion of defendants inasmuch as they "met [their] prima facie burden by demonstrating that [they] did not have the opportunity or the ability to control the conduct of [the intoxicated cotenant, and] plaintiff[] failed to raise a triable issue of fact" (*Daly v Finley*, 101 AD3d 931, 932 [2d Dept 2012]; *see McGlynn v St. Andrew Apostle Church*, 304 AD2d 372, 372-373 [1st Dept 2003], *lv denied* 100 NY2d 508 [2003]; *see generally Cavanaugh v Knights of Columbus Council 4360*, 142 AD2d 202, 204-205 [3d Dept 1988], *lv denied* 74 NY2d 604 [1989]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

637

KA 13-02114

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TROY M. CORDELL, JR., DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (CAROLYN WALTHER OF COUNSEL), FOR DEFENDANT-APPELLANT.

TROY M. CORDELL, JR., DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered October 22, 2013. The judgment convicted defendant upon a jury verdict of insurance fraud in the fourth degree and falsifying business records in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of insurance fraud in the fourth degree (Penal Law § 176.15) and falsifying business records in the first degree (§ 175.10), defendant contends that the evidence is legally insufficient to establish his intent to defraud. Defendant failed, however, to preserve that contention for our review inasmuch as he failed to renew his motion for a trial order of dismissal after presenting evidence (*see People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]). 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]).

Defendant failed to preserve for our review his procedural challenge to Supreme Court's disposition of his *Batson* application and, in any event, that challenge lacks merit (*see People v Farrare*, 118 AD3d 1477, 1477 [4th Dept 2014], *lv denied* 23 NY3d 1061 [2014]). By denying defendant's *Batson* challenge, the court thereby implicitly determined that the race-neutral explanations given by the prosecutor for exercising peremptory challenges with respect to the two prospective jurors in question were not pretextual (*see People v Jiles*, 158 AD3d 75, 78 [4th Dept 2017], *lv denied* 31 NY3d 1149 [2018]).

Defendant's contention that he was deprived of a fair trial due to instances of prosecutorial misconduct is for the most part unpreserved because defense counsel did not object to the majority of the alleged improprieties (*see People v Romero*, 7 NY3d 911, 912 [2006]; *People v Maxey*, 129 AD3d 1664, 1666 [4th Dept 2015], *lv denied* 27 NY3d 1002 [2016], *reconsideration denied* 28 NY3d 933 [2016]). In any event, we conclude that "[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Resto*, 147 AD3d 1331, 1333 [4th Dept 2017], *lv denied* 29 NY3d 1000 [2017], *reconsideration denied* 29 NY3d 1094 [2017] [internal quotation marks omitted]). Inasmuch as we conclude that there was no prosecutorial misconduct, we reject defendant's further contention that he was denied effective assistance of counsel based on defense counsel's failure to object to certain alleged improprieties (*see People v Townsend*, 171 AD3d 1479, 1481 [4th Dept 2019], *lv denied* 33 NY3d 1109 [2019]). With respect to defendant's remaining claims of ineffective assistance of counsel, we conclude that they lack merit and that defendant was afforded "meaningful representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]).

We also reject defendant's contention that reversal is required based on an alleged mode of proceedings error with respect to the court's handling of a jury note requesting an item not in evidence. The procedure set forth in *People v O'Rama* (78 NY2d 270 [1991]) " 'is not implicated when the jury's request is ministerial in nature and therefore requires only a ministerial response' " (*People v Williams*, 142 AD3d 1360, 1362 [4th Dept 2016], *lv denied* 28 NY3d 1128 [2016], quoting *People v Nealon*, 26 NY3d 152, 161 [2015]; *see People v Paul*, 171 AD3d 1555, 1557 [4th Dept 2019], *lv denied* 33 NY3d 1107 [2019], *reconsideration denied* 34 NY3d 983 [2019]). The note at issue "only necessitated the ministerial action of informing the jury that [the] requested item was not in evidence" (*Williams*, 142 AD3d at 1362). Although the record does not establish whether the court responded to the note, the need for a ministerial response was obviated by the fact that the jury reached a verdict only 23 minutes after making the subject inquiry (*see People v Johnson*, 183 AD3d 77, 84 [3d Dept 2020], *lv denied* 35 NY3d 993 [2020]; *People v Murphy*, 133 AD3d 690, 691 [2d Dept 2015], *lv denied* 27 NY3d 1136 [2016]). We thus conclude that " 'there was no *O'Rama* error requiring this Court to reverse the judgment' " based on the jury note in question (*Paul*, 171 AD3d at 1557).

Finally, we have reviewed the contentions raised in defendant's pro se supplemental brief and conclude that none warrants reversal or modification of the judgment.

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

653

CA 19-01460

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

CHRISANNTHA, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARC DEBAPTISTE AND MELISSA DEBAPTISTE,
DEFENDANTS-RESPONDENTS.

ERNSTROM & DRESTE, LLP, ROCHESTER (TIMOTHY D. BOLDT 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, Ontario County (Brian D. Dennis, A.J.), dated July 19, 2019. The order granted the motion of defendants for partial summary judgment and dismissed plaintiff's claim for consequential damages.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied and the claim for consequential damages is reinstated.

Memorandum: In August 2016, the parties executed an agreement pursuant to which defendants would purchase a residence being constructed by plaintiff as part of a larger development project. Although the foundation and framing were largely complete at that time, defendants asked for and received substantial changes to the internal design. In November 2016, defendants terminated the agreement, prompting plaintiff to commence this breach of contract action. Defendants moved for partial summary judgment seeking the dismissal of plaintiff's claim for consequential damages. Supreme Court granted the motion, and we now reverse.

We agree with plaintiff that the court erred in determining that consequential damages are precluded as a matter of law under the circumstances of this case. As a general rule, consequential damages are not available to a seller of residential real estate when the purchaser breaches the contract (*see Tator v Salem*, 81 AD2d 727, 728 [3d Dept 1981]; *see also Di Scipio v Sullivan*, 30 AD3d 677, 678 [3d Dept 2006]). That is because, typically, the seller "retain[s] ownership, use and enjoyment of the premises," and it cannot be said that the "mortgage interest expenses, repairs or utilities paid postbreach" are proximately caused by the breach (*Di Scipio*, 30 AD3d at 678).

Where, however, the seller is a commercial developer, the seller does not live in the home and never intends to do so. Upon the purchaser's breach, the developer begins to incur costs that reduce the profit margin. Such carrying costs may include, among other things, maintenance and utility costs as well as real property taxes. Whereas the ordinary residential seller, by living in the home after the purchaser's breach, receives value for the carrying costs until the subsequent sale, the commercial developer does not receive such value. Instead, the carrying costs are nothing but a financial loss. We recognized that distinction in *David Home Bldrs., Inc. v Misiak* (91 AD3d 1362 [4th Dept 2012] [*Misiak*]), which applies here with equal force.

Contrary to defendants' contention, our decision in *Misiak* was not overruled by *White v Farrell* (20 NY3d 487 [2013]). In *White*, the issue presented concerned how to measure *actual* damages in the resale of a house, and the Court of Appeals stated in a footnote that "any question of whether, or to what extent, the [sellers] were entitled to recover consequential damages is not properly before us" (*id.* at 493 n 1). The Court of Appeals has not yet considered the issue presented in *Misiak*.

We also do not agree with defendants that *Misiak* is at odds with our decision in *Tesmer Bldrs. v Cimato* (217 AD2d 953, 954 [4th Dept 1995], *lv denied* 87 NY2d 810 [1996]). In *Tesmer Bldrs.*, the purchaser, who had rescinded the contract, had "not controverted the claim of damages asserted by the seller" (*id.*). Instead, the purchaser contended that it had not breached the contract at all (*see id.*).

Finally, we conclude that defendants failed to establish as a matter of law that consequential damages were not foreseeable or contemplated by the parties at the time they executed the agreement (*see generally Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187, 192-193 [2008], *rearg denied* 10 NY3d 890 [2008]). As a result, the burden never shifted to plaintiff to raise a triable issue of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

667

KA 19-00014

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK TRINE, DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS (JOHN J. GILSENAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wayne County Court (John B. Nesbitt, J.), rendered August 30, 2018. The judgment convicted defendant upon his plea of guilty of driving while intoxicated, a class E felony (two counts).

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of two counts of felony driving while intoxicated (Vehicle and Traffic Law §§ 1192 [2], [3]; 1193 [1] [c] [i] [A]), defendant contends that County Court erred in refusing to suppress evidence obtained following an unlawful traffic stop. We affirm.

The evidence at the suppression hearing established that a New York State Trooper stopped the vehicle defendant was driving after observing that the vehicle did not have an inspection sticker affixed to the lower left corner of its windshield. During the stop, defendant acknowledged that his vehicle had recently failed its inspection and produced a document extending the prior inspection period by 10 days. The Trooper testified that he did not see this document on defendant's windshield at the time he initiated the traffic stop. Indeed, the evidence at the hearing established that the document was not affixed to the windshield, but had been placed on the dashboard behind the registration sticker.

A police officer may lawfully stop a motor vehicle where he or she has probable cause to believe that the driver of the car has committed a traffic violation (*see People v Guthrie*, 25 NY3d 130, 133 [2015], *rearg denied* 25 NY3d 1191 [2015]; *People v Robinson*, 97 NY2d 341, 349 [2001]). Vehicle and Traffic Law § 306 (b) provides that "[n]o motor vehicle shall be operated or parked on the public highways

of this state unless a certificate or certificates of inspection . . . is or are displayed upon the vehicle or affixed to the registration certificate for the vehicle." Here, the uncontroverted evidence established that, at the time the Trooper initiated the traffic stop, he observed no inspection documentation displayed in the vehicle's windshield, and therefore the stop was justified (*see generally People v Mayo*, 26 AD3d 669, 670 [3d Dept 2006]; *People v Daniger*, 227 AD2d 846, 846 [3d Dept 1996], *lv denied* 88 NY2d 1020 [1996]; *People v Bowdoin*, 89 AD2d 986, 987 [2d Dept 1982]; *cf. People v Driscoll*, 145 AD3d 1349, 1350 [3d Dept 2016]). Although defendant subsequently produced a document showing that he had received an extension on his inspection certification, that document was not displayed at the time the Trooper initiated the stop because it was not visible through the windshield but rather was concealed by the registration sticker.

We reject defendant's contention that the validity of the initial stop should be analyzed under the mistake of fact doctrine (*see generally Guthrie*, 25 NY3d at 134; *People v Smith*, 1 AD3d 965, 965 [4th Dept 2003]) inasmuch as the Trooper did not effectuate the stop based on a mistake of fact with respect to whether the required inspection documents were displayed on the vehicle's windshield.

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

679

CA 19-02039

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

CECELIA SMITH, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SYRACUSE UNIVERSITY, DEFENDANT-RESPONDENT.

HELD & HINES, LLP, BROOKLYN (URI NAZRYAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (LIZA R. MAGLEY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered April 15, 2019. The order granted the motion of defendant for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff allegedly sustained injuries when she fell in a shower stall in one of defendant's dormitories. Plaintiff thereafter commenced this action asserting causes of action for negligence and the violation of multiple federal statutes. Supreme Court granted defendant's motion for summary judgment dismissing the complaint. We affirm. Plaintiff does not dispute that defendant met its initial burden on the motion, and we conclude that plaintiff failed to raise a triable issue of fact in opposition (*see Keller v Keller*, 153 AD3d 1613, 1614-1615 [4th Dept 2017]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562-564 [1980]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

680.4

KA 18-02087

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EMAD AHMED, 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 (Susan M. Eagan, J.), rendered August 29, 2018. The judgment convicted defendant, upon a plea of guilty, of attempted criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). Even assuming, arguendo, that defendant's waiver of the right to appeal was invalid (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US — [Mar. 30, 2020]) and thus does not preclude our review of his challenge to the severity of the sentence (*see People v Baker*, 158 AD3d 1296, 1296 [4th Dept 2018], *lv denied* 31 NY3d 1011 [2018]), we conclude that the sentence is not unduly harsh or severe.

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

680.5

KA 18-02097

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LOIRMUS DESIUS, ALSO KNOWN AS BABOO,
DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS, DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wayne County Court (Daniel G. Barrett, J.), rendered July 26, 2018. The appeal was held by this Court by order entered December 20, 2019, decision was reserved and the matter was remitted to Wayne County Court for further proceedings (178 AD3d 1422 [4th Dept 2019]). The proceedings were held and completed.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of assault in the second degree (Penal Law § 120.05 [4]) and dismissing count three of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, after a nonjury trial, of two counts of assault in the second degree (Penal Law § 120.05 [1] [intentional assault], [4] [reckless assault]), arising from an altercation during which he punched the victim in the face approximately three times, causing the victim to fall and hit his head on the concrete sidewalk, then continued to punch the victim while he was lying on the ground unconscious. The victim died as a result of his injuries. We previously held the case, reserved decision, and remitted the matter to County Court for a ruling on defendant's objection to the verdict as inconsistent (*see People v Desius*, 178 AD3d 1422, 1422-1423 [4th Dept 2019]). On remittal, the court determined, for the reasons set forth in its written decision on the verdict, that its verdict convicting defendant of both intentional and reckless assault is not inconsistent.

Defendant contends that the evidence is legally insufficient to support the conviction of assault in the second degree (Penal Law § 120.05 [1] [intentional assault]) under the fourth count of the

indictment because the People failed to establish that he intended to cause serious physical injury to the victim. We reject that contention. "[V]iewing the facts in a light most favorable to the People," we conclude that the evidence is legally sufficient to establish that defendant intended to cause serious physical injury to the victim (*People v Danielson*, 9 NY3d 342, 349 [2007]; *see People v Ford*, 114 AD3d 1273, 1274 [4th Dept 2014], *lv denied* 23 NY3d 962 [2014]; *People v Meacham*, 84 AD3d 1713, 1714 [4th Dept 2011], *lv denied* 17 NY3d 808 [2011]). Intent can be proven by circumstantial evidence (*see People v Wiley*, 104 AD3d 1314, 1314 [4th Dept 2013], *lv denied* 21 NY3d 1011 [2013]), and "[a] defendant may be presumed to intend the natural and probable consequences of his [or her] actions" (*Ford*, 114 AD3d at 1274 [internal quotation marks omitted]; *see Meacham*, 84 AD3d at 1714).

Here, eyewitnesses to the altercation testified that defendant repeatedly punched the victim while he was lying unconscious on the sidewalk. Under the circumstances, serious physical injury was the natural and probable consequence of defendant's actions (*see Ford*, 114 AD3d at 1274; *Meacham*, 84 AD3d at 1714). Defendant's expressions of anger toward the victim also support the inference that defendant intended to cause serious physical injury (*see Meacham*, 84 AD3d at 1714; *see generally People v Bracey*, 41 NY2d 296, 301-302 [1977], *rearg denied* 41 NY2d 1010 [1977]).

We also reject defendant's contention that the verdict convicting him of intentional assault is against the weight of the evidence (*see People v Cooper*, 50 AD3d 1570, 1571 [4th Dept 2008], *lv denied* 10 NY3d 957 [2008]; *People v Mahoney*, 6 AD3d 1104, 1104 [4th Dept 2004], *lv denied* 3 NY3d 660 [2004]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We agree with defendant, however, that the evidence is not legally sufficient to support the conviction of assault in the second degree (Penal Law § 120.05 [4] [reckless assault]) under the third count of the indictment. Although a sidewalk or concrete surface can be "used" as a dangerous instrument (*People v Galvin*, 65 NY2d 761, 763 [1985]; *see People v Al Haideri*, 141 AD3d 742, 745 [3d Dept 2016], *lv denied* 28 NY3d 1025 [2016]; *People v Melville*, 298 AD2d 601, 601 [2d Dept 2002], *lv denied* 99 NY2d 617 [2003]), the testimony of the eyewitnesses establishes that the blows to the victim, which were delivered using a cross-wise motion, were not executed in such a way as to establish that defendant consciously disregarded a substantial and unjustifiable risk that the victim's head would have contact with the concrete (*cf. Galvin*, 65 NY2d at 762; *Al Haideri*, 141 AD3d at 745; *Melville*, 298 AD2d at 601). Under the circumstances presented, there is no "valid line of reasoning and permissible inferences from which a rational [person]" could conclude that defendant recklessly used the sidewalk as a dangerous instrument (*Danielson*, 9 NY3d at 349; *see People v McElroy*, 139 AD3d 980, 982 [2d Dept 2016], *lv denied* 28 NY3d 1029 [2016]). We therefore modify the judgment by reversing that part convicting defendant of assault in the second degree (Penal Law § 120.05 [4]) and dismiss count three of the indictment.

In light of our determination, defendant's further contention that the verdict with respect to count three is against the weight of the evidence is moot (*see People v Jones*, 100 AD3d 1362, 1365 [4th Dept 2012], *lv denied* 21 NY3d 1005 [2013], *cert denied* 571 US 1077 [2013]), as is his contention that the verdict convicting him of counts three and four of the indictment is inconsistent (*see People v Jackson*, 111 AD2d 253, 254 [2d Dept 1985]). We note, however, that the court erred in determining that Penal Law § 120.05 (1) and (4) have two different results, i.e., that the former results in "serious physical injury" and the latter results in "grave risk of injury to another person." Contrary to the court's determination, both subdivisions state that the result is "serious physical injury," and it is well settled that a person cannot act both recklessly and intentionally in causing the same result (*see People v Gallagher*, 69 NY2d 525, 529 [1987]; *see also People v Finkelstein*, 144 AD2d 250, 250 [1st Dept 1988], *lv denied* 73 NY2d 921 [1989]).

Defendant contends that the court erred in denying his request for a missing witness charge. We reject that contention. Defendant failed to make a prima facie showing of entitlement to a missing witness charge because he did not establish the materiality of the witnesses' knowledge (*see People v Smith*, 33 NY3d 454, 458-459 [2019]; *People v Savinon*, 100 NY2d 192, 197 [2003]).

Although defendant correctly contends that he was improperly restrained during the trial because the court failed to make the requisite "case-specific, on-the-record finding of necessity" (*People v Clyde*, 18 NY3d 145, 153 [2011], *cert denied* 566 US 944 [2012]; *see People v Best*, 19 NY3d 739, 742 [2012]), we conclude that the error was harmless in this nonjury trial. The evidence of defendant's guilt with respect to the fourth count of the indictment is overwhelming, and there is no reasonable possibility that the error contributed to the verdict (*see Clyde*, 18 NY3d at 154; *see also People v Morillo*, 104 AD3d 792, 794 [2d Dept 2013], *lv denied* 22 NY3d 1201 [2014]).

Defendant failed to preserve for this Court's review his contention that the court violated CPL 380.50 by not asking him if he wished to make a statement at sentencing (*see People v Green*, 54 NY2d 878, 880 [1981]). In any event, the court substantially complied with CPL 380.50 by asking defense counsel if he wished to be heard prior to the imposition of sentence (*see generally People v McClain*, 35 NY2d 483, 491 [1974], *cert denied* 423 US 852 [1975]).

We reject defendant's contention that he was denied effective assistance of counsel at sentencing because defense counsel failed to request a lesser sentence. The evidence establishes that defendant was the aggressor throughout the altercation that resulted in the victim's death, and defendant's extensive criminal history included a prior assault conviction. Thus, "given the nature of defendant's criminal record and the criminal conduct herein, . . . no statement made by defense counsel at sentencing would have had an impact on the sentence imposed" (*People v Price*, 129 AD3d 1484, 1485 [4th Dept 2015], *lv denied* 26 NY3d 970 [2015] [internal quotation marks

omitted]), and counsel was not required to make a request "with little or no chance of success" (*People v Nuffer*, 70 AD3d 1299, 1300 [4th Dept 2010]).

