SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MAY 8, 2015

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. JOSEPH D. VALENTINO

HON. GERALD J. WHALEN

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

200.1

CA 14-01354

PRESENT: PERADOTTO, J.P., CARNI, SCONIERS, AND WHALEN, JJ.

AINSWORTH M. BENNETT, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF VIRGINIA R. BENNETT, DECEASED, PLAINTIFF-APPELLANT,

V ORDER

ST. JOHN'S HOME AND ST. JOHN'S HEALTH CARE CORPORATION, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.)

DAVID E. WOODIN, LLC, CATSKILL (DAVID E. WOODIN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

UNDERBERG & KESSLER LLP, ROCHESTER (MARGARET E. SOMERSET OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

ANDREW B. STRICKLAND, WASHINGTON, DC, FOR AARP FOUNDATION LITIGATION, LONG TERM CARE COMMUNITY COALITION, MFY LEGAL SERVICES, INC. AND DISABILITY RIGHTS NEW YORK, AMICUS CURIAE.

Appeal from an order of the Supreme Court, Monroe County (William P. Polito, J.), entered November 22, 2013. The order granted defendants' motion for summary judgment dismissing the complaint.

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

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

200.2

CA 14-01356

PRESENT: PERADOTTO, J.P., CARNI, SCONIERS, AND WHALEN, JJ.

AINSWORTH M. BENNETT, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF VIRGINIA R. BENNETT, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ST. JOHN'S HOME AND ST. JOHN'S HEALTH CARE CORPORATION, DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.)

DAVID E. WOODIN, LLC, CATSKILL (DAVID E. WOODIN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

UNDERBERG & KESSLER LLP, ROCHESTER (MARGARET E. SOMERSET OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

ANDREW B. STRICKLAND, WASHINGTON, DC, FOR AARP FOUNDATION LITIGATION, LONG TERM CARE COMMUNITY COALITION, MFY LEGAL SERVICES, INC. AND DISABILITY RIGHTS NEW YORK, AMICUS CURIAE.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (William P. Polito, J.), entered January 28, 2014. The order and judgment granted defendants' motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff, individually and as the administrator of the estate of his wife, Virginia R. Bennett (decedent), commenced this action pursuant to Public Health Law § 2801-d, alleging that decedent was deprived of certain rights and benefits derived from federal and state regulations while she was a patient in a nursing home operated by defendants. Supreme Court granted defendants' motion for summary judgment dismissing the complaint, and plaintiff appeals.

Plaintiff contends that the motion should have been denied as untimely because it was made more than 120 days after the filing of the note of issue without a showing of good cause for the delay (*see generally* CPLR 3212 [a]; *Brill v City of New York*, 2 NY3d 648, 652). Plaintiff waived that contention, however, by expressly consenting to the timing of the motion before it was made (*see Stephen v Brooklyn Pub. Lib.*, 120 AD3d 1221, 1221; *see generally Hadden v Consolidated Edison Co. of N.Y.*, 45 NY2d 466, 469).

While we agree with our dissenting colleague that the court was not required to accept the express stipulation of the parties to extend the 120-day deadline in CPLR 3212, we note that the court in fact did so in advance of the motion (*cf. Coty v County of Clinton*, 42 AD3d 612, 614). Moreover, unlike our dissenting colleague, we do not view the timing requirements applicable to motions for summary judgment as a matter of public policy that may not be affirmatively waived by a party (*see Mitchell v New York Hosp.*, 61 NY2d 208, 214).

With respect to the merits, we conclude that defendants established as a matter of law that they provided appropriate care and treatment to decedent and did not violate any of the various federal and state regulations identified by plaintiff as the bases for this action, and plaintiff failed to raise a triable issue of fact in opposition (*see Gold v Park Ave. Extended Care Ctr. Corp.*, 90 AD3d 833, 834; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

All concur except WHALEN, J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent because I disagree with the majority's conclusion that plaintiff waived his contention that defendants' motion for summary judgment should have been denied as untimely. I would therefore reverse the order and judgment, deny defendants' motion, and reinstate the complaint.

Where, as here, Supreme Court does not schedule a deadline for filing motions for summary judgment, "such motion shall be made no later than one hundred and twenty days after the filing of the note of issue, except with leave of court on good cause shown" (CPLR 3212 [a]; *see O'Brien v Bainbridge*, 109 AD3d 1206, 1208; *Jones v Town of Le Ray*, 28 AD3d 1177, 1178). The moving party has the burden of demonstrating good cause, and "[n]o excuse at all, or a perfunctory excuse, cannot be 'good cause' " (*Brill v City of New York*, 2 NY3d 648, 652; *see LoGrasso v Myer*, 16 AD3d 1089, 1089-1090). In that context, CPLR 3212 (a) "requires a showing of good cause for the delay in making the motion—a satisfactory explanation for the untimeliness—rather than simply permitting meritorious, nonprejudicial filings, however tardy" (*Brill*, 2 NY3d at 652; *see O'Brien*, 109 AD3d at 1208).

The Court of Appeals has explained that requiring the movant to show good cause serves "the purpose of the amendment,[i.e.,] to end the practice of eleventh-hour summary judgment motions" (*Brill*, 2 NY3d at 652), and that "statutory time frames . . . are not options, they are requirements, to be taken seriously by the parties. Too many pages of the Reports, and hours of the courts, are taken up with deadlines that are simply ignored" (*Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 726-727).

Here, the court did not set a deadline for motions, and the note of issue was filed on April 20, 2012, which meant that all summary judgment motions were to be filed within 120 days and no later than August 18, 2012 (*see* CPLR 3212 [a]). The motion for summary judgment was not filed until June 28, 2013, which is just over 10 months beyond

the 120-day limit (*see O'Brien*, 109 AD3d at 1208). Defendants' moving papers did not include any explanation for the delay, and the reason set forth by the court during proceedings on May 13, 2013 was simply that defendants may have a meritorious motion and, thus, that determining the motion might simplify the issues at trial, which is the same excuse that was rejected by the Court of Appeals in *Miceli* and *Brill* (*see Miceli*, 3 NY3d at 727; *Brill*, 2 NY3d at 652-653). I therefore conclude that the motion should not have been entertained by the court.

In my view, the fact that the parties entered a stipulation to allow defendants to make a late motion for summary judgment does not alter the above analysis inasmuch as "[the] parties' stipulation is insufficient to excuse [a] delay" (*Coty v County of Clinton*, 42 AD3d 612, 614). "Unless public policy is violated, the parties are free to chart their own procedural course, and may fashion the basis upon which a particular controversy will be resolved" (*Loretto-Utica Props. Corp. v Douglas Co.*, 226 AD2d 1058, 1059 [internal quotation marks omitted]; *see Mitchell v New York Hosp.*, 61 NY2d 208, 214). However, as articulated by the legislature and the Court of Appeals, it is public policy to strictly enforce the 120-day limit for summary judgment motions in the absence of leave of court on good cause shown. CPLR 3212 (a) was amended by the legislature with "the purpose . . . to end the practice of eleventh-hour summary judgment motions" (*Brill*, 2 NY3d at 652), which the Court of Appeals described as a "sloppy practice threatening the integrity of our judicial system" (*id.* at 653). "[T]he Court of Appeals [has] clearly indicated that the 120-day statutory time frame contained in CPLR 3212 (a) is a strict requirement 'to be taken seriously by the parties' " (*Coty*, 42 AD3d at 614, quoting *Miceli*, 3 NY3d at 726) and "must be 'applied as written and intended' " (*id.*, quoting *Brill*, 2 NY3d at 653). Although parties may stipulate away some statutory rights (*see Mitchell*, 61 NY2d at 214), under CPLR 3212 (a) and the decisions of the Court of Appeals in *Brill* and *Miceli*, "the court has the exclusive authority to extend the statutory deadline; mutual agreement of the parties without court approval will not suffice" (*Coty*, 42 AD3d at 614), and the court may not approve of the delayed motion without a showing of good cause (*see* CPLR 3212 [a]; *Brill*, 2 NY3d at 652). Thus, contrary to the majority's position, litigants cannot waive the statutory requirement that good cause be shown in order to permit the late filing of a motion pursuant to CPLR 3212, and the statute does not permit courts to accept a stipulation of the parties "in advance of the motion" where there is no showing of good cause. I therefore conclude that, while a court may accept a late motion for summary judgment "pursuant to both a stipulation and the court's own order, *upon a showing of 'good cause'* " (*Jim Beam Brands Co. v Tequila Cuervo La Rojena, S.A. De C.V.*, 85 AD3d 556, 556-557 [emphasis added]), a stipulation alone is not sufficient to extend the deadline imposed by the statute (*see Coty*, 42 AD3d at 614).

As discussed above, the parties' stipulation in the present case was accompanied by acquiescence of the court, but without any showing of good cause for the delay. In my view, "[i]f this practice is

tolerated and condoned, the ameliorative statute is, for all intents and purposes, obliterated" (*Brill*, 2 NY3d at 653). The courts should heed the admonition of the Court of Appeals and not countenance such statutory violations (*see id.*).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

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KA 10-01793

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, SCONIERS, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES R. COOPER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KIMBERLY J. CZAPRANSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered July 21, 2010. The judgment convicted defendant, upon a nonjury verdict, of grand larceny in the fourth degree (seven counts) and criminal mischief in the fourth degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a nonjury verdict of seven counts of grand larceny in the fourth degree (Penal Law § 155.30 [4]) and one count of criminal mischief in the fourth degree (§ 145.00 [1]). In appeal No. 2, defendant appeals from a judgment convicting him upon a nonjury verdict of five counts of grand larceny in the fourth degree (§ 155.30 [4]), two counts of petit larceny (§ 155.25), and one count of criminal mischief in the fourth degree (§ 145.00 [1]).

With respect to the judgment in appeal No. 1, we reject defendant's contention that he was denied the right to testify before the grand jury and that County Court erred in denying his motion to dismiss the indictment on that ground. The record establishes that defendant refused to testify before the grand jury when County Court (Connell, J.) determined, following a hearing, that he was not entitled to removal of the restraints that had been placed on him by correction officers (*see generally People v Best*, 19 NY3d 739, 743). "Inasmuch as defendant chose not to testify before the grand jury, it cannot be said that he was denied his statutory right to do so" (*People v Buccina*, 62 AD3d 1252, 1254, *lv denied* 12 NY3d 913). Although we agree with defendant that the court erred in failing to articulate on the record a rational basis for the restraints, we note that the prosecutor was directed by the court to provide a cautionary

instruction to dispel any prejudice resulting from defendant testifying in restraints (*see People v Felder* [appeal No. 2], 201 AD2d 884, 885, *lv denied* 83 NY2d 871; *see also People v Burroughs*, 108 AD3d 1103, 1106, *lv denied* 22 NY3d 995; *People v Pennick*, 2 AD3d 1427, 1427-1428, *lv denied* 1 NY3d 632). However, because he refused to testify, defendant has made it impossible for us to determine on the record before us whether his appearance before the grand jury "fail[ed] to conform to the requirements of article [190] to such degree that the integrity [of the grand jury proceeding was] impaired and prejudice to the defendant may [have] result[ed]" (CPL 210.35 [5]; *see Buccina*, 62 AD3d at 1254).

We reject defendant's further contention in appeal No. 1 that County Court (DeMarco, J.), which issued the judgments in appeal Nos. 1 and 2, violated the "law of the case" by failing to conduct a *Weaver* hearing with respect to the placement of a GPS tracking device on a motor vehicle owned by defendant's sister (*see People v Weaver*, 49 NY2d 1012). The record establishes that the GPS device was placed pursuant to a warrant and defendant failed to contest the warrant (*see People v Wilson*, 82 AD3d 797, 797, *lv denied* 16 NY3d 901).

In appeal No. 2, defendant challenges the placement of a GPS device on a motor vehicle owned by a commercial car rental agency and rented to defendant's sister, but he failed to demonstrate a legitimate expectation of privacy in that vehicle (*see People v Lacey*, 66 AD3d 704, 704-705, *lv denied* 14 NY3d 772). The court therefore properly determined that defendant lacked standing to challenge the placement of the GPS device on that vehicle (*see id.* at 705).

Contrary to defendant's further contention in both appeals, the court properly determined that he forfeited his right to counsel by his persistent course of egregious conduct toward successive assigned counsel, consisting of threats and other abusive behavior (*see People v Wilkerson*, 294 AD2d 298, 298-299, *lv denied* 98 NY2d 772; *People v Sloane*, 262 AD2d 431, 432, *lv denied* 93 NY2d 1027). Defendant failed to preserve for our review his contention in both appeals that the court erred in failing to specify the offenses it would consider in rendering a verdict (*see People v Mitchell*, 254 AD2d 830, 831, *lv denied* 92 NY2d 984). "In any event, the court's failure to comply with CPL 320.20 (5) is harmless error inasmuch as defendant was convicted of offenses charged in the indictment, not lesser included offenses" (*id.*; *see People v Wright*, 16 AD3d 982, 983, *lv denied* 4 NY3d 892).

Finally, we reject defendant's contention in appeal No. 2 that the court abused its discretion in consolidating the indictments and denying his motion to sever (*see People v McCune*, 210 AD2d 978, 978-979, *lv denied* 85 NY2d 864). Although based upon different criminal transactions, the offenses are the "same or similar in law" (CPL 200.20 [2] [c]), and defendant failed to make a convincing showing that he had important testimony to give on one count and a genuine need to refrain from testifying on others (*see People v Burrows*, 280

AD2d 132, 133-134, *lv denied* 96 NY2d 826).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

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KA 10-01792

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, SCONIERS, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES R. COOPER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KIMBERLY J. CZAPRANSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered July 21, 2010. The judgment convicted defendant, upon a nonjury verdict, of grand larceny in the fourth degree (five counts), petit larceny (two counts) and criminal mischief in the fourth degree.

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

Same memorandum as in *People v Cooper* ([appeal No. 1] ___ AD3d ___ [May 8, 2015]).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

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KA 10-01027

PRESENT: SMITH, J.P., CARNI, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON D. SMITH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered February 24, 2010. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree and robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [4]) and robbery in the second degree (§ 160.10 [1]). The charges stemmed from the gunpoint robbery of the victim by two perpetrators. Contrary to defendant's contention, the police had reasonable suspicion to stop and detain him for a showup identification based upon the totality of the circumstances, including the victim's 911 call, which provided a general description of the perpetrators, the proximity of defendant to the site of the crime, the brief period of time between the crime and the discovery of defendant near the location of the crime, and a police officer's observation of defendant, who matched the 911 call description (*see People v Owens*, 39 AD3d 1260, 1261, *lv denied* 9 NY3d 849; *People v Evans*, 34 AD3d 1301, 1302, *lv denied* 8 NY3d 845). Contrary to the further contention of defendant, the conduct of the police in detaining and transporting him to the crime scene in handcuffs did not constitute a de facto arrest (*see Owens*, 39 AD3d at 1261). We reject defendant's contention that he was denied effective assistance of counsel because his counsel did not seek a *Dunaway* hearing. Initially, we note that the failure to request a particular hearing, in and of itself, does not constitute ineffective assistance of counsel (*see People v Rivera*, 71 NY2d 705, 709; *People v Perea*, 27 AD3d 960, 961). More specifically, the failure to move for a *Dunaway* hearing is not ineffective assistance "where, as here, such endeavor was potentially futile" (*People v Jackson*, 48 AD3d 891, 893, *lv denied* 10 NY3d 841; *see People v Creech*,

183 AD2d 777, 777, *lv denied* 80 NY2d 902).

We reject defendant's further contention that the trial evidence established that the showup identification was rendered unduly suggestive by the transporting officer's remark to the victim that a suspect was in custody inasmuch as that remark "conveyed [only] what a witness of ordinary intelligence would have expected under the circumstances" (*People v Williams*, 15 AD3d 244, 246, *lv denied* 5 NY3d 771; *see People v Rodriguez*, 64 NY2d 738, 740-741). We further conclude that the victim's observation of defendant being removed from a patrol car, and the fact that defendant was handcuffed, did not render the showup unduly suggestive as a matter of law (*see People v Boyd*, 272 AD2d 898, 899, *lv denied* 95 NY2d 850; *People v Aponte*, 222 AD2d 304, 304-305, *lv denied* 88 NY2d 980). We likewise reject defendant's contention that his counsel was ineffective by failing to move to reopen the *Wade* hearing based on trial evidence (*see Creech*, 183 AD2d at 777). Such a motion had little or no chance of success (*see People v Dark*, 122 AD3d 1321, 1322; *People v Stafford*, 215 AD2d 212, 212-213, *lv denied* 86 NY2d 784). Contrary to defendant's further contention, the People established an independent basis for the in-court identification of defendant by the victim. The victim was familiar with defendant, having seen him in the neighborhood on numerous prior occasions (*see People v Fountaine*, 8 AD3d 1107, 1108, *lv denied* 3 NY3d 706). We reject defendant's contention that he was deprived of effective assistance of counsel because defense counsel failed to call an expert witness to testify on the subject of eyewitness identification (*see People v Stanley*, 108 AD3d 1129, 1130, *lv denied* 22 NY3d 959). We conclude that defendant has not demonstrated "the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712 [internal quotation marks omitted]). Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we further conclude that defendant received meaningful representation (*see People v Baldi*, 54 NY2d 137, 147).

Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction inasmuch as his motion for a trial order of dismissal was not " 'specifically directed' at the alleged error[s]" asserted on appeal (*People v Gray*, 86 NY2d 10, 19), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to defendant's contention, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

We reject the further contention of defendant that he was deprived of his right to a fair trial by prosecutorial misconduct during summation. Initially, we note that County Court sustained defense counsel's objection to the prosecutor's remark that defendant "does not challenge" the victim's testimony that two persons were

involved in the robbery, and the court gave a curative instruction. Defendant did not thereafter request further curative instructions or move for a mistrial, and thus failed to preserve for our review his present contention that the prosecutor's remark deprived him of a fair trial (*see* CPL 470.05 [2]; *People v Norman*, 1 AD3d 884, 884, *lv denied* 1 NY3d 599). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject defendant's further contention that during summation the prosecutor "vouched" for one of the People's witnesses. An argument by counsel, based upon the record evidence and reasonable inferences drawn therefrom, that his or her witnesses have testified truthfully is not vouching for their credibility (*see People v Bailey*, 58 NY2d 272, 277; *cf. United States v Spinelli*, 551 F3d 159, 168-169, *cert denied* 558 US 939; *United States v Rivera*, 22 F3d 430, 437-438).

Finally, defendant's sentence is not unduly harsh or severe.

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

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KA 11-02497

PRESENT: SMITH, J.P., CENTRA, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD LARKINS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CHRISTINE M. COOK OF COUNSEL), FOR DEFENDANT-APPELLANT.

RONALD LARKINS, DEFENDANT-APPELLANT PRO SE.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JAMES P. MAXWELL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered December 2, 2011. The judgment convicted defendant, upon a jury verdict, of attempted 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 a jury verdict of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [4]) in connection with his attempt to rob a Ramada Inn in DeWitt, Onondaga County (hereafter, DeWitt attempted robbery), at approximately 12:25 p.m. on August 24, 2010. The evidence at trial included a video recording made by the hotel's security system, in which defendant can clearly be seen entering the building, speaking with the hotel desk clerk, drawing a weapon and pointing it over the counter at the clerk, but then immediately fleeing the building after the clerk ducked and ran from the counter. The video recording shows that defendant wore aviator-style sunglasses, a black shirt or jacket, and a blue necktie. A witness also testified that a man fitting defendant's description and wearing a T-shirt or tank top ran from the vicinity of the Ramada Inn immediately after the DeWitt attempted robbery and then left the area in a brown- or rust-colored Toyota or Lexus.

Members of the New York State Police testified that they stopped defendant on the New York State Thruway approximately 90 minutes after the DeWitt attempted robbery, after Thruway toll collectors at an exit near Weedsport indicated that a brown Toyota or Lexus, generally matching the description of the getaway car, had just entered the

Thruway. The police took defendant into custody and found $225 in his pocket. In the vehicle, they also found a necktie, a handgun, and a pair of sunglasses matching those used by the perpetrator in the DeWitt attempted robbery. At the time of the stop, defendant was wearing, inter alia, a green dress shirt on top of a red T-shirt.

Defendant was also charged, in a separate indictment in Cayuga County, with the robbery of a Best Western hotel in Weedsport (hereafter, Weedsport robbery), which occurred approximately an hour after, but prior to defendant's arrest on, the DeWitt attempted robbery. Pursuant to a *Molineux* ruling (*see People v Molineux*, 168 NY 264, 293), the front desk clerk from the hotel in the Weedsport robbery testified, during the trial of the DeWitt attempted robbery that is before us on this appeal, that she was robbed at gunpoint by a man wearing a green shirt. She further testified that the perpetrator took approximately $200, although she was not certain of the exact amount taken. Pursuant to County Court's *Molineux* ruling, that witness was not permitted to identify defendant as the perpetrator of the Weedsport robbery.

Defendant contends that he was deprived of a fair trial by the court's *Molineux* ruling. In determining that the evidence would be admitted, the court concluded, among other things, that the evidence was "relevant and material to . . . the issue[s] of intent" and identification, and "inextricably interwoven" with the evidence of the charge of attempted robbery being tried. The court also gave limiting instructions regarding the proper use of the *Molineux* evidence by the jury, which defendant does not challenge on appeal. We conclude that the court's *Molineux* ruling was not an abuse of discretion (*see generally People v Duperroy*, 88 AD3d 606, 607, *lv denied* 18 NY3d 957; *People v Galloway*, 61 AD3d 520, 520-521, *lv denied* 12 NY3d 915).

"It is fundamental that evidence of uncharged crimes is not admissible if the sole purpose is to show that the defendant was predisposed to commit the crime charged . . . On the other hand, evidence relevant to prove some fact in the case, other than the defendant's criminal propensity, is not rendered inadmissible simply because it may also reveal that the defendant has committed other crimes" (*People v Allweiss*, 48 NY2d 40, 46-47). Pursuant to the rule in *Molineux* (168 NY at 293), "evidence of uncharged crimes may be relevant to show (1) intent, (2) motive, (3) knowledge, (4) common scheme or plan, or (5) identity of the defendant" (*People v Alvino*, 71 NY2d 233, 242). "As a corollary, such evidence may be allowed when, as here, it . . . is found to be needed as background material or to complete the narrative of the episode" (*People v Till*, 87 NY2d 835, 837 [internal quotation marks omitted]).

Here, the court concluded that the *Molineux* evidence was admissible to establish defendant's intent, identity, and motive, and to complete the narrative of the events. Initially, we agree with defendant that such evidence was not properly admitted on the issue of identity inasmuch as defendant's identity as the perpetrator of the attempted robbery was " '*conclusively* established' " by the clear video recording from the hotel's security system (*People v Robinson*,

68 NY2d 541, 548).

We conclude, however, that the court properly admitted the *Molineux* evidence pursuant to the remaining grounds upon which it relied, i.e., to establish defendant's intent and motive, and to complete the narrative, with respect to the crime herein. Along with the other elements of the crime herein, the People were required to prove beyond a reasonable doubt that defendant intended to steal property (*see* Penal Law § 160.15; *People v De Jesus*, 123 AD2d 563, 564, *lv denied* 69 NY2d 745; *see generally People v Starks*, 46 AD3d 1426, 1427, *lv denied* 10 NY3d 817; *People v Osinowo*, 28 AD3d 1011, 1012-1013, *lv denied* 7 NY3d 792). Contrary to defendant's contention, the court properly admitted evidence that defendant stole property during the Weedsport robbery as evidence that he intended to steal property during the crime herein. It has long been settled that the *Molineux* rule contains an "exception thereto[] that permits such evidence when 'the transactions in respect to which evidence was given were all intimately connected in point of time, place[,] and circumstance with that for which the accused was indicted, so that they formed a continuous series of transactions, each throwing light upon the other, upon the question of knowledge, intent, and motive' " (*People v Friedman*, 149 App Div 873, 875). Here, the jury could conclude, based upon the evidence that the Weedsport robbery occurred shortly after the DeWitt attempted robbery, that defendant was engaged in "a continuous series of transactions" (*id.*), pursuant to which he first attempted to rob the hotel in DeWitt and, having failed to obtain money during that crime, continued his criminal efforts until he was successful in the Weedsport robbery. Furthermore, the "probative and explanatory value [of the *Molineux* evidence] clearly outweighed the potential prejudice to defendant, particularly since the later incident can readily be viewed as a continuation of the" crime herein (*People v Tarver*, 2 AD3d 968, 969). Thus, the evidence that defendant committed another robbery a short time after this unsuccessful attempt was admissible to show his intent and motive to commit this crime (*see generally People v Burnell*, 89 AD3d 1118, 1120-1121, *lv denied* 18 NY3d 922).

The court also properly admitted the *Molineux* evidence to complete the narrative of the crime herein and to provide necessary background information for it. Absent the *Molineux* evidence, the jury would have been left to speculate why defendant was stopped on the Thruway about five exits away from the scene of the crime herein and over an hour later, in a vaguely described vehicle, wearing different clothing than either the clerk or the witness described defendant as wearing, and possessing $225 in cash. Thus, the *Molineux* evidence was properly admitted to explain the reason for the stop (*see People v Radoncic*, 259 AD2d 428, 428, *lv denied* 93 NY2d 1005; *People v Hernandez*, 139 AD2d 472, 477, *lv denied* 72 NY2d 957), and to "provide background information as to how and why the police pursued and confronted defendant" (*People v Tosca*, 98 NY2d 660, 661; *cf. People v Resek*, 3 NY3d 385, 388-390; *see generally Till*, 87 NY2d at 836-837). In addition, the evidence of the Weedsport robbery occurring between the time of the crime herein and the time of the Thruway stop of

defendant, coupled with the additional clothing items found in his car, explained how defendant was arrested in a different shirt than the one he wore during the crime herein, "provided a complete and coherent narrative of the events leading to defendant's arrest" (*People v Antegua*, 7 AD3d 466, 467, *lv denied* 3 NY3d 670; *see People v Buchanan*, 95 AD3d 1433, 1436, *lv denied* 22 NY3d 1029), and was "inextricably interwoven with directly related material in the sense that it is explanatory of the acts done" in the crime charged in the indictment (*People v Johnson*, 149 AD2d 930, 931, *lv denied* 73 NY2d 1017 [internal quotation marks omitted]; *see People v Ely*, 68 NY2d 520, 529; *People v Ventimiglia*, 52 NY2d 350, 361; *People v Williams*, 28 AD3d 1005, 1008, *lv denied* 7 NY3d 819).

Furthermore, defense counsel argued at trial that the evidence, most notably the video recording, demonstrated that defendant committed only the crime of menacing. Therefore, especially after "[c]onsidering the defense position that defendant [did not intend to steal property, we conclude that] the *Molineux* evidence fell within recognized exceptions and its probative value to the People's case outweighed its prejudice to defendant" (*People v Smith*, 63 AD3d 1301, 1303, *lv denied* 13 NY3d 862; *see People v Bradford*, 118 AD3d 1254, 1256, *lv denied* 24 NY3d 1082; *People v Brown*, 57 AD3d 1461, 1463, *lv denied* 12 NY3d 814, *reconsideration denied* 12 NY3d 923). Thus, "[w]e cannot say that the trial court abused its discretion when it allowed . . . evidence of [subsequent] conduct relating to [the crime herein] and gave proper limiting instructions to the jury" (*People v Dorm*, 12 NY3d 16, 19).

We reject defendant's contention that the court erred in denying his requests for substitution of his second assigned counsel. It is well settled that a court must carefully evaluate serious complaints about counsel, and "should substitute counsel when a defendant can demonstrate 'good cause' " therefor (*People v Linares*, 2 NY3d 507, 510). Defendant's requests to replace the second assigned counsel were based on counsel's alleged failure to file certain motions and on frequent disagreements with defendant. We conclude that, "[a]t most, defendant's allegations evinced disagreements with counsel over strategy . . . , which were not sufficient grounds for substitution" (*People v Agard*, 107 AD3d 613, 613, *lv denied* 21 NY3d 1039; *see Linares*, 2 NY3d at 511). Contrary to his further contention, "the court made a sufficient inquiry into defendant's complaints concerning the alleged lack of communication between defendant and defense counsel. The court 'repeatedly allowed defendant to air his concerns about defense counsel, and after listening to them reasonably concluded that defendant's vague and generic objections had no merit or substance' " (*People v Reese*, 23 AD3d 1034, 1035, *lv denied* 6 NY3d 779, quoting *Linares*, 2 NY3d at 511), and thus defendant's objections were insufficient to demonstrate " 'good cause' " for substitution of counsel (*Linares*, 2 NY3d at 510). To the extent that there was a hostile relationship between defendant and counsel, we conclude that defendant was the source of that hostility, and that such hostility was "unjustified . . . and . . . did not require substitution" (*People v Walton*, 14 AD3d 419, 420, *lv denied* 5 NY3d 796).