Contrary to defendant's further contentions, the record fails to establish that the court improperly sentenced him as a first rather than a second violent felony offender, and the sentence is not unduly harsh or severe. Finally, we note that the certificate of conviction incorrectly states that counts one and two of the indictment were satisfied by the conviction on count three. The court indicated, however, in rendering its verdict, that it did not consider counts one and two. The certificate of conviction must therefore be amended to reflect that the court did not consider those counts (*see generally People v Gause*, 46 AD3d 1332, 1333 [4th Dept 2007], *lv dismissed* 10 NY3d 811 [2008]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

681

KA 18-01543

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS BROOKS, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIELLE E. PHILLIPS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered May 30, 2018. The judgment convicted defendant upon his plea of guilty of rape 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 rape in the first degree (Penal Law § 130.35 [1]). We reject defendant's contention that the waiver of the right to appeal is invalid. The oral waiver, together with the written waiver, establishes that defendant knowingly, intelligently, and voluntarily waived the right to appeal (*see People v Sanders*, 180 AD3d 1327, 1328 [4th Dept 2020], *lv denied* 35 NY3d 973 [2020]; *People v Adams*, 177 AD3d 1334, 1334-1335 [4th Dept 2019], *lv denied* 34 NY3d 1125 [2020]; *see generally People v Thomas*, 34 NY3d 545, 560-563 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). The valid waiver of the right to appeal encompasses defendant's challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

684

KA 19-01304

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SANTOS ANTONETTI, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Christopher S. Ciaccio, J.), entered May 6, 2019. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends that County Court erred in refusing to grant him a downward departure from his presumptive risk level. We reject that contention.

Correction Law § 168-n (3) requires a court making a risk level determination pursuant to SORA to "render an order setting forth its determinations and the findings of fact and conclusions of law on which the determinations are based." Here, defendant requested a downward departure from his presumptive risk level based upon two mitigating factors, i.e., his completion of a sex offender treatment program and his progress in substance abuse treatment. Although the court addressed defendant's completion of a sex offender treatment program, the court made no mention of defendant's progress in a substance abuse treatment program. Inasmuch as the record is sufficient for us to make our own findings of fact and conclusions of law, however, remittal is not required (*see People v Merkley*, 125 AD3d 1479, 1479 [4th Dept 2015]; *People v Urbanski*, 74 AD3d 1882, 1883 [4th Dept 2010], *lv denied* 15 NY3d 707 [2010]).

On appeal, defendant contends only that the court should have granted his request for a downward departure based on the second mitigating factor. Although defendant is correct that "[a]n

offender's response to treatment, if exceptional, can be the basis for a downward departure" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 17 [2006]), we conclude that defendant failed to meet his burden of proving by a preponderance of the evidence that his response to substance abuse treatment was exceptional (*see People v Rivera*, 144 AD3d 1595, 1596 [4th Dept 2016], *lv denied* 28 NY3d 915 [2017]; *People v Butler*, 129 AD3d 1534, 1534-1535 [4th Dept 2015], *lv denied* 26 NY3d 904 [2015]; *see also People v Lombard*, 30 AD3d 573, 574 [2d Dept 2006], *lv denied* 7 NY3d 712 [2006]). Initially, defendant failed to submit any evidence to support his contention that an assessment conducted prior to his release to parole supervision suggested that he was unlikely to have a substance abuse problem upon his release. Furthermore, although defendant demonstrated that he participated in substance abuse treatment programs approximately 13 years prior to the SORA hearing, that alone is insufficient to meet defendant's burden (*see People v Desnoyers*, 180 AD3d 1080, 1081 [2d Dept 2020]; *People v Brunjes*, 174 AD3d 747, 748 [2d Dept 2019], *lv denied* 34 NY3d 905 [2019]).

Moreover, even assuming, arguendo, that defendant demonstrated that his response to substance abuse treatment was exceptional, we nevertheless conclude, based upon the "totality of the circumstances," including defendant's extensive criminal history, his history of domestic violence, and his minimization of the offense and disparaging statements about the victim in his probation interview, that a downward departure is not warranted (*People v Gillotti*, 23 NY3d 841, 861 [2014]; *see Rivera*, 144 AD3d at 1596).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

692

CA 19-01281

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

LISA ANN SCOPPO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BERNARD CHARLES SCOPPO, DEFENDANT-APPELLANT.

KAMAN BERLOVE MARAFIOTI JACOBSTEIN & GOLDMAN, LLP, ROCHESTER (GARY MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

MAUREEN A. PINEAU, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (John B. Gallagher, Jr., J.), entered December 21, 2018 in a divorce action. The judgment, inter alia, ordered defendant to pay child support.

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

Memorandum: Defendant husband appeals from a judgment of divorce that, inter alia, directed him to pay child support to plaintiff wife and distributed marital assets. The husband contends that Supreme Court abused its discretion in imputing income to him, for purposes of calculating his child support obligation, based on undisclosed income from a vehicle repair and storage business. We reject that contention. The trial court has "considerable discretion to . . . impute an annual income to a [party] . . . , and a court's imputation of income will not be disturbed so long as there is record support for its determination" (*Lauzonis v Lauzonis*, 105 AD3d 1351, 1351 [4th Dept 2013] [internal quotation marks omitted]). A court " 'may properly find a true or potential income higher than that claimed where the party's account of his or her finances is not credible' " (*Sharlow v Sharlow*, 77 AD3d 1430, 1431 [4th Dept 2010]), and "may impute income when the record supports a finding that the [party] has underreported earnings from a business" (*Matter of Susko v Susko*, 181 AD3d 1016, 1020-1021 [3d Dept 2020]; *see Matter of Rubley v Longworth*, 35 AD3d 1129, 1130 [3d Dept 2006], *lv denied* 8 NY3d 811 [2007]). We conclude that the evidence in the record here, including the husband's payment of business expenses and sales tax, supports the court's determination imputing additional annual income to him (*see Susko*, 181 AD3d at 1021-1022; *Matter of Sena v Sena*, 65 AD3d 1244, 1245 [2d Dept 2009]). The husband's further contention with respect to the calculation of child support is not preserved for our review (*see Brinson v Brinson*, 178 AD3d 1367, 1368 [4th Dept 2019]; *Barrett v Barrett*, 175 AD3d 1067, 1070 [4th Dept 2019]; *Winship v Winship*, 115 AD3d 1328, 1329 [4th Dept

2014]). Finally, contrary to the husband's contention, we conclude on this record that the court did not err in determining that the proceeds from the sale of the parties' residence, which had been acquired by the parties prior to the marriage as joint tenants with rights of survivorship, should be divided equally (*see generally* RPAPL 901 [1]; *Quattrone v Quattrone*, 210 AD2d 306, 307 [2d Dept 1994]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

695.3

KA 16-00800

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT GREEN, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN C. MINISTERO OF COUNSEL), AND HODGSON RUSS LLP, 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 (Russell P. Buscaglia, A.J.), rendered February 20, 2015. The appeal was held by this Court by order entered June 7, 2019, decision was reserved and the matter was remitted to Supreme Court, Erie County, for further proceedings (173 AD3d 1690 [4th Dept 2019]). The proceedings were held and completed.

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

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We previously held this case, reserved decision, and remitted the matter to Supreme Court for a determination whether the police officer who initiated a traffic stop of the vehicle in which defendant was a passenger "possessed the requisite justification to conduct a search of defendant" (*People v Green*, 173 AD3d 1690, 1692 [4th Dept 2019]). Upon remittal, the court determined that the officer had probable cause to search defendant, and that defendant's flight from the officer and subsequent abandonment of the components of a handgun were not in response to unlawful police conduct. The court therefore concluded that the gun should not be suppressed. We now affirm.

We reject defendant's contention that the officer exceeded his authority in ordering defendant out of the vehicle and in directing him to place his hands against the patrol car. It is well settled that "[t]he odor of marihuana emanating from a vehicle, when detected by an officer qualified by training and experience to recognize it, is sufficient to constitute probable cause to search a vehicle and its occupants" (*People v Cuffie*, 109 AD3d 1200, 1201 [4th Dept 2013], *lv denied* 22 NY3d 1087 [2014] [internal quotation marks omitted]; *see*

People v Clanton, 151 AD3d 1576, 1577 [4th Dept 2017]; *People v Ricks*, 145 AD3d 1610, 1611 [4th Dept 2016], *lv denied* 29 NY3d 1000 [2017]). Here, the court credited the testimony of the officer that he smelled fresh, unburned marihuana emanating from the vehicle through its open windows, and that he was trained and experienced in detecting marihuana. We discern no basis to disturb the court's credibility assessment 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 Williams*, 115 AD3d 1344, 1345 [4th Dept 2014]).

We also reject defendant's contention that the officer was not justified in pursuing him when he fled. It is well settled that "the police may pursue a fleeing defendant if they have a reasonable suspicion that defendant has committed or is about to commit a crime" (*People v Martinez*, 80 NY2d 444, 446 [1992]; *see People v Rainey*, 110 AD3d 1464, 1465 [4th Dept 2013]). Here, the officer possessed probable cause to search defendant when he fled and, thus, the pursuit of defendant was justified (*see generally Martinez*, 80 NY2d at 447-448). Inasmuch as " 'the pursuit of . . . defendant was justified, the gun he discarded during the pursuit was not subject to suppression as the product of unlawful police conduct' " (*People v Walker*, 149 AD3d 1537, 1538 [4th Dept 2017], *lv denied* 30 NY3d 954 [2017]; *see People v Williams*, 120 AD3d 1441, 1442 [2d Dept 2014], *lv dismissed* 24 NY3d 1089 [2014]).

Finally, the sentence is not unduly harsh or severe.

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

708

CA 19-01908

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

S&T BANK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOP CAPITAL OF NEW YORK BROCKPORT, LLC, FORMERLY KNOWN AS PERSISTENCE PATH, LLC, ET AL., DEFENDANTS, SWAN TILE AND MARBLE, INC., DIMARCO CONSTRUCTORS, LLC, JAMES C. DELLY, DOING BUSINESS AS JAMES C. DELLY CUSTOM PAINTING, US CEILING CORP., KENNEDY MECHANICAL PLUMBING AND HEATING, INC., NORTHEAST COMMERCIAL FLOORING, INC., AND BBT CONSTRUCTION SERVICES, INC., DEFENDANTS-APPELLANTS.

ADAMS LECLAIR, LLP, ROCHESTER (DANIEL P. ADAMS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WOODS OVIATT GILMAN LLP, ROCHESTER (JOHN C. NUTTER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Monroe County (William K. Taylor, J.), entered September 20, 2019. The amended order, inter alia, granted the motion of plaintiff for summary judgment.

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

Memorandum: Plaintiff commenced this mortgage foreclosure action against defendant Top Capital of New York Brockport, LLC, formerly known as Persistence Path, LLC (Top Capital), among others, after Top Capital defaulted on a building loan agreement (BLA). Defendant DiMarco Constructors, LLC (DiMarco) was the general contractor on the project. The remaining defendants-appellants are subcontractors who, together with DiMarco (collectively, defendants), filed mechanics' liens for amounts they contend are due on their contracts for services provided on the project. As relevant here, defendants asserted in their answer a second affirmative defense alleging that plaintiff's mortgage lien is subordinate to the mechanics' liens of defendants because plaintiff failed to file a material modification to the BLA in violation of Lien Law § 22. Plaintiff moved for, inter alia, summary judgment dismissing defendants' second affirmative defense, and defendants cross-moved for summary judgment seeking a determination of

the priority of their mechanics' liens over plaintiff's mortgage lien. Supreme Court granted the motion and denied the cross motion, and we affirm.

Contrary to defendants' contention, plaintiff established as a matter of law that there was no violation of Lien Law § 22, and defendants failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Lien Law § 22 provides, in pertinent part, that a building loan contract "and any modification thereof, must be in writing and duly acknowledged" and must be "filed in the office of the clerk of the county in which any part of the land is situated, . . . within ten days after the execution" thereof. The failure to comply with the provisions of Lien Law § 22 renders that party's interests "subject to the lien and claim" of those who thereafter file a notice of a mechanics' lien (*id.*). The purpose of section 22 is "to permit contractors on construction projects 'to learn exactly what sum *the loan* in fact made available to the owner of the real estate for the project' " (*Altshuler Shaham Provident Funds, Ltd. v GML Tower, LLC*, 21 NY3d 352, 363 [2013], quoting *Nanuet Natl. Bank v Eckerson Terrace*, 47 NY2d 243, 247 [1979] [emphasis added]). As the Court of Appeals has recognized, "[a]lthough section 22 states that '*any* subsequent modification' . . . to a building loan contract must be filed, this language . . . has always been interpreted to mean any 'material' subsequent modification" (*id.* at 365 n 9). A modification is deemed material if it: "(1) alters the rights and liabilities otherwise existing between the parties to the agreement[,] or (2) enlarges, restricts or impairs the rights of any third-party beneficiary" (*Howard Sav. Bank v Lefcon Partnership*, 209 AD2d 473, 475 [2d Dept 1994], *lv dismissed* 86 NY2d 837 [1995] [internal quotation marks omitted]; *see Altshuler Shaham Provident Funds, Ltd.*, 21 NY3d at 365 n 9).

Here, defendants contend that plaintiff effectively and materially modified the terms of the BLA when it failed to require Top Capital to adhere to certain equity infusion provisions of the BLA and, inasmuch as no modification was filed pursuant to Lien Law § 22, they contend that plaintiff's interest is subordinate to their mechanics' liens. We reject that contention.

Although the BLA identified certain "Required Equity Funds," including a "Developer's Fee" that was to be paid "on a par[i] passu basis in accordance with the percentage of completion of the Project," the BLA did not require those payments to be made before plaintiff advanced loan proceeds to Top Capital. Rather, the BLA established that, once those payments were made, plaintiff would be obligated to make certain advances. Plaintiff therefore retained the discretion to make the loan advances even in the absence of a Developer's Fee payment. We thus conclude that Top Capital's failure to provide those funds at rate equal with the percentage of completion of the project did not constitute a material modification of the BLA inasmuch as that failure did not alter the rights or liabilities otherwise existing between plaintiff and Top Capital under the BLA (*see Howard Sav. Bank*, 209 AD2d at 474-476; *cf. Sackman-Gilliland Corp. v Lupo*, 55 AD2d 1008, 1009 [4th Dept 1977]).

We reject defendants' further contention that there was a material modification of the BLA inasmuch as they were third-party beneficiaries to the BLA whose rights were impaired or restricted by the action or inaction of plaintiff and Top Capital. The BLA specifically provides that the BLA, mortgage and note were "made for the sole protection of [Top Capital] and [plaintiff], and [plaintiff's] successors and assigns, and [that] no other person [would] have any right of action hereunder or thereunder." Such contractual provisions have been held to preclude contractors from claiming third-party beneficiary status (*see Howard Sav. Bank*, 209 AD2d at 476; *cf. Dollar Dry Dock Sav. Bank v Hudson St. Dev. Assoc.*, 175 AD2d 688, 689 [1st Dept 1991]). Even assuming, arguendo, that defendants had third-party beneficiary status, we conclude that plaintiff's "decision to exercise—or to refrain from exercising—the rights it possessed under the [BLA] cannot be described as a modification within the meaning of the Lien Law" (*Howard Sav. Bank*, 209 AD2d at 477; *see e.g. In re Admiral's Walk*, 134 BR 105, 120-122 [Bankr WD NY 1991]; *In re Lynch III Props. Corp.*, 125 BR 857, 861-862 [Bankr ED NY 1991]).

Based on our determination, we do not address plaintiff's alternative ground for affirmance.

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

710

CA 19-01553

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

MICHAEL D. LAMAR, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

AARON M. ANASTASI, DEFENDANT-RESPONDENT.

WOODRUFF LEE CARROLL, P.C., SYRACUSE (WOODRUFF LEE CARROLL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AALOK J. KARAMBELKAR OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered March 25, 2019. The order granted the motion of defendant for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that he purportedly sustained in a motor vehicle accident with defendant. Plaintiff alleged that, as a result of the motor vehicle accident, he suffered a serious injury within the meaning of Insurance Law § 5102 (d) under the permanent loss of use, permanent consequential limitation of use, significant limitation of use, and 90/180-day categories. Defendant moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury that was causally related to the accident. Supreme Court granted the motion, and plaintiff appeals. We affirm.

We note at the outset that plaintiff contends on appeal only that he sustained a serious injury to his cervical spine under the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories of serious injury, and therefore he has abandoned his other particularized claims of serious injury (*see Koneski v Seppala*, 158 AD3d 1211, 1212 [4th Dept 2018]; *Barron v Northtown World Auto*, 137 AD3d 1708, 1708-1709 [4th Dept 2016]).

"On a motion for summary judgment dismissing a complaint that alleges serious injury under Insurance Law § 5102 (d), the defendant bears the initial burden of establishing by competent medical evidence that [the] plaintiff did not sustain a serious injury caused by the accident" (*Gonyou v McLaughlin*, 82 AD3d 1626, 1627 [4th Dept 2011] [internal quotation marks omitted]). Here, defendant met that burden

by establishing through the affirmed report of his expert that plaintiff's injuries to his cervical spine were caused by a preexisting condition (*see Perl v Meher*, 18 NY3d 208, 218 [2011]; *Goodwin v Walter*, 165 AD3d 1596, 1597 [4th Dept 2018]; *Kwitek v Seier*, 105 AD3d 1419, 1420-1421 [4th Dept 2013]). After completing his examination of plaintiff and reviewing plaintiff's medical records and imaging studies, defendant's expert opined that there was no objective medical evidence that plaintiff sustained any significant orthopedic injury in the relevant accident. The expert noted that plaintiff had chronic orthopedic issues throughout his neck and had been on medication for chronic spinal problems since the 1980s. The expert also opined that there was no objective evidence that plaintiff's cervical spine condition had worsened as a result of the accident; that the imaging studies taken after the accident, as compared to the pre-accident studies, "showed [only] chronic degenerative findings"; and that ultimately there was no orthopedic injury to his cervical spine that was causally related to the accident.

Because defendant met his initial burden on the motion, the burden shifted to plaintiff "to come forward with evidence addressing defendant's claimed lack of causation" (*Pommells v Perez*, 4 NY3d 566, 580 [2005]; *see Franchini v Palmieri*, 1 NY3d 536, 537 [2003]; *see also Carpenter v Steadman*, 149 AD3d 1599, 1600 [4th Dept 2017]). Plaintiff, however, failed to present competent evidence in admissible form that "adequately address[ed] how plaintiff's alleged [cervical spine] injuries, in light of [his] past medical history, [were] causally related to the subject accident" (*Fisher v Hill*, 114 AD3d 1193, 1194 [4th Dept 2014], *lv denied* 23 NY3d 909 [2014] [internal quotation marks omitted]; *see Franchini*, 1 NY3d at 537; *French v Symborski*, 118 AD3d 1251, 1252 [4th Dept 2014], *lv denied* 24 NY3d 904 [2014]), and therefore failed to raise a triable issue of fact in opposition. We have reviewed plaintiff's remaining contentions and conclude that none warrants reversal or modification of the order.

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

711

CA 19-01196

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

JAMES MARTINGANO, AS ADMINISTRATOR OF THE ESTATE OF REIGO MARTINGANO AND AS EXECUTOR OF THE ESTATE OF HELEN MARTINGANO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WALTER A. HALL, M.D., JOHN PICANO, M.D., DENISE BRANNICK, M.D., MOHAMMED OMAR, M.D., NEUROLOGICAL ASSOCIATES OF CENTRAL NEW YORK, LLP, RADIOLOGY ASSOCIATES OF NEW HARTFORD, LLP, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

GALE GALE & HUNT, LLC, SYRACUSE (ANDREW R. BORRELLI OF COUNSEL), FOR DEFENDANTS-APPELLANTS WALTER A. HALL, M.D. AND NEUROLOGICAL ASSOCIATES OF CENTRAL NEW YORK, LLP.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (CHRISTOPHER F. DEFRANCESCO OF COUNSEL), FOR DEFENDANTS-APPELLANTS DENISE BRANNICK, M.D., MOHAMMED OMAR, M.D., AND RADIOLOGY ASSOCIATES OF NEW HARTFORD, LLP.

NAPOLI SHKOLNIK, PLLC, MELVILLE (SETH KORNFELD OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered June 4, 2019. The order, insofar as appealed from, denied the motion of defendants Walter A. Hall, M.D., and Neurological Associates of Central New York, LLP, and denied the cross motion of defendants John Picano, M.D., Denise Brannick, M.D, Mohammed Omar, M.D., and Radiology Associates of New Hartford, LLP, seeking summary judgment dismissing plaintiff’s amended complaint against them.

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

Memorandum: Plaintiff, as administrator of the estate of Reigo Martingano (decedent) and executor of the estate of Helen Martingano, commenced this medical malpractice and wrongful death action alleging, inter alia, that defendants were negligent in the care and treatment

of decedent's brain tumor and that, as a result of the negligence, decedent suffered recurrence of the tumor, which was not timely detected and treated. Defendants Walter A. Hall, M.D. and Neurological Associates of Central New York, LLP (collectively, Neurological Associates) performed surgery to remove the tumor and provided treatment thereafter. Defendants John Picano, M.D., Denise Brannick, M.D., Mohammed Omar, M.D., and Radiology Associates of New Hartford, LLP (collectively, Radiology Associates) were emergency department radiologists who interpreted CT scans of decedent's brain on three occasions when decedent was hospitalized because of seizures. Neurological Associates and Radiology Associates appeal from an order that, inter alia, denied their respective motion and cross motion for summary judgment dismissing the amended complaint against them.

With respect to Neurological Associates' motion, Supreme Court properly determined that they " 'established their prima facie entitlement to judgment as a matter of law by . . . demonstrating that [they] did not deviate or depart from accepted medical practice or proximately cause [decedent's] injuries' " (*Edwards v Myers*, 180 AD3d 1350, 1352 [4th Dept 2020]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The expert affidavit of the neurosurgeon submitted by Neurological Associates was "detailed, specific and factual in nature . . . and address[ed] each of the specific factual claims of negligence raised in [plaintiff's] bill[s] of particulars" (*Dziwulski v Tollini-Reichert*, 181 AD3d 1165, 1165-1166 [4th Dept 2020] [internal quotation marks omitted]).

We agree with Neurological Associates, however, that the court erred in determining that plaintiff raised a triable issue of fact in opposition to Neurological Associates' motion. Although we reject Neurological Associates' contention that the affidavits of plaintiff's two medical experts raised a new theory of liability in opposition to the motion (*see Gilfus v CSX Transp., Inc.*, 79 AD3d 1671, 1673 [4th Dept 2010]), we nevertheless conclude that the experts' opinions were "speculative, conclusory and 'unsupported by competent evidence tending to establish the essential elements of medical malpractice' " (*Boland v Imboden*, 163 AD3d 1408, 1409 [4th Dept 2018], *lv denied* 32 NY3d 912 [2019], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]).

In particular, plaintiff's experts "failed to provide any factual basis for [their] conclusion[s]" that Neurological Associates deviated from the standard of care in surgically resecting the tumor, documenting the resection, and advising decedent as to post-operative radiation and, therefore, the experts' affidavits "lacked probative force and [were] insufficient as a matter of law to overcome" the motion with respect to those claims (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 545 [2002]; *see Bubar v Brodman*, 177 AD3d 1358, 1360 [4th Dept 2019]). With respect to the claims regarding post-operative monitoring of decedent's condition and detection of recurrence, although plaintiff raised a triable issue of fact whether Neurological Associates deviated from the applicable standard of care in that regard, we nevertheless conclude that plaintiff's submissions are insufficient to raise a triable issue of fact whether any such

deviation was a proximate cause of decedent's injuries (*see Page v Niagara Falls Mem. Med. Ctr.*, 174 AD3d 1318, 1320 [4th Dept 2019], *lv denied* 34 NY3d 908 [2020]). Plaintiff's experts failed to explain how further testing would have led to an earlier diagnosis of recurrence of the tumor (*see G.L. v Harawitz*, 146 AD3d 476, 476 [1st Dept 2017]; *Foster-Sturrup v Long*, 95 AD3d 726, 728-729 [1st Dept 2012]) and offered only conclusory and speculative assertions that earlier detection of recurrence and additional treatment would have produced a different outcome for decedent (*see Longtemps v Oliva*, 110 AD3d 1316, 1319 [3d Dept 2013]; *Poblocki v Todoro*, 49 AD3d 1239, 1240 [4th Dept 2008]; *Bullard v St. Barnabas Hosp.*, 27 AD3d 206, 206 [1st Dept 2006]). Based on the foregoing, we conclude that the court erred in denying Neurological Associates' motion for summary judgment dismissing the amended complaint against them.

We further conclude that the court erred in denying the cross motion of Radiology Associates for summary judgment dismissing the amended complaint against them. Initially, contrary to the court's determination, we conclude that Radiology Associates' experts, who were board certified neurosurgeons, were qualified to offer opinions on the emergency department radiology services provided to decedent (*see Moon Ok Kwon v Martin*, 19 AD3d 664, 664 [2d Dept 2005]), inasmuch as the experts "possessed the requisite skill, training, knowledge and experience to render . . . reliable opinion[s]" in this case (*Fay v Satterly*, 158 AD3d 1220, 1221 [4th Dept 2018]). It is well settled that "[a] physician need not be a specialist in a particular field to qualify as a medical expert and any alleged lack of knowledge in a particular area of expertise goes to the weight and not the admissibility of the testimony" (*Moon Ok Kwon*, 19 AD3d at 664; *see Stradtman v Cavaretta* [appeal No. 2], 179 AD3d 1468, 1471 [4th Dept 2020]).

Radiology Associates met their initial burden on the cross motion, and plaintiff failed to raise a triable issue in opposition thereto. The record establishes that Radiology Associates assumed only a limited duty of care in interpreting CT scans of decedent's brain when he was hospitalized for seizures in order to rule out emergent conditions such as hemorrhaging, skull fracture, or brain injury and to ensure that decedent was stabilized (*see Neyman v Doshi Diagnostic Imaging Servs., P.C.*, 153 AD3d 538, 546 [2d Dept 2017]; *Schallert v Mercy Hosp. of Buffalo*, 281 AD2d 983, 983 [4th Dept 2001]). Indeed, on the occasions that decedent was admitted to the emergency department, he was under the care of other physicians for his tumor condition, the scope of radiology services was limited to emergency care, and Radiology Associates did not "assume[] a general duty of care to schedule or urge further testing, or [to] diagnose [or treat decedent's underlying] medical condition[]" (*Mosezhnik v Berenstein*, 33 AD3d 895, 897 [2d Dept 2006]; *see Covert v Walker*, 82 AD3d 825, 826 [2d Dept 2011]; *Pigut v Leary*, 64 AD3d 1182, 1183 [4th Dept 2009]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

730

CA 19-01807

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

JOSEPH A. GALLETTA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

UGO DELSORBO, DEFENDANT-APPELLANT.

HAGELIN SPENCER LLC, BUFFALO (MATTHEW D. PFALZER OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAVID W. POLAK ATTORNEY AT LAW, P.C., WEST SENECA (DAVID W. POLAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered September 16, 2019. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: This appeal arises out of a collision that occurred at the intersection of Harlem Road and Yorktown Road in the Town of Amherst. Plaintiff, who was operating a motorcycle, was traveling southbound on Harlem Road and was stopped behind three or four cars at the subject intersection. To turn right onto Yorktown Road, plaintiff maneuvered his motorcycle onto the paved right shoulder of Harlem Road, rode past the cars in front of him and began to turn. At the same time, defendant, who was driving a pickup truck, was at the intersection in the northbound lane of Harlem Road and was waiting to turn left onto Yorktown Road. When another motorist signaled to defendant to make his turn, he did so. Neither defendant nor plaintiff saw each other, and a collision occurred in which the front of defendant's pickup truck struck the left side of plaintiff's motorcycle as well as plaintiff's left leg. As a result of the collision, plaintiff allegedly sustained serious injuries to his left leg, back and neck. Plaintiff commenced an action against defendant, alleging that his injuries were caused by defendant's negligence. Defendant moved for summary judgment dismissing the complaint. Supreme Court denied the motion, and defendant now appeals.

Contrary to defendant's contention, the court properly denied his motion. "Defendant, as the movant for summary judgment, had the burden of establishing as a matter of law that he was not negligent or that, even if he was negligent, his negligence was not a proximate cause of the accident" (*Pagels v Mullen*, 167 AD3d 185, 187 [4th Dept

2018]). To meet that burden, "defendant was required to establish that he fulfilled his common-law duty to see that which he should have seen [as a driver] through the proper use of his senses . . . and to exercise reasonable care under the circumstances to avoid an accident" (*id.* [internal quotation marks omitted]; *see Heltz v Barratt*, 115 AD3d 1298, 1299 [4th Dept 2014], *affd* 24 NY3d 1185 [2014]). Viewing, as we must, the evidence in the light most favorable to plaintiff and affording him the benefit of every reasonable inference (*see Bank of N.Y. Mellon v Simmons*, 169 AD3d 1446, 1446 [4th Dept 2019]; *Esposito v Wright*, 28 AD3d 1142, 1143 [4th Dept 2006]), we conclude that defendant failed to meet his initial burden with respect to either his negligence or proximate cause. Triable issues of fact remain in light of defendant's "deposition testimony that he never saw plaintiff's [motorcycle] before the impact[and defendant's failure] to submit any other evidence establishing that there was nothing he could have done to avoid the accident" (*Pagels*, 167 AD3d at 188-189; *see Coffed v McCarthy*, 130 AD3d 1436, 1438-1439 [4th Dept 2015, Centra and Whalen, JJ., dissenting], *revd* 29 NY3d 978 [2017]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

732

CA 19-00901

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

SUSAN DEMAIORIBUS AND LOUIS DEMAIORIBUS,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF CHEEKTOWAGA, DEFENDANT-RESPONDENT.

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

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (KEVIN E. LOFTUS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered April 18, 2019. The order granted the motion of defendant for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiffs commenced this negligence action seeking to recover damages for injuries sustained by Susan DeMaioribus (plaintiff) when she slipped and fell on the final step at the top of an outdoor stairway that connected a sidewalk to the entrance of defendant Town of Cheektowaga's town hall (building). The final step was on the same level as the building's entrance, and plaintiff alleged that she slipped on an accumulation of ice as she entered the building. Defendant moved for summary judgment dismissing the complaint on the ground that the step was covered by its prior written notice requirement (Code of the Town of Cheektowaga § 168-2), and that defendant had not received prior written notice of the allegedly dangerous condition. Plaintiffs appeal from an order granting the motion and dismissing the complaint. We affirm.

"It is well settled that where, as here, a municipality has enacted a prior written notice provision . . . , compliance with that provision is a condition precedent to tort actions against that municipality" (*Beagle v City of Buffalo*, 178 AD3d 1363, 1365 [4th Dept 2019]; *see Amabile v City of Buffalo*, 93 NY2d 471, 473-474 [1999]). A defendant can meet its initial burden on the motion by "establishing that it did not receive prior written notice of the allegedly dangerous condition" (*Horan v Town of Tonawanda*, 83 AD3d 1565, 1567 [4th Dept 2011]). In opposition, a plaintiff can defeat the motion by, inter alia, "rais[ing] a triable issue of fact whether one of the

exceptions [to the notice requirement] applies" (*id.*).

Defendant's prior written notice requirement applies to, inter alia, "injuries to person[s] . . . sustained in consequence of any . . . sidewalk or crosswalk . . . [being] dangerous or obstructed or in consequence of snow and ice" (Code of the Town of Cheektowaga § 168-2). A stairway, although not explicitly mentioned by the statute, may be subject to the notice requirement when the stairway " 'functionally fulfills the same purpose that a standard sidewalk would serve' " (*Hinton v Village of Pulaski*, 33 NY3d 931, 932 [2019]; *see Woodson v City of New York*, 93 NY2d 936, 937-938 [1999]). A functional equivalent of a standard sidewalk is an area that " 'provide[s] a passageway for the public' " (*Hinton*, 33 NY3d at 932; *see Loiaconi v Village of Tarrytown*, 36 AD3d 864, 865-866 [2d Dept 2007]).

Here, defendant met its prima facie burden on the motion by offering evidence that it never received prior written notice about the stairway's condition (*see Craig v Town of Richmond*, 122 AD3d 1429, 1429 [4th Dept 2014]; *Horan*, 83 AD3d at 1567). In opposition, plaintiffs do not dispute that showing or argue that an exception to the prior written notice requirement applies. Rather, they argue that the site of the accident was not covered by the prior written notice requirement because it was a part of the entranceway of the building, and was not part of the stairway. We reject that contention because plaintiff slipped on the final step of the stairway, which served the same purpose as the preceding steps or landing which, together with the sidewalk below that led to the bottom of the stairway, provided passage for the public from a parking lot to the building. Thus, the stairway and final step are the functional equivalent of the sidewalk for purposes of defendant's prior written notice requirement (*see Hinton*, 33 NY3d at 932; *Loiaconi*, 36 AD3d at 865-866). We therefore conclude that Supreme Court properly granted the motion because, in opposition, plaintiff did not raise a question of fact whether the prior written notice requirement was inapplicable to the site of the accident (*see* Code of the Town of Cheektowaga § 168-2; *Hinton*, 33 NY3d at 933; *Woodson*, 93 NY2d at 937-938; *Donnelly v Village of Perry*, 88 AD2d 764, 765 [4th Dept 1982]).

In light of the foregoing, plaintiffs' remaining contentions are academic.

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

737

KA 19-01464

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEROY K. HOLLEY, DEFENDANT-APPELLANT.

TODD G. MONAHAN, LITTLE FALLS, FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (STEVEN D. COLE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered February 19, 2019. The judgment convicted defendant, upon a nonjury verdict, 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 nonjury verdict, of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). This case arises out of an incident where defendant and his adult son sold crack cocaine to a confidential informant during a controlled buy. As defendant correctly concedes, he failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence (*see People v White*, 114 AD3d 1256, 1257 [4th Dept 2014], *lv denied* 23 NY3d 1026 [2014]). In any event, we conclude that the contention is without merit. Contrary to defendant's contention, the People presented evidence establishing more than defendant's "mere presence at the scene" of the controlled buy (*People v Fonerin*, 159 AD3d 717, 719 [2d Dept 2018], *lv denied* 31 NY3d 1081 [2018]). Moreover, although during her testimony the confidential informant was confused about whether the person who used the street name "Ace" was defendant or defendant's son, that confusion did not render insufficient her identification of defendant as one of the two men involved in the controlled buy. The confidential informant's confusion about the alias, as well as her criminal history, were placed before County Court, and we see no basis to disturb the court's credibility determination (*see People v Dixon*, 181 AD3d 1190, 1191 [4th Dept 2020], *lv denied* 35 NY3d 1026 [2020]). Also, viewing the evidence in light of the elements of the crimes in this nonjury trial

(*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We agree with defendant that the court erred when it denied his oral motion at trial to suppress certain tangible evidence that was recovered during a traffic stop that occurred nine days after the controlled buy. Although the officer who executed the traffic stop testified during a hearing on defendant's oral motion that he stopped the vehicle because he was aware that it had been involved in the controlled buy, there was no evidence to establish that, at the time of the stop, the officer knew that the occupants of the vehicle were involved in the controlled buy nine days earlier, or that the rental vehicle was rented to the same person on the date of the controlled buy and the date of the traffic stop. The mere fact that a person is driving a vehicle that has been previously used in a crime is insufficient to permit the seizure of that person (*see People v Sellers*, 168 AD2d 581, 582-583 [2d Dept 1990], *lv denied* 77 NY2d 911 [1991]; *People v Dawkins*, 163 AD2d 322, 324 [2d Dept 1990]), and the evidence at the hearing is insufficient to establish that the " 'driver or occupants of the vehicle ha[d] committed, [were] committing, or [were] about to commit a crime' " (*People v Bushey,* 29 NY3d 158, 164 [2017]). Thus, we conclude that the court erred in denying defendant's oral motion to suppress tangible evidence (*see generally People v Dukes*, 245 AD2d 1052, 1053 [4th Dept 1997]; *People v Beach*, 187 AD2d 943, 944 [4th Dept 1992]). Nevertheless, we conclude that the evidence of defendant's guilt is overwhelming and there is no reasonable possibility that the admission of the tangible evidence seized during the traffic stop, i.e., defendant's driver's license, contributed to the conviction (*see generally People v Crimmins*, 36 NY2d 230, 237 [1975]).

Defendant failed to preserve for our review his contention that the court improperly admitted in evidence without a proper foundation a recording of defendant's telephone call to his wife from jail inasmuch as he failed to raise that specific issue before the trial court (*see People v Heard*, 92 AD3d 1142, 1144-1145 [3d Dept 2012], *lv denied* 18 NY3d 994 [2012]; *People v Devers*, 82 AD3d 1261, 1262 [2d Dept 2011], *lv denied* 17 NY3d 794 [2011]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant also failed to preserve his challenge to his waiver of the right to a jury trial because he "did not challenge the adequacy of the allocution related to [the] waiver" before the trial court (*People v McCoy*, 174 AD3d 1379, 1381 [4th Dept 2019], *lv denied* 34 NY3d 982 [2019], *reconsideration denied* 35 NY3d 994 [2020] [internal quotation marks omitted]; *see People v Hailey*, 128 AD3d 1415, 1415-1416 [4th Dept 2015], *lv denied* 26 NY3d 929 [2015]). In any event, we conclude that the contention is without merit. The court's inquiry into defendant's understanding of the waiver of his right to a jury trial "was sufficient to establish that defendant understood the ramifications of such waiver" (*People v Smith*, 6 NY3d 827, 828 [2006],

cert denied 548 US 905 [2006]).

We reject defendant's contention that the trial judge should have, sua sponte, recused herself. "Absent a legal disqualification under Judiciary Law § 14, a [t]rial [j]udge is the sole arbiter of recusal. This discretionary decision is within the personal conscience of the court when the alleged appearance of impropriety arises from inappropriate awareness of 'nonjuridical data' " (*People v Moreno*, 70 NY2d 403, 405 [1987], quoting *People v Horton*, 18 NY2d 355, 362 [1966], *cert denied* 387 US 934 [1967]). In this case, disqualification was not required pursuant to section 14, "and defendant otherwise made no showing that the court's alleged bias affected the result of the trial" (*People v Terborg*, 156 AD3d 1320, 1321 [4th Dept 2017], *lv denied* 31 NY3d 1018 [2018]).

Contrary to defendant's further contention, he was not deprived of effective assistance of counsel. Defense counsel's failure to move for a trial order of dismissal and for sanctions based upon a purported *Brady* violation did not render his assistance ineffective because an ineffective assistance of counsel claim cannot be premised upon a failure to make motions that have little or no chance of success (*see People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]). We conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). Finally, to the extent that defendant contends that the court failed to make a minimal inquiry into his request for new counsel, we conclude that defendant "failed to proffer specific allegations of 'a seemingly serious request' that would require the court to engage in a minimal inquiry" (*People v Porto*, 16 NY3d 93, 100 [2010]; *see People v Morris*, 183 AD3d 1254, 1255 [4th Dept 2020], *lv denied* 35 NY3d 1047 [2020]; *People v Thompson*, 32 AD3d 743, 743 [1st Dept 2006], *lv denied* 9 NY3d 870 [2007]; *cf. People v Sides*, 75 NY2d 822, 825 [1990]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

747

TP 20-00231

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

IN THE MATTER OF ONONDAGA CENTER FOR REHABILITATION AND HEALTHCARE AND STELLA GIACOBBE, PETITIONERS,

V ORDER

HOWARD ZUCKER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH, RESPONDENT.

COWART DIZZIA LLP, NEW YORK CITY (JENNIFER J. NEARY OF COUNSEL), FOR PETITIONERS.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Onondaga County [Scott J. DelConte, J.], entered February 6, 2020) to review a determination of respondent. The determination, among other things, affirmed the Onondaga County Department of Social Services' denial of Medicaid benefits.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on June 17 and 18, 2020,

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

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

750

KA 16-02363

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONALD J. HUNT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered September 21, 2016. The judgment convicted defendant upon his plea of guilty of attempted rape in the first degree, rape in the third degree, attempted criminal sexual act in the first degree, criminal sexual act in the third degree, burglary in the second degree, unlawful imprisonment in the second degree (two counts) and forcible touching.