Contrary to defendant's further contention, the court did not abuse its discretion in denying his request to proceed pro se. Defendant's request to represent himself was not clear and unequivocal. Rather, his request was made in the alternative to his frequent and unsupported requests for substitution of assigned counsel. Thus, the court did not abuse its discretion in denying those requests (*see People v Wilson*, 112 AD3d 1317, 1318, *lv denied* 23 NY3d 1069; *cf. People v Slaughter*, 78 NY2d 485, 491-492; *see generally Matter of Kathleen K. [Steven K.]*, 17 NY3d 380, 384-385).

Contrary to defendant's further contention, the evidence viewed in the light most favorable to the prosecution is legally sufficient to support the conviction (*see People v Bleakley*, 69 NY2d 490, 495; *People v Foster*, 64 NY2d 1144, 1146, *cert denied* 474 US 857; *People v Contes*, 60 NY2d 620, 621). Furthermore, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant failed to preserve for our review his contention that the prosecutor's stated reasons for striking a prospective juror in response to a *Batson* challenge were pretextual, inasmuch as he "failed to articulate [to the court] any reason why he believed that the prosecutor's explanations were pretextual" (*People v Santiago*, 272 AD2d 418, 418, *lv denied* 95 NY2d 907; *see People v Smocum*, 99 NY2d 418, 423-424). In any event, that contention lacks merit. "The court was in the best position to observe the demeanor of the prospective juror[] and the prosecutor, and its determination that the prosecutor's reasons for exercising peremptory challenges with respect to [the] . . . prospective juror[] were race-neutral and not pretextual is entitled to great deference" (*People v Williams*, 13 AD3d 1214, 1215, *lv denied* 4 NY3d 857; *see People v Carter*, 38 AD3d 1256, 1256-1257, *lv denied* 8 NY3d 982).

Defendant failed to preserve for our review his additional contention that he was penalized for rejecting a plea offer and exercising his right to a jury trial (*see People v Stubinger*, 87 AD3d 1316, 1317, *lv denied* 18 NY3d 862; *People v Griffin*, 48 AD3d 1233, 1236-1237, *lv denied* 10 NY3d 840). In any event, that contention is without merit (*see Stubinger*, 87 AD3d at 1317), and the sentence is not unduly harsh or severe. We have reviewed defendant's remaining contentions in his main and pro se supplemental briefs and conclude that none warrant reversal or modification of the judgment.

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

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CA 14-01522

PRESENT: SCUDDER, P.J., LINDLEY, VALENTINO, AND DEJOSEPH, JJ.

DEMISSE TESSEMA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER, DEFENDANT-RESPONDENT.

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR PLAINTIFF-APPELLANT.

T. ANDREW BROWN, CORPORATION COUNSEL, ROCHESTER (JOHN M. CAMPOLIETO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (William P. Polito, J.), entered November 6, 2013. The order granted the motion of defendant for summary judgment, dismissed the action and denied the cross motion of plaintiff for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying defendant's motion and reinstating the complaint with the exception of any defamation claim and as modified the order is affirmed without costs in accordance with the following memorandum: On November 15, 2007, plaintiff purchased a parcel of real property at 430 Andrews Street in defendant, City of Rochester, at a tax foreclosure sale. Prior to that purchase, dating back to the 1930's, the property at 430 Andrews Street had been used as an automobile service station. Furthermore, the property at 430 Andrews Street historically fronted on the "Northerly Branch of University Avenue" and the "Southerly Branch of University Avenue" (now Andrews Street). On occasion, in order to access the gas pumps on the property, vehicles drove across the "Northerly Branch of University Avenue" because, according to plaintiff, it was not feasible to enter and exit on Andrews Street. In or about 1970, defendant abandoned the "Northerly Branch of University Avenue" for the use of traffic, and it then became a parking lot owned and used by defendant with an address of 440 Andrews Street. According to plaintiff, after the "1970 abandonment," customers for the gas and automobile service at 430 Andrews Street continued to drive across the former "Northerly Branch of University Avenue." In 1993, the former owner of the property at 430 Andrews Street entered into an easement agreement with defendant, which allowed defendant's property at 440 Andrews Street to be used by customers of 430 Andrews Street for ingress and egress. The agreement contained a clause providing that the easement would terminate, as relevant here, upon "[d]iscontinuation of the automobile service station [at 430 Andrews

Street] for a period of six (6) months." After plaintiff purchased the property in 2007, he was advised by defendant that the prior owner had abandoned any use of the property at 430 Andrews Street for a period of approximately 23 months and that the easement therefore had terminated by its own terms.

Plaintiff commenced this action seeking, inter alia, a declaration that he has an easement over defendant's lot. Defendant moved for summary judgment dismissing the complaint, and plaintiff cross-moved for partial summary judgment on liability. We conclude that Supreme Court erred in granting defendant's motion but properly denied plaintiff's cross motion. We note at the outset that, even assuming, arguendo, that the complaint included a claim for defamation, we conclude that plaintiff abandoned any contention with respect to the propriety of the dismissal of such a claim by addressing it for the first time in his reply brief on appeal (*see Turner v Canale*, 15 AD3d 960, 961, *lv denied* 5 NY3d 702). We therefore modify the order by denying defendant's motion and reinstating the complaint except with respect to any defamation claim.

We conclude with respect to plaintiff's first two causes of action, seeking to enforce the easement, that there is a triable issue of fact whether the " 'conditional easement [was] extinguished by its own terms' " prior to plaintiff's purchase of 430 Andrews Street (*South Buffalo Dev., LLC v PVS Chem. Solutions, Inc.*, 115 AD3d 1152, 1152-1153). Even assuming, arguendo, that defendant met its initial burden of proof, we conclude that plaintiff raised a triable issue of fact whether there was a "discontinuation" of automobile service at the property for six consecutive months because, according to plaintiff, the subject property was "still being used as an automobile service station shortly before [he] purchased it . . . and [he] observed people at the [s]tation, and vehicles, including a red car inside the [b]uilding, shortly before purchasing the [p]roperty in late 2007" (*cf. id.*; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

With respect to plaintiff's prescriptive easement theory, we cannot determine as a matter of law whether the municipal land at issue was designated for a public purpose and therefore was immune from a prescriptive easement (*see City of Tonawanda v Ellicott Cr. Homeowners Assn.*, 86 AD2d 118, 125, *appeal dismissed* 58 NY2d 824). As was the case in *Ellicott Cr. Homeowners Assn.*, "not only has [defendant] not offered proof that it attempted to put the land to a public use," but the record in fact includes evidence of discussions that defendant had with private citizens regarding the "leasing of the land" (*id.*). Furthermore, even though the 1993 agreement comes after the alleged prescriptive time period, it recognizes the potential for a sale of the property by defendant (*see id.*).

We reject defendant's further contention that any prescriptive easement that may have existed was superseded by the 1993 written easement agreement (*see Kusmierz v Herman*, 172 AD2d 1056, 1056; *New York State Elec. & Gas Corp. v Persson*, 64 AD2d 194, 196, *lv denied* 46 NY2d 709), inasmuch as the easement agreement "did not necessarily

destroy a matured prescriptive right" (*Kusmierz*, 172 AD2d at 1056). Moreover, there are issues of fact regarding the existence of a prescriptive easement, specifically, whether permission to use defendant's property could " 'be inferred where . . . the relationship between the parties [was] one of neighborly cooperation and accommodation' " (*Taverni v Broderick*, 111 AD3d 1197, 1199).

We note our agreement with plaintiff that defendant's reliance on the Rochester City Code is misplaced inasmuch as plaintiff is not challenging administrative determinations made by defendant but, rather, is asserting that he has a valid easement over defendant's property.

Finally, we conclude with respect to plaintiff's remaining causes of action that neither plaintiff nor defendant met their respective burdens on their motion and cross motion for summary judgment (*see generally Zuckerman*, 49 NY2d at 562).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

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KA 11-01265

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, SCONIERS, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY L. KEELS, DEFENDANT-APPELLANT.

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered May 10, 2011. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the second degree (Penal Law § 160.10 [3]). We reject defendant's contention that his counsel was ineffective in failing to move to reopen the *Wade* hearing because the determination denying his motion to suppress identification testimony was undermined by trial evidence. As an initial matter, we note that a suppression determination must be based solely on the evidence presented at the suppression hearing, and thus the court could not reconsider its *Wade* determination based on trial testimony (*see People v Riley*, 70 NY2d 523, 532; *People v Evans*, 291 AD2d 868, 869). In any event, the record establishes that, at a reopened *Wade* hearing, the People could have called the victim to testify that he had an independent basis for his in-court identification of defendant (*see People v Elamin*, 82 AD3d 1664, 1665, *lv denied* 17 NY3d 794; *People v Hill*, 53 AD3d 1151, 1151-1152).

Defendant contends that the verdict is against the weight of the evidence with respect to the use of force to steal the motor vehicle (*see* Penal Law § 160.10 [3]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant failed to preserve for our review his contentions that he was deprived of a fair trial based on prosecutorial misconduct during examination of one of the People's witnesses and during summation (*see People v Brown*, 94 AD3d 1461, 1462, *lv denied* 19 NY3d 995). In any event, those contentions are without merit. The prosecutor did not mislead the jury regarding the function of a judicial subpoena testificandum or the power of a prosecutor to compel testimony. While a subpoena may secure the attendance of a witness at trial (*see* CPL 610.10 [1], [2]), contrary to defendant's contention, it does not assure the cooperation of the witness (*see generally People v Woodruff*, 26 AD2d 236, 237, *affd* 21 NY2d 848). We further conclude that the prosecutor did not vouch for a witness for the People. An argument by counsel on summation, based on the record evidence and reasonable inferences drawn therefrom, that his or her witnesses have testified truthfully is not vouching for their credibility (*see People v Bailey*, 58 NY2d 272, 277; *cf. United States v Spinelli*, 551 F3d 159, 168-169, *cert denied* 558 US 939; *United States v Rivera*, 22 F3d 403, 437-438).

We reject defendant's related contention that he was denied effective assistance of counsel based on defense counsel's failure to object to the prosecutor's alleged misconduct. As noted, neither the prosecutor's questioning of the People's witness under subpoena nor her comments during summation concerning the witness's willingness to testify constituted improper vouching or other prosecutorial misconduct. Thus, defense counsel's failure to object to the allegedly improper questions to the witness under subpoena or the comments by the prosecutor on summation does not constitute ineffective assistance of counsel (*see generally People v Brown*, 17 NY3d 742, 743-744). Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

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CA 14-01640

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, SCONIERS, AND DEJOSEPH, JJ.

SHANE VANDERWALL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

1255 PORTLAND AVENUE LLC AND SPOLETA CONSTRUCTION LLC, DEFENDANTS-RESPONDENTS.

SPOLETA CONSTRUCTION LLC, THIRD-PARTY PLAINTIFF,

V

HUB-LANGIE PAVING, INC., THIRD-PARTY DEFENDANT.

CELLINO & BARNES, P.C., ROCHESTER (ROBERT L. VOLTZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PILLINGER MILLER TARALLO, LLP, SYRACUSE (JEFFREY D. SCHULMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT 1255 PORTLAND AVENUE LLC.

RUBIN, FIORELLA & FRIEDMAN LLP, NEW YORK CITY (STEWART B. GREENSPAN OF COUNSEL), FOR DEFENDANT-RESPONDENT SPOLETA CONSTRUCTION LLC.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered November 12, 2013. The order, among other things, granted those parts of the motions of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is modified on the law by denying those parts of the motions of defendants seeking dismissal of the Labor Law § 241 (6) claim insofar as that claim is based upon a violation of 12 NYCRR 23-9.5 (c) and reinstating the complaint to that extent, and as modified the order is affirmed without costs.

Memorandum: Defendant 1255 Portland Avenue LLC (1255 Portland) hired defendant-third-party plaintiff, Spoleta Construction LLC (Spoleta), as the general contractor to perform certain work in the construction of a medical office building, and Spoleta in turn hired plaintiff's employer, third-party defendant, Hub-Langie Paving, Inc. (Hub-Langie), as a subcontractor. Plaintiff allegedly sustained injuries as a result of being hit by the bucket of an excavator at the

construction site, and thereafter commenced this action, asserting claims for the violation of Labor Law §§ 200 and 241 (6), and a cause of action for common-law negligence. Defendants each moved for summary judgment seeking, inter alia, dismissal of the complaint against them, and plaintiff moved for partial summary judgment on the issue of defendants' liability pursuant to section 241 (6) insofar as plaintiff's claim thereunder was based on defendants' violation of 12 NYCRR 23-9.5 (c) and Spoleta's violation of 12 NYCRR 23-4.2 (k). Supreme Court, inter alia, granted those parts of defendants' motions seeking summary judgment dismissing the complaint against them.

As a preliminary matter, we reject plaintiff's contention that the court erred in dismissing the Labor Law § 241 (6) claim to the extent that it alleged the violation of 12 NYCRR 23-4.2 (k). That regulation "[is] not sufficiently specific to support a cause of action under Labor Law § 241 (6)" (*Webber v City of Dunkirk*, 226 AD2d 1050, 1051).

We agree with plaintiff, however, that the court erred in granting those parts of defendants' motions for summary judgment dismissing the Labor Law § 241 (6) claim insofar as that claim is based on 12 NYCRR 23-9.5 (c), and we therefore modify the order accordingly. That regulation provides, in relevant part, that "[e]xcavating machines shall be operated only by designated persons . . . [and] [n]o person[s] other than the pitman and excavating crew shall be permitted to stand within range of the back of a power shovel or within range of the swing of the dipper bucket while the shovel is in operation." Plaintiff contends that the regulation was violated because his supervisor was operating the excavator at the time of the accident despite the fact that plaintiff was the only designated operator. Plaintiff further contends the regulation was violated because he was not a member of the excavating crew at the time of the accident, and thus should not have been permitted to stand within range of the excavation bucket, which struck him. Contrary to plaintiff's contention, we conclude that his supervisor was a "designated person[]" authorized to operate the subject excavator inasmuch as he was the superintendent for plaintiff's employer, he had his own key to the excavator, and he possessed supervisory authority over both plaintiff and the entire work site (*see* 12 NYCRR 23-1.4 [b] [17]). Nevertheless, we further conclude that, although plaintiff and his supervisor were performing excavation work at the time of the incident, plaintiff was not part of any "excavation crew." In support of that conclusion, we note that the interpretation of a regulation presents a question of law for a court to resolve (*see Morris v Pavarini Constr.*, 9 NY3d 47, 51) and, in our view, the word "crew" necessarily denotes more than one worker. Here, it is undisputed that plaintiff expected to perform the subject excavation work alone, with no expectation that his supervisor would be joining him and no awareness that his supervisor had, in fact, arrived and started operating the excavator. Specifically, plaintiff's supervisor conceded that plaintiff did not see him get into the excavator as plaintiff was looking down operating a jackhammer with earplugs in. Because plaintiff was not part of any "crew" at the time of the accident, the regulation was violated when plaintiff was permitted to

stand within range of the bucket when the excavating machine was in use (*cf. Benevento v City of Buffalo*, 74 AD3d 1738, 1739; *Mingle v Barone Dev. Corp*. [appeal No. 2], 283 AD2d 1028, 1029).

Despite our conclusion that defendants violated 12 NYCRR 23-9.5 (c), we reject plaintiff's contention that he is entitled to partial summary judgment on the issue of defendants' liability with respect to the Labor Law § 241 (6) claim. A violation of an Industrial Code provision "does not establish negligence as a matter of law but is merely some evidence to be considered on the question of a defendant's negligence" (*Puckett v County of Erie*, 262 AD2d 964, 965 [internal quotation marks omitted]; *see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 349; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502 n 4).

All concur except PERADOTTO and CARNI, JJ., who dissent in part and vote to affirm in the following memorandum: We respectfully dissent in part because we disagree with the majority that Supreme Court "erred in granting those parts of defendants' motions for summary judgment dismissing the Labor Law § 241 (6) claim insofar as that claim is based on 12 NYCRR 23-9.5 (c)." Initially, we agree with the majority that the court did not err "in dismissing the Labor Law § 241 (6) claim to the extent that it alleged the violation of 12 NYCRR 23-4.2 (k)." We also agree with the majority that plaintiff's supervisor "was a 'designated person[]' authorized to operate the subject excavator." Contrary to the majority, however, we conclude that the court properly determined that plaintiff was a member of an "excavating crew," and therefore defendants did not violate 12 NYCRR 23-9.5 (c). We would therefore affirm the order in its entirety.

Plaintiff was employed by third-party defendant Hub-Langie Paving, Inc. (Hub-Langie). Defendant Spoleta Construction LLC (Spoleta), a general contractor, hired Hub-Langie as a subcontractor to help Spoleta construct a medical office building for defendant 1255 Portland Avenue LLC. Specifically, "Hub Langie's job was just to do the excavating and the paving."

Hub-Langie hired plaintiff as a "pipe layer." The position "consisted of . . . working with the excavator, being in a hole, [and] putting pipe together, whether it be water [or] sewer." On October 20, 2008, the date of the accident at issue, plaintiff was working with his supervisor and a licenced plumber whom Hub-Langie had hired as an independent contractor. The plumber's job was to make a connection to a water main.

When plaintiff arrived at work at 7:00 a.m., his supervisor instructed him to "go out there and expose the water main for the licensed plumber." Plaintiff understood that to mean that he needed to take a truck, trailer, and excavator to the job site, block a lane of traffic, and "do a saw cut in the road" where the water main had been marked.

After plaintiff cut the asphalt with a saw, he attempted to "pop the asphalt out" with an excavator that he had used in the past. When

that did not work, plaintiff shut off the excavator and removed the key. He then attempted to break up the asphalt with a jackhammer. Plaintiff was wearing earplugs and safety glasses and, although he was facing the excavator, he was looking down at the ground. The excavator bucket struck plaintiff's left arm, hand, and wrist. Plaintiff then saw his supervisor, who had his own key to the excavator, jump off the machine and run over to him.

The above facts demonstrate that, at the time of the accident, both plaintiff and his supervisor were acting as members of Hub-Langie's "excavating crew" within the meaning of 12 NYCRR 23-9.5 (c). That regulation provides, in relevant part, that "[n]o person other than the pitman and excavating crew shall be permitted to stand within range of the back of a power shovel or within range of the swing of the dipper bucket while the shovel is in operation" (12 NYCRR 23-9.5 [c]). As the majority acknowledges, both plaintiff and his supervisor were performing excavation work at the time of the accident (*see* 12 NYCRR 23-1.4 [b] [19]). Moreover, they were performing that work at the same time and in the same area of the construction site. Thus, we conclude that "plaintiff was a member of the 'excavating crew' within the meaning of 12 NYCRR 23-9.5 (c)" because both he and his supervisor were collectively performing excavation work that was "an integral part of the excavation operation" (*Mingle v Barone Dev. Corp.* [appeal No. 2], 283 AD2d 1028, 1029).

We respectfully disagree with the majority's conclusion that plaintiff was not part of an "excavating crew" simply because "plaintiff expected to perform the subject excavation work alone, with no expectation that his supervisor would be joining him and no awareness that his supervisor had, in fact, arrived and started operating the excavator." There is nothing in 12 NYCRR 23-9.5 (c) that requires members of an excavating crew to be aware that other members of the crew are working at the same location. In our view, the facts that plaintiff had been hired to do excavation work, that his supervisor ordered him to perform excavation work on the day of the accident, that plaintiff then commenced performing that excavation work, and that his supervisor then joined him and commenced performing excavation work on the same area establishes that plaintiff and his supervisor were both part of an "excavation crew."

The majority's implicit assertion that plaintiff, who was following his supervisor's orders, had to have some subjective understanding that he was part of the excavation crew chosen by his supervisor inverts the common understanding of how a "crew" is chosen at a workplace. Instead of a supervisor choosing the composition of a crew, the majority's view allows the subordinate employee to opt out, in his own mind and without telling anyone else, of being assigned to a particular crew.

Moreover, the majority's interpretation of the word "crew" violates the long-established rule of construction that "general, commonly used terms . . . may not be limited by judicial . . . construction . . . and should be accorded their commonly understood meaning" (*Matter of Eastern Pork Prods. Co. v New York State Div. of*

Hous. & Community Renewal, 187 AD2d 320, 323; *see Matter of Murawski*, 84 AD2d 496, 498; McKinney's Cons Laws of NY, Book 1, Statutes § 94), " 'without resorting to an artificial or forced construction' " (*Feher Rubbish Removal, Inc. v New York State Dept. of Labor, Bur. of Pub. Works*, 28 AD3d 1, 4, *lv denied* 6 NY3d 711, quoting § 94). The commonly understood meaning of the word "crew" does not focus on the individual members' subjective understanding. Instead, it focuses on the commonality of the activity in which the members are engaged. Thus, a "crew" is defined as, among other things, "a group of people associated together in a common activity or by common traits or interests" (Merriam-Webster's Collegiate Dictionary 295 [11th ed 2004]). Neither that definition nor any dictionary definition offered by plaintiff in his brief focuses on the subjective understanding of crew members.

Here, it is undisputed that, at the time of plaintiff's injury, both plaintiff and his supervisor were engaged in the common activity of trying to excavate the water main, plaintiff with the jackhammer and his supervisor with the excavator. They were, therefore, both members of an excavating crew. By giving plaintiff's subjective understanding the power to redefine what it means to be in a "crew," the majority has "limited by judicial construction" the "commonly understood meaning" of that word (*Murawski*, 84 AD2d at 498), which is contrary to the intent of the drafters of 12 NYCRR 23-9.5 (c) as " 'ascertained from the words and language' " of the regulation (*Frank v Meadowlakes Dev. Corp.*, 6 NY3d 687, 692, quoting Statutes § 94).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

343

KA 11-02364

PRESENT: SCUDDER, P.J., SMITH, CARNI, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DENYS ALMEIDA, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JAMES P. MAXWELL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered November 3, 2011. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [1]). We reject defendant's contention that the People's failure to introduce the exculpatory portions of defendant's statement to the police and to charge the grand jury with the defense of justification rendered the grand jury proceedings defective. The People have broad discretion in presenting their case to the grand jury and were not required to present all of their evidence tending to exculpate defendant (*see People v Mitchell*, 82 NY2d 509, 515). With respect to the defense of justification, we conclude that the evidence before the grand jury was not sufficient to require the People to charge that defense (*see id.* at 514-515).

We reject defendant's further contention that County Court erred in failing to grant his request to instruct the trial jury on the defense of extreme emotional disturbance. Defendant did not offer any psychiatric testimony or any other proof that he suffered from a mental infirmity, not rising to the level of insanity, at the time of the incident. Thus, there was an insufficient offer of proof by defendant in support of a defense of extreme emotional disturbance (*see People v Smith*, 1 NY3d 610, 612).

Defendant's contention that the court erred when it limited the cross-examination of a witness regarding her prior bad conduct toward defendant is without merit. The court has broad discretion to keep

proceedings within manageable limits and to curtail exploration of collateral matters (*see People v Hudy*, 73 NY2d 40, 56) and, here, we conclude that the court properly exercised its discretion.

Defendant also contends that comments made by the prosecutor during summation and the court's admission in evidence of the recording of a 911 call denied him a fair trial. We reject that contention. Initially, we note that all but one of the alleged instances of prosecutorial misconduct during summation were not preserved for this Court's review (*see* CPL 470.05 [2]; *People v Smith*, 32 AD3d 1291, 1292, *lv denied* 8 NY3d 849), 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]). Even assuming, arguendo, that the remaining alleged instance of prosecutorial misconduct was improper, we conclude that it did not cause such substantial prejudice to defendant that he was denied due process of law (*see People v Santiago*, 289 AD2d 1070, 1071, *lv denied* 97 NY2d 761). We further conclude that the admission in evidence of the recording of the 911 call was harmless error because "the 'proof of [defendant's] guilt was overwhelming . . . and . . . there was no significant probability that the jury would have acquitted [him] had the proscribed evidence not been introduced' " (*People v Spencer*, 96 AD3d 1552, 1553, *lv denied* 19 NY3d 1029, *reconsideration denied* 20 NY3d 989, quoting *People v Kello*, 96 NY2d 740, 744; *see generally People v Crimmins*, 36 NY2d 230, 241-242).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the jury failed to give the evidence the weight it should be accorded when it determined that he intended to cause the victim's death, and when it rejected his defense of justification (*see People v Morgan*, 207 AD2d 501, 501-502, *affd* 87 NY2d 878; *People v Fernandez*, 304 AD2d 504, 504-505, *lv denied* 100 NY2d 620; *see generally People v Bleakley*, 69 NY2d 490, 495). There was testimony that the victim sustained 33 stab wounds, several of which were in the chest and back. " '[D]efendant's homicidal intent could be inferred from evidence that defendant plunged a knife deep into the victim's chest [multiple times], in the direction and close vicinity of vital organs' " (*People v Massey*, 61 AD3d 1433, 1434, *lv denied* 13 NY3d 746; *see People v Elston*, 118 AD3d 538, 539, *lv denied* 24 NY3d 960; *People v Fils-Amie*, 291 AD2d 358, 358-359, *lv denied* 98 NY2d 650). Furthermore, even if it was unclear who grabbed the knife first, "[d]efendant ended up with the knife and inflicted severe injuries on the [victim], while defendant remained virtually uninjured" with cuts to hands and fingers only (*Fernandez*, 304 AD2d at 505). There was also evidence that the victim attempted to escape from defendant, but that defendant followed him and continued to stab him. Thus, the jury's rejection of the justification defense was not contrary to the weight of the evidence (*see id.* at 504-505; *see also Morgan*, 207 AD2d at 501-502). Finally, we reject defendant's

contention that his sentence is unduly harsh and severe.

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

345

KA 11-00691

PRESENT: SCUDDER, P.J., SMITH, CARNI, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID L. HARDY, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered January 21, 2011. The judgment convicted defendant, upon a jury verdict, of manslaughter in the second degree, assault in the second degree, assault in the third degree and attempted petit larceny.

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, manslaughter in the second degree (Penal Law § 125.15 [1]), defendant contends that the evidence is not legally sufficient to establish that the victim of the manslaughter was a person within the meaning of article 125 of the Penal Law (*see* § 125.05 [1]). Defendant's conviction arose from an incident that began when he fled the scene of an attempted petit larceny. During that flight, his vehicle crossed the center line, side-swiped a car, then collided head-on with another vehicle driven by a woman who had been pregnant for approximately 23 weeks, causing her to sustain severe injuries. In order to save the mother's life, her female child was delivered by cesarean section. The pediatrician who delivered the child did not detect breathing or a heartbeat immediately after the cesarean section, but the child was resuscitated, and she had a heartbeat of between 60 and 80 beats per minute at five minutes after birth. Based on the child's high risk of cognitive and neurological deficits, the parents and the pediatrician determined that resuscitative efforts should cease, and removed the child from mechanical life support. The child's heart beat for about 2½ hours before she died.

Contrary to defendant's contention, we conclude that the evidence of the child's personhood is legally sufficient to support the

conviction (*see generally People v Danielson*, 9 NY3d 342, 349; *People v Bleakley*, 69 NY2d 490, 495). The Penal Law provides that a defendant "is guilty of manslaughter in the second degree when . . . [he or she] recklessly causes the death of another person" (§ 125.15 [1]). Furthermore, " '[p]erson,' when referring to the victim of a homicide, means a human being who has been born and is alive" (§ 125.05 [1]), and the Penal Law defines homicide as "conduct which causes the death of a person or an unborn child with which a female has been pregnant for more than twenty-four weeks" (§ 125.00).

Defendant first contends that the evidence is not legally sufficient because, pursuant to the above statutory scheme, a child who is less than 24 weeks of gestational age is not a person. That contention is without merit. Penal Law § 125.00 uses the disjunctive "or" in defining who may be the victim of a homicide, and it is a well-settled rule of statutory interpretation that "[u]se of the conjunction 'or' in a statute usually indicates that the language is to be construed in an alternative sense" (McKinney's Cons Laws of NY, Book 1, Statutes § 235; *see McSweeney v Bazinet*, 269 App Div 213, 216, *affd* 295 NY 797; *People v Cubiotti*, 4 Misc 2d 44, 46). Therefore, a victim who is born alive may be a person for the purposes of a homicide pursuant to section 125.00, regardless of whether he or she is less than 24 weeks of gestational age.