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, inter alia, attempted rape in the first degree (Penal Law §§ 110.00, 130.35 [1]), attempted criminal sexual act in the first degree (§§ 110.00, 130.50 [1]), and burglary in the second degree (§ 140.25 [2]). Initially, we agree with defendant that the purported waiver of the right to appeal is not enforceable inasmuch as the totality of the circumstances fails to reveal that defendant "understood the nature of the appellate rights being waived" (*People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v Youngs*, 183 AD3d 1228, 1228 [4th Dept 2020], *lv denied* 35 NY3d 1050 [2020]). County Court's oral colloquy "mischaracterized the waiver of the right to appeal, portraying it in effect as an 'absolute bar' to the taking of an appeal" (*People v Cole*, 181 AD3d 1329, 1330 [4th Dept 2020]; *see Thomas*, 34 NY3d at 565; *Youngs*, 183 AD3d at 1228-1229). In explaining the waiver, the court suggested that defendant was ceding any right to challenge his guilty plea on appeal, but such an "improper description of the scope of the appellate rights relinquished by the waiver is refuted by . . . precedent, whereby a defendant retains the right to appellate review of very selective fundamental issues" (*Thomas*, 34 NY3d at 566; *see People v Callahan*, 80 NY2d 273, 280 [1992]). Moreover, the written

waiver of the right to appeal does not "establish a valid waiver because it was not executed until sentencing" (*People v Fox*, 173 AD3d 1680, 1681 [4th Dept 2019], *lv denied* 33 NY3d 1104 [2019]). Even if the written waiver is considered, it did not contain clarifying language; instead, it perpetuated the mischaracterization that the waiver of the right to appeal constituted an absolute bar to the taking of a first-tier direct appeal and even incorrectly stated that the waiver foreclosed appellate review of nonwaivable issues, such as the voluntariness of the waiver, legality of the sentence, and defendant's competency to stand trial (*see Thomas*, 34 NY3d at 564, 566; *Callahan*, 80 NY2d at 280). Where, as here, the "trial court has utterly 'mischaracterized the nature of the right a defendant was being asked to cede,' [this] '[C]ourt cannot be certain that the defendant comprehended the nature of the waiver of appellate rights' " (*Thomas*, 34 NY3d at 565-566).

Defendant contends that his mental health history cast significant doubt on the voluntariness of his plea. However, " '[a] history of prior mental illness or treatment does not itself call into question [a] defendant's competence' " (*People v Jones*, 175 AD3d 1845, 1846 [4th Dept 2019], *lv denied* 34 NY3d 1078 [2019]; *see People v Young*, 66 AD3d 1445, 1446 [4th Dept 2009], *lv denied* 13 NY3d 912 [2009]), and there is nothing in the record here to suggest that defendant " 'lacked the capacity to understand the plea proceeding' " (*People v Smith*, 37 AD3d 1141, 1142 [4th Dept 2007], *lv denied* 9 NY3d 851 [2007], *reconsideration denied* 9 NY3d 926 [2007]; *see Jones*, 175 AD3d at 1846; *Young*, 66 AD3d at 1446). Contrary to defendant's further contention, his "monosyllabic responses to [the court's] questions did not render the plea invalid" (*People v Loper*, 118 AD3d 1394, 1395 [4th Dept 2015], *lv denied* 25 NY3d 1204 [2015] [internal quotation marks omitted]; *see People v Gordon*, 98 AD3d 1230, 1230 [4th Dept 2012], *lv denied* 20 NY3d 932 [2012]).

We also reject defendant's contention that the court erred in denying his motion to withdraw his plea without making a sufficient inquiry with respect to the grounds for that motion. "The court afforded defendant the requisite 'reasonable opportunity to present his contentions' in support of that motion . . . and [it] did not abuse its discretion in concluding that no further inquiry was needed" (*People v Strasser*, 83 AD3d 1411, 1411 [4th Dept 2011], quoting *People v Tinsley*, 35 NY2d 926, 927 [1974]). Additionally, defendant's belated and unsubstantiated assertion that the plea was the result of a failure to take prescribed medication is insufficient to support a motion to withdraw a plea (*see People v Gonzalez*, 231 AD2d 939, 940 [4th Dept 1996], *lv denied* 89 NY2d 923 [1996]; *People v McNair* [appeal No. 1], 186 AD2d 1089, 1089 [4th Dept 1992], *lv denied* 80 NY2d 1028 [1992]).

Contrary to defendant's contention, his sentence is not unduly harsh or severe. Finally, we have reviewed defendant's remaining

contention and conclude that it lacks merit.

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

764

CA 19-02270

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

DIANNA PETRELLA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

FAIRPORT BAPTIST HOME, AS OPERATOR OF FAIRPORT BAPTIST HOMES, DEFENDANT-RESPONDENT.

LADUCA LAW FIRM, LLP, ROCHESTER (MICHAEL STEINBERG OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (V. CHRISTOPHER POTENZA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (William K. Taylor, J.), entered May 21, 2019. The judgment awarded plaintiff money damages upon a jury verdict.

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

Memorandum: Plaintiff commenced this action seeking damages for pain and suffering arising from a bedsore she developed during a stay at defendant's nursing home. The amended complaint asserted causes of action for negligence and violation of Public Health Law § 2801-d. The matter proceeded to trial, where the jury awarded plaintiff damages of $50,000 for past pain and suffering on her negligence cause of action. The jury did not find that defendant violated Public Health Law § 2801-d. On appeal, plaintiff contends that Supreme Court abused its discretion in refusing to instruct the jury on 10 NYCRR 415.12 (c) as a basis to find defendant liable on the section 2801-d cause of action.

Even assuming, arguendo, that the court abused its discretion in denying plaintiff's request for that charge, we nevertheless affirm inasmuch as plaintiff stipulated that she sought only a "judgment as a matter of law" and the remedy for the alleged error would be a new trial on the Public Health Law cause of action, which is separate and distinct from the negligence cause of action (*see Zeides v Hebrew Home for Aged at Riverdale*, 300 AD2d 178, 179 [1st Dept 2002]), not a judgment on a claim that was never considered by the jury (*see generally Peguero v 601 Realty Corp.*, 58 AD3d 556, 564 [1st Dept

2009]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

772

KA 19-01962

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDRE L. INGRAM, DEFENDANT-APPELLANT.

TODD G. MONAHAN, LITTLE FALLS, FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered October 5, 2018. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance 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 criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]), defendant contends that his guilty plea was the result of undue coercion by the court. Defendant failed to raise that contention in his motion to withdraw his guilty plea and failed to move to vacate the judgment of conviction on that ground. Thus, he failed to preserve that contention for our review (*see People v Bellamy*, 170 AD3d 1652, 1653 [4th Dept 2019]; *People v Carlisle*, 50 AD3d 1451, 1452 [4th Dept 2008], *lv denied* 10 NY3d 957 [2008]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Defendant's further contention that he was denied effective assistance of counsel does not survive his plea of guilty because he "failed to demonstrate that the plea bargaining process was infected by [the] allegedly ineffective assistance or that he entered the plea because of his attorney['s] allegedly poor performance" (*Bellamy*, 170 AD3d at 1653 [internal quotation marks omitted]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

776

CAF 19-00178

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

IN THE MATTER OF KC B. MENCH,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

RONALD G. MAJERUS, III, RESPONDENT-RESPONDENT.

MICHAEL G. CIANFARANO, OSWEGO, FOR PETITIONER-APPELLANT.

CASEY E. JORDAN, CLAY, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered October 24, 2018 in proceedings pursuant to Family Court Act article 6 and article 8. The order, among other things, adjudged that the parties shall share joint legal and physical custody of the subject child.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by dismissing the family offense petition, and as modified the order is affirmed without costs.

Memorandum: Petitioner mother appeals from an order that, after, inter alia, a hearing on her petition for custody of the subject child and on her family offense petition against respondent father, awarded the parties joint legal custody and shared physical custody of the child. In its written decision, in addition to awarding custody of the child, Family Court also dismissed the mother's family offense petition. The order appealed from, however, does not expressly mention that the court dismissed the family offense petition, and referenced only its resolution of the mother's custody petition.

Initially, we conclude that the court did not err in refusing to award the mother sole physical custody of the child. In our view, the court's determination that it was in the child's best interests to award the parties joint legal and physical custody "is supported by a sound and substantial basis in the record and thus [should] not be disturbed" (*Wideman v Wideman*, 38 AD3d 1318, 1319 [4th Dept 2007] [internal quotation marks omitted]; *see Matter of Steingart v Fong*, 156 AD3d 794, 795-796 [2d Dept 2017]). The record establishes that the court weighed the appropriate factors (*see generally Eschbach v Eschbach*, 56 NY2d 167, 171-174 [1982]), and the determination of the court, " 'which [was] in the best position to evaluate the character and credibility of the witnesses, must be accorded great weight' " (*Wideman*, 38 AD3d at 1319; *see Matter of Lesinski v Ciamaga*, 180 AD3d

1341, 1342 [4th Dept 2020]).

With respect to the mother's contention challenging the dismissal of the family offense petition, we note that where, as here, there is a conflict between the decision and order, the decision controls (*see Matter of Esposito v Magill*, 140 AD3d 1772, 1773 [4th Dept 2016], *lv denied* 28 NY3d 904 [2016]; *Matter of Edward V.*, 204 AD2d 1060, 1061 [4th Dept 1994]), and the order "must be modified to conform to the decision" (*Waul v State of New York*, 27 AD3d 1114, 1115 [4th Dept 2006], *lv denied* 7 NY3d 705 [2006]; *see* CPLR 5019 [a]). We therefore modify the order by dismissing the family offense petition.

Moreover, we conclude that the court did not err in determining that the mother failed to prove by a fair preponderance of the evidence that the father's alleged conduct established the relevant family offense (*see* Family Ct Act § 832; *see generally Matter of Washington v Washington*, 158 AD3d 717, 718 [2d Dept 2018], *lv denied* 32 NY3d 912 [2018]). "The determination whether [the father] committed a family offense was a factual issue for the court to resolve, and '[the] court's determination regarding the credibility of witnesses is entitled to great weight on appeal and will not be disturbed if supported by the record' " (*Matter of Martin v Flynn*, 133 AD3d 1369, 1370 [4th Dept 2015]; *see Cunningham v Cunningham*, 137 AD3d 1704, 1704-1705 [4th Dept 2016]). Here, we find no reason to disturb the court's credibility determinations or its conclusion that the father did not commit the relevant family offense of harassment in the second degree (*see Matter of Teanna P. v David M.*, 134 AD3d 654, 655 [1st Dept 2015]; *Matter of Krisztina K. v John S.*, 103 AD3d 724, 724 [2d Dept 2013]; *see generally* Penal Law § 240.26 [3]). The record does not support the conclusion that the father intended to "harass, annoy or alarm [the mother]" (§ 240.26) and, thus, the mother did not meet her burden of establishing a family offense by a preponderance of the evidence (*see Matter of David ZZ. v Michael ZZ.*, 151 AD3d 1339, 1341 [3d Dept 2017]; *Matter of Eck v Eck*, 44 AD3d 1168, 1168-1169 [3d Dept 2007], *lv denied* 9 NY3d 818 [2008]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

780

CA 19-00913

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

CHARLES EBERHARDT,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

G&J CONTRACTING, INC., DEFENDANT,
AND LAWLEY SERVICE, INC.,
DEFENDANT-RESPONDENT-APPELLANT.

DOLCE PANEPINTO, P.C., BUFFALO (ANNE M. WHEELER OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JESSE B. BALDWIN OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered April 25, 2019. The order granted in part and denied in part the motion of defendant Lawley Service, Inc. to dismiss plaintiff's complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in its entirety and dismissing the complaint against defendant Lawley Service, Inc., and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action to recover damages for injuries sustained at a work site and asserted causes of action against, inter alia, Lawley Service, Inc. (defendant) for common-law negligence and the violation of Labor Law §§ 200 and 241 (6). Defendant moved to dismiss the complaint against it pursuant to CPLR 3211. Supreme Court granted the motion in part and dismissed the Labor Law causes of action, but the court denied the motion insofar as it sought to dismiss the common-law negligence cause of action against defendant. Plaintiff appeals and defendant cross-appeals.

Contrary to plaintiff's contention on his appeal, the court properly granted defendant's motion insofar as it sought to dismiss the Labor Law causes of action because defendant submitted documentary evidence "conclusively establish[ing]" (*Liberty Affordable Hous., Inc. v Maple Ct. Apts.*, 125 AD3d 85, 92 [4th Dept 2015]) that, "as a subcontractor, it did not have the authority to supervise or control the work that caused the plaintiff's injury and thus cannot be held liable under Labor Law §§ 200 . . . or 241 (6)" (*Foots v Consolidated Bldg. Contrs., Inc.*, 119 AD3d 1324, 1327 [4th Dept 2014] [internal

quotation marks omitted]). Moreover, the documentary evidence belies plaintiff's allegation that he is a third-party beneficiary of the contract between his employer and defendant (*see generally Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786 [2006]). Finally, given the documentary evidence submitted in support of defendant's motion, we agree with defendant on its cross appeal that the court should have also granted the motion insofar as it sought to dismiss the common-law negligence cause of action against defendant (*see generally Wright v Ellsworth Partners, LLC*, 143 AD3d 1116, 1120 [3d Dept 2016]). We therefore modify the order accordingly.

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

786

CA 19-02188

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

CHARLES EBERHARDT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

G&J CONTRACTING, INC., DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

DOLCE PANEPINTO, P.C., BUFFALO (ANNE M. WHEELER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (TIMOTHY P. WELCH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered November 26, 2019. The order granted the motion of defendant G&J Contracting, Inc. for summary judgment dismissing the complaint against it.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries sustained at a work site and asserted causes of action against, inter alia, G&J Contracting, Inc. (defendant) for common-law negligence and the violation of Labor Law §§ 200 and 241 (6). Defendant moved for summary judgment dismissing the complaint against it. Supreme Court granted the motion, and we now affirm.

Contrary to plaintiff's contention, the summary judgment motion was not premature (*see Gannon v Sadeghian*, 151 AD3d 1586, 1588 [4th Dept 2017]). Contrary to plaintiff's further contention, the court properly granted the motion. Defendant established as a matter of law that, "as a subcontractor, it did not have the authority to supervise or control the work that caused the plaintiff's injury and thus cannot be held liable under Labor Law §§ 200 . . . or 241 (6)" (*Foots v Consolidated Bldg. Contrs., Inc.*, 119 AD3d 1324, 1327 [4th Dept 2014] [internal quotation marks omitted]). Similarly, defendant cannot be held liable for common-law negligence because it did not "exercise any direct control over [the work] or the manner in which [the] work was performed" (*Wright v Ellsworth Partners, LLC*, 143 AD3d 1116, 1120 [3d Dept 2016]) and it did not create a hazardous condition (*cf. Johnson v Ebidenergy, Inc.*, 60 AD3d 1419, 1421 [4th Dept 2009]). In opposition, plaintiff failed to raise a triable issue of fact (*see generally*

Zuckerman v City of New York, 49 NY2d 557, 562 [1980]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

810

CA 19-02199

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

GEOFFREY DUBEY, PLAINTIFF-RESPONDENT,

V ORDER

RONEN ZOUR, DEFENDANT-APPELLANT,
AND ROC CITY PARTNERS, LLC, DEFENDANT.

RONEN ZOUR, THIRD-PARTY PLAINTIFF,

V

SABONIS PARTNERS, LLC, THIRD-PARTY DEFENDANT.

ROTHENBERG LAW, ROCHESTER (MICHAEL ROTHENBERG OF COUNSEL), FOR DEFENDANT-APPELLANT.

ALDOUS PLLC, NEW YORK CITY (KENNETH E. ALDOUS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (William K. Taylor, J.), entered February 15, 2019. The order, insofar as appealed from, denied that part of defendant's motion seeking sanctions.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 29 and October 7, 2020,

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

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

828

KA 17-01865

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONALD MILLS, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered June 30, 2017. The judgment convicted defendant upon a jury verdict of 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 jury verdict of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [12]). Defendant contends that Supreme Court erred in refusing to suppress his statements to the police because he lacked the intellectual capacity to make voluntary and knowing statements. We reject that contention. A "defendant's impaired intelligence is but one factor to be considered in the totality of circumstances voluntariness analysis where, as here, there is no evidence of mental retardation so great as to render the accused completely incapable of understanding the meaning and effect of [the] confession" (*People v Wilson*, 151 AD3d 1836, 1837 [4th Dept 2017] [internal quotation marks omitted]; *see People v Williams*, 62 NY2d 285, 289 [1984]).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Although an acquittal would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally Danielson*, 9 NY3d at 348; *Bleakley*, 69 NY2d at 495).

Defendant contends that the court, in response to a jury note,

erred in submitting to the jury for its examination defendant's driver's license, which defendant asserts was not admitted in evidence (*see* CPL 310.20 [1]). Defense counsel, however, did not object to the submission of the driver's license to the jury, and thus the issue is not preserved for our review (*see People v Dame*, 144 AD3d 1625, 1626 [4th Dept 2016], *lv denied* 29 NY3d 948 [2017]; *see also People v Brown*, 178 AD2d 647, 647-648 [2d Dept 1991]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant also failed to preserve his further contention that he was deprived of his right to a fair trial because of improper statements made by the prosecutor during summation (*see People v Tonge*, 93 NY2d 838, 839 [1999]). In any event, defendant's contention is without merit. "Reversal based on prosecutorial misconduct is 'mandated only when the conduct [complained of] has caused such substantial prejudice to the defendant that he [or she] has been denied due process of law' " (*People v Jacobson*, 60 AD3d 1326, 1328 [4th Dept 2009], *lv denied* 12 NY3d 916 [2009]) and, here, "[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Jones*, 114 AD3d 1239, 1241 [4th Dept 2014], *lv denied* 23 NY3d 1038 [2014], *lv denied* 25 NY3d 1166 [2015] [internal quotation marks omitted]).

Finally, we have reviewed defendant's remaining contention and conclude that it lacks merit.

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

831

CA 19-02290

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

IN THE MATTER OF JOHN L. YEHLE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JON T. RICH, JR., RESPONDENT-RESPONDENT.

SLYE LAW OFFICES, P.C., WATERTOWN (ROBERT J. SLYE OF COUNSEL), FOR PETITIONER-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (DANIEL R. ROSE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered June 6, 2019 in a proceeding pursuant to Limited Liability Company Law § 702. The order, among other things, denied petitioner's cross motion to vacate a stipulated order.

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

Memorandum: Petitioner and respondent formed Wellesley Island Storage, LLC (WIS) to construct and operate rental storage units, and each held a 50% interest in WIS. After financial disputes arose between them, petitioner commenced this proceeding seeking judicial dissolution of WIS, the sale of its property, and an accounting. Respondent did not oppose dissolution and sought an order directing the sale of WIS's assets.

Following some amount of discovery, a stipulated order was entered pursuant to which the parties agreed, among other things, that WIS should be dissolved and all of its assets sold at auction. In the stipulated order, the parties agreed that "additional discovery relating to the accounting and distribution of assets [was] still outstanding" and that "further proceedings and claims remain[ed] to determine each member's contribution and membership interests."

Despite the provisions of the stipulated order, petitioner refused to execute the documents necessary to proceed with the sale of the assets at auction "until [respondent] produce[d] the financial" documents petitioner had requested. Respondent thereafter moved for the appointment of a receiver to proceed with the auction, and petitioner cross-moved for an order vacating the stipulated order. Supreme Court granted the motion in part by directing the sale of the

assets at auction and denied the cross motion. Petitioner appeals.

We conclude that the court properly denied the cross motion. "As with a contract, courts should not disturb a valid stipulation absent a showing of good cause such as fraud, collusion, mistake or duress . . . ; or unless the agreement is unconscionable . . . or contrary to public policy . . . ; or unless it suggests an ambiguity indicating that the words did not fully and accurately represent the parties' agreement" (*McCoy v Feinman*, 99 NY2d 295, 302 [2002]; *see Hallock v State of New York*, 64 NY2d 224, 230 [1984]). The party seeking to vacate a stipulation bears the burden of proof, and "[u]nsubstantiated or conclusory allegations are insufficient" (*Pieter v Polin*, 148 AD3d 1191, 1192 [2d Dept 2017]; *see Hallock*, 64 NY2d at 230).