Defendant next contends that the evidence is not legally sufficient because the child was not born alive as required by the definition of "person" (Penal Law § 125.05). As a preliminary matter, we note that defendant did not raise that contention in support of his motion for a trial order of dismissal (*see generally People v Gray*, 86 NY2d 10, 19). Indeed, in his argument in support of his motion, defendant conceded that the child had been born alive, but advanced a different challenge to the child's personhood. We nevertheless conclude that "the trial court, in response to defendant's [motion], 'expressly decided the question raised on appeal,' thus preserving the issue for review" (*People v Smith*, 22 NY3d 462, 465). In any event, that contention is also without merit. A "child was born alive in the legal sense [if it] had been wholly expelled from its mother's body and possessed or was capable of an existence by means of a circulation independent of [the mother's] . . . The true test of separate existence in the theory of the law (whatever it may be in medical science) is the answer to the question whether the child is carrying on its being without the help of the mother's circulation" (*People v Hayner*, 300 NY 171, 174 [internal quotation marks omitted]). Here, although the child's breathing was sustained by mechanical means for a short time after the cesarean section was performed, she was removed from mechanical life support and survived on her own without medical assistance for approximately 2½ hours. Thus, for that period of time she carried "on [her] being without the help of [her] mother's circulation" (*id.*).

Defendant further contends that the evidence is legally insufficient because any injury he may have inflicted on the child occurred before her birth, i.e., when she was not yet a "person" within the meaning of Penal Law § 125.05 (1). We reject that

contention. To the contrary, we conclude that the evidence was legally sufficient to establish that element of manslaughter in the second degree, inasmuch as the child "was a 'person' from the moment of her birth . . . , notwithstanding that defendant may have perpetrated the act that caused the injury prior to her birth" (*People v Hayat*, 235 AD2d 287, 287, *lv denied* 89 NY2d 1036; *see People v Hall*, 158 AD2d 69, 72-80, *lv denied* 76 NY2d 940, *reconsideration denied* 76 NY2d 1021).

Finally, defendant contends that the evidence is legally insufficient because the child would likely have died from complications arising from her premature birth, and thus he should not be held responsible for her death. That challenge is unavailing because the evidence establishes that the injuries that defendant recklessly inflicted were significant factors in causing the child's premature birth and, eventually, her death. Thus, "defendant may not avoid responsibility by arguing that other causes contributed since his acts were also factors in the [child]'s demise" (*People v Cicchetti*, 44 NY2d 803, 804-805). Indeed, "[i]t has long been held that criminal liability for death resulting from a felonious assault is not relieved by such contributing factors as a victim's pre-existing health condition" (*People v Bowie*, 200 AD2d 511, 512, *lv denied* 83 NY2d 869; *see generally People v Griffin*, 80 NY2d 723, 726-727, *cert denied* 510 US 821). In light of the People's evidence that defendant's actions were a "*sufficiently direct cause* of the [child's] ensuing death" (*People v Kibbe*, 35 NY2d 407, 413, *rearg denied* 37 NY2d 741), we conclude that it would be impermissible to allow a jury "to speculate on the [child's] chance of survival" outside of that context of direct causation (*People v Knapp*, 113 AD2d 154, 166, *cert denied* 479 US 844).

Thus, we reject defendant's challenge to the sufficiency of the evidence, and we conclude that there is a "valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt" (*Danielson*, 9 NY3d at 349 [internal quotation marks omitted]; *see generally Bleakley*, 69 NY2d at 495).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

348

KA 13-00968

PRESENT: SCUDDER, P.J., SMITH, CARNI, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALFRED MACK, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered May 16, 2013. The judgment convicted defendant, upon a jury verdict, of criminal trespass in the second degree, burglary in the second degree, criminal contempt in the second degree and criminal contempt in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal trespass in the second degree (Penal Law § 140.15 [1]), burglary in the second degree (§ 140.25 [2]), criminal contempt in the second degree (§ 215.50 [3]), and criminal contempt in the first degree (§ 215.51 [b] [v]). The conviction arises out of two incidents on the same night in which defendant, in violation of an order of protection, entered the home of his former girlfriend and attacked her. We reject defendant's contention that Supreme Court erred in denying his request to charge criminal trespass in the second degree as a lesser included offense of burglary in the second degree. In order to establish entitlement to a charge on a lesser included offense, "a defendant must show both that the greater crime cannot be committed without having concomitantly committed the lesser by the same conduct, and that a reasonable view of the evidence supports a finding that he or she committed the lesser, but not the greater, offense" (*People v James*, 11 NY3d 886, 888; *see People v Van Norstrand*, 85 NY2d 131, 135; *People v Glover*, 57 NY2d 61, 63; *see also* CPL 1.20 [37]; 300.50 [1], [2]). Here, the only reasonable view of the evidence is that defendant knowingly entered or remained unlawfully in a dwelling (*see* Penal Law § 140.15 [1]), intending to engage in conduct prohibited by the order of protection while in the banned premises that went beyond criminal trespass, thereby satisfying the " 'intent to commit a crime therein' element of burglary" (*People*

v Lewis, 5 NY3d 546, 548; *see also* Penal Law § 140.25; *People v Cajigas*, 19 NY3d 697, 701-702). Contrary to defendant's further contention, "the court properly denied defendant's request to charge criminal contempt in the second degree . . . as a lesser included offense of criminal contempt in the first degree because no reasonable view of the evidence 'would support a finding that [defendant] committed the lesser offense but not the greater' " (*People v Wilson*, 55 AD3d 1273, 1274, *lv denied* 11 NY3d 931).

We reject defendant's contention that prosecutorial misconduct on summation deprived him of a fair trial. Even assuming, arguendo, that some of the prosecutor's remarks were improper, we conclude that they were not so egregious as to deprive defendant of a fair trial, and any prejudice was alleviated by the court's prompt curative instruction and its later instruction that the jury "may not consider sympathy" (*People v Melendez*, 11 AD3d 983, 984, *lv denied* 4 NY3d 888; *see People v Riley*, 117 AD3d 1495, 1496, *lv denied* 24 NY3d 1088). Finally, we reject defendant's contention that the court improperly limited his testimony on redirect examination. The extent of redirect examination is within the sound discretion of the trial court, and the testimony sought here was properly excluded because it would not have explained or clarified any testimony that had been elicited on cross-examination (*see People v Melendez*, 55 NY2d 445, 451-453).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

392

KA 11-00290

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JARRETT T. WHITE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered December 16, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fifth degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a controlled substance in the fifth degree (§ 220.06 [5]), defendant contends that County Court erred in refusing to suppress the drugs seized from his person because he was subject to an illegal search, and that his statements to a police investigator should have been suppressed as the fruits of that illegal search. We conclude that the court properly denied that part of defendant's omnibus motion seeking to suppress the physical evidence and statements.

In March 2010, defendant attempted to enter the Hall of Justice in Rochester. The security measures at the Hall of Justice required that all entrants be searched via metal detectors, and that their personal belongings pass through an X-ray machine to search for weapons and other contraband. During his entry to the Hall of Justice, defendant set off the walk-through magnetometer, and a subsequent scan of his person by a hand scanner operated by a Monroe County Sheriff's Deputy indicated that there was metal in the area of defendant's crotch. When asked if he had any metal on his person, defendant gave an illogical and unlikely explanation, and began to act in a nervous manner. Defendant was scanned twice more by the hand scanner, which continued to indicate the presence of metal in the same

location inside defendant's pants. After a pat frisk revealed no observable weapon on defendant's person, defendant was handcuffed and escorted to an adjacent private room by two deputies. There, one of the deputies helped defendant pull down his pants "just below the waist area," and a "gold-covered foil package" containing drugs was retrieved from a seam in defendant's long underwear.

The evidence at the suppression hearing established that prospective entrants into the Hall of Justice were warned by postings that "anybody entering the building [was] subject to be[ing] searched," and that, prior to submitting to the security procedures, defendant would have been able to see individuals in line ahead of him passing through the magnetometer and placing their belongings on the X-ray machine. Thus, inasmuch as defendant had notice of the impending security checkpoint and search, we conclude that he relinquished any reasonable expectation of privacy and impliedly consented to the search by seeking entry into the Hall of Justice (*see People v Hurt*, 93 AD3d 617, 617, *lv denied* 19 NY3d 962; *People v Rincon*, 177 AD2d 125, 127, *lv denied* 79 NY2d 1053; *see also People v Price*, 54 NY2d 557, 563).

We further conclude that defendant did not revoke his consent to the search, and that his implied consent was limited neither to the initial scans by the walk-through magnetometer and hand scanner nor to the subsequent pat frisk. " 'The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "objective" reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect' " (*People v Gomez*, 5 NY3d 416, 419, quoting *Florida v Jimeno*, 500 US 248, 251).

Here, defendant was warned before walking through the magnetometers that he could be subject not just to a pat frisk, but to a search. Given a reasonable person's knowledge of the increased security measures in government buildings in the past decade and the notifications posted for entrants into the Hall of Justice, we conclude that a reasonable person would have understood that the impending search could involve more than a pat frisk if the initial magnetometer scans indicated the presence of metal on his or her person (*see Hurt*, 93 AD3d at 617-618; *see generally Gomez*, 5 NY3d at 419). We therefore further conclude that the deputies' search of defendant's person did not exceed the scope of defendant's implied consent.

Defendant's contention that the opening of the foil package, once it was removed from his person, was a separate, improper search incident to an arrest is unpreserved for our review because defendant failed to raise that contention in his omnibus motion or before the suppression court (*see generally People v Turner*, 96 AD3d 1392, 1393, *lv denied* 19 NY3d 1002). In any event, that contention has no merit. As defendant correctly concedes, he was not under arrest when he was taken to the adjacent room. Moreover, inasmuch as defendant impliedly consented to a search of his person and belongings before entering the Hall of Justice, and did not revoke said consent before the deputies

opened the foil package, we conclude that the deputies' opening of the package to check if it contained a small weapon, such as a razor blade, was not improper (*see Hurt*, 93 AD3d at 618; *Rincon*, 177 AD2d at 129).

Finally, inasmuch as the search was lawful, there is no basis for suppressing defendant's subsequent statements to a police investigator as the fruits of an illegal search (*see People v John*, 119 AD3d 709, 710, *lv denied* 24 NY3d 1003; *People v Palmeri*, 272 AD2d 968, 969, *lv denied* 95 NY2d 967).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

399

CA 14-01228

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND SCONIERS, JJ.

KAREN BOYSON, PLAINTIFF-APPELLANT,

V OPINION AND ORDER

IRENE KWASOWSKY, ET AL., DEFENDANTS,
KEMPER INDEPENDENCE INSURANCE COMPANY AND
FARM AND FAMILY CASUALTY INSURANCE CO.,
DEFENDANTS-RESPONDENTS.

DAVID G. GOLDBAS, UTICA, FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KRISTIN L. NORFLEET OF COUNSEL), FOR DEFENDANT-RESPONDENT KEMPER INDEPENDENCE INSURANCE COMPANY.

COSTELLO COONEY & FEARON, PLLC, CAMILLUS (TERANCE V. WALSH OF COUNSEL), FOR DEFENDANT-RESPONDENT FARM AND FAMILY CASUALTY INSURANCE CO.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), dated October 3, 2013. The judgment granted the motion and cross motion of defendants Kemper Independence Insurance Company and Farm and Family Casualty Insurance Co., respectively, for summary judgment dismissing the complaint against those defendants.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the motion and cross motion, and reinstating the complaint to that extent, and judgment is granted in favor of defendants Kemper Independence Insurance Company and Farm and Family Casualty Insurance Co. as follows:

> It is ADJUDGED and DECLARED that plaintiff is not entitled to first-party benefits, additional personal injury protection, or optional basic economic loss under the terms of the policy issued by Kemper Independence Insurance Company to plaintiff and Carl Boyson; and
>
> It is further ADJUDGED and DECLARED that plaintiff is not entitled to first-party benefits under the terms of the automobile insurance policy issued by Farm and Family Casualty Insurance Co. to Irene Kwasowsky;

and as modified the judgment is affirmed without costs.

Opinion by SCONIERS, J.:

At issue on this appeal is whether plaintiff, who was seriously injured in an accident involving a motorcycle and a pickup truck, is entitled to first-party benefits under no-fault automobile insurance policies issued by defendants Kemper Independence Insurance Company (Kemper) and Farm and Family Casualty Insurance Co. (Farm and Family). Resolving that issue requires that we determine whether plaintiff was "occupying" the motorcycle, within the meaning of that term under the insurance policies at issue, when she was injured. In the unique circumstances of this case, we conclude that plaintiff, at the time of her injuries, was "occupying" the motorcycle and is therefore not entitled to first-party benefits under the Kemper and Farm and Family insurance policies.

I.

On April 22, 2011, plaintiff was a passenger on a motorcycle owned and operated by her husband, defendant Carl Boyson (Boyson). They were traveling west on Route 49 in the Town of Vienna when Boyson pulled into the eastbound lane to pass a recreational vehicle. A pickup truck owned by defendant Irene Kwasowsky and operated by defendant Bohdan Kwasowsky was then traveling in the eastbound lane of Route 49 approaching the motorcycle. To avoid a collision with the Kwasowsky pickup truck, Boyson veered to the left and dropped the motorcycle on its side, causing him and plaintiff to come off the motorcycle. The motorcycle collided with the front of the pickup truck, became airborne, and landed on plaintiff.

At the time of the accident, plaintiff and Boyson had two vehicles insured under an automobile insurance policy issued by Kemper, and the Kwasowsky pickup truck was insured under an automobile insurance policy issued by Farm and Family. Plaintiff sought, inter alia, first-party no-fault benefits under each policy. Kemper and Farm and Family denied coverage based upon, inter alia, an identical provision in each policy excluding personal injury protection (no-fault) coverage for "personal injury sustained by . . . [a]ny person while occupying a motorcycle." Both insurance policies define "occupying" to mean "in or upon or entering into or alighting from."

Plaintiff commenced this action against Boyson, the Kwasowskys, Kemper, and Farm and Family. In the second cause of action, plaintiff alleged that she is entitled to first-party benefits under the Kemper policy because she was injured as a pedestrian and is thus an "eligible injured person" pursuant to that policy. In the third cause of action, plaintiff similarly alleged that Farm and Family is obligated to provide her with first-party benefits under its policy because she was injured as a pedestrian. Plaintiff therefore sought, inter alia, judgment declaring that Kemper and Farm and Family must pay first-party benefits to her according to the terms and conditions of the insurance policies at issue, and pursuant to Insurance Law § 5102.

Kemper moved, and Farm and Family cross-moved, for summary

judgment, asserting that there is no coverage for plaintiff under their respective insurance policies. Supreme Court granted the motion and cross motion. The court rejected plaintiff's argument, advanced in opposition to the motion and cross motion, that her status as an occupant of the motorcycle was transformed into that of a pedestrian when she came off the motorcycle as the accident unfolded. Rather, the court concluded that plaintiff remained an occupant of the motorcycle throughout the continuous and nearly instantaneous chain of events that produced her injures. Consequently, the court determined that her injuries were excluded from no-fault coverage under both the Kemper and Farm and Family insurance.

II.

Previously, motorcycle operators and passengers injured in motor vehicle accidents were generally entitled to first-party benefits under the no-fault law. Former section 672 (1) (a) of the Insurance Law provided that those entitled to first-party benefits under the no-fault scheme encompassed "persons, other than occupants of another motor vehicle." That category included motorcyclists on a par with pedestrians (*see Perkins v Merchants Mut. Ins. Co.*, 41 NY2d 394, 396-397). The statute was amended in 1977 to exclude occupants of motorcycles from such benefits (*see* L 1977, ch 892, § 9), thereby terminating the treatment of motorcycle occupants "as pedestrians rather than motorists [who] enjoy the benefits of no-fault at no cost" (Mem of Legislature, 1977 McKinney's Session Laws of NY at 2448). The successor of the amended statute, Insurance Law § 5103 (a) (1), currently provides that, under a policy of insurance issued on an automobile, first-party benefits are available to "[p]ersons, other than occupants of another motor vehicle or *a motorcycle*" (*id.* [emphasis added]; *see Carbone v Visco*, 115 AD2d 948, 948; *Innes v Public Serv. Mut. Ins. Co.*, 106 AD2d 899, 899). The exclusions in the Kemper and Farm and Family insurance policies of "any person while occupying a motorcycle" are consistent with Insurance Law § 5103 (a) (1) and the regulations promulgated thereunder (*see* 11 NYCRR 65-1.1 [d]).

Plaintiff acknowledges that, at the inception of the events that produced her injuries, she was "occupying" the motorcycle within the meaning of those exclusions. She therefore does not seek first-party benefits for all of the injuries she sustained during the incident. In particular, she does not seek such benefits with respect to the injuries she sustained when Boyson veered off the road and dropped the motorcycle, causing her to strike the ground. Instead, plaintiff seeks first-party benefits only for the injuries she sustained after the pickup truck collided with the motorcycle, propelling the latter into the air and causing it to land on her. Plaintiff postulates that there were two distinct accidents, the first occurring when she struck the ground and the second when the motorcycle landed on her. She contends that she was an occupant of the motorcycle only during the first accident and became a pedestrian during the second. Kemper and Farm and Family counter that plaintiff remained an occupant of the motorcycle throughout an unbroken chain of events that constituted a single accident.

III.

Interpretation of the terms "occupant" and "occupying" for purposes of no-fault coverage begins with *Colon v Aetna Cas. & Sur. Co.* (48 NY2d 570). The injured plaintiff in *Colon* had exited his disabled vehicle and was standing on the highway attempting to divert oncoming traffic away from his vehicle when he was struck by a vehicle operated by the defendant's insured. When the accident occurred, the plaintiff was walking six or seven feet behind his vehicle and had been flagging oncoming traffic for approximately 20 minutes (*id.* at 572-573). The Court of Appeals determined that the plaintiff was not an "occupant" of his own vehicle when he was injured, and thus he was not excluded from no-fault coverage under the defendant's policy on the ground that he was "an occupant of another motor vehicle" within the meaning of Insurance Law former § 672 (1) (a) (now § 5103 [a] [1]) (*Colon*, 48 NY2d at 572).

In making that determination, the Court rejected the defendant's contention that, for purposes of the no-fault scheme, the term "occupant" should be interpreted in accordance with the expanded meaning given to the term "occupying" under the Motor Vehicle Accident Indemnification Corporation (MVAIC) Law. Former Insurance Law § 617 (now § 5217) defined "occupying" to mean "in or upon or entering into or alighting from." That expansive definition of "occupying" had been held to encompass situations in which a person is "vehicle oriented" (*Colon*, 48 NY2d at 574). A person may be vehicle oriented with respect to a particular vehicle when not in physical contact with that vehicle, as long as the separation from the vehicle is temporary and brief, and "provided there has been no severance of connection with it" (*Matter of Rice v Allstate Ins. Co.*, 32 NY2d 6, 11; *see State-Wide Ins. Co. v Murdock*, 31 AD2d 978, 979, *affd* 25 NY2d 674; *see also Gallaher v Republic Franklin Ins. Co.*, 70 AD3d 1359, 1360, *lv denied* 14 NY3d 711; *Matter of Travelers Ins. Co. [Youdas]*, 13 AD3d 1044, 1045; *Estate of Cepeda v United States Fid. & Guar. Co.*, 37 AD2d 454, 455).

The Court in *Colon* rejected the more expansive MVAIC definition of "occupying" as meaning vehicle oriented when it interpreted "occupant" for no-fault insurance purposes. The Court concluded that for no-fault insurance purposes, "the word 'occupant' . . . should be ascribed its normal, dictionary meaning" (*id.*, 48 NY2d at 575; *see Matter of General Acc., Fire & Life Ins. Co. v Viruet*, 169 AD2d 608, 609). When he was injured, the plaintiff in *Colon* "was not an 'occupant' of his own car within the ordinary and customary meaning of the term," and thus he was not excluded from first-party no-fault insurance benefits under the defendant's policy (*id.* at 573; *see Matter of General Acc. Fire & Life Assur. Corp. [Avery]*, 88 AD2d 739, 740; *Matter of 20th Century Ins. Co. [Lumbermen's Mut. Cas. Co.]*, 80 AD2d 288, 291).

Notably, the statute currently defines the class of persons entitled to the payment of first-party no-fault insurance benefits using "the unembellished word 'occupant' " (*Colon*, 48 NY2d at 574), but the exclusions at issue in the Kemper and Farm and Family

insurance policies incorporate an expansive definition of "occupying" identical to that of the MVAIC Law: "in or upon or entering into or alighting from" (§ 5217). Arguably, plaintiff was not an "occupant" of the motorcycle within the ordinary and customary meaning of that term when she was lying on the ground and the motorcycle landed on her. The question remains, however, whether plaintiff was "occupying" the motorcycle in the broader sense of being "vehicle oriented" when she was injured.

IV.

Case law in New York does not address the question whether a person in plaintiff's position, who sustains injury after being thrown from a motorcycle, nevertheless continues "occupying" the motorcycle, and authority from other jurisdictions on that question is divided. Courts in other jurisdictions have held that the injured person continued to occupy the motorcycle for no-fault insurance purposes after being thrown from it (*see Dunlap v U.S. Auto. Assn.*, 470 So 2d 98, 100 [Fla Dist Ct App, 1st Dist]; *Farmers Ins. Co. of Washington v Clure*, 41 Wash App 212, 215-217, 702 P2d 1247, 1249-1250; *see also Partridge v Southeastern Fid. Ins. Co.*, 172 Ga App 466, 467, 323 SE2d 676, 677; 9 Couch on Insurance § 125:38 [2014]). Other courts have held that the injured motorcycle operator or passenger ceased occupying the motorcycle after being thrown from it (*see Swarner v Mutual Benefit Group*, 72 A3d 641, 650-651 [Pa Super Ct], *appeal denied* 85 A3d 484; *Miller v Amica Mut. Ins. Co.*, 156 NH 117, 122, 931 A2d 1180, 1184; *Mid-Century Ins. Co. v Henault*, 128 Wash 2d 207, 218, 905 P2d 379, 384; *Professional Affiliates Co., Inc. v Farmers Ins. Group*, 849 P2d 819, 820-821 [Colo Ct App, Div III]; *see also State Farm Mut. Auto. Ins. Co. v Berg*, 70 Or App 410, 416, 689 P2d 959, 963, *appeal denied* 298 Or 553, 695 P2d 49), or that issues of fact existed with respect to the status of the injured person (*see Schmidt v State Farm Mut. Ins. Co.*, 750 So 2d 695, 697 [Fla Dist Ct App, 2d Dist]; *Collins v International Indem. Co.*, 256 Ga. 493, 494, 349 SE2d 697, 698).

In those cases holding that the occupancy of the motorcycle by the injured person had ceased, the facts supported a conclusion that there were two accidents, i.e., the first when the injured person was thrown to the pavement, and the second when that person was struck by another vehicle unconnected to the first accident (*see Swarner*, 72 A3d at 650-651; *Miller*, 156 NH at 122, 931 A2d at 1184; *Mid-Century Ins. Co.*, 128 Wash 2d at 218, 905 P2d at 384; *but see Professional Affiliates Co., Inc.*, 849 P2d at 820-821). Here, however, plaintiff was injured by an impact with the motorcycle she was occupying, immediately following her accidental ejection from it. Her ejection, moreover, was the result of Boyson's attempt to avoid a collision with the very pickup truck that propelled the motorcycle in plaintiff's direction. Given those circumstances, we conclude that there was a single accident and that plaintiff was continuously "occupying" the motorcycle within the meaning of the exclusions of the Kemper and Farm and Family insurance policies. Although plaintiff was briefly separated from the motorcycle during the incident, she remained "vehicle oriented." Her separation from the motorcycle did not

transform her status from an occupant of the motorcycle to a pedestrian during the brief interval between striking the ground and being struck by the motorcycle.

We therefore agree with the court that plaintiff is not entitled to first-party no-fault insurance benefits under the Kemper and Farm and Family insurance policies. We conclude, however, that the court erred in granting Kemper's motion insofar as it sought dismissal of the complaint and Farm and Family's cross motion seeking dismissal of the third cause of action rather than declaring the rights of the parties (*see Pless v Town of Royalton*, 185 AD2d 659, 660, *affd* 81 NY2d 1047). Accordingly, we conclude that the judgment should be modified by denying the motion and cross motion, and reinstating the complaint to that extent, and that judgment should be granted to Kemper and Farm and Family declaring that plaintiff is not entitled to first-party no-fault insurance benefits under either of the insurance policies at issue.

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

402

CA 14-01496

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND SCONIERS, JJ.

JEFFREY P. CARY, INDIVIDUALLY AND AS FATHER OF JOAN CARY, AN INFANT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. CIMINO AND DOMINICK F. CIMINO, DEFENDANTS-APPELLANTS.

MCCABE, COLLINS, MCGEOUGH & FOWLER, LLP, CARLE PLACE (TAMARA M. HARBOLD OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SCHIANO LAW OFFICE, P.C., ROCHESTER (CHARLES A. SCHIANO, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered May 5, 2014. The order, inter alia, granted the motion of plaintiff for a default judgment and denied the motion of defendants to compel plaintiff to accept service of their answer.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, plaintiff's motion is denied, defendants' motion to compel plaintiff to accept service of the answer is granted, and plaintiff is directed to accept service of the answer dated January 17, 2014.

Memorandum: Plaintiff, individually and on behalf of his daughter, commenced this action seeking damages for injuries his daughter sustained in an incident involving a vehicle operated by Michael A. Cimino (defendant) and owned by defendant Dominick F. Cimino. Plaintiff's daughter was standing on the sidewalk selling either cigarettes or marihuana to defendant in the vehicle, and was dragged alongside the vehicle when defendant drove forward during the transaction. Defendant pleaded guilty to reckless assault in the second degree in connection with the incident. As relevant to this appeal, plaintiff moved for a default judgment upon defendants' failure to serve a timely answer, and defendants moved to compel plaintiff to accept service of their answer. We conclude that Supreme Court abused its discretion in granting plaintiff's motion and denying defendants' motion, and we therefore reverse.

We agree with defendants that plaintiff failed to establish his entitlement to a default judgment. Plaintiff's submissions in support of his motion included, inter alia, his own affidavit and the

complaint, but his affidavit did not demonstrate personal knowledge of the incident, and the complaint was not verified. We therefore conclude that plaintiff failed to submit adequate "proof of the facts constituting the claim" (CPLR 3215 [f]; *see Williams v North Shore LIJ Health Sys.*, 119 AD3d 937, 938; *Atlantic Cas. Ins. Co. v RJNJ Servs., Inc.*, 89 AD3d 649, 651; *see generally Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71). We note that the affidavit of plaintiff's daughter, which was submitted with reply papers that also opposed a cross motion by defendants, could not be properly used to remedy the deficiencies in plaintiff's initial submissions (*see Pittsford Plaza Co. LP v TLC W., LLC*, 45 AD3d 1272, 1274; *see also Givan v Makin*, 115 AD3d 1224, 1224; *Juseinoski v Board of Educ. of City of N.Y.*, 15 AD3d 353, 355).

Moreover, even assuming, arguendo, that plaintiff made a prima facie showing of entitlement to a default judgment, we agree with defendants that the court abused its discretion in granting plaintiff's motion and denying their motion. Defendants established a reasonable excuse for their default, which resulted from "the inadvertence of [their] liability insurer" (*Accetta v Simmons*, 108 AD3d 1096, 1097; *see Hayes v Maher & Son*, 303 AD2d 1018, 1018; *Abramovich v Harris*, 227 AD2d 1000, 1000), and further established the existence of a meritorious comparative negligence defense (*see Steve Marchionda & Assoc. v Maximum Express Delivery*, 213 AD2d 1071, 1071-1072; *see also Strychalski v Dailey*, 65 AD3d 546, 547; *Captain v Hamilton*, 178 AD2d 938, 939). "[G]iven the brief overall delay, the promptness with which defendant[s] [responded to plaintiff's motion], the lack of any intention on defendant[s'] part to abandon the action, plaintiff['s] failure to demonstrate any prejudice attributable to the delay, and the preference for resolving disputes on the merits" (*Davidson v Straight Line Contrs., Inc.*, 75 AD3d 1143, 1144-1145), we conclude that defendants have established entitlement to their requested relief.

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

403

CA 14-01427

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND SCONIERS, JJ.