Here, petitioner contends that the stipulated order should be vacated on grounds of fraud, unilateral mistake and unconscionability. We disagree. Contrary to petitioner's contention, he failed to establish that any misrepresentation was made that would support claims of fraud or unilateral mistake (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *Mooney v Manhattan Occupational, Physical & Speech Therapies, PLLC*, 166 AD3d 957, 960 [2d Dept 2018]). Rather, he alleged that respondent's claims related to the amount respondent purportedly contributed to WIS could not be verified. Petitioner also failed to establish any justifiable reliance on respondent's claims inasmuch as the stipulated order specifically provides that further discovery and proceedings were required to determine the parties' contribution amounts (*see Cervera v Bressler*, 126 AD3d 924, 926 [2d Dept 2015]).

We reject petitioner's further contention that it would be unjust or inequitable to enforce the stipulated order, i.e., that the order is unconscionable, inasmuch as petitioner "failed to establish that the terms of the [stipulated order] were so unfair or one-sided as to 'shock the conscience and confound the judgment of any person of common sense' " (*Amerally v Liberty King Produce, Inc.*, 170 AD3d 637, 638 [2d Dept 2019]; *see Chang v Chang*, 237 AD2d 235, 235 [1st Dept 1997]).

Having failed to show the existence of any ground sufficient to invalidate a contract, petitioner is not entitled to vacatur of the stipulated order (*see Hallock*, 64 NY2d at 230).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

833

CA 19-01909

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

CHRISTOPHER MEIER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT BRUCE SIMPSON, M.D., UPSTATE ORTHOPEDICS, LLP, KWAME AMANKWAH, M.D., AND UNIVERSITY SURGICAL ASSOCIATES, LLP, DEFENDANTS-APPELLANTS.

GALE GALE & HUNT, LLC, SYRACUSE (KATHERINE A. BUCKLEY OF COUNSEL), FOR DEFENDANTS-APPELLANTS ROBERT BRUCE SIMPSON, M.D., AND UPSTATE ORTHOPEDICS, LLP.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JEFFREY M. NARUS OF COUNSEL), FOR DEFENDANTS-APPELLANTS KWAME AMANKWAH, M.D., AND UNIVERSITY SURGICAL ASSOCIATES, LLP.

DEMORE LAW FIRM, PLLC, SYRACUSE (TIMOTHY J. DEMORE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order and judgment (one paper) of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered October 15, 2019. The order and judgment, among other things, denied the motion of defendants Kwame Amankwah, M.D., and University Surgical Associates, LLP, for summary judgment and denied in part the motion of defendants Robert Bruce Simpson, M.D., and Upstate Orthopedics, LLP, for summary judgment.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by granting the motion of defendants Kwame Amankwah, M.D. and University Surgical Associates, LLP in part and dismissing the second cause of action against those defendants, and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action against defendants Kwame Amankwah, M.D. and University Surgical Associates, LLP (collectively, Amankwah defendants) and defendants Robert Bruce Simpson, M.D. and Upstate Orthopedics, LLP (collectively, Simpson defendants), seeking damages for injuries sustained by plaintiff following reconstructive knee surgery, resulting in the need for plaintiff to undergo a below-the-knee amputation. In his complaint, plaintiff asserted causes of action for medical malpractice and lack of informed consent. The Amankwah defendants and the Simpson

defendants separately moved for summary judgment dismissing the complaint against them. Defendants now appeal from an order and judgment that denied the Amankwah defendants' motion in its entirety and denied the Simpson defendants' motion except with respect to certain claims in the medical malpractice cause of action.

While we agree with defendants that they separately met their initial burden with respect to the remaining claims in the medical malpractice cause of action by each submitting the affidavit of their expert physician, who averred that defendants did not deviate from the accepted standard of medical care in the treatment and monitoring of plaintiff (*see Carthon v Buffalo Gen. Hosp. Deaconess Skilled Nursing Facility Div.*, 83 AD3d 1404, 1405 [4th Dept 2011]), we conclude that the affidavit of plaintiff's medical expert raised triable issues of fact with respect thereto (*see Gardiner v Halleran*, 172 AD3d 1922, 1922 [4th Dept 2019]; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Where, as here, the "nonmovant's expert affidavit 'squarely opposes' the affirmation of the moving parties' expert, the result is 'a classic battle of the experts that is properly left to a jury for resolution' " (*Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018]).

We agree with the Amankwah defendants, however, that they established their entitlement to judgment as a matter of law dismissing the second cause of action, for lack of informed consent, against them and that plaintiff failed to raise a triable issue of fact in opposition (*see Jousma v Kolli*, 169 AD3d 1356, 1357 [4th Dept 2019]; *Harris v Saint Joseph's Med. Ctr.*, 128 AD3d 1010, 1013 [2d Dept 2015]). We therefore modify the order and judgment accordingly.

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

835

CA 19-02260

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

HAVVA TOZAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

HOLLY P. ENGERT, DEFENDANT-RESPONDENT.

MICHAEL STEINBERG, ROCHESTER, FOR PLAINTIFF-APPELLANT.

HAGELIN SPENCER LLC, BUFFALO (LAURA B. GARDINER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Evelyn Frazee, J.), dated February 27, 2019. The judgment dismissed the complaint upon a jury verdict of no cause of action.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when her vehicle was struck by a vehicle operated by defendant. On appeal from the judgment entered on the jury's verdict finding that defendant's negligence was not a substantial factor in causing plaintiff's injuries, plaintiff contends that Supreme Court erred in denying her posttrial motion pursuant to CPLR 4404 (a) to set aside the verdict as against the weight of the evidence. We reject that contention.

" 'A verdict rendered in favor of a defendant may be successfully challenged as against the weight of the evidence only when the evidence so preponderated in favor of the plaintiff that it could not have been reached on any fair interpretation of the evidence' " (*Lesio v Attardi*, 121 AD3d 1527, 1528 [4th Dept 2014]; *see Clark v Loftus*, 162 AD3d 1643, 1643-1644 [4th Dept 2018]). "Where a verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view . . . and the trial court should not set aside [the] verdict unless it is palpably irrational or wrong" (*Lesio*, 121 AD3d at 1528 [internal quotation marks omitted]; *see Boryszewski v Henderson*, 129 AD3d 1465, 1466 [4th Dept 2015]).

Here, we conclude that the evidence at trial did not so preponderate in favor of plaintiff that the verdict could not have been reached on any fair interpretation of the evidence. At trial, both plaintiff's and defendant's expert witnesses agreed that

plaintiff suffered from degenerative lumbar spinal stenosis, which had required surgical intervention before the accident at issue and was unrelated to the collision. Thus, the central dispute at trial was whether the collision caused a traumatic injury to the nerves in plaintiff's lumbar spine or, instead, whether her presentation of symptoms related to a cause other than the collision. Here, although plaintiff's expert opined that plaintiff's injuries were caused by the collision with defendant's vehicle, defendant's expert opined that the timing of the onset of plaintiff's new symptoms, as set forth in the medical records, established that they were not the result of the collision. Defendant's expert further testified that plaintiff's complaints of foot numbness in the days immediately following the collision were not attributable to the collision inasmuch as plaintiff had made those same complaints before the collision. The jury was entitled to credit the testimony of defendant's witnesses and reject the testimony of plaintiff's witnesses, and its interpretation of the competing evidence was neither "palpably irrational" nor "palpably wrong" (*McMillian v Burden*, 136 AD3d 1342, 1344 [4th Dept 2016] [internal quotation marks omitted]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

836

CA 20-00532

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

ROBERT SMILEY, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 116640.)
(APPEAL NO. 1.)

STANLEY LAW OFFICES, LLP, SYRACUSE (ANTHONY R. MARTOCCIA OF COUNSEL), FOR CLAIMANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (SARAH L. ROSENBLUTH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Diane L. Fitzpatrick, J.), entered November 19, 2019. The order awarded claimant damages in accordance with CPLR article 50-B.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1st Dept 1978]; *see also* CPLR 5501 [a] [1]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

837

CA 20-00552

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

ROBERT SMILEY, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 116640.)
(APPEAL NO. 2.)

STANLEY LAW OFFICES, LLP, SYRACUSE (ANTHONY R. MARTOCCIA OF COUNSEL), FOR CLAIMANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (SARAH L. ROSENBLUTH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Diane L. Fitzpatrick, J.), entered December 18, 2019. The judgment awarded claimant money damages.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part apportioning liability equally between the parties and apportioning 100% liability to defendant and as modified the judgment is affirmed without costs, and the matter is remitted to the Court of Claims for further proceedings in accordance with the following memorandum: Claimant commenced this action seeking damages for injuries he sustained when he slipped and fell on a wet floor in the lobby of a building owned by defendant. At the liability portion of a bifurcated nonjury trial, the evidence established that, shortly before claimant's fall, a maintenance worker employed by defendant mopped the floor. Although the maintenance worker set up one wet floor sign, that sign was located on the opposite end of the lobby from where claimant approached the lobby from the elevator. Claimant walked with a group of other people in the direction of the sign. There were people in front of him, behind him, and to the side of him. There were mats running the length of the lobby, but claimant did not walk on those mats because the group of people in his vicinity were walking three to five people abreast. Claimant fell approximately 20 to 25 feet before reaching the door near where the wet floor sign was located. After he fell, claimant noticed that his pants were damp and the floor was wet. A security guard who witnessed the incident and approached claimant testified that there was no standing water in the area where claimant fell, but that the area was wet.

Following the trial on liability, the Court of Claims (Midey, J.)

apportioned liability equally between the parties, finding that claimant failed to use reasonable care by walking briskly, looking toward the front door instead of the floor, and failing to walk on the available mats. Following a trial on damages, the court (Fitzpatrick, J.) entered a judgment awarding damages to claimant in accordance with the court's apportionment of liability.

We agree with claimant that any apportionment of liability to him is not based on a fair interpretation of the evidence. " 'On appeal from a judgment entered after a nonjury trial, this Court has the power to set aside the trial court's findings if they are contrary to the weight of the evidence and to render the judgment we deem warranted by the facts,' although '[w]e must give due deference . . . to the court's evaluation of the credibility of the witnesses and quality of the proof . . . and review the record in the light most favorable to sustain the judgment' " (*Ramulic v State of New York*, 179 AD3d 1494, 1495 [4th Dept 2020]).

Here, there are no material credibility issues presented. Claimant does not dispute that he was walking briskly, was looking forward, did not see the mats, and did not walk on the mats. Inasmuch as the court "did not resolve issues of credibility, no deference is owed on th[at] issue to the trier of fact" (*Bernard v State of New York*, 34 AD3d 1065, 1067 [3d Dept 2006]). The only issue before us is whether the undisputed facts support the court's determination that claimant was comparatively negligent.

"Culpable conduct claimed in diminution of damages . . . [is] an affirmative defense to be pleaded and proved by the party asserting the defense" (CPLR 1412). As a result, defendant "bore the burden of proving that claimant acted negligently" (*Jones v State of New York*, 62 AD3d 1078, 1079 [3d Dept 2009]). Based on our independent review of the evidence (*see id.* at 1079-1080), we conclude that defendant failed to demonstrate that claimant acted negligently.

It is well settled that people are "bound to see what by the proper use of [their] senses [they] might have seen" and act accordingly (*Weigand v United Traction Co.*, 221 NY 39, 42 [1917]). Here, however, the evidence at trial established that the wet condition of the floor was not open and obvious (*see Jones*, 62 AD3d at 1081; *cf. Sniatecki v Violet Realty, Inc.*, 98 AD3d 1316, 1319 [4th Dept 2012]) and that the sign warning of a wet floor was not readily observable to claimant as he exited the elevator and proceeded, in a group, toward the front door (*see e.g. Spannagel v State of New York*, 298 AD2d 687, 688 [3d Dept 2002]; *Thornhill v Toys "R" Us NYTEX*, 183 AD2d 1071, 1072-1073 [3d Dept 1992]; *see also De Conno v Golub Corp.*, 255 AD2d 734, 735 [3d Dept 1998]). As a result, there was nothing that would have alerted claimant to any danger in walking briskly, looking forward, and walking on the bare floor instead of the available mats.

We thus conclude that the court's determination that claimant failed to use reasonable care under the circumstances is not supported by a fair interpretation of the evidence and, as a result, the court

(Midey, J.) erred in its apportionment of 50% liability to claimant, who should bear no responsibility for his injuries. Indeed, we cannot conclude that claimant was comparatively negligent for walking briskly or looking forward while he walked toward the exit. We therefore modify the judgment accordingly, and we remit the matter to the Court of Claims to direct the entry of judgment in favor of claimant in accordance with the apportionment of 100% liability to defendant.

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

842

KA 18-02106

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VICTOR LONG, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered September 7, 2018. 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 modified on the law and as a matter of discretion in the interest of justice by reducing the period of postrelease supervision to 2½ years and as modified the judgment is affirmed.

Memorandum: On appeal 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]), defendant contends that his waiver of the right to appeal is invalid, and that Supreme Court failed to apprehend the extent of its sentencing discretion. With respect to defendant's contention that he did not knowingly, intelligently and voluntarily waive the right to appeal, we reiterate that the better practice is for the court "to use the Model Colloquy, which 'neatly synthesizes . . . the governing principles' " (*People v Dozier*, 179 AD3d 1447, 1447 [4th Dept 2020], *lv denied* 35 NY3d 941 [2020], quoting *People v Thomas*, 34 NY3d 545, 567 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see* NY Model Colloquies, Waiver of Right to Appeal). Here, however, we see no reason to address defendant's challenge to the waiver of the right to appeal inasmuch as his "contention that the court failed to apprehend the extent of its sentencing discretion survives his waiver of the right to appeal and does not require preservation" (*People v Dunham*, 83 AD3d 1423, 1424-1425 [4th Dept 2011], *lv denied* 17 NY3d 794 [2011]; *see People v Gardner*, 162 AD3d 1758, 1759 [4th Dept 2018], *lv denied* 32 NY3d 937 [2018]; *see generally People v Irby*, 158 AD3d 1050, 1051 [4th Dept 2018], *lv denied* 31 NY3d 1014 [2018]).

We agree with defendant that the court failed to apprehend its sentencing discretion. At the time of the plea, the court promised to impose the minimum sentence, which the court characterized as a determinate term of 3½ years' incarceration plus five years' postrelease supervision, when in fact the court had the authority to impose a period of postrelease supervision of between 2½ years and five years (*see* Penal Law § 70.45 [2] [f]). Subsequently, the court reiterated several times during the proceedings that it had promised to impose the minimum sentence. "The failure of the court to apprehend the extent of its discretion deprived defendant of the right to be sentenced as provided by law" (*People v Hager*, 213 AD2d 1008, 1008 [4th Dept 1995]; *see People v Slattery*, 81 AD3d 1415, 1416 [4th Dept 2011]). Inasmuch as the court clearly expressed its intention to impose the minimum sentence, we "exercise our power to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]), in order to effectuate the sentence promised under the plea agreement" (*People v Consilio*, 74 AD3d 1809, 1810 [4th Dept 2010], *lv denied* 19 NY3d 959 [2012]), and we therefore modify the judgment by reducing the period of postrelease supervision to 2½ years.

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

856

CA 19-02291

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

UP STATE TOWER CO., L.L.C., AND BUFFALO-LAKE ERIE WIRELESS SYSTEMS CO., L.L.C., DOING BUSINESS AS BLUE WIRELESS, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF CHEEKTOWAGA, DEFENDANT-RESPONDENT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (ANNE K. BOWLING OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (CHARLES W. MALCOMB OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered November 18, 2019. The order and judgment granted the motion of defendant to dismiss the complaint and dismissed the complaint.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by reinstating the complaint to the extent that it seeks declarations in the fourth and sixth causes of action and granting judgment in favor of defendant as follows:

> It is ADJUDGED and DECLARED that there is no agreement between the parties,

and as modified the order and judgment is affirmed without costs.

Memorandum: We agree with Supreme Court that plaintiffs are not entitled to the relief sought in the complaint. We note, however, that the court erred in dismissing the complaint to the extent that it seeks declarations in the fourth and sixth causes of action and in failing to declare the rights of the parties (*see Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954 [1989]; *Ives Hill Country Club, Inc. v City of Watertown*, 185 AD3d 1494, 1496-1497 [4th Dept 2020]; *Ames v County of Monroe*, 162 AD3d 1724, 1725 [4th Dept 2018]). We therefore modify the order and judgment accordingly.

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

884

KA 18-01285

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY CROWLEY, 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 (Kenneth F. Case, J.), rendered March 20, 2018. The judgment convicted defendant upon a nonjury verdict of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Although defendant failed to preserve for our review his contention concerning the legal sufficiency of the evidence (*see People v Carrasquillo*, 71 AD3d 1591, 1591 [4th Dept 2010], *lv denied* 15 NY3d 803 [2010]), we exercise our discretion to review that contention in the interest of justice (*see* CPL 470.15 [6] [a]), and we reject it. Specifically, defendant contends that the evidence is legally insufficient to establish his constructive possession of the firearm at issue. "To meet their burden of proving defendant's constructive possession of the [gun], the People had to establish that defendant exercised dominion or control over [the gun] by a sufficient level of control over the area in which [it was] found" (*People v Boyd*, 145 AD3d 1481, 1482 [4th Dept 2016], *lv denied* 29 NY3d 947 [2017] [internal quotation marks omitted]; *see People v Everson*, 169 AD3d 1441, 1442 [4th Dept 2019], *lv denied* 33 NY3d 1068 [2019]; *People v Lawrence*, 141 AD3d 1079, 1082 [4th Dept 2016], *lv denied* 28 NY3d 1029 [2016]). It was not necessary for the People to establish that defendant had "exclusive access" to the area in question and, here, the evidence "went beyond defendant's mere presence" in the residence where the gun was found "and established a particular set of circumstances from which a [factfinder] could infer possession" (*Boyd*, 145 AD3d at 1482 [internal quotation marks omitted]). In particular, the People presented

"evidence that DNA samples taken from the handgun were consistent with defendant's DNA, from which an inference could be made that defendant had physically possessed the gun at some point in time" (*People v Long*, 100 AD3d 1343, 1344 [4th Dept 2012], *lv denied* 20 NY3d 1063 [2013] [internal quotation marks omitted]; *see People v Robinson*, 72 AD3d 1277, 1278 [3d Dept 2010], *lv denied* 15 NY3d 809 [2010]). In addition, the evidence established that, at the time the residence was searched, defendant was found sleeping in a rear bedroom among numerous personal belongings. Moreover, during the search, defendant signed a consent-to-search form, which identified the premises as his residence. Based on the above, we conclude that there is a "valid line of reasoning and permissible inferences" supporting County Court's conclusion that defendant constructively possessed the firearm (*People v Williams*, 84 NY2d 925, 926 [1994]).

We also reject defendant's contention that he was denied effective assistance of counsel. Because defendant's contention regarding the legal sufficiency of the evidence lacks merit, it cannot be said that defense counsel was ineffective for failing to preserve that contention for our review (*see Carrasquillo*, 71 AD3d at 1591). Viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we likewise reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Johnson*, 121 AD3d 1578, 1579 [4th Dept 2014], *lv denied* 25 NY3d 1166 [2015]).

Defendant's contention that the court erred in denying his motion to suppress certain statements that he made to police officers during and after the search is largely academic inasmuch as most of the challenged statements were not introduced at trial, either as part of the People's case or on cross-examination of defendant (*see People v Joseph*, 97 AD3d 838, 839 [2d Dept 2012]; *People v Nevins*, 16 AD3d 1046, 1048 [4th Dept 2005], *lv denied* 4 NY3d 889 [2005], *cert denied* 548 US 911 [2006]). With respect to the statements that were introduced at trial, we conclude that defendant's contention lacks merit. Considering the totality of the circumstances, we agree with the court's determination that those statements, which were made by defendant after he had received his *Miranda* warnings, were voluntarily made (*see generally People v Jin Cheng Lin*, 26 NY3d 701, 719 [2016]).

Finally, contrary to defendant's remaining contention, his sentence is not unduly harsh or severe.

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

893

KA 19-02124

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON MAYERAT, DEFENDANT-APPELLANT.

LAW OFFICE OF JAMES F. GRANVILLE, CHEEKTOWAGA (JAMES F. GRANVILLE OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MINDY F. VANLEUVAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Susan M. Eagan, J.), rendered November 13, 2019. The judgment revoked defendant's sentence of probation and imposed a sentence of incarceration.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed and the matter is remitted to Erie County Court for proceedings pursuant to CPL 460.50 (5).