ANNA GRECO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, DEFENDANT,
BUFFALO PLACE, INC. AND MAIN SENECA
CORPORATION, DEFENDANTS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (C. CHRISTOPHER BRIDGE OF COUNSEL), FOR DEFENDANT-APPELLANT MAIN SENECA CORPORATION.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANT-APPELLANT BUFFALO PLACE, INC.

GRECO TRAPP, PLLC, BUFFALO (DUANE D. SCHOONMAKER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered November 12, 2013 in a personal injury action. The order denied the motion and cross motion of defendants Main Seneca Corporation and Buffalo Place, Inc., respectively, for summary judgment dismissing the complaint against them.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when she tripped and fell on the elevated edge of a sidewalk slab in front of a building owned by defendant Main Seneca Corporation (Main Seneca) in downtown Buffalo. Defendant Buffalo Place, Inc. (Buffalo Place) provided management and maintenance services for the area where the sidewalk was located pursuant to an agreement with defendant City of Buffalo (City). Main Seneca moved for summary judgment dismissing the complaint on the ground that the defect was trivial and, thus, nonactionable as a matter of law. Buffalo Place cross-moved for summary judgment dismissing the complaint on that same ground, and on the additional ground that it owed no duty of care to plaintiff because it did not own, occupy, control, or make special use of the property at issue. Supreme Court denied the motion and cross motion, and we affirm.

"[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of

fact for the jury" (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [internal quotation marks omitted]; *see Tesak v Marine Midland Bank*, 254 AD2d 717, 717-718). "[T]here is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable" (*Trincere*, 90 NY2d at 977). Although "in some instances . . . the trivial nature of the defect may loom larger than another element[,] . . . [a] mechanistic disposition of a case based exclusively on the dimension of the [pavement] defect" is inappropriate (*id.* at 977-978). Thus, a determination whether a particular defect is actionable requires examination of "the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury" (*id.* at 978 [internal quotation marks omitted]; *see Tesak*, 254 AD2d at 717-718).

Here, we conclude that Main Seneca and Buffalo Place failed to meet their initial burden of establishing that the defect was trivial and nonactionable as a matter of law, and thus the court properly denied the motion in its entirety and the cross motion to that extent (*see Lupa v City of Oswego*, 117 AD3d 1418, 1419; *Gafter v Buffalo Med. Group, P.C.*, 85 AD3d 1605, 1605-1606; *Cuebas v Buffalo Motor Lodge/Best Value Inn*, 55 AD3d 1361, 1362). The photographs of the alleged defect submitted in support of Main Seneca's motion, and incorporated by reference into Buffalo Place's cross motion, depict between the adjoining sidewalk slabs an abrupt edge that was one-half of an inch to three-quarters of an inch in depth, and which appeared to span a substantial length of the two adjoining slabs (*see Lupa*, 117 AD3d at 1419). In addition, Main Seneca submitted plaintiff's deposition testimony, in which plaintiff testified that her left toe caught on the edge between the sidewalk slabs (*see id.*; *Gafter*, 85 AD3d at 1605-1606; *see also McKenzie v Crossroads Arena*, 291 AD2d 860, 861, *lv dismissed* 98 NY2d 647). Because defendants failed to meet their initial burdens on their respective motion and cross motion, "we need not consider the sufficiency of plaintiff's opposing papers" (*Gafter*, 85 AD3d at 1606; *see Seivert v Kingpin Enters., Inc.*, 55 AD3d 1406, 1407-1408; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

We further conclude that the court properly denied that part of Buffalo Place's cross motion seeking dismissal of the complaint on the ground that it owed no duty of care to plaintiff. "[I]t is well settled that [l]iability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of [the] premises" (*Knight v Realty USA.COM, Inc.*, 96 AD3d 1443, 1444 [internal quotation marks omitted]; *see Clifford v Woodlawn Volunteer Fire Co., Inc.*, 31 AD3d 1102, 1103). "The existence of one or more of these elements is sufficient to give rise to a duty of care[, but w]here none is present, a party cannot be held liable for injury caused by the defective or dangerous condition of the property" (*Knight*, 96 AD3d at 1444 [internal quotation marks omitted]). In support of its cross motion, Buffalo Place offered the affidavit of its manager, who averred that, pursuant to its agreement with the City, Buffalo Place was not responsible for repairs involving "capital

improvements" and that plaintiff's "allegations involved capital improvements." Buffalo Place did not address, however, the issue whether, as part of the management and maintenance duties it assumed from the City, it was responsible for warning pedestrians of any hazards in the area it maintained. Nor did Buffalo Place offer any evidence that the alleged defect in the sidewalk could be made safer only by means of a capital improvement. In opposition to the cross motion, plaintiff submitted the agreement between Buffalo Place and the City which provided, in relevant part, that Buffalo Place would "assum[e] certain responsibilities . . . for the management, maintenance[,] and promotion" of an area of Buffalo's downtown known as Buffalo Place, and that, specifically, it would provide "[c]omprehensive maintenance" for Lafayette Square, the area where plaintiff's fall occurred. We therefore conclude on the record before us that there are issues of fact whether Buffalo Place exercised the requisite level of control over the sidewalk sufficient to hold it liable for the presence of a dangerous condition on the property (*see Mesler v PODD LLC*, 89 AD3d 1533, 1536; *Figueroa v Tso*, 251 AD2d 959, 959; *see also Mollino v Ogden & Clarkson Corp.*, 243 NY 450, 455), and whether the contractual obligation of Buffalo Place to provide "comprehensive maintenance" for the area in question created a duty of care extending to plaintiff (*see Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 588; *see also Cowsert v Macy's E., Inc.*, 79 AD3d 1319, 1319-1320; *Riley v ISS Intl. Serv. Sys.*, 5 AD3d 754, 756-757).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

406

KA 14-00521

PRESENT: SMITH, J.P., VALENTINO, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN ROBINSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered March 7, 2014. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence, and as modified the judgment is affirmed and the matter is remitted to Supreme Court, Monroe County, for resentencing in accordance with the following memorandum: Defendant appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), and convicting him of violating the terms and conditions of his probation. After being placed on probation, defendant was arrested and subsequently arraigned on a new indictment charging him with, inter alia, criminal possession of a weapon in the second degree (§ 265.03 [3]), and criminal possession of marihuana in the fifth degree (§ 221.10 [2]). He was also arraigned on an information for delinquency alleging that he violated the terms of his probation. The information for delinquency alleged that he possessed a loaded weapon and marihuana in November 2013, and that he also violated the terms of his probation because he failed to report, failed to pay a fine and surcharge, and consumed alcoholic beverages and marihuana on several occasions while he was on probation.

Supreme Court conducted a combined *Mapp* and violation of probation hearing and then suppressed the marihuana, handgun and ammunition seized from defendant's house and person in November 2013. The court also concluded, however, that defendant violated the terms of his probation by possessing the contraband that the court suppressed, as well as by violating the other terms of his probation, as alleged in the information for delinquency. The court sentenced

defendant to a determinate term of three years' incarceration plus three years of postrelease supervision.

We agree with defendant that the court erred in using the unconstitutionally seized evidence as a basis upon which to revoke defendant's probationary sentence. The Court of Appeals has "recognized . . . that a probationer loses some privacy expectations and some part of the protections of the Fourth Amendment, but not all of both" (*People v Hale*, 93 NY2d 454, 459), and "that a person on parole, although legally in custody and subject to supervision, is nevertheless constitutionally entitled to protection against unreasonable searches and seizures. A person on probation, subject to similar restraints (*see* CPL 410.50, subds. 1, 2)[,] should be similarly protected" (*People v Jackson*, 46 NY2d 171, 174). Furthermore, with respect to evidence that was illegally seized from a person under a revocable disposition, "the Court of Appeals has applied the New York constitution to suppress such evidence at a parole revocation hearing . . . , and it would seem to follow *a fortiori* that such evidence would not be admissible at a probation violation hearing, which is even closer to a criminal action than a parole violation hearing" (Peter Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 410.70 at 126). Here, the court concluded that the stop and search of defendant and his home were violative of defendant's rights under the Constitutions of New York and the United States. Consequently, the court erred in relying upon the evidence seized as a result of those improper searches to conclude that defendant violated a condition of his probation (*see generally People v Newhirk*, 279 AD2d 535, 535-537).

Nevertheless, defendant does not challenge on appeal the court's further findings that he engaged in other actions that violated his probation, including failing to appear for a probation appointment and consuming alcohol and marihuana, and we thus do not disturb the court's determination that he violated the terms of his probation based on those other actions (*see People v Welch*, 55 AD3d 952, 953). We therefore modify the judgment by vacating the sentence, and we remit the matter to Supreme Court for resentencing based only on those other actions (*see People v Hudson*, 263 AD2d 545, 546; *People v Randolph*, 195 AD2d 699, 699-700; *see generally People v Britton*, 158 AD2d 932, 933, *lv dismissed* 86 NY2d 785).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

419

CAF 13-01774

PRESENT: SMITH, J.P., VALENTINO, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF JESSICA W. VOORHEES,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

GARY I. TALERICO, II,
RESPONDENT-PETITIONER-RESPONDENT.

IN THE MATTER OF JESSICA W. VOORHEES,
PETITIONER-APPELLANT,

V

GARY I. TALERICO, II, RESPONDENT-RESPONDENT.

MARY R. HUMPHREY, NEW HARTFORD, FOR PETITIONER-RESPONDENT-APPELLANT.

JOHN J. RASPANTE, UTICA, FOR RESPONDENT-PETITIONER-RESPONDENT.

JOHN G. KOSLOSKY, ATTORNEY FOR THE CHILD, UTICA.

Appeal from an order of the Family Court, Oneida County (Julia M. Brouillette, R.), entered August 28, 2013 in proceedings pursuant to Family Court Act articles 6 and 8. The order, among other things, awarded respondent-petitioner primary physical custody of the subject child.

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

Memorandum: Petitioner-respondent mother appeals from an order that, inter alia, granted the petition of respondent-petitioner father seeking to modify a prior order of custody by awarding him primary physical custody of the parties' child, and dismissed the mother's family offense petition. We affirm.

Contrary to the mother's contention, we conclude that Family Court properly determined that the father established " 'the requisite change in circumstances to warrant an inquiry into whether the best interests of the child would be served by modifying the existing custody arrangement' " (*Matter of Mercado v Frye*, 104 AD3d 1340, 1341, *lv denied* 21 NY3d 859; *see Matter of York v Zullich*, 89 AD3d 1447, 1448). The father presented evidence establishing that the conditions in the mother's residence were unsanitary and unsafe for the child and

that the child had been exposed to instances of sexual abuse while under the mother's care and supervision (*see Matter of Graves v Stockigt*, 79 AD3d 1170, 1171; *Matter of Laurie II. v Raymond JJ.*, 68 AD3d 1170, 1171). Furthermore, according due deference to the court's assessment of witness credibility (*see Graves*, 79 AD3d at 1171), we conclude that the court's determination to award primary physical custody of the child to the father is supported by a sound and substantial basis in the record (*see Mercado*, 104 AD3d at 1341-1342). We note that the mother's contention that the court erred in continuing joint legal custody of the child is raised for the first time on appeal and thus is not properly before us (*see generally Matter of Murphy v Peace*, 72 AD3d 1626, 1626).

Finally, the court did not err in dismissing the mother's family offense petition and refusing to issue an order of protection. The mother contends for the first time on appeal that the father's actions constituted the offenses of menacing in the third degree and disorderly conduct, and we therefore do not consider that contention (*see generally id.*). We reject the mother's further contention that her petition should have been granted on the ground that the father's actions constituted harassment in the second degree. According due deference to the court's credibility determinations (*see Matter of Shelly RR. v Frank SS.*, 72 AD3d 1426, 1426-1427, *lv denied* 15 NY3d 705), we conclude that the mother failed to establish by a "fair preponderance of the evidence" that the father engaged in acts constituting harassment in the second degree (Family Ct Act § 832; *cf. Matter of Chadwick F. v Hilda G.*, 77 AD3d 1093, 1093-1094, *lv denied* 16 NY3d 703).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

435

KA 13-02108

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARLAND D. BROOKS, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Marianne Furfure, A.J.), rendered October 15, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, and the matter is remitted to Steuben County Court for further proceedings on the indictment.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [3]), defendant contends that the Trial Judge should have recused herself. We conclude that defendant waived that contention, inasmuch as the Judge explained her potential conflict of interest and defendant consented to the Judge's continued involvement after discussing the potential conflict with defense counsel (*see People v Hines [Stephen]*, 260 AD2d 646, 647, *lv denied* 93 NY2d 1019). In any event, we conclude on this record that the Judge did not abuse her discretion in failing to recuse herself (*see generally People v Moreno*, 70 NY2d 403, 405-406; *Hines*, 260 AD2d at 647).

We agree with defendant, however, that his plea should be vacated on the ground that it was not voluntarily, knowingly or intelligently entered based on the mistaken understanding of the legally required sentence shared by County Court and counsel. Although defendant failed to preserve his contention for our review (*see People v Darling*, 125 AD3d 1279, 1279), we conclude that the narrow exception to the preservation requirement applies (*see generally People v Lopez*, 71 NY2d 662, 666). Here, it is clear from the face of the record that the prosecutor incorrectly stated that the sentence on the instant conviction must run consecutively to the sentence imposed on an

unrelated conviction, when in fact that was not the case because the instant offense occurred prior to the unrelated conviction (*see generally* Penal Law § 70.25). It is equally clear that this error was not corrected by defense counsel or the trial court. Thus, preservation was not required "[i]nasmuch as defendant—due to the inaccurate advice of his counsel and the trial court—did not know during the plea . . . proceedings" that consecutive sentences were not required by law (*People v Williams*, 123 AD3d 1376, 1377). " '[D]efendant [could] hardly be expected to move to withdraw his plea on a ground of which he ha[d] no knowledge' " (*People v Peque*, 22 NY3d 168, 182, quoting *People v Louree*, 8 NY3d 541, 546). Even assuming, arguendo, that the narrow exception to the preservation requirement is inapplicable, we would nevertheless exercise our power to address defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

On the merits, we conclude that defendant's plea should be vacated because "[i]t is impossible to have confidence, on a record like this, that defendant had a clear understanding of what he was doing when he entered his plea," based on the prosecutor's erroneous statement that consecutive sentences were required and the failure of the court or defense counsel to correct that error. We "cannot countenance a conviction that seems to be based on complete confusion by all concerned" (*People v Johnson*, 23 NY3d 973, 975-976; *see People v Worden*, 22 NY3d 982, 985; *People v Williams*, 123 AD3d 240, 243-244). Where, as here, "the prosecutor, defense counsel and the court all suffered from the same misunderstanding of the [court's sentencing discretion], it would be unreasonable to conclude that defendant understood it" (*Worden*, 22 NY3d at 985). We therefore reverse the judgment, vacate the plea, and remit the matter to County Court for further proceedings on the indictment. In light of our determination, we do not reach defendant's remaining contention.

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

446

CAF 14-00975

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF DARIO R. PEREZ,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KARIN C. JOHNSON, RESPONDENT-RESPONDENT.

DARIO R. PEREZ, PETITIONER-APPELLANT PRO SE.

WELCH & ZINK, CORNING (COLLEEN G. ZINK OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Steuben County (Marianne Furfure, A.J.), entered October 15, 2013 in a proceeding pursuant to Family Court Act article 4. The order denied petitioner's objection to the order of the Support Magistrate.

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

Memorandum: In this proceeding pursuant to Family Court Act article 4, petitioner father appeals from an order denying his objection to the order of the Support Magistrate that denied his petition for a downward modification of his child support obligation. We affirm. The Support Magistrate's findings are entitled to great deference (*see Matter of Fragola v Alfaro*, 45 AD3d 684, 685), and we conclude that the record supports the determination that the father "failed to demonstrate a substantial change in circumstances that would justify a downward modification of his support obligation because he [did not present sufficient] 'evidence establishing that he diligently sought re-employment commensurate with his former employment' " (*Matter of Greene v Hanson*, 100 AD3d 1558, 1558; *see Matter of Leonardo v Leonardo*, 94 AD3d 1452, 1453, *lv denied* 19 NY3d 807). We have considered the father's remaining contentions and conclude that they are without merit.

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

453

CA 14-02035

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, VALENTINO, AND WHALEN, JJ.

DAWN HARRISON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SAMARITAN MEDICAL CENTER, DEFENDANT-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (DANIEL J. MOORE OF COUNSEL), FOR DEFENDANT-APPELLANT.

ABDELLA LAW OFFICES, GLOVERSVILLE (J. DAVID BURKE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Norman I. Siegel, J.), entered August 19, 2014. The order, insofar as appealed from, denied those parts of defendant's motion seeking to dismiss plaintiff's first, second and fourth causes of action.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of defendant's motion seeking dismissal of the second and fourth causes of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking to recover damages for, inter alia, false arrest and false imprisonment, malicious prosecution, breach of contract, and tortious interference with contract. According to plaintiff, she was arrested, criminally charged, incarcerated, and lost her job as a traveling nurse employed by a staffing agency after employees of defendant hospital falsely accused her of diverting prescription medications. The criminal charges were presented to a grand jury, which returned a "no bill." Defendant made a pre-answer motion to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211 (a) (7) "or, in the alternative, for summary judgment pursuant to CPLR 3212." Supreme Court denied the motion in part, and defendant appeals.

Initially, we agree with plaintiff that defendant's request for summary judgment was premature. As a general matter, " '[a] court may not entertain a motion for summary judgment prior to joinder of issue' " (*Pitts v City of Buffalo*, 298 AD2d 1003, 1004; *see* CPLR 3212 [a]), and here it cannot be said that both parties "deliberately charted a summary judgment course" inasmuch as plaintiff contended in opposition to the motion that she was entitled to an opportunity to conduct discovery (*LMIII Realty, LLC v Gemini Ins. Co.*, 90 AD3d 1520, 1521-1522; *see Pilatich v Town of New Baltimore*, 100 AD3d 1248, 1249-

1250).

We reject defendant's contention that the court erred in denying that part of its motion seeking dismissal of the first cause of action, for false arrest and false imprisonment. "[W]hen reviewing a motion to dismiss pursuant to CPLR 3211, we must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiff[] the benefit of every favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory" (*Williams v Beemiller, Inc.*, 100 AD3d 143, 148, *amended on rearg* 103 AD3d 1191 [internal quotation marks omitted]; *see Leon v Martinez*, 84 NY2d 83, 87-88). Although liability for false arrest and false imprisonment generally will not be imposed where a civilian complainant merely furnishes information to law enforcement authorities rather than taking " 'an active role in the [arrest] of the plaintiff, such as giving advice and encouragement or importuning the authorities to act' . . . with the intent that [the] plaintiff be confined" (*Lowmack v Eckerd Corp.*, 303 AD2d 998, 999; *see Oszustowicz v Admiral Ins. Brokerage Corp.*, 49 AD3d 515, 516), we conclude that the complaint and plaintiff's submissions in opposition to defendant's motion here sufficiently allege that defendant's employees made false statements to investigators with the intent of having plaintiff be arrested and confined (*see D'Amico v Correctional Med. Care, Inc.*, 120 AD3d 956, 961).

We agree with defendant, however, that the court erred in denying those parts of its motion seeking dismissal of plaintiff's second and fourth causes of action, and we therefore modify the order accordingly. With respect to the second cause of action, alleging malicious prosecution, plaintiff did not sufficiently allege that defendant acted with actual malice, i.e., with " 'a wrong or improper motive, something other than a desire to see the ends of justice served' " (*Zetes v Stephens*, 108 AD3d 1014, 1016; *see Nardelli v Stamberg*, 44 NY2d 500, 502-503), or "awareness of conscious falsity" (*Santoro v Town of Smithtown*, 40 AD3d 736, 738 [internal quotation marks omitted]). To the extent that the fourth cause of action alleges breach of contract, the record establishes that plaintiff did not have a contractual relationship with defendant (*see LaBarte v Seneca Resources Corp.*, 285 AD2d 974, 975; *see also Siskin v Cassar*, 122 AD3d 714, 717), and that she was not an intended third-party beneficiary of her employer's contract with defendant (*see Rosenheck v Calcam Assoc.*, 233 AD2d 553, 555; *cf. Logan-Baldwin v L.S.M. Gen. Contrs., Inc.*, 94 AD3d 1466, 1467-1468). To the extent that the fourth cause of action alleges tortious interference with contract, plaintiff did not sufficiently allege that defendant knew of her contract with her employer and intentionally procured her employer's breach thereof (*see Ferrandino & Son, Inc. v Wheaton Bldrs., Inc., LLC*, 82 AD3d 1035, 1036; *see generally Ferraro v Finger Lakes Racing Assn.*, 182 AD2d 1072, 1072).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

456

KA 11-02322

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC F. MCCLOUGH, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered September 20, 2011. The judgment convicted defendant, upon his plea of guilty, of robbery 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 robbery in the second degree (Penal Law § 160.10 [2] [a]). We agree with defendant that the waiver of the right to appeal does not encompass his challenge to the severity of the sentence because "no mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal his conviction" that he was also waiving his right to appeal the severity of the sentence (*People v Pimentel*, 108 AD3d 861, 862, *lv denied* 21 NY3d 1076; *see People v Maracle*, 19 NY3d 925, 928). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

463

KA 13-01457

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SCOTT D. STANLEY, DEFENDANT-APPELLANT.

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered August 1, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted rape in the first degree and rape in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Genesee County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of attempted rape in the first degree (Penal Law §§ 110.00, 130.35 [4]) and rape in the second degree (§ 130.30 [1]), defendant contends that County Court erred in imposing an enhanced sentence based on his alleged violation of the conditions of the court's sentence promise. We conclude that, before imposing an enhanced sentence, the court should have conducted a more in-depth inquiry to determine whether defendant violated the conditions of the sentence promise by failing to answer truthfully questions asked of him by the probation officer who prepared his presentence report (PSR).

By way of background, the indictment alleged in pertinent part that defendant, age 34, had sexual intercourse with two girls who were under the age of 15. After several court appearances, defendant reached an agreement with the People whereby he pleaded guilty to rape in the second degree in satisfaction of the counts of the indictment relating to the older victim, and attempted rape in the first degree in satisfaction of the counts relating to the younger victim. During the plea colloquy, defendant stated under oath that he had sexual intercourse with both victims.

In return for defendant's plea, the court, consistent with the plea agreement, promised to sentence defendant to a determinate term of imprisonment of ten years plus a period of postrelease supervision

for rape in the second degree, and to a lesser concurrent term of imprisonment for attempted rape in the first degree. Prior to accepting defendant's plea, however, the court stated that its sentence promise was conditioned upon defendant, among other things, cooperating with the probation department "in the preparation" of a PSR and truthfully answering any questions asked of him "in that process." "[I]f you fail to keep any of those promises to me," the court advised defendant, "your guilty plea will stand, but the promise of a ten-year cap and the promise of concurrent sentences would be gone."

During his interview with the probation officer assigned to prepare the PSR, defendant admitted that he had sexual intercourse with the older victim. With respect to the younger victim, defendant stated that he attempted to have sexual intercourse with her as well but that, after touching her breasts, he stopped because he could tell from her body language that she did not wish to go further. At the request of the probation officer, defendant went to a sex offender treatment facility to obtain a sex offender evaluation and risk assessment. During his interview with a social worker at the treatment facility, defendant again admitted that he had sexual intercourse with the older victim but initially denied having sexual intercourse with the younger victim. Upon further questioning, however, defendant eventually admitted that he had sexual intercourse with both victims, as he stated during the plea colloquy.

When defendant appeared for sentencing, the prosecutor asked the court to impose the promised sentence. Following an off-the-record conference at the bench, however, the prosecutor asked the court to impose an enhanced sentence of imprisonment of 15 years, contending that defendant violated the conditions of the sentence promise by lying to the probation officer when he said that he merely touched the younger victim's breasts, and lying to the social worker by initially denying that he had sexual intercourse with her. Following a brief adjournment, the court concluded that defendant violated the conditions of the sentence promise by lying to the probation officer and deceiving the officer "into thinking that there was only one victim of serious sexual intrusion and not two." The court sentenced defendant to consecutive determinate terms of imprisonment amounting to 22 years, plus a period of postrelease supervision.

As a preliminary matter, we note that, although defendant effected a valid waiver of the right to appeal, a "general waiver of the right to appeal does not foreclose review of the defendant's contention that his [postplea] conduct did not warrant an enhanced sentence" (*People v Patterson*, 106 AD3d 757, 757, *lv denied* 21 NY3d 1018; *see People v Faulkner*, 54 AD3d 1134, 1135, *lv denied* 11 NY3d 854). Moreover, with respect to preservation, because the court was "aware of, and expressly decided, the [issue] raised on appeal" (*People v Collins*, 106 AD3d 1544, 1546, *lv denied* 21 NY3d 1072 [internal quotation marks omitted]; *see People v Hawkins*, 11 NY3d 484, 493), we conclude that defendant's challenge to the court's imposition of the enhanced sentence is properly before us notwithstanding defense counsel's failure to object to the enhanced sentence.

With respect to the merits, "[i]t is well established that the violation of an explicit and objective . . . condition[of a sentence promise] that was accepted by the defendant can result in the imposition of an enhanced sentence" (*People v Becker*, 80 AD3d 795, 796; *see People v Hicks*, 98 NY2d 185, 189). In addition, "a failure to abide by a condition of a [sentence promise] to truthfully answer questions asked by the probation department is an appropriate basis for the enhancement of the defendant's sentence" (*Patterson*, 106 AD3d at 757; *see Hicks*, 98 NY2d at 189; *People v Mazyck*, 117 AD3d 1084, 1085, *lv denied* 23 NY3d 1064).

Here, the court did not find that defendant lied during his interview with the social worker who prepared the sex offender evaluation and risk assessment instrument. Thus, even assuming, arguendo, that defendant's statements to the social worker constitute a violation of the conditions of the court's sentence promise, as the People contend, the court did not decide that issue adversely to defendant, and we cannot therefore affirm on that basis (*see People v Concepcion*, 17 NY3d 192, 197-198; *People v LaFontaine*, 92 NY2d 470, 474, *rearg denied* 93 NY2d 849).

As noted, the court imposed an enhanced sentence based solely on its determination that defendant "lied to the probation officer" during the PSR interview, presumably by telling the officer about an incident in which he touched the younger victim's breasts but did not have sexual intercourse with her. With respect to that issue, we conclude that it cannot be determined from a review of record, including the PSR, whether defendant failed to answer truthfully questions asked of him by the probation officer, as the court found. Defendant's admission of one incident in which he touched the younger victim's breasts but stopped short of having sexual intercourse with her does not preclude the fact that there may have been a separate incident in which he had sexual intercourse with her. The PSR does not indicate whether the probation officer specifically asked defendant whether he had sexual intercourse with the younger victim, and it is therefore unclear whether defendant violated the condition of the sentence promise that he answer such questions truthfully. In the absence of evidence of an untruthful answer to a question asked by the probation officer, we conclude that the court erred in imposing an enhanced sentence. We therefore hold the case, reserve decision and remit the matter to County Court for a hearing to determine whether there is such evidence.

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

471

CAF 14-00140

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

IN THE MATTER OF CHARLES E. WILSON, SR.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DARCIE M. HAYWARD, RESPONDENT-RESPONDENT.
(PROCEEDING NO. 1.)

IN THE MATTER OF DARCIE M. HAYWARD,
PETITIONER-RESPONDENT,

V

CHARLES E. WILSON, SR., RESPONDENT-APPELLANT.
(PROCEEDING NO. 2.)

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

ASHLEY N. LYON, ATTORNEY FOR THE CHILDREN, ADAMS.

Appeal from an order of the Family Court, Jefferson County (Diana D. Trahan, R.), entered December 27, 2013 in proceedings pursuant to Family Court Act article 6. The order, among other things, adjudged that the custody of the subject children shall remain with Darcie M. Hayward.

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

Memorandum: Petitioner-respondent father Charles Wilson, Sr., is the father of the four subject children, and respondent-petitioner Darcie M. Hayward is a friend of the father's family. In 2008, during a neglect proceeding against the father with respect to the four subject children, the father asked Hayward to take custody of the children. Hayward then petitioned for custody of the children, and Family Court issued an order pursuant to Family Court Act article 6 that, inter alia, granted Hayward's petition and awarded custody of the children to Hayward, with visitation to the father. Upon the father's consent, the court also issued an order pursuant to Family Court Act article 10 that contained a finding that the father had neglected the children and, inter alia, placed the father under the supervision of Jefferson County Department of Social Services (DSS) and ordered the father's visitation with the children to be

supervised. In 2013, the father filed a petition seeking to modify the prior custody order by awarding him custody of the children. Hayward filed a cross petition seeking to modify the prior custody order by, inter alia, reducing the hours and frequency of the father's supervised visitation with the children. After a hearing, the Referee, inter alia, awarded custody of the children to Hayward and set forth a schedule for the father's supervised visitation with the children. We affirm.

The father contends that there is a conflict between the prior order awarding custody to Hayward pursuant to Family Court Act article 6 and the prior order containing a finding of neglect pursuant to Family Court Act article 10. That contention is raised for the first time on appeal and thus is not preserved for our review (*see Matter of York v Zullich*, 89 AD3d 1447, 1448).

The father contends that Hayward failed to meet her burden of proving that extraordinary circumstances exist to warrant Hayward's continued custody of the children. We reject that contention. It is well settled that, "as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of 'surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances' " (*Matter of Gary G. v Roslyn P.*, 248 AD2d 980, 981, quoting *Matter of Bennett v Jeffreys*, 40 NY2d 543, 544; *see Matter of Campbell v January*, 114 AD3d 1176, 1176, *lv denied* 23 NY3d 902). "The nonparent has the burden of establishing that extraordinary circumstances exist even where, as here, 'the prior order granting custody of the child[ren] to [the] nonparent[] was made upon consent of the parties' " (*Matter of Howard v McLoughlin*, 64 AD3d 1147, 1147; *see Matter of Ruggieri v Bryan*, 23 AD3d 991, 992). Here, the record establishes that, in July 2008, the father voluntarily surrendered the children to Hayward, that in 2009 the father petitioned to regain custody of the children but the petition was dismissed for failure to prosecute, and that the father made no further efforts to regain custody of the children until April 2013, when he filed the instant petition. While the children were in Hayward's custody, the father sporadically attended visitation with the children and, when he did so, behaved inappropriately. Moreover, during his testimony at a hearing on the petition and cross petition, the father admitted that he did not know the children's birth dates, ages, or grade levels at school. We therefore agree with the court that Hayward met her burden of proving that extraordinary circumstances were present here (*see Matter of Komenda v Dininny*, 115 AD3d 1349, 1350; *Campbell*, 114 AD3d at 1176-1177; *Ruggieri*, 23 AD3d at 992).

We reject the father's related contention that he was not required to demonstrate a change in circumstances to warrant an inquiry into the best interests of the children. Where, as here, the prior order granting custody of the children to a nonparent was made upon the consent of the parties and the nonparent has met his or her burden of demonstrating that extraordinary circumstances exist, the

burden shifts to the parent "to demonstrate a change in circumstances to warrant an inquiry into the best interests of the children on the issue of custody" (*Matter of McNeil v Deering*, 120 AD3d 1581, 1582, *lv denied* 24 NY3d 911; *see generally Howard*, 64 AD3d at 1148). Contrary to his contention, the father failed to demonstrate a change in circumstances (*see generally McNeil*, 120 AD3d at 1582-1583; *Matter of Rosso v Gerouw-Rosso*, 79 AD3d 1726, 1727).

Finally, even assuming, arguendo, that the father demonstrated a change in circumstances to warrant an inquiry into the best interests of the children, we conclude that the record establishes that "[Hayward] is more fit to care for the child[ren], and the continuity and stability of the existing custodial arrangement is in the child[ren's] best interests" (*Rosso*, 79 AD3d at 1727).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

474

CA 14-02046

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

JON J. CHARLES, AN INFANT, BY HIS PARENTS
JAMES CHARLES AND ROBERTA CHARLES,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

VILLAGE OF MOHAWK, A MUNICIPAL CORPORATION
EXISTING PURSUANT TO LAWS OF STATE OF NEW YORK,
HERKIMER COUNTY, DEFENDANT-APPELLANT.

MURPHY, BURNS, BARBER & MURPHY, LLP, ALBANY, CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER, UNIONDALE (CHRISTINE GASSER OF COUNSEL), FOR DEFENDANT-APPELLANT.

GEORGE FARBER ANEY, HERKIMER (JESSE B. BALDWIN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Erin P. Gall, J.), entered May 21, 2014. The order, among other things, denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained in a cemetery owned and maintained by defendant. While playing in the cemetery, which was open to the public, plaintiff, then age 7, climbed on to a cantilever gate at one of the cemetery's entrances and began "riding" the rolling gate as it was being pushed by his cousin and her friend. Plaintiff failed to remove his hands from the top rail of the gate as he approached the gate's rollers, and his fingers were injured as they passed through the rollers. The complaint alleged, inter alia, that defendant was negligent in failing to secure the gate so as prevent it from being "ridden" by children. Supreme Court denied defendant's motion for summary judgment dismissing the complaint, and we affirm.

"It is beyond dispute that landowners . . . have a duty to maintain their properties in [a] reasonably safe condition" (*Di Ponzio v Riordan*, 89 NY2d 578, 582). "Consistent with that duty, the degree of care to be exercised must take into account the known 'propensity' of children 'to roam and climb and play' " (*Leone v City of Utica*, 66 AD2d 463, 466, *affd* 49 NY2d 811, quoting *Collentine v City of New*

York, 279 NY 119, 125). Indeed, "New York State courts have recognized 'the special propensities of children and the prevailing social policy of protecting them from harm' . . . and have not deprived them of a right to compensation for injuries caused by the negligence of third parties . . . solely on account of their misuse of an instrument found on the defendant's premises" (*Cruz v New York City Tr. Auth.*, 136 AD2d 196, 201). "What accidents are reasonably foreseeable, and what preventive measures should reasonably be taken, are ordinarily questions of fact" (*Diven v Village of Hastings-On-Hudson*, 156 AD2d 538, 539).

Here, although we agree with defendant "that there is nothing inherently dangerous about a gate that has no lock" (*Ortiz v New York City Hous. Auth.*, 85 AD3d 573, 574), defendant's own submissions raise triable issues of fact whether it was foreseeable that children such as plaintiff would misuse the gate in the manner giving rise to the accident. Defendant's former superintendent of cemeteries testified at his deposition that, although it "was not a typical occurrence," children sometimes played in the cemetery and, when that occurred, he would ask them to leave. Defendant also submitted the deposition testimony of plaintiff's cousins, who testified that they had played in the cemetery on prior occasions. "[A]t least once it is known that children commonly play around . . . an artificial structure [such as the gate], their 'well-known propensities . . . to climb about and play' . . . create a duty of care on the part of a landowner to prevent foreseeable risks of harm that might arise out of those activities" (*Holtslander v Whalen & Sons*, 126 AD2d 917, 919 [Levine, J., concurring in part and dissenting in part], *mod on concurring in part and dissenting in part mem below*, 70 NY2d 962).

Given that, "as a matter of law, ['riding' a gate] is not such an 'extraordinary' form of play as to break the causal connection between the dangerous condition . . . and plaintiff's injuries," we conclude that there is a triable issue of fact whether "[i]t was a natural and foreseeable consequence of defendant's failure to effectively secure the [gate] against access that young children would play [on it]," thereby resulting in injury (*Roberts v New York City Hous. Auth.*, 257 AD2d 550, 550, *lv denied* 93 NY2d 811).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

484

KA 11-02604

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HADJI S. HILL, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered October 20, 2011. The judgment convicted defendant, upon his plea of guilty, of manslaughter 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 guilty plea, of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that County Court erred in accepting his plea. According to defendant, his plea was not knowingly and voluntarily entered because the court failed to advise him that justification was a defense to manslaughter in the first degree. We reject that contention.

When defendant was initially charged with murder in the second degree for stabbing his uncle to death, he pleaded guilty to manslaughter in the first degree in return for a sentence promise of 15 years in prison. Although we affirmed the judgment of conviction (*People v Hill*, 66 AD3d 1471), the Court of Appeals reversed our order and vacated the plea because "defendant denied that he intended to cause serious physical injury to his uncle, thus negating the intent element of first-degree manslaughter" (*People v Hill*, 16 NY3d 811, 814). Upon remittal, the case proceeded to a jury trial, during which defendant again pleaded guilty to manslaughter in the first degree, but this time with a sentence promise of 12 years. During the plea colloquy, the court advised defendant that, by pleading guilty, he would be waiving the justification defense he asserted at trial with respect to the murder charge. The court later imposed the promised sentence, and defendant did not move to withdraw his plea or to vacate the judgment of conviction. Contrary to defendant's contention, the

court was not obligated to inform him prior to the plea that justification is also a defense to manslaughter in the first degree, and that he was waiving such defense by pleading guilty.

Defendant failed to preserve for our review his contention that the plea was not knowingly or voluntarily entered (*see People v Darling*, 125 AD3d 1279, 1279), and we conclude that this case does not fall within the narrow preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666), such that the court had a duty to inquire further into the voluntariness of the plea (*see Darling*, 125 AD3d at 1279). " '[W]hen a criminal defendant waives the fundamental right to trial by jury and pleads guilty, due process requires that the waiver be knowing, voluntary and intelligent' " (*People v Mox*, 20 NY3d 936, 938, quoting *People v Hill*, 9 NY3d 189, 191, *cert denied* 553 US 1048). Although "no catechism is required in connection with the acceptance of a plea" (*People v Goldstein*, 12 NY3d 295, 301), it is well settled that, "where the defendant's recitation of the facts underlying the crime pleaded to clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea, . . . the trial court has a duty to inquire further to ensure that defendant's guilty plea is knowing and voluntary" (*Lopez*, 71 NY2d at 666).

Here, defendant did not suggest during his plea colloquy that he acted in self-defense when he stabbed the victim, nor did he otherwise say anything that cast doubt upon his guilt or called into question the voluntariness of the plea (*cf. Mox*, 20 NY3d at 938-939; *People v Dukes*, 120 AD3d 1597, 1598-1599). Thus, the court was not required to inquire further of defendant to ensure that his plea was knowingly and voluntarily entered. Although it is true, as defendant points out, that defense counsel raised the justification defense in his opening statement during the jury trial that ended with the plea, defendant cites no authority for the proposition that a court must conduct a *Lopez* inquiry with respect to all possible defenses regardless of whether they are referenced by the defendant during the plea colloquy.

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

488

KA 14-00678

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN WISNIEWSKI, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

STEVEN WISNIEWSKI, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered April 13, 2011. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the third degree and offering a false instrument for filing in the first degree.

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

Same memorandum as in *People v Wisniewski* ([appeal No. 2] ___ AD3d ___ [May 8, 2015]).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

489

KA 14-00679

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN WISNIEWSKI, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

STEVEN WISNIEWSKI, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JODI A. DANZIG OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered April 13, 2011. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of grand larceny in the third degree (Penal Law former § 155.35) and offering a false instrument for filing in the first degree (former § 175.35). In appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of grand larceny in the second degree (§ 155.40 [1]). At the outset, we conclude with respect to both appeals that defendant knowingly, voluntarily and intelligently waived his right to appeal, and that waiver encompasses his challenge to the severity of the sentences (*see People v Lopez*, 6 NY3d 248, 255-256).

Although defendant's challenges to the voluntariness of his pleas in each appeal survive his valid waiver of the right to appeal (*see People v Gimenez*, 59 AD3d 1088, 1088-1089, *lv denied* 12 NY3d 816), the contention in his main brief that his pleas were rendered involuntary by an alleged misstatement by Supreme Court concerning the maximum

legal sentence for grand larceny in the third degree is not preserved for our review because he did not move to withdraw the pleas or to vacate the judgments of conviction on that ground (*see People v Halsey*, 108 AD3d 1123, 1124). We conclude in any event that the court "did not misinform him of the sentencing range to which he was exposed" (*People v Bloom*, 96 AD3d 1406, 1406, *lv denied* 19 NY3d 1024). The further contention in defendant's pro se supplemental brief that the pleas were coerced by the conduct of the court "is belied by [his] responses to [the court's] questions during the plea colloquy" (*Gimenez*, 59 AD3d at 1089; *see People v Montgomery*, 63 AD3d 1635, 1636, *lv denied* 13 NY3d 798).

We agree with defendant that the court did not validly order him to pay restitution at sentencing in connection with his guilty plea in appeal No. 2, although it is clear from the record that the court and the parties intended that defendant would be ordered to pay restitution, and that the court's failure to do so at sentencing was a mere oversight. Indeed, defendant's victims sought restitution in their victim impact statement and, thus, "in the absence of a finding that the interests of justice dictated otherwise, [the court] was required to order restitution as a part of the sentence" (*People v Johnson*, 208 AD2d 1175, 1176, *lv denied* 85 NY2d 910; *see* Penal Law § 60.27 [1]). We therefore modify the judgment in appeal No. 2 by vacating the sentence, and we remit the matter to Supreme Court for resentencing that will include restitution (*see generally People v Sparber*, 10 NY3d 457, 471-472).

We have considered the remaining contention raised in defendant's pro se supplemental brief with respect to both appeals and conclude that it is without merit.

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

490

KA 02-00049

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES KENDRICK, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (WILLIAM G. PIXLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES KENDRICK, DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), rendered February 1, 2001. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [1]), defendant contends that Supreme Court erred in determining that he lacked standing to challenge the legality of the police search of a vehicle in which a large quantity of cocaine was found. Although the People correctly concede that the court erred in determining that defendant lacked standing to contest the search, they nevertheless contend that the error is harmless. We reject the People's contention. As a general rule, the harmless error doctrine "cannot be used to uphold a guilty plea that is entered after the improper denial of a suppression motion" (*People v Wells*, 21 NY3d 716, 717-718). An improper suppression ruling may be upheld only if there is no "reasonable possibility that the error contributed to the plea" (*People v Grant*, 45 NY2d 366, 379).

Here, we conclude that there is a reasonable possibility that the court's incorrect ruling on standing contributed to defendant's decision to plead guilty. Defendant was charged with, among other offenses, two counts of criminal possession of a controlled substance in the first degree, a class A-I felony, both of which carried a maximum sentence of 25 years to life. One of the class A-1 felony counts related to cocaine that was the subject of defendant's

suppression motion. After the court denied defendant's motion without a hearing based on lack of standing, defendant pleaded guilty to one count of criminal possession of a controlled substance in the second degree in return for a sentence promise of six years to life. There is a reasonable possibility that, had the court granted defendant a suppression hearing and then granted the motion, defendant would not have pleaded guilty.

We therefore hold the case, reserve decision and remit the matter to Supreme Court for a suppression hearing (*see People v Glover*, 46 AD3d 362, 362).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

491

KA 11-00315

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARLO J. BLOCKER, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered July 9, 2010. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the first degree, criminal possession of a controlled substance in the third degree and operating a motor vehicle without stop lamps.

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 first degree (Penal Law § 220.21 [1]), criminal possession of a controlled substance in the third degree (§ 220.16 [1]) and operating a motor vehicle without stop lamps (Vehicle and Traffic Law § 375 [40] [b]). Contrary to defendant's contention, County Court did not abuse its discretion in denying his request for an adverse inference instruction concerning the People's failure to preserve the motor vehicle that was driven by defendant at the time of his arrest (*see generally People v Perkins*, 124 AD3d 915, 915-916). The record establishes that, at the time of defendant's arrest, the vehicle was towed to an impound lot but was not held by the police as evidence. The record further establishes that defendant was the registered owner of the vehicle, and thus that defendant or his authorized representative could have picked up the vehicle from the impound lot at any time. The vehicle, however, went unclaimed and was sold at auction approximately three weeks after defendant was indicted and two weeks after he appeared with counsel at his arraignment on the indictment. We therefore conclude that defendant was not entitled to an adverse inference instruction because the record establishes that defendant had the opportunity to recover the vehicle and inspect it before it was sold at auction (*cf. People v Handy*, 20 NY3d 663, 669;

People v John, 288 AD2d 848, 849, *lv denied* 97 NY2d 705).

We reject defendant's contention that trial counsel was ineffective for failing to move to reopen the suppression hearing (*see generally People v Baldi*, 54 NY2d 137, 147). "Inasmuch as a motion to reopen the suppression hearing would not have been successful, defendant was not denied effective assistance of counsel when his . . . attorney did not make such a motion" (*People v Crespo*, 117 AD3d 1538, 1539, *lv denied* 23 NY3d 1035; *see People v Carver*, 124 AD3d 1276, 1278-1279).

Contrary to defendant's contention, the court properly exercised its discretion in allowing the prosecutor to introduce evidence that defendant was arrested pursuant to an outstanding warrant inasmuch as "police credibility was [a] central issue in the case [and] this background material was necessary to complete the narrative of events leading to defendant's arrest and to explain the actions of the police" (*People v Childs*, 8 AD3d 116, 116, *lv denied* 3 NY3d 672; *see generally People v Brown*, 277 AD2d 974, 974, *lv denied* 96 NY2d 756). Finally, we reject defendant's further contention that the court abused its discretion in denying defendant's request at sentencing for substitution of counsel (*see People v Porto*, 16 NY3d 93, 100-101).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

493

CAF 14-00119

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

IN THE MATTER OF SCOTT J. LAMAY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KIMBERLY R. STAVES, RESPONDENT-APPELLANT.

IN THE MATTER OF KIMBERLY R. STAVES,
PETITIONER-APPELLANT,

V

SCOTT J. LAMAY, RESPONDENT-RESPONDENT.

DAVIS LAW OFFICE PLLC, OSWEGO (STEPHANIE N. DAVIS OF COUNSEL), FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

LINDA M. CAMPBELL, SYRACUSE, FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

LAURA ESTELA CARDONA, ATTORNEY FOR THE CHILD, SYRACUSE.

Appeal from an order of the Family Court, Oswego County (Bobette J. Morin, R.), entered August 9, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded Scott J. LaMay sole legal and primary physical custody of the subject child.

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

Memorandum: Petitioner-respondent father commenced this proceeding pursuant to article 6 of the Family Court Act, seeking custody of the subject child, and respondent-petitioner mother filed, among other pleadings, a competing custody petition. The mother appeals from an order that, inter alia, awarded sole legal and primary physical custody of the subject child to the father, granted the mother final decision-making authority over medical determinations if the parties are unable to agree, and set a visitation schedule that divided the parties' parenting time into specified blocks of time.

We reject the mother's contention that Family Court erred in its custody determination. The parties presented diametrically opposing testimony concerning each other's parenting skills, drug use,

employment, and acts of domestic violence, and each testified in a derogatory manner regarding the other. After hearing the testimony and reviewing the evidence, the court concluded, inter alia, that both parties' testimony was "partisan to a fault, unconvincing, lacking in credibility, and significantly devoid of many details," but further concluded that the father was the more stable parent and that the mother was likely to undermine the subject child's relationship with the father. "It is well settled . . . that [a] concerted effort by one parent to interfere with the other parent's contact with the child is so inimical to the best interests of the child . . . as to, per se, raise a strong probability that [the interfering parent] is unfit to act as custodial parent" (*Matter of Marino v Marino*, 90 AD3d 1694, 1695 [internal quotation marks omitted]; *see Matter of Howell v Lovell*, 103 AD3d 1229, 1231). Inasmuch as no other factor strongly favors either party, and the court's custody determination, which is "based upon [its] first-hand assessment of the credibility of the witnesses," has a sound and substantial basis in the record, we conclude that it should not be disturbed (*Matter of Bryan K.B. v Destiny S.B.*, 43 AD3d 1448, 1449 [internal quotation marks omitted]).

Contrary to the mother's further contention, the court fully considered the impact of the evidence concerning acts of domestic violence by both parties in making its determination (*see* Domestic Relations Law § 240 [1] [a]). Indeed, the court concluded that both parties engaged in "egregious domestic violence," and we agree with the court that the best interests of the child are served by awarding custody to the father notwithstanding his actions (*see Matter of Booth v Booth*, 8 AD3d 1104, 1105, *lv denied* 3 NY3d 607).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

494

CAF 13-01776

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

IN THE MATTER OF ALLYSON A. MILLS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JOEL T. RIEMAN, RESPONDENT-RESPONDENT.

IN THE MATTER OF JOEL T. RIEMAN,
PETITIONER-RESPONDENT,

V

ALLYSON A. MILLS, RESPONDENT-APPELLANT.

BOUVIER PARTNERSHIP, LLP, BUFFALO (EMILIO COLAIACOVO OF COUNSEL), FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

GLEICHENHAUS, MARCHESE & WEISHAAR, P.C., BUFFALO (CHARLES J. MARCHESE OF COUNSEL), FOR RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT.

MINDY L. MARRANCA, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Rosalie Bailey, J.), entered September 13, 2013 in a proceeding pursuant to Family Court Act article 6. The order granted Joel T. Rieman sole custody of the subject child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, and the matter is remitted to Family Court, Erie County, for further proceedings in accordance with the following memorandum: In this custody proceeding pursuant to Family Court Act article 6, petitioner-respondent mother appeals from an order that modified a prior order by granting sole legal custody of the parties' daughter to respondent-petitioner father. We agree with the mother that "Family Court's determination with respect to custody lacks a sound and substantial basis in the record" (*Matter of Thurston v Skellington*, 89 AD3d 1520, 1520; *see Matter of Bryan K.B. v Destiny S.B.*, 43 AD3d 1448, 1449).

"[A] custody determination should be made only after a full and fair hearing at which the record is fully developed" (*Matter of Peek v Peek*, 79 AD3d 753, 754; *see Barnes v Barnes*, 234 AD2d 959, 959). Here, the court made its determination following a hearing at which, apart from an in camera interview of the child, the mother was the

sole witness. Although the record contains sufficient evidence to establish that "[t]he relationship of the parties had deteriorated to such an extent that [the existing joint custody arrangement] was no longer feasible" (*Matter of Thayer v Ennis*, 292 AD2d 824, 825; *see Matter of York v Zullich*, 89 AD3d 1447, 1448), it "does not contain sufficient evidence supporting the award of sole legal custody to [the father]" (*Matter of David A.A. v Maryann A.*, 41 AD3d 1300, 1300; *see Matter of Williams v Williams*, 35 AD3d 1098, 1099-1100; *cf. Matter of Tin Tin v Thar Kyi*, 92 AD3d 1293, 1293, *lv denied* 19 NY3d 802). Indeed, inasmuch as the mother's testimony raised significant questions about the father's parental fitness and the father did not present any evidence, "we conclude that the [father] failed to establish that it was in the best interests of the child to award sole custody to [him]" (*Matter of Gelster v Burns*, 122 AD3d 1294, 1295, *lv denied* 24 NY3d 915).

Moreover, the court failed to make any findings concerning the factors that must be considered in making a best interests determination (*see Matter of Avdic v Avdic*, 125 AD3d 1534, 1536), and we conclude that "the record is insufficient for us to make an independent determination in this regard" (*Matter of Martin v Mills*, 94 AD3d 1364, 1366; *see Matter of Bradbury v Monaghan*, 77 AD3d 1424, 1425; *Matter of Amato v Amato*, 51 AD3d 1123, 1124). We therefore reverse the order and remit the matter to Family Court for a new hearing focusing on the best interests of the child (*see Bradbury*, 77 AD3d at 1424).

Contrary to the mother's further contention, we conclude that the court properly denied her motion to remove the Attorney for the Child (AFC) (*see Matter of Linda S. v Westchester County Dept. of Social Servs.*, 63 AD3d 1164, 1164-1165, *lv dismissed in part and denied in part* 13 NY3d 825; *see also Matter of Leichter-Kessler v Kessler*, 71 AD3d 1148, 1149). The record establishes that "the AFC properly advocated for the wishes of [her] client" (*Matter of Swinson v Dobson*, 101 AD3d 1686, 1687-1688, *lv denied* 20 NY3d 862).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

495

CA 14-01451

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

SHNEIKA M. ROBERTS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ELVIRA A. NORTHINGTON AND JETUANA MOODY,
DEFENDANTS-APPELLANTS.

LAW OFFICE OF JOHN WALLACE, ROCHESTER (ALYSON CULLITON OF COUNSEL), FOR DEFENDANT-APPELLANT ELVIRA A. NORTHINGTON.

ADAMS, HANSON, REGO, KAPLAN & FISHBEIN, WILLIAMSVILLE (NICOLE PALMERTON OF COUNSEL), FOR DEFENDANT-APPELLANT JETUANA MOODY.

FRANK S. FALZONE, BUFFALO (LOUIS ROSADO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (John M. Curran, J.), entered January 31, 2014. The order granted the motion of plaintiff to vacate orders of dismissal and reinstated the action.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the motion is denied.

Memorandum: In this negligence action arising from a motor vehicle accident, defendants appeal from an order granting plaintiff's motion pursuant to CPLR 5015 to vacate the orders dismissing the action based on plaintiff's failure to serve a complaint within 20 days of defendants' demand pursuant to CPLR 3012 (b). "To avoid dismissal for failure to timely serve a complaint after a demand for the complaint has been made pursuant to CPLR 3012 (b), a plaintiff must demonstrate both a reasonable excuse for the delay in serving the complaint and a meritorious cause of action" (*Berges v Pfizer, Inc.*, 108 AD3d 1118, 1119 [internal quotation marks omitted]). We agree with defendants that Supreme Court abused its discretion in granting plaintiff's motion because plaintiff failed to establish that she has a meritorious cause of action, i.e., she failed to submit an "affidavit of merit containing evidentiary facts sufficient to establish a prima facie case" (*Kel Mgt. Corp. v Rogers & Wells*, 64 NY2d 904, 905), or a verified complaint (*see McIntosh v Genesee Val. Laser Ctr.*, 121 AD3d 1560, 1561). Here, in support of her motion, plaintiff submitted only the affirmation of her attorney, who has no personal knowledge of the relevant facts, and plaintiff thus failed to meet her burden (*see Oversby v Linde Div. of Union Carbide Corp.*, 121

AD2d 373, 373). Although plaintiff thereafter submitted a verified complaint, she improperly did so for the first time in her reply papers (*see generally James C. v Cintron*, 126 AD3d 464, 464; *Jackson-Cutler v Long*, 2 AD3d 590, 590). We conclude that "[p]laintiff['s] failure to demonstrate the merit of [the cause of action] in response to the CPLR 3012 (b) motion . . . compels the unconditional dismissal of [the] action . . . , and it [was] reversible error for the court to hold otherwise" (*McIntosh*, 121 AD3d at 1561-1562 [internal quotation marks omitted]).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

498

CA 14-01753

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

WILMONT WOOD, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID GIORDANO, DEFENDANT-APPELLANT,
AND GERALD BREEN, III, DEFENDANT-RESPONDENT.

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP, WHITE PLAINS (JEREMY BUCHALSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

ATHARI & ASSOCIATES, LLC, NEW HARTFORD (MO ATHARI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), rendered December 6, 2013. The order, inter alia, denied the motion of defendant David Giordano for summary judgment.

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

Memorandum: Plaintiff's mother commenced this action seeking damages for injuries that plaintiff allegedly sustained as a result of ingesting lead paint while living in, inter alia, an apartment owned by David Giordano (defendant). Plaintiff was substituted as a party upon attaining majority. Defendant thereafter moved for summary judgment dismissing the complaint and cross claims against him, and plaintiff cross-moved for partial summary judgment on liability against both defendants. Supreme Court denied the motion and cross motion, and defendant appeals.

Initially, we note that defendant did not establish his entitlement to summary judgment with respect to one of the two causes of action against him, i.e., the cause of action for negligent abatement of the lead-based paint hazard, inasmuch as he failed to address that cause of action in support of his motion and, indeed, he has not addressed it on appeal (*see generally Ronan v Northrup*, 245 AD2d 1119, 1119). Thus, the court properly denied defendant's motion with respect to that cause of action.

We conclude that the court properly denied defendant's motion with respect to the remaining cause of action, for negligently allowing a dangerous lead paint condition to exist on the premises. In order "[t]o establish that a landlord is liable for a lead-paint condition, a plaintiff must demonstrate that the landlord had actual

or constructive notice of, and a reasonable opportunity to remedy, the hazardous condition" (*Rodriguez v Trakansook*, 67 AD3d 768, 768-769; *see Hamilton v Picardo*, 118 AD3d 1260, 1261, *lv denied* 24 NY3d 904). Where, as here, there is no evidence that the landlord had actual notice of the existence of a hazardous lead paint condition, plaintiff may establish that defendant had constructive notice of such condition by demonstrating that the landlord "(1) retained a right of entry to the premises and assumed a duty to make repairs, (2) knew that the apartment was constructed at a time before lead-based interior paint was banned, (3) was aware that paint was peeling on the premises, (4) knew of the hazards of lead-based paint to young children and (5) knew that a young child lived in the apartment" (*Chapman v Silber*, 97 NY2d 9, 15). Defendant conceded that he was aware that a young child lived in the subject premises, and we conclude that he failed to meet his burden on the four remaining *Chapman* factors (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). Even assuming, arguendo, that defendant met his initial burden with respect to those four factors, we conclude that plaintiff raised issues of fact with respect to them (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

500

CA 14-01816

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

JOHN ARD AND PATRICIA ARD, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

THOMPSON & JOHNSON EQUIPMENT CO., INC., TOTALL ATTACHMENTS, INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE, KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (MAURICE L. SYKES OF COUNSEL), FOR DEFENDANT-APPELLANT THOMPSON & JOHNSON EQUIPMENT CO., INC.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (CORY J. WEBER OF COUNSEL), FOR DEFENDANT-APPELLANT TOTALL ATTACHMENTS, INC.