Memorandum: Defendant appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of driving while intoxicated (DWI) as a class E felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i] [A]) and imposing a sentence of incarceration. We affirm.

Initially, we reject defendant's contention that County Court erred in refusing to dismiss the declaration of delinquency dated July 15, 2019 (declaration of delinquency) on the ground that it was facially insufficient. Contrary to defendant's contention, the declaration of delinquency "comport[ed] with the statutory requirement of providing [defendant] with the time, place, and manner of the alleged violation[s] (CPL 410.70)" (*People v Kislowski*, 30 NY3d 1006, 1007 [2017]).

Defendant further contends that the evidence at the hearing was insufficient to establish that he violated a condition of his probation. It is well settled that the People bear the burden of establishing an alleged violation by a preponderance of the evidence (*see People v Bailey*, 181 AD3d 1243, 1244 [4th Dept 2020]; *People v Robinson*, 147 AD3d 1351, 1351 [4th Dept 2017], *lv denied* 29 NY3d 1085 [2017]; *see generally* CPL 410.70 [3]), and that "the decision to revoke [a term of] probation will not be disturbed, [absent a] clear abuse of discretion" (*People v Barber*, 280 AD2d 691, 694 [3d Dept

2001], *lv denied* 96 NY2d 825 [2001] [internal quotation marks omitted]; *see Bailey*, 181 AD3d at 1244; *People v Bergman*, 56 AD3d 1225, 1225 [4th Dept 2008], *lv denied* 12 NY3d 756 [2009]). In addition, "[i]t is well settled that, in reviewing a finding after a violation of probation hearing, we give 'the court's credibility determination[s] . . . great deference' " (*People v Travis*, 156 AD3d 1399, 1400 [4th Dept 2017], *lv denied* 30 NY3d 1120 [2018]). Contrary to defendant's contention, the People met their burden with respect to both of the alleged violations upon which the declaration of delinquency was based.

First, a preponderance of the evidence supports the court's determination that defendant violated the condition requiring him to allow his probation officer to visit him at his home. Defendant admitted at the hearing that the officer came to visit his home on the date at issue and that a condition of his probation required that defendant allow such visits, and the evidence established that defendant did not accede to the officer's request to enter and examine defendant's home. Second, a preponderance of the evidence supports the court's determination that defendant violated the condition requiring him to install an ignition interlock device on any vehicle he operated. The evidence at the hearing established that defendant did not install such a device on a vehicle owned by his ex-wife, with whom defendant resided. In addition, affording the requisite "great deference" to the court's credibility determinations (*People v Perna*, 74 AD3d 1807, 1807 [4th Dept 2010], *lv denied* 17 NY3d 716 [2011]), we perceive no basis for disturbing the court's implicit conclusion that the ex-wife's vehicle was operated by defendant and subject to the interlock device requirement. Indeed, we note that, shortly before the filing of the declaration of delinquency, defendant was convicted of another DWI offense in connection with his operation of his ex-wife's vehicle in violation of that same condition.

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

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

906

KA 18-00941

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SARAH MURPHY, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

JESSICA PERRY, NEW YORK CITY, FOR NEW YORK CIVIL LIBERTIES UNION FOUNDATION, AMICUS CURIAE.

Appeal from a judgment of the Onondaga County Court (James H. Cecile, A.J.), rendered June 27, 2017. The judgment convicted defendant upon a plea of guilty of criminal possession of a forged instrument in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence imposed to an indeterminate term of incarceration of 1 to 3 years and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting her upon a plea of guilty of criminal possession of a forged instrument in the first degree (Penal Law § 170.30). Defendant was initially referred to a drug treatment court program but, following an incident in which she tested positive for drugs and was found to have drugs hidden on her person, she was sentenced to an indeterminate term of 2 to 6 years in prison.

Initially, we agree with defendant that her purported waiver of the right to appeal is not enforceable inasmuch as the totality of the circumstances fails to reveal that she "understood the nature of the appellate rights being waived" (*People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). County Court's oral colloquy "mischaracterized the waiver of the right to appeal, portraying it in effect as an 'absolute bar' to the taking of an appeal" (*People v Cole*, 181 AD3d 1329, 1330 [4th Dept 2020]; *see Thomas*, 34 NY3d at 565). In explaining the waiver, the court suggested that defendant was entirely ceding any ability to challenge

her guilty plea on appeal, but such an "improper description of the scope of the appellate rights relinquished by the waiver is refuted by . . . precedent, whereby a defendant retains the right to appellate review of very selective fundamental issues," including the voluntariness of the plea and appeal waiver, the legality of the sentence, and the defendant's competency to stand trial (*Thomas*, 34 NY3d at 566; *see People v Callahan*, 80 NY2d 273, 280 [1992]). Where, as here, the court " 'mischaracterize[s] the nature of the right a defendant was being asked to cede,' " this Court " 'cannot be certain that the defendant comprehended the nature of the waiver of appellate rights' " (*Thomas*, 34 NY3d at 565-566). The better practice is for the court to use the Model Colloquy, which "neatly synthesizes . . . the governing principles" (*People v Dozier*, 179 AD3d 1447, 1447 [4th Dept 2020], *lv denied* 35 NY3d 941 [2020] [internal quotation marks omitted]).

Defendant failed to preserve for our review her contention that the court violated her constitutional right to equal protection when it sentenced her to a term of incarceration because she tested positive for drugs while pregnant (*see* CPL 470.05 [2]; *People v Cesar*, 131 AD3d 223, 226-227 [2d Dept 2015]; *People v Lashley*, 58 AD3d 753, 754 [2d Dept 2009], *lv dismissed* 12 NY3d 759 [2009]) and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice.

We reject defendant's contention that the court failed to exercise its discretion in imposing a sentence of incarceration (*see generally People v Farrar*, 52 NY2d 302, 305-306 [1981]). We agree with defendant, however, that the sentence is harsh and severe. In light of defendant's minimal criminal history, the nonviolent nature of the instant offense and the fact that this was defendant's first relapse while participating in the drug treatment court program, we modify the judgment as a matter of discretion in the interest of justice by reducing the sentence to an indeterminate term of incarceration of 1 to 3 years (*see* CPL 470.15 [6] [b]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

910

KA 18-01925

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHANE SEEMAN, DEFENDANT-APPELLANT.

DONALD R. GERACE, UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered May 23, 2016. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his *Alford* plea, of course of sexual conduct against a child in the second degree (Penal Law § 130.80 [1] [a]), defendant contends that his plea was involuntarily entered and that his waiver of the right to appeal is invalid. Because a challenge to the voluntariness of a plea survives even a valid waiver of the right to appeal (*see People v Burney*, 41 AD3d 1221, 1221 [4th Dept 2007], *lv denied* 9 NY3d 863 [2007]), there is no reason for us to address the validity of the waiver in this case. We note, however, that "the Model Colloquy for the waiver of right to appeal drafted by the Unified Court System's Criminal Jury Instructions and Model Colloquy Committee neatly synthesizes [Court of Appeals] precedent and the governing principles and provides a solid reference for a better practice" (*People v Thomas*, 34 NY3d 545, 567 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]).

Defendant contends that his plea was involuntarily entered because County Court misinformed him during the plea colloquy that he would be sentenced as a second felony offender. Because he did not move to withdraw his plea or to vacate the judgment of conviction, however, defendant failed to preserve that contention for our review (*see People v Tchiyuka*, 160 AD3d 1488, 1488-1489 [4th Dept 2018]; *People v Miller*, 87 AD3d 1303, 1303-1304 [4th Dept 2011], *lv denied* 18 NY3d 926 [2012]; *People v Elardo*, 52 AD3d 1272, 1272 [4th Dept 2008], *lv denied* 11 NY3d 787 [2008]). In any event, the contention plainly

lacks merit inasmuch as the court, upon realizing its mistake with respect to defendant's status as a second felony offender, advised defendant of the error and afforded him the opportunity to withdraw his plea (*cf. People v Young*, 301 AD2d 754, 754 [3d Dept 2003], *lv denied* 99 NY2d 634 [2003]). Defendant declined that opportunity and said that he still wished to accept the plea agreement.

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

927

KA 18-02093

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TAHEEB DOUGLAS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (WILLIAM CLAUSS 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 (Stephen J. Dougherty, J.), rendered August 22, 2018. The judgment convicted defendant upon his plea of guilty of criminal sexual act in the second degree (two counts), sexual abuse 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 him upon his plea of guilty of, inter alia, two counts of criminal sexual act in the second degree (Penal Law § 130.45 [1]). Preliminarily, we note that defendant's waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 564-568 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Johnson*, 182 AD3d 1036, 1036 [4th Dept 2020], *lv denied* 35 NY3d 1046 [2020]), and that the better practice is for County Court "to use the Model Colloquy, which 'neatly synthesizes . . . the governing principles' " (*People v Dozier*, 179 AD3d 1447, 1447 [4th Dept 2020], *lv denied* 35 NY3d 941 [2020], quoting *Thomas*, 34 NY3d at 567; *see* NY Model Colloquies, Waiver of Right to Appeal). To the extent that defendant contends that the court abused its discretion in declining to grant him youthful offender status, we reject that contention (*see Johnson*, 182 AD3d at 1036). We decline defendant's request that we exercise our interest of justice jurisdiction to adjudicate him a youthful offender (*see People v Nicorvo* [appeal No. 2], 177 AD3d 1408, 1409 [4th Dept 2019]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

928

KA 19-01447

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RYAN WERPECHOWSKI, DEFENDANT-APPELLANT.

TRACY PUGLIESE, CLINTON, FOR DEFENDANT-APPELLANT.

JEFFREY S. CARPENTER, DISTRICT ATTORNEY, HERKIMER (ROBERT R. CALLI, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Herkimer County Court (John H. Crandall, J.), dated May 3, 2019. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

933

CAF 19-01529

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

IN THE MATTER OF GEMMA G.B.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

LAURA T., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

MUSCATO DIMILLO & VONA, LLP, LOCKPORT (BRIAN J. HUTCHISON OF COUNSEL), AND DOMINIC CANDINO, WEST SENECA, FOR RESPONDENT-APPELLANT.

ERIC R. ZIOBRO, BUFFALO, FOR PETITIONER-RESPONDENT.

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), dated July 25, 2019 in a proceeding pursuant to Family Court Act article 10. The order, among other things, placed respondent under the supervision of petitioner until January 18, 2020.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see Matter of Francis S.*, 67 AD3d 1442, 1442 [4th Dept 2009], *lv denied* 14 NY3d 702 [2010]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

934

CAF 19-02198

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

IN THE MATTER OF TESSA S.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

LAURA T., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

MUSCATO DIMILLO & VONA, LLP, LOCKPORT (BRIAN J. HUTCHISON OF COUNSEL), AND DOMINIC CANDINO, WEST SENECA, FOR RESPONDENT-APPELLANT.

ERIC R. ZIOBRO, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (RUSSELL E. FOX OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered October 22, 2019 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject child.

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

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

935

CAF 20-00096

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

IN THE MATTER OF GEMMA B.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

LAURA T., RESPONDENT-APPELLANT.

MARY ANNE CONNELL, ESQ., ATTORNEY FOR THE
CHILD, APPELLANT.
(APPEAL NO. 3.)

MUSCATO DIMILLO & VONA, LLP, LOCKPORT (BRIAN J. HUTCHISON OF COUNSEL), AND DOMINIC CANDINO, WEST SENECA, FOR RESPONDENT-APPELLANT.

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

ERIC R. ZIOBRO, BUFFALO, FOR PETITIONER-RESPONDENT.

Appeals from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered January 10, 2020 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject child.

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

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

946

CA 19-02034

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

IN THE MATTER OF THE ESTATE OF JACQUES M. LIPSON, DECEASED.

DAWN F. LIPSON, PETITIONER-RESPONDENT;

ORDER

ELAINE DWYER, JUDI TAMBLIN, MARIA TAMBLIN AND RICHARD TAMBLIN, OBJECTANTS-APPELLANTS.

HARTER SECREST & EMERY LLP, ROCHESTER (MARTIN W. O'TOOLE OF COUNSEL), FOR OBJECTANTS-APPELLANTS.

WOODS OVIATT GILMAN LLP, ROCHESTER (GORDON S. DICKENS OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Surrogate's Court, Monroe County (John M. Owens, S.), entered October 10, 2019. The order denied the motion of the objectants to compel the production of documents.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision by the Surrogate.

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

949

TP 19-01095

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

IN THE MATTER OF GILL TERRENCE, PETITIONER,

V ORDER

ANTHONY J. ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, AND DONALD E. VENETTOZZI, DIRECTOR, S.H.U./DISP. PROG., DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENTS.

GILL TERRENCE, PETITIONER PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JEFFREY W. LANG OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division in the Fourth Judicial Department by order of the Supreme Court, Erie County [John L. Michalski, A.J.], entered October 30, 2018) to review a determination of respondents. The determination found after a tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996, 996 [4th Dept 1996]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

951

KA 20-00710

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JORDAN R. PATTERSON, DEFENDANT-APPELLANT.

LINDSEY M. PIEPER, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered November 7, 2019. The judgment convicted defendant upon a jury verdict of rape in the second degree (eight counts), criminal sexual act in the second degree (two counts) 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 him upon a jury verdict of, inter alia, rape in the second degree (Penal Law § 130.30 [1]). We reject defendant's contention that Supreme Court deprived him of his right to present a defense by limiting his cross-examination of a sexual assault nurse examiner and a forensic chemist. Even assuming, arguendo, that the court erred in limiting the cross-examination of those witnesses, we conclude that defendant was not deprived of his right to present a defense (*see generally Chambers v Mississippi*, 410 US 284, 302 [1973]). Contrary to defendant's further 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]) and according deference to the jury's credibility determinations (*see People v Romero*, 7 NY3d 633, 644 [2006]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Defendant failed to preserve his remaining contentions for our review, 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: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

953

KA 15-01056

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES L. CARTER, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (PATRICK J. MARTHAGE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered March 23, 2015. The judgment convicted defendant upon a jury verdict of, inter alia, robbery in the first degree and attempted murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, robbery in the first degree (Penal Law § 160.15 [4]) and attempted murder in the second degree (§§ 110.00, 125.25 [1]), defendant contends that the evidence is legally insufficient to support the conviction of attempted murder in the second degree because the People failed to prove the element of intent. Defendant failed to preserve that contention for our review, however, inasmuch as he made only a general motion for a trial order of dismissal and never specifically directed County Court to that alleged error (*see People v Woods*, 284 AD2d 995, 996 [4th Dept 2001], *lv denied* 96 NY2d 926 [2001]; *see also People v Morris*, 126 AD3d 1370, 1371 [4th Dept 2015], *lv denied* 26 NY3d 932 [2015]; *see generally People v Gray*, 86 NY2d 10, 19 [1995]).

Viewing the evidence in light of the elements of attempted murder in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict on that count is against the weight of the evidence with respect to the element of intent (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Intent to kill may be inferred from defendant's conduct as well as from the circumstances surrounding the crime (*see People v Perkins*, 160 AD3d 1455, 1455-1456 [4th Dept 2018], *lv denied* 31 NY3d 1151 [2018]; *People v Lopez*, 96 AD3d 1621, 1622 [4th Dept 2012], *lv denied* 19 NY3d 998 [2012]). Here, the People presented

evidence that defendant and codefendant forcefully entered the apartment of the victim to commit an armed robbery; that defendant and the victim engaged in a physical altercation, which codefendant then joined and which moved out to the hallway; that codefendant went back into the apartment to rob another man in the apartment; and that defendant shot at the victim as the victim attempted to run down the hallway of the apartment building. Although a different verdict would not have been unreasonable (*see generally Bleakley*, 69 NY2d at 495), we cannot conclude that the jury failed to give the evidence the weight it should be accorded (*see People v Gottsche*, 118 AD3d 1303, 1305-1306 [4th Dept 2014], *lv denied* 24 NY3d 1084 [2014]; *People v Stevens*, 186 AD2d 832, 832-833 [2d Dept 1992], *lv denied* 81 NY2d 766 [1992]; *see also People v Torres*, 136 AD3d 1329, 1330 [4th Dept 2016], *lv denied* 28 NY3d 937 [2016], *cert denied* — US —, 137 S Ct 661 [2017]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

970

KA 17-01351

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TYLER D. KEYS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered October 12, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted aggravated assault upon a police officer or a peace officer (four counts), attempted assault in the second degree (two counts), endangering the welfare of a child (two counts), and criminal obstruction of breathing or blood circulation.

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

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

971

KA 18-01464

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH J. PATERNOSTRO, III, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIELLE E. PHILLIPS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered January 25, 2018. The judgment convicted defendant upon his plea of guilty of attempted burglary in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted burglary in the first degree (Penal Law §§ 110.00, 140.30 [2]). Although defendant's challenge to the voluntariness of his plea would survive even a valid waiver of the right to appeal (*see People v Thomas*, 34 NY3d 545, 558 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Seaberg*, 74 NY2d 1, 10 [1989]), "[b]y failing to move to withdraw the plea or to vacate the judgment of conviction, defendant failed to preserve for our review his contention that the plea was not voluntarily entered" (*People v Garcia-Cruz*, 138 AD3d 1414, 1414-1415 [4th Dept 2016], *lv denied* 28 NY3d 929 [2016]; *see also People v Lopez*, 71 NY2d 662, 665 [1988]). Contrary to defendant's contention, we conclude that this case does not fall within the rare exception to the preservation requirement (*see People v Hopper*, 153 AD3d 1045, 1046-1047 [3d Dept 2017], *lv denied* 30 NY3d 1061 [2017]; *People v Matos*, 27 AD3d 485, 486 [2d Dept 2006]; *People v Farnham* [appeal No. 1], 254 AD2d 767, 767 [4th Dept 1998], *lv denied* 92 NY2d 949 [1998]; *see generally Lopez*, 71 NY2d at 666). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

974

KAH 20-00157

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
BLAKE WINGATE, PETITIONER-APPELLANT,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK
STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT-RESPONDENT.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (PATRICK A. WOODS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered October 15, 2019 in a habeas corpus proceeding. The judgment denied the petition and dismissed the proceeding.

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

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

975

KA 18-00872

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NAIEM D. FITTS, DEFENDANT-APPELLANT.

EFTIHIA BOURTIS, ROCHESTER, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DEREK HARNSBERGER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), entered March 6, 2018. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, that part of the omnibus motion seeking to suppress physical evidence is granted, the indictment is dismissed, and the matter is remitted to Supreme Court, Monroe County, for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]). We agree with defendant that Supreme Court erred in refusing to suppress the gun seized by the police because they lacked reasonable suspicion to stop the vehicle in which he was a passenger. According to the testimony at the suppression hearing, at approximately 12:50 a.m., an officer assisting other officers with a traffic stop heard multiple gunshots coming from the north or northeast. He proceeded north, passing two intersecting streets and looked, but did not see, any pedestrians or vehicles on those streets. On the next intersecting street, he looked to his right and saw the taillights of a vehicle moving fairly slowly. He followed the vehicle and then stopped it, explaining that he wanted to conduct a traffic stop to investigate if a crime had been committed. He testified that less than a minute passed from the time he heard the shots until he saw the subject vehicle and that less than two minutes passed from the time he heard the shots until he stopped the vehicle.

It is well settled that automobile stops are considered "seizure[s] implicating constitutional limitations" (*People v Spencer*, 84 NY2d 749, 752 [1995], *cert denied* 516 US 905 [1995]) and, as

relevant here, are lawful "when based on a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime" (*People v Hinshaw*, — NY3d —, 2020 NY Slip Op 04816, *2 [2020], citing *Spencer*, 84 NY2d at 752-753). A vehicle stop is a level three intrusion under *People v De Bour* (40 NY2d 210 [1976]), i.e., a forcible seizure, not a level two intrusion under *De Bour*, which is the common-law right to inquire based on a "founded suspicion that criminal activity is afoot" (*id.* at 223; *see Spencer*, 84 NY2d at 752).