DOLCE PANEPINTO, P.C., BUFFALO (STEPHEN C. HALPERN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered February 5, 2014. The order, among other things, denied the motions of defendants Thompson & Johnson Equipment Co., Inc., and Totall Attachments, Inc., for summary judgment.

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

Memorandum: Plaintiffs commenced this negligence and strict products liability action seeking damages for injuries sustained by John Ard (plaintiff) when a roll of paper weighing approximately 3,000-pounds fell on his foot. Prior to the accident, plaintiff was transporting the paper roll on a pallet truck in his employer's facility. Defendant Thompson & Johnson Equipment Co., Inc. (Thompson) was the dealer/distributor of the pallet truck, which had been modified by defendant Totall Attachments, Inc. (Totall) to include a "roll cradle" to carry the large paper rolls. The paper roll fell off the roll cradle, allegedly because of a defect in the pallet truck as modified with the roll cradle. Plaintiff enlisted the assistance of a coworker to lift the roll upright with a forklift, the roll slipped off the forks of the forklift, and the roll ultimately came to rest on plaintiff's foot, resulting in injuries that required the amputation of plaintiff's lower leg.

Following discovery, Thompson moved for summary judgment

dismissing the complaint against it, and Totall likewise moved for summary judgment dismissing the amended complaint against it. Those defendants (hereafter, defendants) contended that any defect in the pallet truck and roll cradle they provided to plaintiff's employer was not a proximate cause of plaintiff's accident, but merely "furnished the occasion" for the accident, and that in any event the actions of plaintiff and his coworkers were a superseding cause of his injuries. Supreme Court denied the motions, and we affirm.

"As a general rule, the question of proximate cause is to be decided by the finder of fact, aided by appropriate instructions" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 312, *rearg denied* 52 NY2d 784). Where the cause of an accident is "within the class of foreseeable hazards that [a] duty exists to prevent, the [defendant] may be held liable, even though the harm may have been brought about in an unexpected way" (*Di Ponzio v Riordan*, 89 NY2d 578, 584). We conclude that the hazard that caused plaintiff's injury, i.e., the movement of the roll while it was being placed back in an upright position, was "within the class of foreseeable hazards" associated with a roll falling off the allegedly defective pallet truck (*id.*), and thus a jury "could rationally [find] that . . . there was a causal connection between [defendants' alleged] negligence and plaintiff's injuries" (*McMorrow v Trimper*, 149 AD2d 971, 972, *affd for the reasons stated* 74 NY2d 830, 832). We thus reject the contention of defendants that the falling roll merely "furnished the occasion" for plaintiff's accident.

We also reject the contention of defendants that the actions of plaintiff and his coworkers in attempting to upright the roll were a superseding cause of plaintiff's injuries. "An intervening act may not serve as a superseding cause, and relieve an actor of responsibility, where the risk of the intervening act is the very same risk which renders the actor negligent" (*Derdiarian*, 51 NY2d at 316). As noted above, the risk of the roll falling while being uprighted is the same risk underlying plaintiffs' allegations of negligence, and we conclude that the actions of plaintiff and his coworkers were not "of such an extraordinary nature" as to relieve defendants of liability (*Kush v City of Buffalo*, 59 NY2d 26, 33; *see Baker v Sportservice Corp.*, 142 AD2d 991, 993).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

501

CA 14-01155

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

GINGER KURTZ, AS PARENT AND NATURAL GUARDIAN OF
SAMANTHA MANDARINO, AN INFANT,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOHN J. POIRIER, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

ROBERT E. LAHM, PLLC, SYRACUSE (JOEL FEROLETO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARTH SULLIVAN BEHR, SYRACUSE (LAURENCE D. BEHR OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (James P. Murphy, J.), entered February 19, 2014. 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 negligence action seeking damages for injuries sustained by her daughter when she was struck by a motor vehicle operated by defendant while walking to school. Contrary to plaintiff's contention, Supreme Court properly denied her motion to set aside the jury verdict in favor of defendant as against the weight of the evidence. It is well established that " '[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' " (*Sauter v Calabretta*, 103 AD3d 1220, 1220). Here, there was a fair interpretation of the evidence supporting the jury's determination that defendant was not negligent. Plaintiff's daughter testified that she never saw defendant's motor vehicle before it struck her, and defendant testified he was traveling below the speed limit and that plaintiff's daughter entered the unmarked crosswalk only five or six feet in front of his vehicle. He testified that he "slammed on [his] brakes and [sounded his] horn," and he noted that "[i]t was so quick [he] couldn't do anything." Plaintiff's expert testified on cross-examination that he had "no idea how far away [plaintiff's daughter] was when she stepped in front of [defendant's] car" but, assuming that the distance was five feet, defendant would not have been able to stop

in time to avoid hitting plaintiff's daughter. Moreover, the reporting police officer testified that defendant was not a contributing cause of the accident and that the accident was caused by "pedestrian error." We therefore agree with defendant that the court properly denied plaintiff's motion.

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

502

CA 14-01685

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

GINGER KURTZ, AS PARENT AND NATURAL GUARDIAN OF
SAMANTHA MANDARINO, AN INFANT,
PLAINTIFF-APPELLANT,

V ORDER

JOHN J. POIRIER, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

ROBERT E. LAHM, PLLC, SYRACUSE (JOEL FEROLETO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARTH SULLIVAN BEHR, SYRACUSE (LAURENCE D. BEHR OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered April 10, 2014. The order denied the motion of plaintiff to set aside a jury verdict and upheld and affirmed the verdict of no cause of action.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435; *see also* CPLR 5501 [a] [1], [2]).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

504

CA 14-01456

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

SUSAN E. ROSE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KIM A. LEBERTH, DEFENDANT-RESPONDENT.

BRENNA, BRENNA & BOYCE, PLLC, ROCHESTER (ROBERT L. BRENNA, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

OSBORN, REED & BURKE, LLP, ROCHESTER (MICHAEL A. REDDY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered May 5, 2014. 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 commenced this action seeking damages for injuries she sustained when the motor vehicle she was operating collided with a vehicle operated by defendant on Mt. Hope Avenue in the City of Rochester. At the time of the accident, plaintiff was attempting to make a left-hand turn out of a parking lot onto Mt. Hope Avenue. She was waiting for a UPS truck to make a left-hand turn from the roadway into the parking lot and, as the UPS truck turned into the parking lot, plaintiff exited the parking lot onto Mt. Hope Avenue and collided with defendant's vehicle, which, unseen by plaintiff, was coming from plaintiff's left.

We conclude that Supreme Court properly granted defendant's motion for summary judgment dismissing the complaint. "It is well settled that a driver 'who has the right[-]of[-]way is entitled to anticipate that [the drivers of] other vehicles will obey the traffic laws that require them to yield' " (*Lescenski v Williams*, 90 AD3d 1705, 1705, *lv denied* 18 NY3d 811). Because plaintiff was entering the roadway from a parking lot, she was required to yield the right-of-way to defendant's vehicle regardless of whether it was in the curb lane, as defendant testified at her deposition, or in the center turn lane, as plaintiff asserts (*see* Vehicle and Traffic Law § 1143; *Van Doren v Dressler*, 45 AD3d 1366, 1366-1367). Moreover, in support of her motion, defendant established that she was traveling at or below the posted speed limit and did not otherwise negligently operate her vehicle. Defendant thus met her initial burden on the motion "by

establishing as a matter of law ‘that the sole proximate cause of the accident was [plaintiff’s] failure to yield’ ” the right-of-way to her (*Guadagno v Norward*, 43 AD3d 1432, 1433), and in response plaintiff failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Plaintiff’s contention that defendant violated Vehicle and Traffic Law § 1126 is raised for the first time on appeal and therefore is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

507

KA 14-00327

PRESENT: CENTRA, J.P., CARNI, SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROGER BEAVER, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN C. MINISTERO OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered April 17, 2013. The judgment convicted defendant, upon his plea of guilty, of failure to register as a sex offender.

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 failure to register as a sex offender, a class E felony (Correction Law §§ 168-f [4]; 168-t), defendant contends that the waiver of the right to appeal is not valid and challenges the severity of the sentence. We agree with defendant that the waiver of the right to appeal is invalid because the perfunctory inquiry made by Supreme Court was "insufficient to establish that the court 'engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Brown*, 296 AD2d 860, 860, *lv denied* 98 NY2d 767; *see People v Hamilton*, 49 AD3d 1163, 1164). Although defendant signed a written waiver of the right to appeal, the court failed to inquire on the record whether defendant understood the waiver and knew that he was waiving the right to challenge the length of his sentence (*see People v Bradshaw*, 18 NY3d 257, 264-265; *People v Carno*, 101 AD3d 1663, 1664, *lv denied* 20 NY3d 1060). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

535

KA 12-00840

PRESENT: SCUDDER, P.J., SMITH, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARIO CLARK, DEFENDANT-APPELLANT.

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

MARIO CLARK, DEFENDANT-APPELLANT PRO SE.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JAMES P. MAXWELL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered February 24, 2012. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree (two counts) and robbery in the third degree (two counts) and upon a plea of guilty, of burglary in the second degree and robbery 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 two counts each of burglary in the second degree (Penal Law § 140.25 [2]) and robbery in the third degree (§ 160.05) and convicting him upon his plea of guilty of one count each of burglary in the second degree (§ 140.25 [2]) and robbery in the third degree (§ 160.05). Contrary to defendant's contention in his main brief, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We further reject defendant's contention in his main brief that Supreme Court erred in refusing to sever the counts of the indictment relating to a burglary and robbery that occurred in May 2011 from those counts relating to a burglary and robbery that occurred in February 2011. "Where counts of an indictment are properly joined because 'either proof of the first offense would be material and admissible as evidence in chief upon a trial of the second, or proof of the second would be material and admissible as evidence in chief upon a trial of the first' (CPL 200.20 [2] [b]), . . . the trial court has no discretion to sever counts pursuant to CPL 200.20 (3)" (*People v*

Griffin, 111 AD3d 1413, 1414, *lv denied* 23 NY3d 1037; *see People v Webb*, 60 AD3d 1291, 1293, *lv denied* 12 NY3d 930). Here, the evidence from one incident was admissible to establish defendant's intent with respect to the other (*see People v Griffin*, 147 AD2d 897, 897, *lv denied* 73 NY2d 977; *see generally People v Garcia*, 278 AD2d 147, 147, *lv denied* 96 NY2d 759). We therefore conclude that the offenses were properly joined pursuant to CPL 200.20 (2) (b), "and thus the court lacked statutory authority to grant" the request for severance (*People v Murphy*, 28 AD3d 1096, 1097, *lv denied* 7 NY3d 759; *see Griffin*, 111 AD3d at 1414).

Contrary to defendant's contention in his main and pro se supplemental briefs, he was not denied his right to be present at a material stage of trial based on the fact that he was not present when the court and the attorneys prepared a response to a note from the jury requesting the read-back of trial testimony. Defendant's "right to be present during a read-back of testimony to the jury . . . did not include the right of defendant to be present at a colloquy between his attorney and the Trial [Justice] which took place outside the jury's presence and involved only the sufficiency of the read-back" (*People v Rodriguez*, 76 NY2d 918, 921; *see People v Afrika*, 13 AD3d 1218, 1222, *lv denied* 4 NY3d 827). Contrary to defendant's further contention in his main brief, the sentence is not unduly harsh or severe.

Defendant's remaining contentions are raised in his pro se supplemental brief, and none has merit. We reject his contention that the People were required to move to consolidate the charges related to the February 2011 incident with the charges related to the May 2011 incident. Inasmuch as, as previously noted herein, the offenses were initially properly joined in a single indictment pursuant to CPL 200.20 (2) (b), the statutory requirements concerning the consolidation of multiple indictments are not applicable here (*see generally* CPL 200.20 [4]; *People v Lane*, 56 NY2d 1, 7).

Defendant further contends that the grand jury proceedings were defective because the prosecutor presented the grand jury with evidence of criminal conduct that was not alleged in the felony complaint. We reject that contention. It is well settled that "[t]he offense or offenses for which a grand jury may indict a person in any particular case are not limited to that or those which may have been designated, at the commencement of the grand jury proceeding, to be the subject of the inquiry" (CPL 190.65 [2]). Contrary to defendant's further contention, the grand jury proceedings were not rendered defective when defendant sought to exercise his statutory right to appear after a true bill had been voted but before the indictment had been filed, and the prosecutor reopened the proceedings before the same grand jury to allow defendant's testimony. "If the [g]rand [j]ury has voted favorably on the charges, the District Attorney is at liberty to resubmit the matter to the same [g]rand [j]ury, without the necessity of recalling witnesses who have previously testified" (*People v Cade*, 74 NY2d 410, 415; *see People v Young*, 138 AD2d 764, 764-765, *lv denied* 72 NY2d 868). We likewise reject defendant's contention that during his grand jury testimony the prosecutor

violated defendant's privilege against self-incrimination. "By waiving the right to immunity, a testifying defendant before the [g]rand [j]ury necessarily gives up the Fifth Amendment privilege against self-incrimination" (*People v Smith*, 87 NY2d 715, 719). Finally, defendant received adequate notice of the grand jury proceedings, inasmuch as "the notice provisions of CPL 190.50 (5) do not obligate the People to provide notice of separate charges presented to a grand jury which are not included in a pending felony complaint" (*People v Thomas*, 27 AD3d 292, 293, *lv denied* 6 NY3d 898; *see People v McNamara*, 99 AD3d 1248, 1249, *lv denied* 21 NY3d 913; *People v Knight*, 1 AD3d 379, 380, *lv denied* 1 NY3d 630).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

539

KA 12-00552

PRESENT: SCUDDER, P.J., SMITH, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HARVERT STEPHENS, ALSO KNOWN AS HAVERT STEPHENS, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JAMES P. MAXWELL OF COUNSEL), FOR RESPONDENT.

ROBERT P. STAMEY, CORPORATION COUNSEL, SYRACUSE (ANN MAGNARELLI ALEXANDER OF COUNSEL), FOR CITY OF SYRACUSE, AMICUS CURIAE.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered October 26, 2011. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fifth degree and sound reproduction.

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 controlled substance in the third degree (Penal Law § 220.16 [1]), criminal possession of a controlled substance in the fifth degree (§ 220.06 [5]), and sound reproduction under the Syracuse Noise Control Ordinance (Revised General Ordinances of City of Syracuse § 40-16 [b] [hereafter, City Ordinance]). On August 24, 2010, defendant's vehicle was stopped by the police because his vehicle's stereo was allegedly operating at an extremely loud volume. As a result of the traffic stop, the police recovered an amount of crack cocaine from defendant's vehicle.

Defendant contends that the judgment should be reversed because the City Ordinance is unconstitutionally vague, specifically concerning its definition of "unnecessary noise," and the police did not have probable cause to stop his vehicle. We reject defendant's contention that the City Ordinance is unconstitutionally vague. Section 40-16 (b), the subdivision under which defendant was convicted, provides that "[n]o person shall operate, play or permit

the operation or playing of any . . . device which produces, reproduces or amplifies sound . . . [i]n such a manner as to create *unnecessary noise* at fifty (50) feet from such device, when operated in or on a motor vehicle on a public highway" (emphasis added). The term "unnecessary noise" is defined in section 40-3 (u) of the City Ordinance as "any excessive or unusually loud sound or any sound which either annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of a reasonable person of normal sensibilities." The City Ordinance also provides a nonexclusive list of 11 standards to consider in determining whether noise is unnecessary (*see id.*).

Municipal ordinances "enjoy 'an exceedingly strong presumption of constitutionality' " (*Cimato Bros. v Town of Pendleton*, 270 AD2d 879, 879, *lv denied* 95 NY2d 757, quoting *Lighthouse Shores v Town of Islip*, 41 NY2d 7, 11), and such legislative enactments "are to be construed so as to avoid constitutional issues if such a construction is fairly possible" (*FGL & L Prop. Corp. v City of Rye*, 66 NY2d 111, 120; *see* McKinney's Cons Laws of NY, Book 1, Statutes § 150). "The void-for-vagueness doctrine embodies a 'rough idea of fairness' " (*Quintard Assoc. v New York State Liq. Auth.*, 57 AD2d 462, 465, *lv denied* 42 NY2d 805, *appeal dismissed* 42 NY2d 973, quoting *Colten v Kentucky*, 407 US 104, 110), and "an impermissibly vague ordinance is a violation of the due process of law" (*Matter of Turner v Municipal Code Violations Bur. of City of Rochester*, 122 AD3d 1376, 1377; *see People v Stuart*, 100 NY2d 412, 419). In addressing such a challenge, courts first "must determine whether the statute in question is sufficiently definite to give a person of ordinary intelligence fair notice that his [or her] contemplated conduct is forbidden by the statute" (*Stuart*, 100 NY2d at 420 [internal quotation marks omitted]). "Second, the court must determine whether the enactment provides officials with clear standards for enforcement" (*id.*; *see People v New York Trap Rock Corp.*, 57 NY2d 371, 378-379).

Defendant contends that the City Ordinance is unconstitutionally vague because it is similar to a different ordinance voided by the Court of Appeals in *New York Trap Rock Corp.* We reject defendant's contention. The ordinance here, unlike that in *New York Trap Rock Corp.*, defines "unnecessary noise" with reference to an objective standard of reasonableness rather than a subjective standard, and thus it is not unconstitutionally vague on that ground (*see People v Bakolas*, 59 NY2d 51, 53-55). Specifically, it defines "unnecessary noise" as noise that would offend "a reasonable person of normal sensibilities" (City Ordinance § 40-3 [u]). The ordinance at issue in *New York Trap Rock Corp.*, however, contained a subjective standard, which defined "unnecessary noise" as that which offends "a person" (*see id.* at 375). The subjective standard essentially permitted a conviction to "rest solely upon the 'malice or animosity of a cantankerous neighbor' . . . or 'boiling point of a particular person[,]' . . . situations which are the product, not only of imprecise standards, but of no standard at all" (*id.* at 380). There is no such constitutional infirmity in the City Ordinance at issue here.

We further conclude that the City Ordinance is not unconstitutionally vague because the section under which defendant was convicted was tailored to a specific context—the creation of "unnecessary noise" beyond 50 feet of a motor vehicle on a public highway (City Ordinance § 40-16 [b]). In our view, "[w]hat is usual noise in the operation of a car [radio or other sound production device] has become common knowledge . . . and any ordinary motorist should have no difficulty in ascertaining" whether the noise in question violates the applicable standard (*People v Byron*, 17 NY2d 64, 67; *see People v Frie*, 169 Misc 2d 407, 410). Based on the foregoing, we conclude that the ordinance in question was "sufficiently definite" to put defendant on notice that his conduct was forbidden, and that it provided the police "with clear standards for enforcement" (*Stuart*, 100 NY2d at 420).

Defendant's First Amendment challenge to the City Ordinance is unpreserved for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to address that challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Furthermore, we conclude that defense counsel's failure to make a First Amendment argument before the trial court did not constitute ineffective assistance inasmuch as that " 'argument . . . ha[d] little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152, quoting *People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702; *see People v Bradberry*, 68 AD3d 1688, 1691, *lv denied* 14 NY3d 838).

Finally, contrary to defendant's contention, we conclude that there was ample evidence to support the court's determination that the police had probable cause to initiate the traffic stop on the ground that defendant violated the City Ordinance (*see generally People v Robinson*, 97 NY2d 341, 349-350).

Frances E. Cafarell

Entered: May 8, 2015

Clerk of the Court

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

540

KA 11-00941

PRESENT: SCUDDER, P.J., SMITH, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONNIE R. WALKER, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered February 22, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]), defendant contends that he was unlawfully searched after a traffic stop in the City of Rochester. Specifically, defendant contends that the police officer's pat-down search was not justified based either on safety concerns or on the odor of unburned marihuana. We reject that contention, inasmuch as we conclude that it was justified based on the odor of unburned marihuana. "[I]t is well established 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, *lv denied* 22 NY3d 1087). Here, the police officers testified regarding their training on the identification of marihuana and, on appeal, defendant does not challenge their training but instead challenges only their credibility. We discern no basis to disturb the court's credibility assessments of the officers 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). Furthermore, the court did not abuse its discretion in curtailing defense counsel's cross-examination of the officers because defense counsel's attempts to establish certain "contradictions in time" were

not relevant to the suppression issues before the court (*see generally People v Colvin*, 112 AD3d 1348, 1348-1349, *lv denied* 22 NY3d 1155; *People v Agostini*, 84 AD3d 1716, 1717, *lv denied* 17 NY3d 857; *People v Rutley*, 57 AD3d 1497, 1497, *lv denied* 12 NY3d 821). Thus, the officers had probable cause to search defendant (*see Cuffie*, 109 AD3d at 1201; *see also People v Virges*, 118 AD3d 1445, 1445-1446; *People v Contant*, 90 AD3d 779, 780, *lv denied* 18 NY3d 956). Defendant's reliance on *People v Howington* (96 AD3d 1440, 1441), a People's appeal, is misplaced because in that case we merely upheld the suppression court's credibility determination that the officer could not have detected the odor of unburned marihuana. Here, we uphold the court's credibility determination otherwise.

Contrary to defendant's final contention, he is not entitled to a new hearing. His assertion that the court erred in prohibiting him from establishing that the subject stop was pretextual is without merit because "a traffic stop is lawful where, as here, a police officer has probable cause to believe that the driver of an automobile has committed a traffic violation, . . . [regardless of] the primary motivation of the officer" (*Cuffie*, 109 AD3d at 1201 [internal quotation marks omitted]; *see People v Daniels*, 117 AD3d 1573, 1574).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

545

CAF 14-01596

PRESENT: SCUDDER, P.J., SMITH, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF CARSON W.

OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-APPELLANT; MEMORANDUM AND ORDER

JAMIE G. AND RYAN W., RESPONDENTS-RESPONDENTS.

NELSON LAW FIRM, MEXICO (LESLEY GERMANOW SCHMIDT OF COUNSEL), FOR PETITIONER-APPELLANT.

LINDA M. CAMPBELL, SYRACUSE, FOR RESPONDENT-RESPONDENT JAMIE G.

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (COURTNEY S. RADICK OF COUNSEL), FOR RESPONDENT-RESPONDENT RYAN W.

Appeal from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered August 27, 2014 in a proceeding pursuant to Family Court Act article 10. The order returned the subject child to the custody of respondents.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Oswego County, for further proceedings in accordance with the following memorandum: Petitioner appeals from an order pursuant to Family Court Act § 1089, following a permanency hearing, which returned the subject child, Carson W., to the care and custody of respondents. This Court granted petitioner's motion, supported by the Attorney for the Child (AFC), staying the order pending appeal. We conclude that Family Court's determination that "there is no evidence that Carson will face the possibility of future neglect or abuse while in [respondents'] care" is not supported by a sound and substantial basis in the record (*see generally Matter of Hayley PP. [Christal PP.—Cindy QQ.]*, 77 AD3d 1133, 1134, *lv denied* 15 NY3d 716). Instead, we conclude that, although respondents have completed certain counseling and parenting services, the record establishes that no progress has been made to " 'overcome the specific problems which led to the removal of the child' " (*Matter of Kasja YY. [Karin B.]*, 69 AD3d 1258, 1259, *lv denied* 14 NY3d 711).

Petitioner commenced this Family Court Act article 10 proceeding on November 26, 2013, alleging that two-month-old Carson and 14-month-old Makynzie G. were severely abused children. The amended petition alleged that, while in the care of respondent father, Makynzie suffered a hypoxic brain injury, which was fatal. With respect to

Carson, the amended petition alleged that a full skeletal bone scan revealed that he had a spiral fracture of the upper left arm. Following testimony of witnesses at a fact-finding hearing, which is not included in this record as per the order settling the record on appeal, respondents each admitted that Makynzie "suffered from a non-accidental death" and that Carson sustained a broken arm in their care, for which they have "no reasonable explanation." At the time of their admissions on June 2, 2014, the preliminary autopsy report indicated that Makynzie's death was the result of hypoxic-ischemic encephalopathy after cardiac arrest, but the cause of the cardiac arrest and the manner of death were "undetermined." Based upon respondents' admissions, the children were determined to be abused children and Carson was ultimately placed in the home of his paternal grandmother, who supervised extensive daily visitation between respondents and Carson. Pursuant to the dispositional order entered July 2, 2014, respondents were required to participate in parent educator services, individual counseling, and a psychosocial assessment. It is undisputed that, at the time of the permanency hearing on July 23, 2014, respondents had completed the ordered services. Petitioner's report indicated that the permanency goal was "reunite with parents" and that discharge from placement within the next six months was not anticipated. The report indicated that, in order for respondents to be reunited with Carson, they must be able "to verbalize responsibility in Carson's injury." We note that, at the initial appearance for the permanency hearing, the court encouraged petitioner to begin unsupervised visits, including overnight visits, between the then-10-month-old child and respondents, but petitioner refused to do so before a hearing was conducted.

At the hearing, the children's treating pediatrician testified that he examined Carson after Makynzie's death and that, although the physical examination was normal, X rays revealed a "non-accidental, a traumatic [spiral] fracture of his left humerus," i.e., his upper arm. The pediatrician referred Carson to a pediatric orthopedist who determined that the spiral fracture occurred 2 to 3 weeks before the X ray was taken, when Carson was approximately 1½ months old. The pediatrician denied that the fracture could have occurred during the birth process, which is the explanation for the fracture that respondents provided as part of the psychosocial assessment. The court refused to permit the pediatrician to testify, as not relevant, to the contents of the amended autopsy report, which determined that the cause of Makynzie's death was "hypoxic ischemic encephalopathy due to smothering." The court stated, "We have admissions by both parents that the child died" and that Carson sustained "an unexplained injury. . . . [W]e're here to plan for Carson's future. Not retry the case." The court, however, permitted the caseworker to testify that the amended autopsy report changed the cause of death from "undetermined" to "homicide," which the amended autopsy report states is "defined in medical terms as death at the hands of another," due to smothering.

We agree with petitioner that the court erred in refusing to admit in evidence the amended autopsy report and the records of the pediatric orthopedist. Although those uncertified records constitute hearsay evidence, evidence that is material and relevant is admissible

at a permanency hearing (*see* Family Ct Act § 1046 [c]; *Matter of Laelani B.*, 59 AD3d 880, 882; *cf.* § 1046 [b] [iii]), and we conclude that the evidence is material and relevant. We note that this Court has reviewed those records inasmuch as they are included in the record on appeal as part of petitioner's motion to stay the order.

The caseworker testified that respondents had failed to take responsibility for the injuries sustained by their children, and thus petitioner sought to continue the placement with the paternal grandmother. In response to that testimony, the court stated, "They're never going to be able to . . . They've admitted that they have unexplained injuries. That's the extent that they can admit to." The court asked respondents if they would "insure that [the] child is safe," and each respondent replied "yes." The caseworker explained that it was difficult to recommend further services because, although respondents made an admission in court, they each stated to her that "the only reason why they made the admission is because their attorneys told them to do it." The court asked respondents whether their respective statements at the time of the admission were true and respondents replied that their statements were true. The caseworker further testified that respondents both denied that they knew what happened to either child and the father stated that he did not know why he made "those statements" to the police regarding Makynzie's death.

The court determined that all services had been completed, no further services were recommended, and there was "no evidence that Carson will face the possibility of future neglect or abuse while in [respondents'] care. And there is no testimony that [petitioner] could provide any additional services that would mitigate any possibility of same." The court thus determined that the goal of "return to parent" has been achieved.