Considering the "totality of the circumstances" here (*People v Wallace*, 181 AD3d 1214, 1215 [4th Dept 2020]), we conclude that the People failed to establish the legality of the police conduct (*see generally People v Wise*, 46 NY2d 321, 329 [1978]). As noted, the People established that the police stopped the vehicle less than two minutes after hearing the shots fired, the incident occurred in the early morning hours, the police did not see any pedestrian or vehicular traffic other than the subject vehicle after the shots were fired, and the vehicle was found in proximity to the location of the shots fired. The police, however, were not given a description of the vehicle involved or even informed whether there was a vehicle involved (*cf. People v Camber*, 167 AD3d 1558, 1558 [4th Dept 2018], *lv denied* 33 NY3d 946 [2019]), the officer did not give any testimony regarding whether he saw any pedestrian or vehicle traffic before hearing the shots fired (*cf. People v Floyd*, 158 AD3d 1146, 1146-1147 [4th Dept 2018], *lv denied* 31 NY3d 1081 [2018]), and the vehicle was not fleeing from the area where shots were fired (*cf. id.*; *People v Harris*, 217 AD2d 666, 666 [2d Dept 1995], *lv denied* 87 NY2d 847 [1995]). Rather, the subject vehicle was simply a vehicle that was in the general vicinity of the area where shots were heard (*see People v Layou*, 71 AD3d 1382, 1383-1384 [4th Dept 2010]). As the officer correctly recognized, the police had a founded suspicion that criminal activity was afoot to justify a common-law right to inquire (*see People v Blackwell*, 206 AD2d 300, 301 [1st Dept 1994], *appeal dismissed* 85 NY2d 851 [1995]), but they did not have the required reasonable suspicion to justify the seizure of the vehicle. We therefore reverse the judgment, grant that part of defendant's omnibus motion seeking to suppress the physical evidence seized, and dismiss the indictment.

Based on our determination, we need not reach defendant's remaining contentions.

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

976

KA 18-02427

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MELWIN ROSARIO, ALSO KNOWN AS MELWIN ROSARIO CASTRO, DEFENDANT-APPELLANT.

HAYDEN DADD, CONFLICT DEFENDER, GENESEO (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered January 23, 2018. The judgment convicted defendant upon a plea of guilty of attempted assault in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]), defendant contends that the plea was not voluntarily, knowingly, and intelligently entered. Defendant failed to preserve that contention for our review because he did not move to withdraw the plea or to vacate the judgment of conviction and, contrary to defendant's assertion, this case does not fall within the rare exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 665-666 [1988]; *People v Tapia*, 158 AD3d 1079, 1080 [4th Dept 2018], *lv denied* 31 NY3d 1088 [2018]). Even assuming, arguendo, that defendant's statements during the plea colloquy "clearly cast[] significant doubt upon [his] guilt or otherwise call[ed] into question the voluntariness of the plea," we conclude on this record that County Court fulfilled its "duty to inquire further to ensure that defendant's guilty plea [was] knowing and voluntary" (*Lopez*, 71 NY2d at 666; *see Tapia*, 158 AD3d at 1080). Contrary to defendant's further contention, the sentence is not unduly harsh or severe.

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

978

CA 19-02275

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

ELLEN S. MATESIC, PLAINTIFF-RESPONDENT,

V ORDER

MATTHEW W. LUKASIK, ET AL., DEFENDANTS,
AND MAREN M. SMITH, DEFENDANT-APPELLANT.

THE LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (ELISE L. CASSAR OF COUNSEL), FOR DEFENDANT-APPELLANT.

CONNORS LLP, BUFFALO (JOSEPH D. MORATH, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Matthew J. Murphy, III, A.J.), entered November 27, 2019. The order denied the motion of defendant Maren M. Smith for summary judgment dismissing the amended complaint against her.

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

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

987

CA 19-01670

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

ACCADIA SITE CONTRACTING, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF ORCHARD PARK, DEFENDANT-RESPONDENT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (ELIZABETH A. HOLMES OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered July 30, 2019. The order, among other things, denied plaintiff's motion for partial summary judgment.

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

Memorandum: In this action arising out of a dispute over the performance of a road reconstruction contract, plaintiff appeals from that part of an order that denied its motion for partial summary judgment on its third cause of action, alleging breach of contract for nonpayment on work performed. We conclude that Supreme Court properly denied the motion inasmuch as plaintiff failed to "make a prima facie showing of entitlement to judgment as a matter of law [by] tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *see Breeze Natl. v CATI, Inc.*, 292 AD2d 272, 272-273 [1st Dept 2002]). Plaintiff's "[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

988

CA 19-02053

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

CHRISTOPHER J. JULIANO AND THOMAS R. JULIANO,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

GENESEE GATEWAY, LLC, DEFENDANT-APPELLANT.

DUKE, HOLZMAN, PHOTIADIS & GRESENS, LLP, BUFFALO (PATRICIA GILLEN OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered November 6, 2019. The order, among other things, granted plaintiffs a temporary easement and a temporary restraining order against defendant.

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

Memorandum: Defendant appeals from an ex parte order granting plaintiffs a temporary easement over defendant's property along with a temporary restraining order prohibiting defendant from blocking the back door of plaintiffs' building. We conclude that "[i]nasmuch as no appeal lies as of right 'from an ex parte order, including an order entered sua sponte' . . . , and permission to appeal has not been granted (*see* CPLR 5701 [c]), the appeal must be dismissed" (*Obot v Medaille Coll.*, 82 AD3d 1629, 1630 [4th Dept 2011], *appeal dismissed* 17 NY3d 756 [2011], quoting *Sholes v Meagher*, 100 NY2d 333, 335 [2003]; *see* CPLR 5701 [a] [2]). We decline to treat the notice of appeal as an application pursuant to CPLR 5704 (a) (*cf. Matter of Shaw v Goodman*, 291 AD2d 207, 207 [1st Dept 2002]; *Matter of Tepper v Lonschein*, 253 AD2d 435, 436 [2d Dept 1998]; *Anostario v Anostario*, 249 AD2d 612, 613 [3d Dept 1998]) inasmuch as Supreme Court has stayed enforcement of the order in question and the issues raised herein do not involve "questions of law, i.e., the interpretation of [a statute] and the propriety of the . . . [c]ourt's issuance of the ex parte order" (*Anostario*, 249 AD2d at 613).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

990.2

TP 20-00137

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

IN THE MATTER OF BERNARD MARTIN, PETITIONER,

V ORDER

HOWARD ZUCKER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH, RESPONDENT.

NEIGHBORHOOD LEGAL SERVICES, INC., BUFFALO (DIANA C. PROSKE OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Mark A. Montour, J.], entered January 24, 2020) to review a determination of respondent. The determination denied a prior approval request for a Quantum Q6 Edge power wheelchair with power tilt, swing away joystick mount and attendant control on the ground that medical necessity was not established.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 17 and 18, 2020,

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

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

991

KA 19-02141

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AMBER M. HICKS, DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered September 16, 2019. The judgment convicted defendant upon her plea of guilty of criminal possession of a controlled substance in the fifth degree and obstructing governmental administration in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence of imprisonment imposed on the count of criminal possession of a controlled substance in the fifth degree to a determinate term of one year and as modified the judgment is affirmed and the matter is remitted to Cattaraugus County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [1]) and obstructing governmental administration in the second degree (§ 195.05). Contrary to defendant's contention, her waiver of the right to appeal was knowing, voluntary and intelligent (*see generally People v Thomas*, 34 NY3d 545, 564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). We agree with defendant, however, that the valid waiver of the right to appeal does not encompass her challenge to the severity of the sentence because County Court did not advise defendant, at the time of the plea, of the potential term of incarceration that she could face if she was unsuccessful upon diversion to drug court (*see People v Leiser*, 124 AD3d 1349, 1350 [4th Dept 2015]; *see generally People v Villafane*, 96 AD3d 1588, 1588 [4th Dept 2012], *lv denied* 19 NY3d 1029 [2012]). After considering, inter alia, defendant's minimal criminal history, the nature of the instant offense, and the circumstances of defendant's continued incarceration, we modify the judgment as a matter of discretion in the interest of justice by reducing the sentence of incarceration imposed on the count of criminal possession of a controlled substance in the fifth degree to a determinate term of

one year of imprisonment (*see* CPL 470.15 [6] [b]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

995

KA 18-00609

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD JONES, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered September 20, 2017. The judgment convicted defendant upon a plea of guilty of criminal sexual act in the third degree and endangering the welfare of a child (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, criminal sexual act in the third degree (Penal Law § 130.40 [2]). Preliminarily, we agree with defendant that his waiver of the right to appeal is invalid (*see People v Raghnal*, 185 AD3d 1411, 1411 [4th Dept 2020]; *People v Brown*, 180 AD3d 1341, 1341 [4th Dept 2020], *lv denied* 35 NY3d 968 [2020]; *see also People v Thomas*, 34 NY3d 545, 561-563 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]).

Contrary to defendant's contention, County Court properly refused to suppress statements made by defendant during an interview with a police detective. After the detective read defendant his *Miranda* rights, defendant said, "I would feel more comfortable if I had a lawyer." We conclude that, taking into account the surrounding circumstances, including defendant's demeanor and manner of expression, defendant did not make an unequivocal invocation of his right to counsel (*see People v Glover*, 87 NY2d 838, 839 [1995]; *cf. People v Porter*, 9 NY3d 966, 967 [2007]; *People v Kennard*, 134 AD3d 1519, 1521 [4th Dept 2015]), that "a reasonable officer . . . would have understood only that [defendant] *might* be invoking the right to counsel," and that further communication and questioning by the detective was appropriate to clarify defendant's intention (*Davis v United States*, 512 US 452, 459 [1994]). The detective offered to read the *Miranda* rights to defendant again, but defendant stated that it

was not necessary, then acknowledged that he was comfortable with his understanding of the rights and that he wanted to speak with the detective. Before beginning to ask defendant questions about the underlying criminal incident, the detective reminded defendant that he could have a lawyer if he asked for one and that he could stop talking to the detective at any time. During the rest of the interview, defendant did not ask for an attorney or indicate a desire to stop talking to the detective.

Defendant's challenge to the court's order compelling him to provide a buccal swab for DNA analysis is forfeited by his guilty plea (*see People v Graham*, 175 AD3d 1823, 1824 [4th Dept 2019], *lv denied* 34 NY3d 1159 [2020]; *People v King*, 155 AD3d 1574, 1574 [4th Dept 2017], *lv denied* 30 NY3d 1106 [2018]; *People v Smith*, 138 AD3d 1415, 1416 [4th Dept 2016]). Finally, the sentence is not unduly harsh or severe.

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

1002

CAF 19-01242

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

IN THE MATTER OF J.B. AND J.T.

LAKOIA W., PETITIONER-APPELLANT,

MEMORANDUM AND ORDER

V

PAUL B. AND SHANNON B., RESPONDENTS-RESPONDENTS.

SCOTT GODKIN, WHITESBORO, FOR PETITIONER-APPELLANT.

KOSLOSKY & KOSLOSKY, UTICA (WILLIAM L. KOSLOSKY OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

STEVEN R. FORTNAM, WESTMORELAND, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered June 10, 2019. The order, inter alia, terminated petitioner's visitation with the subject children.

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

Memorandum: Petitioner is the biological mother of the subject children and respondents are the children's adoptive parents. Pursuant to a post-adoption agreement (agreement), petitioner had visitation with the children. Petitioner appeals from an order of Family Court that, inter alia, terminated her visitation with the subject children. We affirm.

"Pursuant to Domestic Relations Law § 112-b (4), '[t]he court shall not enforce an order [incorporating a post-adoption contact agreement] unless it finds that the enforcement is in the child[ren's] best interests' " (*Matter of Kristian J.P. v Jeannette I.C.*, 87 AD3d 1337, 1337 [4th Dept 2011]; *see Matter of Kaylee O.*, 111 AD3d 1273, 1274 [4th Dept 2013]). Here, petitioner was afforded a full and fair evidentiary hearing, and the court's determination that continued visitation was not in the children's best interests has a sound and substantial basis in the record (*see Kristian J.P.*, 87 AD3d at 1337-1338). The court was entitled to credit the testimony of respondents over that of petitioner (*see Kaylee O.*, 111 AD3d at 1274), and we afford great deference to the court's determination of the children's best interests, particularly following a hearing (*see Matter of Sapphire W. [Mary W.–Debbie R.]*, 120 AD3d 1584, 1585 [4th Dept 2014];

Kaylee O., 111 AD3d at 1274).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

1011

CA 20-00516

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

IN THE MATTER OF WILLIAM H. HARRINGTON, III,
PETITIONER-APPELLANT,

V ORDER

CITY OF OSWEGO, RESPONDENT-RESPONDENT.

AMDURSKY, PELKY, FENNELL AND WALLEN, P.C., OSWEGO (AMY CHADWICK OF COUNSEL), FOR PETITIONER-APPELLANT.

ROEMER WALLENS GOLD & MINEAUX LLP, ALBANY (ELENA P. PABLO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated decision and order) of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered September 24, 2019 in a proceeding pursuant to CPLR article 78. The judgment granted the motion of respondent to dismiss the petition.

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

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

1014

KA 16-00961

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RODNEY LEE, DEFENDANT-APPELLANT.

THOMAS J. EOANNOU, BUFFALO, FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIELLE E. PHILLIPS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered January 13, 2016. The judgment convicted defendant upon a jury verdict of robbery in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of robbery in the second degree (Penal Law § 160.10 [1], [2] [b]). Defendant contends that reversal is required because he did not waive his right to testify at trial. While acknowledging that a court has no obligation to advise a defendant of his or her right to testify, defendant nevertheless contends that County Court should have engaged in a colloquy with defendant on the subject, and that it can be reasonably concluded that defense counsel, not defendant, made the decision not to have defendant testify. We reject those contentions. First, the record does not support defendant's contention that the decision not to testify was made by defense counsel, not defendant (*see generally Jones v Barnes*, 463 US 745, 751 [1983]; *People v Ferguson*, 67 NY2d 383, 390 [1986]). When the parties returned to the courtroom after a recess and after the People had rested, defense counsel informed the court that he had "talked to my client and defense will rest." Second, the court had no obligation to ensure that defendant's failure to testify was the result of defendant's voluntary and intelligent waiver of his right to testify (*see People v Richards*, 177 AD3d 1280, 1282 [4th Dept 2019], *lv denied* 35 NY3d 994 [2020]). This case "does not present any of the exceptional, narrowly defined circumstances in which judicial interjection through a direct colloquy with the defendant [would] be required to ensure that the defendant's right to testify is protected" (*People v Madigan*, 169 AD3d 1467, 1469 [4th Dept 2019], *lv denied* 33 NY3d 1033 [2019] [internal quotation marks omitted]; *see People v Calkins*, 171 AD3d 1475, 1476 [4th Dept 2019],

lv denied 33 NY3d 1067 [2019]).

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]). Finally, the sentence is not unduly harsh or severe.

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

1036

KA 18-00280

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ISAAC LAGRAND, DEFENDANT-APPELLANT.

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (John B. Nesbitt, J.), rendered April 20, 2017. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree and assault in the second degree.

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

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

1037

KA 19-01120

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRYAN L. LEE, DEFENDANT-APPELLANT.

TIMOTHY J. BRENNAN, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered May 14, 2019. The judgment convicted defendant upon a plea of guilty of attempted assault in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Cayuga County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]). We agree with defendant that he was deprived of effective assistance of counsel because his attorney took a position adverse to him when defendant initially sought the assignment of new counsel and made other statements that, under the circumstances, County Court properly "deemed to have [been] a motion to withdraw his guilty plea" (*People v King*, 235 AD2d 364, 364 [1st Dept 1997]; *see generally People v Martinez*, 166 AD3d 1558, 1559 [4th Dept 2018]). Although defense counsel had no duty to support defendant's requests, and defense counsel subsequently filed a motion to withdraw the plea on other grounds, defense counsel in effect became a witness against defendant by taking a position adverse to him with respect to his initial request to withdraw the plea, thereby depriving defendant of effective assistance of counsel (*see People v Hunter*, 35 AD3d 1228, 1228 [4th Dept 2006]; *People v Lewis*, 286 AD2d 934, 934-935 [4th Dept 2001]). Indeed, defense counsel stated that he thought defendant's request was "silly" and that it was defense counsel's "opinion that not only was the plea informed, [defendant] made the correct decision" to take the plea (*see People v Washington*, 25 NY3d 1091, 1095 [2015]). Consequently, the court "should not have determined the motion[and request to withdraw the plea] without first assigning a different attorney to represent defendant" (*People v Chrysler*, 233 AD2d 928, 928 [4th Dept 1996]). We therefore hold the case, reserve decision, and remit the matter to County Court for the assignment of new counsel and

a de novo determination of defendant's motion and request to withdraw the guilty plea (*see People v Chaney*, 294 AD2d 931, 932 [4th Dept 2002]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

1039

KA 15-00477

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V OPINION AND ORDER

ANTHONY MILLER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered January 5, 2015. The judgment convicted defendant upon a jury verdict of robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is reversed on the facts, the indictment is dismissed, and the matter is remitted to Supreme Court, Monroe County, for proceedings pursuant to CPL 470.45.

Opinion by TROUTMAN, J.:

On appeal from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [4]), defendant contends that the verdict is against the weight of the evidence. We agree.

I

The evidence at trial established that a robbery occurred at approximately 8:00 p.m. on a chilly September evening at a location near Genesee Street in the City of Rochester. The perpetrator put a gun to the victim's head and stole a cell phone, a set of keys, a pack of cigarettes, and two $5 bills, none of which were ever recovered. The victim estimated that the entire encounter lasted approximately 30 to 45 seconds, after which the gunman ran south on Genesee Street. A second, larger man on a bicycle was in the vicinity at the time of the crime and, after approximately one minute, he left and traveled in the same direction as the gunman. The victim called 911, and a radio dispatch was broadcast at 8:02 p.m.

The dispatch was heard by a Rochester Police Department officer, who was driving a marked patrol vehicle southwest of the location of

the robbery. The officer testified on direct examination that the initial dispatch described "two suspects, both male blacks [sic], one wearing a red hoodie, the other one with a gray hoodie, . . . one approximately five foot[ ]eight, maybe five foot[ ]nine, medium build." The officer knew the area and testified that "there's a lot of side streets, so at any point in time, they could have gone down any one of the side streets." The officer took one of those side streets. By doing so, he traveled north toward an intersection located approximately half a mile from the location of the robbery. The first people he saw on the street were, at 8:07 p.m., standing in the driveway of a house near the intersection and, according to the officer, they matched the description in the purported dispatch. However, on cross-examination, the officer admitted that the dispatch described only one suspect—a black man in a gray hooded sweatshirt and jeans, who was approximately 19 years of age. There was no credible evidence presented at any stage of these proceedings that anyone in a red sweatshirt was at any time reported to have been involved in the robbery.

One of the men standing in the driveway near the intersection was defendant. Defendant's height, which the jury was able to observe at trial, was listed in the presentence report as five feet, five inches. He was wearing a red hooded sweatshirt, baggy black pants, and unlaced tan boots, and was described as having a "chin-strap" beard. The other, much larger man was wearing a gray hooded sweatshirt. The officer exited his patrol vehicle and told the men to show their hands, whereupon he immediately frisked defendant's companion. While the officer was conducting that frisk, his partner arrived and frisked defendant. The officer asked the men where they were coming from and where they were going. Defendant stated that he had gone to the house to retrieve an mp3 player, but that no one was home. The officer thought that the explanation was suspicious because his partner found an mp3 player on defendant's person during the frisk. Thereafter, the victim indicated to an investigator that the gunman had a chin-strap beard, and that description was radioed to the officers who were with defendant. Concluding that defendant fit the description of the gunman, the officers transported him and his companion to the scene of the crime for a showup identification procedure. Upon seeing defendant, the victim identified him as the gunman, explaining that defendant must have changed his clothes. In addition, the victim identified defendant's companion as the man on the bicycle. Defendant was arrested and jailed.