We agree with petitioner that, "in accordance with the best interests and safety of the child, including whether the child would be at risk of abuse or neglect if returned to [respondents]," placement should continue with a fit and willing relative pending further order of the court following a permanency hearing (Family Ct Act § 1089 [d]). "Despite an otherwise good relationship between respondent[s] and [their] child[], [their] inability to acknowledge [his and/or her] previous behavior supports the conclusion that [they have] a faulty understanding of the duties of parenthood sufficient to infer an ongoing danger to the subject child" (*Matter of Keith H.*, 113 AD3d 555, 556, *lv denied* 23 NY3d 902). The record establishes that, while in respondents' care, 14-month-old Makynzie died as a result of smothering, that two-month-old Carson sustained a non-accidental, traumatic spiral fracture, and that the court lacked sufficient information to determine who caused the death and the fracture (*cf. Matter of Kadiatou*, 52 AD3d 388, 390, *lv denied* 12 NY3d 701). Although respondents complied with court-ordered services, "[w]ithout explaining the circumstances which led to [Makynzie's death and Carson's fracture, respondents] cannot effectively address the underlying parenting problems" (*Matter of Haylee RR.*, 47 AD3d 1093, 1095). We conclude that respondents' willingness to "vaguely . . .

accept[] responsibility" for Makynzie's death and Carson's injury is not sufficient to support a determination that Carson's best interests are served by returning him to the care and custody of respondents (*id.*). We therefore reverse the order and remit the matter to Family Court for further permanency proceedings before a different judge.

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

546

CA 14-01820

PRESENT: SCUDDER, P.J., SMITH, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

LEANNE J. WAGNER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WATERMAN ESTATES, LLC AND TIMOTHY WATERMAN,
DEFENDANTS-APPELLANTS.

WATERMAN ESTATES, LLC AND TIMOTHY WATERMAN,
THIRD-PARTY PLAINTIFFS-APPELLANTS,

V

JEFFREY WAGNER, THIRD-PARTY DEFENDANT-RESPONDENT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (JEFFREY F. BAASE OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND THIRD-PARTY PLAINTIFFS-APPELLANTS.

THE BALLOW LAW FIRM, P.C., WILLIAMSVILLE (THOMAS J. GRILLO, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

BURGIO, KITA, CURVIN & BANKER, BUFFALO (WILLIAM J. KITA OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered May 27, 2014. The order denied the motion of defendants-third-party plaintiffs for summary judgment dismissing the complaint and granted the motion of third-party defendant for summary judgment dismissing the third-party complaint.

It is hereby ORDERED that said appeal by defendant Timothy Waterman from the order insofar as it granted third-party defendant's motion is unanimously dismissed and the order is modified on the law by granting defendants' motion in part and dismissing the complaint against defendant Timothy Waterman, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained on March 3, 2010 when a portion of a concrete step crumbled when she stepped on it, causing her to fall. The single-family home where the incident occurred was owned by defendant-third-party plaintiff Waterman Estates, LLC (Estates) and leased by plaintiff's husband, third-party defendant. Defendant-third-party plaintiff, Timothy Waterman (Waterman), is the sole member

and employee of Estates. Defendants moved for summary judgment dismissing the complaint, and third-party defendant sought summary judgment dismissing the third-party-complaint, for contractual and common-law indemnification.

We agree with defendants that Supreme Court erred in denying that part of their motion for summary judgment dismissing the complaint against Waterman, and we therefore modify the order accordingly. "The 'commission of a tort' doctrine permits personal liability to be imposed on a corporate officer for misfeasance or malfeasance, i.e., an affirmative tortious act; personal liability cannot be imposed on a corporate officer for nonfeasance, i.e., a failure to act" (*Peguero v 601 Realty Corp.*, 58 AD3d 556, 559). Plaintiff alleged that Waterman applied salt to the step during the winter months, which contributed to the deterioration of the concrete, thereby committing "misfeasance or malfeasance." Waterman denies that he applied salt to the step. We conclude that, inasmuch as treating icy surfaces does not constitute "an affirmative tortious act," Waterman is not personally liable for any negligence of Estates (*id.*; *see Lloyd v Moore*, 115 AD3d 1309, 1309-1310; *see also Wesolek v Jumping Cow Enters., Inc.*, 51 AD3d 1376, 1378-1379).

We conclude, however, that the court properly denied that part of defendants' motion with respect to Estates. "A landowner is liable for a dangerous or defective condition on [its] property when the landowner created the condition or had actual or constructive notice of it and a reasonable time within which to remedy it" (*Sniatecki v Violet Realty, Inc.*, 98 AD3d 1316, 1318 [internal quotation marks omitted]; *see Anderson v Weinberg*, 70 AD3d 1438, 1439). As a preliminary matter, we conclude that defendants failed to establish that Estates, as an out-of-possession landlord, had no duty to plaintiff. "A landlord may be liable for failing 'to repair a dangerous condition, of which it has notice, on leased premises if the landlord assumes a duty to make repairs and reserves the right to enter in order to inspect or to make such repairs' " (*Litwack v Plaza Realty Invs., Inc.*, 11 NY3d 820, 821). Here, the lease agreement provided that the landlord and its agents shall have the right to enter the premises for purposes of inspecting and making any repairs deemed appropriate for the preservation of the premises. Indeed, Waterman testified that he visually inspected the premises when he mowed the yard or plowed the driveway and that he had made certain repairs while plaintiff lived at the premises. Further, he made a temporary repair to the step and placed a barrier to that area within 24 hours of plaintiff's fall. Thus, defendants failed to establish that Estates relinquished complete control of the premises to the tenant (*see Gronski v County of Monroe*, 18 NY3d 374, 379-381, *rearg denied* 19 NY3d 856).

Even assuming, arguendo, that defendants established their entitlement to judgment on the issue whether Estates caused or had actual or constructive notice of the alleged dangerous condition, we conclude that plaintiff raised an issue of fact sufficient to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Waterman testified at his deposition that he painted the step

in 2007 and that there were cracks in the concrete at that time. Plaintiff testified that Waterman was present in May 2009 when she painted the step. She testified that there were "many cracks" and that the concrete was "not good[,] . . . very run down, dimply." According to plaintiff, on that occasion, Waterman stated that he would not "put any more money into the home." Contrary to defendants' contention, plaintiff's affidavit in opposition to the motion expands upon her description of the condition of the concrete but does not contradict her deposition testimony. In any event, plaintiff supported her affidavit with photographs taken within 24 hours of her fall depicting the cracked and pitted condition of the concrete step (*see Anderson*, 70 AD3d at 1439). We therefore conclude that plaintiff raised an issue of fact whether Estates had actual notice of the alleged dangerous condition.

Plaintiff also submitted the expert affidavit of an architect stating that the pitted condition of concrete, i.e., spalling, creates pockets in the concrete surface, which collect water that is fed into the body of the concrete. The expert explained that, when the water is transformed into ice, it causes the concrete to crack under foot traffic. He opined that "severe spalling," as depicted in the photographs, cracks and then crumbles. The expert opined that the deteriorated condition of the step as depicted in the photographs occurred over an extended period of time. We therefore further conclude that plaintiff raised issues of fact whether Estates created the dangerous condition by failing to repair the deteriorating concrete (*see Sniatecki*, 98 AD3d at 1318), and whether Estates had constructive notice of the dangerous condition (*see Reardon v Benderson Dev. Co.*, 266 AD2d 869, 870).

In view of our determination with respect to Waterman's entitlement to dismissal of the complaint against him, any contentions of Waterman with respect to the third-party action are moot. We conclude that the court properly granted third-party defendant's motion for summary judgment dismissing the third-party complaint with respect to Estates, seeking contractual and common-law indemnification from plaintiff's husband. The lease agreement provided that the "Landlord shall not be liable for any damage or injury of or to the Tenant or the Tenant's family . . . and Tenant hereby agrees to indemnify, defend and hold Landlord harmless from any and all claims or assertions of every kind and nature." We conclude that, inasmuch as the lease agreement purports to exempt Estates from liability for its own acts of negligence, it is void and unenforceable pursuant to General Obligations Law § 5-321 (*see Wagner v Ploch*, 85 AD3d 1547, 1548), and thus Estates is not entitled to contractual indemnification. Estates contends with respect to common-law indemnification that third-party defendant is liable for the deteriorated condition of the concrete because he applied salt to the step. Even assuming, arguendo, that third-party defendant did so, we conclude that Estates is not entitled to common-law indemnification. " 'Since the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine' "

(*Great Am. Ins. Co. v Canandaigua Natl. Bank & Trust Co.*, 23 AD3d 1025, 1028, *lv dismissed* 7 NY3d 741). "Where, as here, an owner out of possession retains the right to reenter and make repairs to the demised property, the owner is liable for injuries arising from a structural . . . defect in the property" (*Fischbein v 1498 Third Realty Corp.*, 225 AD2d 1104, 1104), which we conclude includes the right to repair the concrete step at issue here.

Finally, although Estates contends that it is entitled to contribution, it did not seek that relief in the third-party complaint. In any event, inasmuch as third-party defendant had no duty to Estates or plaintiff with respect to the repair of the concrete step, we conclude that neither indemnification nor contribution principles apply (*see generally Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 567-568).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

550

CA 14-02000

PRESENT: SCUDDER, P.J., SMITH, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

REBECCA LALKA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ACA INSURANCE COMPANY, DEFENDANT-RESPONDENT.

LAW OFFICES OF EUGENE C. TENNEY, PLLC, BUFFALO (NATHAN C. DOCTOR OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HAGELIN KENT LLC, BUFFALO (BENJAMIN R. WOLF OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered January 27, 2014. The order, insofar as appealed from, denied in part the motion of plaintiff to compel disclosure.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of plaintiff's motion to compel disclosure of those documents previously submitted to Supreme Court for in camera review and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action to recover supplementary underinsured motorist coverage pursuant to an automobile liability insurance policy issued by defendant. Thereafter, plaintiff moved for an order compelling defendant to disclose its entire claim file or, in the alternative, to produce all documentation claimed to be privileged and/or confidential for in camera inspection. Supreme Court granted that part of the motion seeking those portions of the claim file generated before the date of commencement of the action "with the exception of those materials reviewed in camera."

We conclude that the court properly denied that part of plaintiff's motion seeking disclosure of documents in the claim file created after commencement of the action (*see Nicastro v New York Cent. Mut. Fire Ins. Co.*, 117 AD3d 1545, 1546, *lv dismissed* 24 NY3d 998; *see generally* CPLR 3101 [d] [2]). We agree with plaintiff, however, that the court abused its discretion in denying that part of her motion seeking disclosure of those documents submitted to the court for in camera review, and we therefore modify the order accordingly. "It is well settled that '[t]he payment or rejection of claims is a part of the regular business of an insurance company. Consequently, reports which aid it in the process of deciding which of

the two indicated actions to pursue are made in the regular course of its business' " (*Nicastro*, 117 AD3d at 1546). "Reports prepared by . . . attorneys before the decision is made to pay or reject a claim are thus not privileged and are discoverable . . . , even when those reports are 'mixed/multi-purpose' reports, motivated in part by the potential for litigation with the insured" (*Bombard v Amica Mut. Ins. Co.*, 11 AD3d 647, 648; *see Bertalo's Rest. v Exchange Ins. Co.*, 240 AD2d 452, 454-455, *lv dismissed* 91 NY2d 848). Here, the documents submitted to the court for in camera review constitute multi-purpose reports motivated in part by the potential for litigation with plaintiff, but also prepared in the regular course of defendant's business in deciding whether to pay or reject plaintiff's claim, and thus plaintiff is entitled to disclosure of those documents.

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

557

KA 14-00925

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA J. FRENCH, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered April 3, 2014. The judgment convicted defendant, upon his plea of guilty, of two counts of driving while intoxicated, class D felonies and two counts of aggravated unlicensed operation of a motor vehicle in the first degree, class E felonies.

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

Memorandum: On appeal from a judgment convicting him, upon his guilty plea, of two counts each of felony driving while intoxicated (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [ii]) and aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3]), defendant contends that his waiver of the right to appeal is unenforceable and that his sentence is unduly harsh and severe. We agree with defendant that the waiver of the right to appeal does not encompass his challenge to the severity of the sentence because "no mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal his conviction that he was also waiving his right to appeal any issue concerning the severity of the sentence" (*People v Lorenz*, 119 AD3d 1450, 1450 [internal quotation marks omitted], *lv denied* 24 NY3d 962; *see People v Pimentel*, 108 AD3d 861, 862, *lv denied* 21 NY3d 1076). Nevertheless, considering that defendant pleaded guilty to, inter alia, two separate felony charges of driving while intoxicated and received only a local jail sentence, we perceive no basis to exercise our discretion to modify his sentence in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

560

KA 11-01613

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMELL R. MCCULLOUGH, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS 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 (David D. Egan, J.), rendered July 29, 2010. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree, robbery in the first degree, robbery in the second degree and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of burglary in the first degree (Penal Law § 140.30 [4]), robbery in the first degree (§ 160.15 [4]), robbery in the second degree (§ 160.10 [1]), and assault in the second degree (§ 120.05 [2]). The conviction arises out of an incident in which defendant and two codefendants broke into an apartment and stole money and property from a woman (hereafter, robbery victim) inside. In addition, a codefendant used a shotgun to shoot two men—only one of whom (hereafter, shooting victim) testified against defendant—as the men fled after coming to the door of the apartment during the robbery. Defendant was convicted at his third trial following two prior trials that resulted in hung juries.

Contrary to defendant's contention, Supreme Court did not err in admitting the robbery victim's testimony from his second trial in evidence at the third trial. The People established that they exercised the required due diligence in attempting to secure the robbery victim's appearance at the third trial but could not locate her (*see* CPL 670.10 [1]; *People v Arroyo*, 54 NY2d 567, 571-574, *cert denied* 456 US 979; *People v DeJesus*, 110 AD3d 1480, 1481, *lv denied* 22 NY3d 1155; *People v Koberstein*, 261 AD2d 849, 849-850, *lv denied* 94 NY2d 798). Moreover, the admission of her prior testimony did not violate defendant's right of confrontation because he "had a full

opportunity to cross-examine [her] at his two prior trials" (*People v Biggs*, 52 AD3d 620, 620, *lv denied* 11 NY3d 785, *cert denied* 555 US 1179; *see People v Mejia*, 126 AD3d 1364, 1365; *cf. People v Simmons*, 36 NY2d 126, 129-131).

Defendant further contends that the People violated their discovery, *Brady*, and *Rosario* obligations by failing to disclose in a timely manner the existence of two pending criminal actions against the shooting victim (*see* CPL 240.45 [1] [c]), as well as by failing to turn over an accusatory instrument containing statements made by the shooting victim in connection with one of the pending actions (*see* CPL 240.45 [1] [a]). Defendant failed to preserve his challenge to the timing of the disclosure of the pending criminal actions (*see generally People v Kessler*, 122 AD3d 1402, 1404), and he also failed to preserve for our review his contention that a *Brady* violation occurred (*see generally People v Caswell*, 56 AD3d 1300, 1303, *lv denied* 11 NY3d 923, *reconsideration denied* 12 NY3d 781). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to defendant's contention, the failure to disclose the accusatory instrument did not violate CPL 240.45 (1) (a) or the *Rosario* rule because the shooting victim's statements therein did not relate to the subject matter of his testimony (*see* CPL 240.45 [1] [a]; *People v Perez*, 65 NY2d 154, 158-159; *People v Matos*, 158 AD2d 959, 959, *lv denied* 75 NY2d 968), notwithstanding that the prosecutor asked the shooting victim about his pending criminal actions on direct examination "to blunt the effect of anticipated impeachment" (*People v Harrell*, 251 AD2d 240, 241, *lv denied* 92 NY2d 925).

We reject defendant's contention that the court abused its discretion in refusing to allow him to admit in evidence the shooting victim's alleged prior inconsistent statements contained in the accusatory instrument, which defense counsel obtained after the shooting victim had already testified. Defendant failed to lay a proper foundation for the admission of the statements through a police witness (*see People v Fiedorczyk*, 159 AD2d 585, 586-587, *lv denied* 76 NY2d 788; *see generally People v Duncan*, 46 NY2d 74, 80-81, *rearg denied* 46 NY2d 940, *cert denied* 442 US 910, *rearg dismissed* 56 NY2d 646; *People v Owens*, 70 AD3d 1469, 1470, *lv denied* 14 NY3d 890). Furthermore, defendant did not preserve his contention that he should have been afforded an opportunity to recall the shooting victim to question him about the statements, and we decline to exercise our power to review it as a matter of discretion in the interest of justice.

Defendant failed to preserve for our review his contention that, in sentencing him, the court penalized him for exercising the right to a jury trial, inasmuch as he failed to raise that contention at sentencing (*see People v Motzer*, 96 AD3d 1635, 1636, *lv denied* 19 NY3d 1104). In any event, we conclude that the court "did not impermissibly punish [defendant] for exercising his right to proceed to trial by imposing a sentence of 15 years[']' imprisonment after he rejected a plea offer of five years" (*People v Melendez*, 71 AD3d 1166,

1167, *lv denied* 15 NY3d 753; *see People v Pena*, 50 NY2d 400, 411-412, *cert denied* 449 US 1087). Finally, the sentence is not unduly harsh or severe.

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

563

KA 13-00301

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

REBECCA R. WALTER, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (GARY MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JAMES B. RITTS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered May 23, 2012. The judgment convicted defendant, upon a jury verdict, of assault in the third degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of assault in the third degree (Penal Law § 120.00 [2]) and endangering the welfare of a child (§ 260.10 [1]). We note at the outset that, contrary to the People's contention, this appeal has not been rendered moot by the fact that defendant has completed serving her sentence (*see People v Maraj*, 44 AD3d 1090, 1091; *People v De Leo*, 185 AD2d 374, 375, *lv denied* 80 NY2d 974).

Defendant contends that there is insufficient evidence of a physical injury to support a conviction of assault in the third degree. We reject that contention. The evidence at trial established that the 14-month-old victim sustained a physical injury, i.e. "impairment of physical condition or substantial pain" (Penal Law § 10.00 [9]), inasmuch as the wound on his shoulder caused "more than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447). Defendant also contends that there was insufficient evidence to support her conviction of assault in the third degree and endangering the welfare of a child inasmuch as the People failed to establish that defendant caused the child's injury. We reject that contention. Based upon the evidence at trial, there was a valid line of reasoning and permissible inferences to lead a rational person to the conclusion that defendant caused the child's injury (*see People v Watson*, 269 AD2d 755, 755-756, *lv denied* 95 NY2d 174; *see generally People v Tompkins*, 8 AD3d 901, 902-903). 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), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

We reject defendant's contention that County Court erred in allowing the prosecutor to introduce evidence that defendant previously pleaded guilty to assault in the third degree after she broke the same victim's femur. That evidence was "admissible to negate the defense of accident or mistake" (*People v Riley*, 23 AD3d 1077, 1077, *lv denied* 6 NY3d 817; *see People v Henson*, 33 NY2d 63, 72-73; *People v Sachs*, 15 AD3d 1005, 1006, *lv denied* 5 NY3d 768).

Finally, defendant's contention that the prosecutor engaged in misconduct during summation by making a statement that shifted the burden of proof to defendant is without merit. We conclude that the allegedly improper statement was merely fair comment on the evidence (*see People v Anzalone*, 70 AD3d 1486, 1487, *lv denied* 14 NY3d 885; *People v Anderson*, 52 AD3d 1320, 1321, *lv denied* 11 NY3d 733).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

564

CAF 14-02014

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

IN THE MATTER OF ANDREW B.,
RESPONDENT-RESPONDENT.
---------- MEMORANDUM AND ORDER
MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-APPELLANT.

MERIDETH H. SMITH, COUNTY ATTORNEY, ROCHESTER (PETER A. ESSLEY OF COUNSEL), FOR PETITIONER-APPELLANT.

TANYA J. CONLEY, ATTORNEY FOR THE CHILD, ROCHESTER, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Joan S. Kohout, J.), entered June 4, 2014 in a proceeding pursuant to Family Court Act article 7. The order, insofar as appealed from, held petitioner in contempt.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, and the matter is remitted to Family Court, Monroe County, for a hearing in accordance with the following memorandum: Petitioner appeals from an order finding it in contempt of court for failing to comply with an order extending the placement of respondent through June 23, 2014. The order extending the placement provided that respondent, who was adjudicated a person in need of supervision in June 2010, was not to be discharged from foster care without the permission of Family Court. Respondent threatened his foster mother in early January 2014 and, when the police arrived, he threatened them as well, resulting in his arrest and incarceration. When respondent was released from incarceration, petitioner placed him in an emergency homeless shelter for teens and filed a petition seeking to terminate his placement in foster care pursuant to Family Court Act § 756 (a) (ii) (1). Respondent, who was 18 years old at the time, moved to hold petitioner in contempt. Without addressing the petitioner's petition, the court granted the motion, held petitioner in contempt, and fined it $250, but suspended payment of the fine upon the condition that petitioner comply with the court order.

Initially, we address respondent's contentions that we should dismiss this appeal. Petitioner purportedly appealed from an oral ruling of the court issued on May 1, 2014 rather than the subsequent written order entered June 4, 2014. We exercise our discretion to treat the notice of appeal as valid and deem the appeal to be from the June 4, 2014 order (*see* CPLR 5520 [c]; *Matter of Alaysha M. [Agustin*

M.], 89 AD3d 1467, 1467; *Matter of Anthony M.*, 56 AD3d 1124, 1124, *lv denied* 12 NY3d 702). Next, we reject respondent's contention that the appeal is moot because he is not presently in foster care. "Inasmuch as enduring consequences potentially flow from an order adjudicating a party in civil contempt," we conclude that the appeal is not moot despite the fact that petitioner is not presently under an order to place respondent in foster care (*Matter of Bickwid v Deutsch*, 87 NY2d 862, 863; *see Matter of Jasco v Alvira*, 107 AD3d 1460, 1460). Additionally, we note that respondent could seek to be returned to foster care (*see* Family Ct Act § 1091), and thus the issues on the appeal could recur (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715). We have examined respondent's remaining contentions in support of dismissing the appeal and conclude that they are without merit.

We agree with petitioner that the court erred in granting the motion and finding petitioner in contempt of court without conducting a hearing. We therefore reverse the order insofar as appealed from and remit the matter to Family Court for a hearing on the motion before a different judge. "To sustain a civil contempt, a lawful judicial order expressing an unequivocal mandate must have been in effect and disobeyed"; "the party to be held in contempt must have had knowledge of the order"; and "prejudice to the rights of a party to the litigation must be demonstrated" (*McCain v Dinkins*, 84 NY2d 216, 226). Those elements must be proved by clear and convincing evidence (*see El-Dehdan v El-Dehdan*, 114 AD3d 4, 10). We agree with the court that respondent established those elements inasmuch as there was a lawful judicial order requiring respondent to be in foster care, but he was not in foster care at the time of the motion seeking to hold petitioner in contempt; petitioner was aware of the order; and respondent was prejudiced as a result. We conclude, however, that petitioner raised a valid defense, i.e., its inability to comply with the order (*see generally United States v Bryan*, 339 US 323, 330, *reh denied* 339 US 991; *El-Dehdan*, 114 AD3d at 17). Petitioner submitted evidence that it contacted numerous foster homes and group homes, and none would accept respondent because of his past violent and disruptive behavior while in foster care. Respondent had a history of not following rules and using drugs. The agency that eventually accepted respondent after the finding of contempt had denied acceptance at the time of the motion. Respondent's mother would not take him back into her home, and she told the caseworker that there were no friends or family who were willing to accept respondent "because he has burned all of his bridges with them." Notably, petitioner did not simply ignore the order when it became apparent that it was unable to comply with it. Instead, it filed a petition seeking to terminate respondent's placement in foster care.

In refusing to consider any reason for petitioner's noncompliance with the order or to hold a hearing, the court relied on *McCain*, but we conclude that *McCain* is distinguishable. In that case, the City of New York was held in contempt for failing to provide shelter for homeless families and instead had them stay overnight temporarily in City Emergency Assistance Units offices (*id.* at 220-222). The Court rejected the City's claims that it acted in good faith and to the best

of its municipal ability to comply with the court orders (*id.* at 223). It affirmed the findings of the lower courts, which had rejected that defense and had rejected the City's argument that compliance in every instance was impossible (*id.* at 225). The Court found that the City "tender[ed] legally inexcusable reasons" for failing to comply with the orders (*id.* at 222). In *McCain*, however, the City had agreed to the orders with which it later failed to comply (*id.*), which led the Court to conclude that "[t]he feasibility of obedience . . . is not before us at this time, nor are intractable or herculean municipal efforts of a financial or political variety. The case is before us with detailed and affirmed findings of a serious, significant and persisting failure to comply with judicial decrees framed and particularized in part by reluctant acquiescence and negotiation by the City itself" (*id.* at 226-227). The situation in the case before us is different. While it is true that petitioner agreed to the December 23, 2013 order extending respondent's placement, the situation changed in January 2014 when respondent was arrested after threatening to shoot his foster mother. Thereafter, petitioner was unable to find any foster homes or group homes that would accept respondent. We cannot agree with the court that petitioner is precluded from raising a defense to the contempt motion especially where, as here, petitioner argued that it was respondent's own conduct that prevented petitioner from complying with the order. We conclude that petitioner is entitled to a hearing to present any such defense.

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

565

CAF 14-00280

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

IN THE MATTER OF CHAD SPRINGSTEAD,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

SALINA WINSHIP BUNK, RESPONDENT-RESPONDENT.

WAGNER & HART, LLP, OLEAN (JANINE FODOR OF COUNSEL), FOR PETITIONER-APPELLANT.

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

BROWNYN E. ENDERS, ATTORNEY FOR THE CHILD, BELFAST

Appeal from an order of the Family Court, Cattaraugus County (Judith E. Samber, R.), entered January 10, 2014 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded respondent sole legal and physical custody of the subject child.

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

Memorandum: In this custody proceeding pursuant to Family Court Act article 6, petitioner father appeals from an order modifying a prior order and awarding sole legal and physical custody of the parties' son to respondent mother. We affirm.

We reject the father's contention that Family Court erred in admitting evidence concerning his criminal history and conduct while incarcerated. Inasmuch as "[a] parent's criminal history may militate against an award of custody" (*Matter of Nunn v Bagley*, 63 AD3d 1068, 1069; *see Matter of Tompkins v Holmes*, 27 AD3d 846, 847; *Hilton v Hilton*, 244 AD2d 902, 903, *lv dismissed* 91 NY2d 922), that evidence was relevant and properly admitted. In addition, the record establishes that the court "did not place undue emphasis on the father's past criminal convictions" or on his conduct while incarcerated (*Matter of Michaellica Lee W.*, 106 AD3d 639, 640).

Contrary to the father's further contention, "there is a sound and substantial basis in the record to support the court's determination that it was in the [child's] best interests to award sole custody to the mother, and thus we will not disturb that

determination" (*Matter of Lawson v Lawson*, 111 AD3d 1393, 1393; *see Matter of Brown v Wolfgram*, 109 AD3d 1144, 1145; *Belec v Belec*, 103 AD3d 1089, 1089-1090). The record establishes that the father "is less able than [the mother] to provide for the child's stability and physical, medical, educational, moral, and emotional well-being" (*Matter of Richard C.T. v Helen R.G.*, 37 AD3d 1118, 1119; *see Matter of Weekley v Weekley*, 109 AD3d 1177, 1178-1179; *see generally Fox v Fox*, 177 AD2d 209, 210).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

574

CA 14-01817

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

SUSAN M. ANDREWS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RENAISSANCE CHIROPRACTIC, P.C., THOMAS JOSEPH INSINNA, DC, INDIVIDUALLY, AND AS PRINCIPLE OWNER, OFFICER, DIRECTOR AND/OR SHAREHOLDER OF RENAISSANCE CHIROPRACTIC, P.C., DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.

HISCOCK & BARCLAY, LLP, BUFFALO (JONATHAN H. BARD OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

KELIANN M. ARGY, ORCHARD PARK, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered April 24, 2014. The order, insofar as appealed from, denied in part the motion of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this action for chiropractic malpractice seeking damages for injuries she allegedly sustained during manipulation of her neck by defendant Thomas Joseph Insinna, DC (Dr. Insinna), a principal owner, officer, director and/or shareholder of defendant Renaissance Chiropractic, P.C. (collectively, defendants). Defendants appeal from an order insofar as it denied in part their motion for summary judgment seeking dismissal of the complaint against them. Contrary to defendants' contention, they are not entitled to invoke the benefit of the shortened limitations period applicable to medical, dental and podiatric malpractice, and they are subject to the three-year statute of limitations of CPLR 214 (6) (*see Perez v Fitzgerald*, 115 AD3d 177, 183, *lv dismissed* 23 NY3d 949; *see also Vidra v Shoman*, 59 AD2d 714, 715). Here, plaintiff was not referred to Dr. Insinna by a licensed physician, and Dr. Insinna's chiropractic treatment was not an integral part of the process of rendering medical treatment to a patient or substantially related to any medical treatment provided by a physician (*see Bleiler v Bodnar*, 65 NY2d 65, 72; *cf. Wahler v Lockport Physical Therapy*, 275 AD2d 906, 907, *lv denied* 96 NY2d 701). We thus conclude that plaintiff's chiropractic malpractice action is governed by the three-year limitations period of CPLR 214 (6).