The same night, the investigator asked for permission to search the residence of defendant's companion, which was located across the street from where defendant and his companion had been standing when they were first approached by the officer. After obtaining such permission, the investigator searched the residence for the fruits of the robbery, particularly the cell phone, or for a pair of jeans that would have fit defendant. The search turned up no evidence related to the robbery. The investigator on direct examination minimized his failure to find evidence inside the residence, explaining that it was a "very, very cursory search." However, on cross-examination, he was unable to provide a coherent explanation for why he did not search the

residence more thoroughly. After the failed search of the residence, the investigator continued to search for the victim's cell phone using a global positioning system locator. Two days after the robbery, while defendant was still in jail, the investigator was able to track the phone to a location close to the scene of the crime, where a group of people had congregated. The police activated the phone's alarm and, when the alarm sounded, everyone in the group immediately fled. The phone was powered down shortly thereafter and never recovered. The trial testimony of the investigator also established that a police dog was able to track the scent of the fleeing gunman down Genesee Street, finally losing the scent at least one block south of where the gunman would have needed to turn in order to get to the place where defendant was found.

II

We have the power to review the factual findings of the jury and the obligation to do so at the request of the defendant (*see People v Danielson*, 9 NY3d 342, 348 [2007]; *see also* CPL 470.15 [5]). Our "unique factual review power is the linchpin of our constitutional and statutory design" (*People v Bleakley*, 69 NY2d 490, 494 [1987]) and is intended to afford every defendant at least one appellate review of the facts (*see People v Kuzdzal*, 31 NY3d 478, 486 [2018]; *Bleakley*, 69 NY2d at 494). In discharging our judicial obligations here, we conclude that, inasmuch as the only evidence linking defendant to the crime was the eyewitness identification by the victim, an acquittal would have been reasonable (*see generally Bleakley*, 69 NY2d at 495). Because an acquittal would have been reasonable, we "must, like the trier of fact below, 'weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony' " (*id.*). "If it appears that the trier of fact has failed to give the evidence the weight it should be accorded," we may set aside the verdict (*id.*; *see* CPL 470.20 [2]).

We start by considering the probative force of the eyewitness identification. It has long been understood that "the frequent untrustworthiness of eyewitness identification testimony" poses an "unusual threat to the truth-seeking process" because "juries unfortunately are often unduly receptive to such evidence" (*Manson v Brathwaite*, 432 US 98, 119-120 [1977, Marshall, J., dissenting]; *see* Felix Frankfurter, The Case of Sacco and Vanzetti: A Critical Analysis 99 [1927] ["What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials."]). More recently, the Court of Appeals, relying on empirical evidence collected as a result of DNA exonerations, has recognized that "[m]istaken eyewitness identifications are 'the single greatest cause of wrongful convictions in this country' . . . , 'responsible for more . . . wrongful convictions than all other causes combined' " (*People v Boone*, 30 NY3d 521, 527 [2017]). Although we generally defer to the jury's determination with respect to the credibility of eyewitnesses (*see Bleakley*, 69 NY2d at 495), there are a number of

cases where we and the other Departments of the Appellate Division, in exercising our obligation to review the factual findings of the jury, have found a verdict to be against the weight of the evidence where the only significant evidence against the defendant was an uncorroborated eyewitness identification of dubious reliability (*see e.g. People v Mann*, 184 AD3d 670, 671-672 [2d Dept 2020]; *People v James*, 179 AD3d 1095, 1096-1097 [2d Dept 2020], *lv denied* 35 NY3d 971 [2020]; *see also People v Rodas*, 76 AD2d 936, 937 [2d Dept 1980]; *People v Gerace*, 254 App Div 135, 135-136 [4th Dept 1938]).

Several factors call the reliability of this particular identification into question. One such factor is that showup identifications are inherently suggestive (*see People v Ortiz*, 90 NY2d 533, 537 [1997]; *People v Crittenden*, 179 AD3d 1543, 1543 [4th Dept 2020], *lv denied* 35 NY3d 969 [2020]; *see also* Jessica Lee, *No Exigency, No Consent: Protecting Innocent Suspects From the Consequences of Non-Exigent Show-Ups*, 36 Colum Hum Rts L Rev 755, 756 [2005]). Additionally, the reliability of an identification is affected where, as here, a gun is displayed, there is a high level of stress, the incident is brief, and the lighting is dim (*see State v Henderson*, 208 NJ 208, 261-264, 27 A3d 872, 904-906 [2011]; Nancy Franklin & Michael Greenstein, *A Brief Guide to Factors That Commonly Influence Identification and Memory of Criminal Events*, 85 NY St BJ 10, 12 [Mar./Apr. 2013]; *see generally People v LeGrand*, 8 NY3d 449, 456 [2007]).

On the other hand, there is considerable objective evidence supporting defendant's innocence. Defendant was found standing in a driveway half a mile from the crime scene only seven minutes after it occurred, wearing clothing different from the clothing worn by the gunman. He was not in possession of the fruits of the crime or of a firearm. There was no testimony that he was out of breath or that he displayed other signs of having recently run a distance. To the contrary, his boots were not even laced. The possibility that he changed clothes and hid the items in his companion's residence across the street was questionable in the first instance given the timing of the events, and was severely undercut by the fact that the police obtained permission to search the residence and did so without finding anything linking defendant to the crime. Furthermore, the police investigation established that a person other than defendant possessed the fruits of the robbery, particularly the victim's cell phone, and that person's act in fleeing from the police when the phone alarm sounded was indicative of consciousness of guilt (*see People v Davis*, 174 AD3d 1538, 1540 [4th Dept 2019], *lv denied* 34 NY3d 980 [2019]; *People v Zuhlke*, 67 AD3d 1341, 1341 [4th Dept 2009], *lv denied* 14 NY3d 774 [2010]). Other objective evidence, particularly the dog tracking, established that the gunman never turned west off of Genesee Street toward the place where defendant was found, but continued to run down Genesee Street in a southerly direction.

In sum, viewing the evidence in light of the elements of the crime as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that the jury "failed to give the evidence the weight it

should be accorded" (*Bleakley*, 69 NY2d at 495). Accordingly, we conclude that the judgment should be reversed and the indictment dismissed (*see* CPL 470.20 [5]; *People v Marchant*, 152 AD3d 1243, 1244 [4th Dept 2017]).

III

Finally, although defendant's contention that Supreme Court erred in refusing to suppress the showup identification is academic in light of our determination, we would be remiss in failing to admonish the court for its erroneous suppression ruling under the circumstances presented here. The court erroneously opined that it could not "dissect the minuscule, little things" that occurred during this street encounter and concluded that the officer was justified in "first, making an inquiry, second, detaining [defendant], and, thirdly, bringing him before the victim for the purposes of identification . . ." Not only was the court's interpretation of the facts contrary to the unequivocal testimony of the officer, which established that defendant was frisked before any inquiry was conducted, the court's explication of the applicable law was incorrect. It has been well established for more than four decades that, "in evaluating the legality of police conduct, we 'must determine whether the action taken was justified in its inception and at every subsequent stage of the encounter' " (*People v Burnett*, 126 AD3d 1491, 1492 [4th Dept 2015]; *see People v De Bour*, 40 NY2d 210, 215 [1976]). Insofar as relevant here, a stop and frisk must be founded on a "reasonable suspicion that the particular person has committed or is about to commit a crime" (*People v Benjamin*, 51 NY2d 267, 270 [1980]; *see Burnett*, 126 AD3d at 1493). Although the general description of defendant for the most part "matched the description provided by the 911 dispatcher [i.e., he was a young black man of average height in a hooded sweatshirt], the court failed to give adequate consideration to the difference between the location where the dispatcher stated that the suspect[] had been observed running from the crime scene . . . and the location where the officer stopped defendant" (*People v Spinks*, 163 AD3d 1452, 1453 [4th Dept 2018]; *cf. People v Carson*, 122 AD3d 1391, 1392 [4th Dept 2014], *lv denied* 25 NY3d 1161 [2015]). The testimony of the officer who initiated this street encounter established that he explored only "one of" several side streets in a residential neighborhood and seized the first young black man in a hooded sweatshirt who he found. It must be plainly stated—the law does not allow the police to stop and frisk any young black man within a half-mile radius of an armed robbery based solely upon a general description.

SMITH, J.P., and DEJOSEPH, J., concur with TROUTMAN, J.; CURRAN, J., concurs in the result in the following Opinion:

I respectfully concur with the majority's decision to reverse the judgment and dismiss the indictment, albeit on a different basis. In my view, reversal is required here solely on the ground that Supreme Court erred in refusing to suppress the showup identification testimony because it was not sufficiently attenuated from the police officer's unlawful stop and detention of defendant (*see People v*

Spinks, 163 AD3d 1452, 1454 [4th Dept 2018]; *see also People v Ayers*, 85 AD3d 1583, 1585 [4th Dept 2011], *lv denied* 18 NY3d 922 [2012]; *People v Parris*, 136 AD2d 882, 883 [4th Dept 1988], *lv dismissed* 71 NY2d 1031 [1988]). In my view, the exceedingly limited "information available to the detaining officer did not provide reasonable suspicion to stop and detain defendant" under the circumstances here (*Spinks*, 163 AD3d at 1453; *see People v Nazario*, 180 AD3d 1355, 1356 [4th Dept 2020]; *People v Young*, 202 AD2d 957, 957-958 [4th Dept 1994]).

I further conclude that, on this record, there is no reason for us to remit the matter for an independent source hearing, relief which I note the People have not requested. At trial, the victim testified that he did not previously know the person who robbed him, that the whole encounter lasted a brief 30 to 45 seconds, and that the robber pointed a gun at his head. Given that uncontested evidence, I conclude that the People could not meet their burden of establishing whether there existed an independent source for the victim's in-court identification of defendant. Indeed, any in-court identification could only be derived from the People's exploitation of the patently unlawful arrest (*see People v Underwood*, 239 AD2d 366, 367 [2d Dept 1997], *lv denied* 90 NY2d 911 [1997]; *cf. Spinks*, 163 AD3d at 1454).

Inasmuch as the identification evidence was the only evidence supporting defendant's conviction, granting suppression thereof in this case also requires dismissal of the indictment (*see generally People v Lopez*, 149 AD3d 1545, 1548 [4th Dept 2017]; *People v Thompson*, 127 AD3d 658, 659 [1st Dept 2015]). In light of that dispositive determination, I would not reach defendant's remaining contentions.

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

1041

KA 20-00736

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DERRICK CLEVELAND, DEFENDANT-APPELLANT.

THOMAS J. EOANNOU, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered February 26, 2019. The judgment convicted defendant upon a nonjury verdict of sexual abuse in the first degree and sexual abuse in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of sexual abuse in the first degree (Penal Law § 130.65 [1]) and two counts of sexual abuse in the third degree (§ 130.55). Contrary to defendant's contention, the conviction of sexual abuse in the first degree is supported by legally sufficient evidence (*see People v Bleakley*, 69 NY2d 490, 495 [1987]). Further, viewing the evidence in light of the elements of sexual abuse in the first degree in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that, even assuming, arguendo, that an acquittal on that count would not have been unreasonable, it cannot be said that County Court failed to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495). Defendant also contends that the verdict convicting him of sexual abuse in the first degree is repugnant because the court acquitted him of rape in the first degree (§ 130.35 [1]) and rape in the third degree (§ 130.25 [3]). We reject that contention inasmuch as defendant's acquittal of the rape charges did not necessarily negate an essential element of the sexual abuse in the first degree charge (*see generally People v Muhammad*, 17 NY3d 532, 539-540 [2011]; *People v Cormack*, 170 AD3d 1628, 1629 [4th Dept 2019], *lv denied* 34 NY3d 979 [2019]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

1042

KA 15-01951

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EARL L. WRIGHT, II, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (JOHN A. HERBOWY OF COUNSEL), FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (EVAN A. ESSWEIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered December 15, 2014. The judgment convicted defendant upon a jury verdict of, inter alia, criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]), defendant contends that the evidence is not legally sufficient to establish that he possessed the weapon and drugs involved. Because defendant made only a general motion to dismiss the indictment at the close of the People's case, he failed to preserve that contention for our review (*see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Moore*, 125 AD3d 1304, 1305 [4th Dept 2015]).

In any event, we reject defendant's contention. "It is well settled that, even in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is 'whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the [jury] on the basis of the evidence at trial, viewed in the light most favorable to the People' " (*People v Hines*, 97 NY2d 56, 62 [2001], *rearg denied* 97 NY2d 678 [2001]). Here, viewing the evidence in that light (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the circumstantial evidence is legally sufficient to establish that defendant possessed the weapon that was found in bushes next to where he was taken into custody (*see People v Jordan*, 157 AD3d 413, 413 [1st Dept 2018], *lv*

denied 31 NY3d 984 [2018]; *People v Primakov*, 105 AD3d 1397, 1398 [4th Dept 2013], *lv denied* 21 NY3d 1045 [2013]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]) and the heroin that was found in the back seat of the patrol vehicle in which he was transported from that location (*see People v McCoy*, 266 AD2d 589, 591-592 [3d Dept 1999], *lv denied* 94 NY2d 905 [2000]). With respect to both the gun and the drugs, "the element of [possession] was established by a compelling chain of circumstantial evidence that had no reasonable explanation except that defendant" possessed those items (*People v Brown*, 92 AD3d 1216, 1217 [4th Dept 2012], *lv denied* 18 NY3d 992 [2012]).

Contrary to defendant's further 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.

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

1045

CAF 19-01325

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

IN THE MATTER OF KENDALL N.

HERKIMER COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ANGELA M., RESPONDENT-APPELLANT.

TRACY L. PUGLIESE, CLINTON, FOR RESPONDENT-APPELLANT.

MICHELLE K. FASSETT, HERKIMER, FOR PETITIONER-RESPONDENT.

ROBERT C. BALDWIN, BARNEVELD, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Herkimer County (John J. Brennan, J.), dated May 29, 2019 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject child.

It is hereby ORDERED that said appeal from the order insofar as it concerns the disposition is unanimously dismissed and the order is affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order that, inter alia, adjudged that she neglected the subject child. As an initial matter, we dismiss the appeal from the order insofar as it concerns the disposition inasmuch as that part of the order was entered on the mother's consent, and thus no appeal lies therefrom (*see* CPLR 5511; *Matter of Thomas C. [Jennifer C.]*, 81 AD3d 1301, 1302 [4th Dept 2011], *lv denied* 16 NY3d 712 [2011]).

Contrary to the mother's contention, petitioner established by a preponderance of the evidence that the child was neglected as a result of the mother's mental illness (*see Matter of Zackery S. [Stephanie S.]*, 170 AD3d 1594, 1595 [4th Dept 2019]; *Matter of Lyndon S. [Hillary S.]*, 163 AD3d 1432, 1433 [4th Dept 2018]). It is well established that "a finding of neglect based on mental illness need not be supported by a particular diagnosis or by medical evidence" (*Matter of Thomas B. [Calla B.]*, 139 AD3d 1402, 1404 [4th Dept 2016]; *cf.* Social Services Law § 384-b [4] [c]; [6] [c]). The evidence at the hearing, including the testimony of three caseworkers, a substance abuse counselor, and a psychiatric nurse practitioner, established that the mother engaged in " 'bizarre and paranoid behavior' " placing the child's physical, mental, or emotional condition in imminent danger of

becoming impaired (*Matter of Christy S. v Phonesavanh S.*, 108 AD3d 1207, 1208 [4th Dept 2013]; *see Zackery S.*, 170 AD3d at 1595; *Thomas B.*, 139 AD3d at 1403).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

1054

CA 19-02294

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

MICHAEL T. MCDONNELL, PLAINTIFF-APPELLANT,

V ORDER

TODD MIRABELLA, ET AL., DEFENDANTS,
MESUT VARDAR AND CENTRAL REAL ESTATE
INSPECTIONS, INC., DEFENDANTS-RESPONDENTS.

DAVIDSON FINK LLP, ROCHESTER (DAVID RASMUSSEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HASHMI LAW FIRM, ROCHESTER (KAMRAN F. HASHMI OF COUNSEL), FOR DEFENDANT-RESPONDENT MESUT VARDAR.

GOLDBERG SEGALLA LLP, BUFFALO (RAUL E. MARTINEZ OF COUNSEL), FOR DEFENDANT-RESPONDENT CENTRAL REAL ESTATE INSPECTIONS, INC.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered September 26, 2019. The order, insofar as appealed from, granted that part of the motion of defendant Mesut Vardar seeking summary judgment dismissing the complaint against him and granted the motion of defendant Central Real Estate Inspections, Inc., for summary judgment dismissing the complaint against it.

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

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

1056

CA 20-00359

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

RICHARD STEATES, PLAINTIFF-APPELLANT,

V ORDER

JUDY A. JOHNSON, DEFENDANT-RESPONDENT.

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

DAVID A. LONGERETTA, UTICA, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered February 5, 2020. The order granted the motion of defendant for summary judgment by dismissing the second cause of action and denied the cross motion of plaintiff for summary judgment.

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

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

1057

KA 19-02222

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM A. CAULEY, DEFENDANT-APPELLANT.

NICHOLAS B. ROBINSON, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Niagara County Court (Sara Sheldon, J.), rendered September 9, 2019. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), defendant contends that his purported waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that the waiver is invalid and thus does not preclude our review of defendant's challenge to the severity of his sentence, we conclude that there is no basis for the exercise of our authority to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]) because County Court imposed the minimum sentence authorized for a second felony offender convicted of a class D violent felony (*see* Penal Law §§ 60.05 [6]; 70.00 [6]; 70.02 [1] [b], [c]; 70.06 [6] [c]; 70.45 [2]; 140.25 [2]; *People v Davis*, 159 AD3d 1586, 1587 [4th Dept 2018], *lv denied* 31 NY3d 1080 [2018]; *People v Barber*, 106 AD3d 1533, 1533-1534 [4th Dept 2013]).

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

1069

CA 20-00108

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

CARRIE A. ISABELLE, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF JAY W. ISABELLE, DECEAESED, PLAINTIFF-RESPONDENT,

V ORDER

TODD M. TOWN, DEFENDANT-APPELLANT.

LAW OFFICE OF KEITH D. MILLER, LIVERPOOL (KEITH D. MILLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

PORTER NORDBY HOWE LLP, SYRACUSE (MICHAEL S. PORTER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered August 12, 2019. The order, insofar as appealed from, granted the motion of plaintiff to compel discovery.

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

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

1074

CA 19-01831

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

ANTHONY JORDAN, PLAINTIFF-RESPONDENT,

V ORDER

KIRK DORN, DEFENDANT-APPELLANT,
STC ARCHITECTURAL PRODUCTS, LLC, AND
TMP TECHNOLOGIES, INC.,
DEFENDANTS-RESPONDENTS.

AUGELLO & MATTELIANO, LLP, BUFFALO (JOSEPH A. MATTELIANO OF COUNSEL), FOR DEFENDANT-APPELLANT.

THE HIGGINS KANE LAW GROUP, P.C., BUFFALO (TERRENCE P. HIGGINS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered September 6, 2019. The order, among other things, granted the motion of plaintiff for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 27, 2020,

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

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

1088

CA 19-02320

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

DEBORAH A. BUTTON, PLAINTIFF-APPELLANT,

V ORDER

BRIAN V. BUTTON, DEFENDANT-RESPONDENT.

BETZJITOMIR LAW OFFICE, BATH (SUSAN BETZJITOMIR OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF MAURICE J. VERRILLO, P.C., ROCHESTER (MAURICE J. VERRILLO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (John B. Gallagher, Jr., J.), dated June 27, 2019. The order granted the motion of defendant for modification of a Qualified Domestic Relations Order.

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

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court

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

1091

CA 20-00488

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

JOHN G. TEW, PLAINTIFF-RESPONDENT,

V ORDER

GEORGE M. EMERLING, DEFENDANT-APPELLANT.

LAW OFFICES OF VICTOR M. WRIGHT, ORCHARD PARK (VICTOR M. WRIGHT OF COUNSEL), SARETSKY KATZ & DRANOFF, L.L.P., NEW YORK CITY, FOR DEFENDANT-APPELLANT.

CAMPBELL & ASSOCIATES, EDEN (R. COLIN CAMPBELL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered March 13, 2020. The order, inter alia, granted the motion of plaintiff to compel defendant to comply with an agreement to arbitrate.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on August 27, 2020,

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

Entered: November 13, 2020

Mark W. Bennett
Clerk of the Court