Contrary to defendants' further contention, Supreme Court properly denied their motion insofar as it was premised on the ground that the action was not commenced within three years of accrual. Even assuming, arguendo, that defendants met their initial burden on that point, we conclude that plaintiff raised a triable issue of fact as to when the treatment giving rise to her alleged injuries occurred (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

577

CA 14-01839

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

WAYNE F. HURLBURT AND MARSHA A. HURLBURT,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

NOBLE ENVIRONMENTAL POWER, LLC, ET AL.,
DEFENDANTS,
AND FRANK MONTELEONE, DOING BUSINESS AS
FRANK MONTELEONE DUMP TRUCK & EXCAVATING,
DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, ROCHESTER (RICHARD C. BRISTER OF COUNSEL), FOR DEFENDANT-APPELLANT.

KAMMHOLZ MESSINA LLP, VICTOR (BRADLEY P. KAMMHOLZ OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered December 24, 2013. The order, insofar as appealed from, denied the motion of defendant Frank Monteleone, doing business as Frank Monteleone Dump Truck & Excavating for summary judgment dismissing the complaint against him.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted, and the complaint against defendant Frank Monteleone, doing business as Frank Monteleone Dump Truck & Excavating, is dismissed.

Memorandum: Wayne F. Hurlburt (plaintiff) and his wife commenced this action to recover damages for injuries sustained by plaintiff when a bulldozer driven by plaintiff's coworker, Stephen Boyd, ran over his right leg. Plaintiff was working with Boyd to construct an access road and, at the time of his accident, plaintiff was directing the dump trucks bringing gravel for the road. Just before the accident occurred, plaintiff, standing behind the bulldozer, signaled to Harold Scott, a dump truck driver for Frank Monteleone, doing business as Frank Monteleone Dump Truck & Excavating (defendant), to back up and dump the truck's load. Plaintiff then moved out of the path of the bulldozer, which was grading the gravel that had already been dumped. When Scott appeared not to see the signal, plaintiff again moved behind the bulldozer to signal Scott. Although plaintiff heard the back-up alarm on the bulldozer as it again graded the gravel, he failed to move out of the bulldozer's path in time to avoid being hit. Plaintiff alleges that he was in the path of the

bulldozer, and therefore sustained injuries, because of Scott's breach of a duty to pay attention and to move his truck promptly when directed to do so. Defendant moved for summary judgment dismissing the complaint against him, contending that no duty to plaintiff was breached, and that any breach was not a proximate cause of plaintiff's injuries. Supreme Court denied the motion, finding that Scott had "some duty to move his truck with reasonable promptness" and that there were triable issues of fact whether Scott's breach of that duty proximately caused plaintiff's injuries. We conclude that the court erred in denying the motion, and we therefore reverse the order insofar as appealed from.

Even assuming, arguendo, that Scott owed plaintiff a duty to move his truck with reasonable promptness when directed to do so, we conclude that any breach of that duty was not a proximate cause of plaintiff's injuries. Although "[a]s a general rule, the question of proximate cause is to be decided by the finder of fact, aided by appropriate instructions" (*Derdiarian v Felix Contr. Corp*., 51 NY2d 308, 312), where a defendant's actions merely "furnish[ ] the condition or occasion" for the events leading to a plaintiff's injuries, those actions will not be deemed a proximate cause of the injuries (*Rodriguez v Pro Cable Servs. Co. Ltd. Partnership*, 266 AD2d 894, 895; *see generally Sheehan v City of New York*, 40 NY2d 496, 503). Here, while Scott's alleged inattention created the opportunity for plaintiff to be standing behind the moving bulldozer, it did not *cause* him to stand behind the bulldozer or stay in the bulldozer's path despite his knowledge that the bulldozer was approaching. In other words, "[a]lthough [defendant's alleged] negligence undoubtedly served to place [plaintiff] at the site of the accident, the intervening act[s of plaintiff and Boyd] w[ere] divorced from and not the foreseeable risk associated with the original [alleged] negligence . . . In short, the [alleged] negligence of [defendant] merely furnished the occasion for an unrelated act to cause injuries not ordinarily anticipated" (*Derdiarian*, 51 NY2d at 315-316).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

581

KA 12-01594

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DELROY GILLESPIE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered June 25, 2012. The judgment convicted defendant, upon his plea of guilty, of reckless endangerment 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 reckless endangerment in the second degree (Penal Law § 120.20), defendant contends that Supreme Court impermissibly enhanced his sentence by revoking his pistol permit without affording him an opportunity to withdraw his plea. That contention is not preserved for our review because defendant "failed to object to the alleged enhanced sentence and did not move to withdraw his plea or to vacate the judgment of conviction on that ground" (*People v Epps*, 109 AD3d 1104, 1105; *see People v Viele*, 124 AD3d 1222, 1223; *People v Predmore*, 68 AD3d 1755, 1756, *lv denied* 14 NY3d 804). In any event, we conclude that defendant's contention is without merit. An order revoking a pistol permit, like an order of protection, "is not a part of [a] defendant's sentence" (*People v Lilley*, 81 AD3d 1448, 1448, *lv denied* 17 NY3d 860; *see People v Nieves*, 2 NY3d 310, 316), and thus the revocation of defendant's pistol permit did not entitle him to an opportunity to withdraw his plea.

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

583

KA 13-01650

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIGE BILLINGSLEY, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered August 19, 2013. The judgment convicted defendant, upon a nonjury verdict, of robbery in the first degree, burglary in the first degree and assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a nonjury trial of, inter alia, assault in the second degree (Penal Law § 120.05 [12]), defendant contends that the evidence is legally insufficient with respect to two elements of that crime, i.e., his age and the physical injury sustained by the victim. Because defendant's motion for a trial order of dismissal was not " 'specifically directed' at th[ose] alleged error[s]," defendant failed to preserve his contention for our review (*People v Gray*, 86 NY2d 10, 19). To the extent that defendant preserved for our review his challenge to the sufficiency of the corroboration of the accomplice testimony, we reject that challenge. The victim's equivocal in-court identification "was sufficient to satisfy the minimal requirements of the accomplice corroboration statute" (*People v Jones*, 85 NY2d 823, 825).

Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Indeed, based upon our independent review of the evidence, we conclude that a different verdict would have been unreasonable (*see People v Peters*, 90 AD3d 1507, 1508, *lv denied* 18 NY3d 996; *see generally Bleakley*, 69 NY2d at 495).

We reject defendant's further contention that he was denied

effective assistance of counsel based on defense counsel's failure to move for severance. It is well settled that "[t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152, quoting *People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702). We conclude that a motion for severance of counts of the indictment had little or no chance of success (*see* CPL 200.20 [2] [b]).

Defendant's remaining contention involves matters that are outside the record on appeal and must be raised by way of a motion pursuant to CPL 440.10 (*see People v Fox*, 124 AD3d 1252, 1253).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

585

KA 13-00803

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KYLE M. JULIANO, DEFENDANT-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, FOR DEFENDANT-APPELLANT.

KYLE M. JULIANO, DEFENDANT-APPELLANT PRO SE.

JEFFREY S. CARPENTER, DISTRICT ATTORNEY, HERKIMER (JACQUELYN M. ASNOE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Herkimer County Court (John J. Brennan, A.J.), rendered November 13, 2012. The judgment convicted defendant, upon a jury verdict, of criminal sexual act 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 a determinate term of 7 years and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal sexual act in the first degree (Penal Law § 130.50 [3]). Defendant contends in his main and pro se supplemental briefs that County Court erred in admitting in evidence that part of defendant's statement that referred to a prior act of abuse against the victim. We reject defendant's contention. That part of his statement was properly admitted to provide necessary background information and to complete the narrative (*see People v Leeson*, 12 NY3d 823, 826-827; *People v Ennis*, 107 AD3d 1617, 1618, *lv denied* 22 NY3d 1040, *reconsideration denied* 23 NY3d 1036). The probative value of that testimony outweighed any prejudice to defendant and, in any event, any prejudice to defendant was minimized by the court's limiting instructions (*see People v Rogers*, 103 AD3d 1150, 1152-1153, *lv denied* 21 NY3d 946).

We reject defendant's contention in his main and pro se supplemental briefs that the court abused its discretion in refusing to afford him youthful offender status. "Pursuant to CPL 720.10 (3) (i), a youth who is convicted of, inter alia, . . . first-degree criminal sexual act is ineligible for a youthful offender adjudication unless the court concludes, insofar as relevant here, that there are

'mitigating circumstances that bear directly upon the manner in which the crime was committed' " (*People v Pulvino*, 115 AD3d 1220, 1223, *lv denied* 23 NY3d 1024), and the court properly concluded that there were no such mitigating circumstances in this case (*see id.*; *People v Terry*, 19 AD3d 1039, 1040, *lv denied* 5 NY3d 833). Defendant's further contention in his main brief that he was penalized for exercising his right to a trial, inasmuch as the court imposed a harsher sentence than the one offered during plea negotiations, is not preserved for our review, and it is without merit in any event (*see People v Griffin*, 48 AD3d 1233, 1236-1237, *lv denied* 10 NY3d 840).

We agree with defendant, however, that the sentence is unduly harsh and severe, particularly considering defendant's mental disabilities and lack of a prior criminal record. We therefore modify the judgment, as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]), by reducing the sentence imposed to a determinate term of imprisonment of 7 years, to be followed by the 15-year period of postrelease supervision previously imposed. We have examined the remaining contentions of defendant raised in his pro se supplemental brief and conclude that they are without merit.

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

588

KA 11-00802

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CAMERON L. WILLIAMS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (WILLIAM G. PIXLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered February 2, 2011. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [1]). Defendant contends a prospective juror who indicated a bias in favor of police testimony failed to provide an unequivocal assurance that his bias would not affect his verdict, and thus that County Court erred in denying his challenge for cause to that prospective juror. We reject that contention. Defendant is correct in contending that, "when a prospective juror makes a statement or statements that 'cast serious doubt on [his or her] ability to render an impartial verdict' . . . , that prospective juror must be excused for cause unless he or she provides an 'unequivocal assurance that [he or she] can set aside any bias and render an impartial verdict based on the evidence' " (*People v Lewis*, 71 AD3d 1582, 1583). Here, we conclude that the prospective juror provided the requisite unequivocal assurance of his ability to be impartial (*see People v Rogers*, 103 AD3d 1150, 1152, *lv denied* 21 NY3d 946). Indeed, the court elicited an unequivocal assurance from the prospective juror that he would treat the testimony of police officers as he would the testimony of "any other witness" and that he would "listen to the evidence in the case and decide whether or not [he] believe[s] . . . what the[] [witnesses] have to say in this courtroom."

Defendant further contends that the court erred in denying his mid-trial request for a *Wade*-type hearing with respect to two witnesses who, as part of the prosecutor's trial preparation, viewed a

surveillance video and identified defendant in the video based upon his walk. We reject that contention because the viewing of the videotape was not a police-arranged identification procedure (*see People v Gee*, 99 NY2d 158, 162-164, *rearg denied* 99 NY2d 652). Even assuming, arguendo, that this was an identification proceeding within the meaning of CPL 710.30, we conclude that the two witnesses were familiar with defendant such that their identifications were confirmatory, and the court did not err in denying defendant's request for a *Wade*-type hearing inasmuch as it would have been superfluous (*see People v Hopkins*, 284 AD2d 223, 223, *lv denied* 96 NY2d 902).

Defendant contends that he was denied a fair trial based on the court's refusal to redact the name "Killa" from a letter found in defendant's jail cell and the prosecutor's use of that name during summation. We reject that contention. The letter was confiscated in defendant's jail cell, contained a fingerprint that was consistent with the fingerprint of defendant, and referenced a court case and the possible outcome if a certain witness did not testify. We conclude that the court did not abuse its discretion in refusing to redact the letter prior to admitting it in evidence as relevant and probative of defendant's consciousness of guilt (*see People v Washington*, 306 AD2d 701, 702, *lv denied* 100 NY2d 600). Defense counsel read the letter in its entirety to the jury during his summation, and the prosecutor referred to the alias in his summation. Inasmuch as defendant did not object to the prosecutor's summation, defendant failed to preserve for our review his contention that the prosecutor engaged in misconduct by referring to the alias (*see People v Tolliver*, 93 AD3d 1150, 1150-1151, *lv denied* 19 NY3d 968). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Finally, we reject defendant's contention that defense counsel was ineffective in failing to object to comments made by the prosecutor during summation (*see Tolliver*, 93 AD3d at 1151; *People v Washington*, 9 AD3d 499, 501-502, *lv denied* 3 NY3d 682).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

594

CAF 14-01955

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF LUCILLE A. SOLDATO, COMMISSIONER, ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, ON BEHALF OF JOHANN BENSON, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

RAYMOND BENSON, RESPONDENT-RESPONDENT.

RICHARD P. FERRIS, UTICA, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered February 26, 2014 in a proceeding pursuant to Family Court Act article 4. The order denied the objections of petitioner to an order of a Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the objections are granted, the petition is granted, and respondent is directed to pay child support in the amount of $26 per week retroactive to September 12, 2013.

Memorandum: Petitioner commenced this proceeding on behalf of the mother of the children at issue seeking an order directing respondent father to pay child support. The Support Magistrate calculated respondent's presumptive support obligation at $26 per week, but determined that respondent was not obligated to pay support because he had physical custody of the children for a majority of the time under his custody arrangement with the mother and was thus not a noncustodial parent within the meaning of Family Court Act § 413 (1) (f) (10) (*see generally Rubin v Della Salla*, 107 AD3d 60, 67-68). Family Court denied petitioner's objections to the order of the Support Magistrate, and petitioner appeals.

We conclude that, contrary to the determination of the Support Magistrate, the custody order between respondent and the mother is intended to divide physical custody of the children equally (*see Redder v Redder*, 17 AD3d 10, 13; *cf. Rubin*, 107 AD3d at 68-71). Respondent, as the parent with the higher income and greater pro rata share of the child support obligation, is therefore the noncustodial parent for support purposes (*see Leonard v Leonard*, 109 AD3d 126, 128-129; *Matter of Moore v Shapiro*, 30 AD3d 1054, 1055), and should have been ordered to pay child support to the mother. In addition, we agree with petitioner that the children's receipt of public assistance

precludes respondent from obtaining any reduction of his support obligation based on expenses incurred while he has custody of the children (*see* Family Ct Act § 413 [1] [f] [9]; *Matter of Pandozy v Gaudette*, 192 AD2d 779, 780). Consequently, we reverse the order, grant petitioner's objections, grant the petition, and direct respondent to pay child support in the amount of $26 per week retroactive to September 12, 2013, the date on which the children became eligible for public assistance (*see* § 449 [2]; *Matter of Davis v Swain*, 281 AD2d 545, 545; *Matter of Commissioner of Social Servs. of City of N.Y. v Daryl S.*, 235 AD2d 126, 130).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

597

CA 14-01306

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, AND VALENTINO, JJ.

IN THE MATTER OF PROBATE OF THE LAST WILL
AND TESTAMENT OF ROBERT BODKIN, ALSO KNOWN AS
ROBERT C. BODKIN, DECEASED.
---------- MEMORANDUM AND ORDER
ROBIN P. GRAHAM, PRELIMINARY EXECUTOR OF THE
ESTATE OF ROBERT BODKIN, ALSO KNOWN AS ROBERT C.
BODKIN, DECEASED, PETITIONER-RESPONDENT;

DAWN GUETTI AND WILLIAM J. BODKIN,
OBJECTANTS-APPELLANTS;

NEW YORK STATE ATTORNEY GENERAL'S OFFICE,
RESPONDENT.
(APPEAL NO. 1.)

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (LESLIE MARK GREENBAUM OF COUNSEL), FOR OBJECTANTS-APPELLANTS.

PHILLIPS LYTLE LLP, BUFFALO (ALAN J. BOZER OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Surrogate's Court, Erie County (Barbara Howe, S.), entered October 2, 2012. The order denied the motion of objectants to disqualify counsel for petitioner.

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

Same memorandum as in *Matter of Bodkin* ([appeal No. 3] ___ AD3d ___ [May 8, 2015]).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

598

CA 14-01307

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, AND VALENTINO, JJ.

IN THE MATTER OF PROBATE OF THE LAST WILL
AND TESTAMENT OF ROBERT BODKIN, ALSO KNOWN AS
ROBERT C. BODKIN, DECEASED.
---------- MEMORANDUM AND ORDER
ROBIN P. GRAHAM, PRELIMINARY EXECUTOR OF THE
ESTATE OF ROBERT BODKIN, ALSO KNOWN AS ROBERT C.
BODKIN, DECEASED, PETITIONER-RESPONDENT;

DAWN GUETTI AND WILLIAM J. BODKIN,
OBJECTANTS-APPELLANTS;

NEW YORK STATE ATTORNEY GENERAL'S OFFICE,
RESPONDENT.
(APPEAL NO. 2.)

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (LESLIE MARK GREENBAUM OF COUNSEL), FOR OBJECTANTS-APPELLANTS.

PHILLIPS LYTLE LLP, BUFFALO (ALAN J. BOZER OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Surrogate's Court, Erie County (Barbara Howe, S.), entered September 9, 2013. The order denied the motion and supplemental motion of objectants to compel disclosure.

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

Same memorandum as in *Matter of Bodkin* ([appeal No. 3] ___ AD3d ___ [May 8, 2015]).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

599

CA 14-01308

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, AND VALENTINO, JJ.

IN THE MATTER OF PROBATE OF THE LAST WILL
AND TESTAMENT OF ROBERT BODKIN, ALSO KNOWN AS
ROBERT C. BODKIN, DECEASED.
---------- MEMORANDUM AND ORDER
ROBIN P. GRAHAM, PRELIMINARY EXECUTOR OF THE
ESTATE OF ROBERT BODKIN, ALSO KNOWN AS ROBERT C.
BODKIN, DECEASED, PETITIONER-RESPONDENT;

DAWN GUETTI AND WILLIAM J. BODKIN,
OBJECTANTS-APPELLANTS;

NEW YORK STATE ATTORNEY GENERAL'S OFFICE,
RESPONDENT.
(APPEAL NO. 3.)

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (LESLIE MARK GREENBAUM OF COUNSEL), FOR OBJECTANTS-APPELLANTS.

PHILLIPS LYTLE LLP, BUFFALO (ALAN J. BOZER OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Surrogate's Court, Erie County (Barbara Howe, S.), entered March 28, 2014. The order granted the motion of petitioner for summary judgment dismissing the objections to probate.

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

Memorandum: Following the death of Robert Bodkin (decedent), petitioner filed a petition to probate decedent's will dated November 3, 2011. Objectants, a niece and nephew of decedent, filed objections contending, inter alia, that decedent lacked testamentary capacity at the time the will was executed and that the will was procured by undue influence. In appeal No. 1, objectants appeal from an order denying their motion to disqualify Phillips Lytle LLP (Phillips Lytle) from representing petitioner. In appeal No. 2, objectants appeal from an order denying their motion and supplemental motion to compel disclosure and, in appeal No. 3, objectants appeal from an order granting petitioner's motion for summary judgment dismissing their objections to probate.

We conclude in appeal No. 1 that Surrogate's Court properly denied objectants' motion to disqualify Phillips Lytle. The sole

basis for the motion was the advocate-witness rule found in rule 3.7 (b) (1) of the Rules of Professional Conduct (22 NYCRR 1200.0) (former Code of Professional Responsibility DR 5-102 [b] [22 NYCRR 1200.21 (b)]), which provides in relevant part that "[a] lawyer may not act as advocate before a tribunal in a matter if: . . . another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client" (*see generally S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 445-446). Here, attorneys from Phillips Lytle drafted the will and witnessed its execution. A different attorney from Phillips Lytle is representing petitioner in this proceeding. It is well settled that the party seeking disqualification under the advocate-witness rule is "required to identify the projected testimony of the witness and show that it would be so adverse to the factual assertions or account of events offered on behalf of the client as to warrant his [or her] disqualification" (*Martinez v Suozzi*, 186 AD2d 378, 379). Upon our review of the papers submitted in support of the motion, we conclude that objectants failed to establish that any testimony from an attorney at Phillips Lytle would be prejudicial to petitioner (*see Vecchiarelli v Continental Ins. Co.*, 216 AD2d 909, 910; *Transcontinental Constr. Servs. v McDonough, Marcus, Cohn & Tretter*, 216 AD2d 19, 19; *cf. Cooley v Brooks*, 210 AD2d 951, 952). To the extent that objectants raise additional grounds for disqualification for the first time on appeal, we conclude that those grounds are not preserved for our review (*see Smothers v County of Erie*, 272 AD2d 906, 906; *Nemia v Nemia*, 124 AD2d 407, 408, *lv denied* 69 NY2d 611).

Contrary to the contentions of objectants in appeal No. 2, the Surrogate did not abuse her discretion in denying the motion and supplemental motion to compel disclosure inasmuch as objectants failed to comply with the requirements of 22 NYCRR 202.7 (a) (2) and (c) (*see Yargeau v Lasertron*, 74 AD3d 1805, 1805-1806; *Amherst Synagogue v Schuele Paint Co., Inc.*, 30 AD3d 1055, 1056-1057).

Finally, we agree with petitioner in appeal No. 3 that the Surrogate properly granted her motion for summary judgment dismissing the objections and admitted the will to probate. As objectants correctly concede, petitioner met her initial burden on the motion with respect to the two grounds raised by objectants. First, petitioner established that, at the time he executed the will, decedent was not suffering from any cognitive issues that would have affected his ability to understand " 'the nature and consequences of executing a will; . . . the nature and extent of the property [he] was disposing of; and . . . those who would be considered the natural objects of [his] bounty and [his] relations with them' " (*Matter of Kumstar*, 66 NY2d 691, 692, *rearg denied* 67 NY2d 647). Second, petitioner established that the will was not procured by undue influence (*see generally Matter of Walther*, 6 NY2d 49, 53-54; *Matter of Panek*, 237 AD2d 82, 84).

Contrary to objectants' contention, they failed to raise a triable issue of fact on either ground. Although decedent was suffering from numerous health issues that would prove fatal and had

been administered morphine over six hours before executing the will, objectants' speculation about the effects that the illnesses or prescribed medication may have had on decedent's testamentary capacity is insufficient to raise a triable issue of fact and prevent probate (*see Matter of Eshaghian*, 54 AD3d 860, 861; *Matter of Van Patten*, 215 AD2d 947, 950-951, *lv denied* 87 NY2d 802; *see generally Kumstar*, 66 NY2d at 692). Here, the only evidence before the Surrogate was that decedent was lucid and alert at the time he executed the will.

With respect to undue influence, objectants submitted nothing more than speculation to support their allegations of undue influence, and it is well settled that " '[m]ere speculation and conclusory allegations . . . are insufficient to raise an issue of fact' " (*Matter of Lee*, 107 AD3d 1382, 1383; *see Matter of Rottkamp*, 95 AD3d 1338, 1340; *see generally Walther*, 6 NY2d at 55-56).

Finally, although objectants raised several other grounds for their objections before the Surrogate, they have failed to brief any issue concerning those grounds on appeal, and we therefore deem those issues abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

600

CA 14-01957

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND VALENTINO, JJ.

KEMPER INDEPENDENCE INSURANCE COMPANY,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

LENORE ELLIS, AS ADMINISTRATRIX OF THE
ESTATE OF CHRISTOPHER SPACK, DECEASED,
DEFENDANT-APPELLANT-RESPONDENT,
WILLIAM L. LEVEA, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

BOTTAR LEONE, PLLC, SYRACUSE (ADAM P. MASTROLEO OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

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

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered May 30, 2014. The order granted that part of the cross motion of defendant William L. LeVea for summary judgment with respect to plaintiff's obligation to defend LeVea and otherwise denied the cross motion, and denied the motion and cross motion of defendant Lenore Ellis, as Administratix of the Estate of Christopher Spack, deceased, and plaintiff, respectively, for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting in part the motion of defendant Lenore Ellis, as administratrix of the estate of Christopher Spack, deceased, and by granting judgment in her favor and in favor of defendant William L. LeVea as follows:

> It is ADJUDGED and DECLARED that plaintiff is obligated to defend defendant William L. LeVea in the underlying action,

and as modified the order is affirmed without costs.

Memorandum: Defendant Lenore Ellis, as administratix of the estate of Christopher Spack, deceased, commenced a wrongful death action against defendant William L. LeVea. LeVea, while intoxicated, struck decedent's vehicle from behind, which caused decedent to collide with an oncoming vehicle, resulting in his death. LeVea pleaded guilty to, inter alia, aggravated vehicular homicide (Penal

Law § 125.14 [5]) and driving while intoxicated (Vehicle and Traffic Law § 1192 [2]). In the wrongful death action, Ellis alleged that LeVea acted negligently in rear-ending decedent's vehicle.

At the time of the incident, LeVea was insured under an automobile policy issued by plaintiff. The policy provided that plaintiff would "pay damages for 'bodily injury' or 'property damage' for which any 'insured' becomes legally responsible because of an auto accident." The policy excluded coverage where the insured "intentionally causes 'bodily injury' or 'property damage.' " Plaintiff commenced this action seeking a declaration that it was not required to defend or indemnify LeVea because there was no "accident" but, rather, LeVea intentionally caused decedent's death. The parties thereafter moved and cross-moved for summary judgment. Ellis asserted in support of her motion that plaintiff was required to defend and indemnify LeVea, LeVea asserted in support of his cross motion that plaintiff, inter alia, has a duty to defend him, and plaintiff cross-moved for summary judgment seeking a declaration that it had no duty to defend or indemnify LeVea. Supreme Court granted LeVea's cross motion with respect to plaintiff's obligation to defend LeVea, and otherwise denied the cross motions and motion. Ellis now appeals and plaintiff cross-appeals. Although the court properly granted LeVea's cross motion in part, the court should have granted that same relief sought by Ellis in her motion. In addition, we note that the court failed to declare the rights of the parties in connection with the duty to defend (*see Seneca Nation of Indians v State of New York,* 89 AD3d 1536, 1538, *lv denied* 18 NY3d 808). We therefore modify the order accordingly.

Initially, we agree with Ellis that plaintiff failed to provide a foundation for the 911 tape of the decedent prior to the fatal collision (*see generally People v Ely*, 68 NY2d 520, 527), and we therefore do not consider that evidence because it does not constitute competent evidence in admissible form (*see Bergstrom v McChesney*, 92 AD3d 1125, 1126-1127).

"In deciding whether a loss is the result of an accident, it must be determined, from the point of view of the insured, whether the loss was unexpected, unusual and unforeseen" (*Allegany Co-op Ins. Co. v Kohorst*, 254 AD2d 744, 744; *see Massa v Nationwide Mut. Fire Ins. Co.*, 74 AD3d 1661, 1662-1663). We must look to the allegations of the complaint in the underlying action, but may also consider extrinsic facts (*see Jubin v St. Paul Fire & Mar. Ins. Co.*, 236 AD2d 712, 713).

Insurable " '[a]ccidental results can flow from intentional acts' " (*General Acc. Ins. Co. v Zazynski*, 229 AD2d 920, 921; *see Slayko v Security Mut. Ins. Co.*, 98 NY2d 289, 293; *Allegany Co-op Ins. Co.*, 254 AD2d at 744). On the other hand, "when the damages alleged in the [underlying] complaint are the intended result which flows directly and immediately from [the insured's] intentional act, . . . there is no accident, and therefore, no coverage" (*Village of Springville v Reynolds*, 61 AD3d 1353, 1354 [internal quotation marks omitted]). "[M]ore than a causal connection between the intentional act and the resultant harm is required to prove that the harm was

intended" (*Allstate Ins. Co. v Mugavero*, 79 NY2d 153, 160). The exclusion for an intentional injury, however, will apply where the injuries are " 'inherent in the nature' of the wrongful act" (*Slayko*, 98 NY2d at 293; *see Allstate Ins. Co.*, 79 NY2d at 161; *Hereford Ins. Co. v Segal*, 40 AD3d 816, 818; *Progressive N. Ins. Co. v Rafferty*, 17 AD3d 888, 889).

In support of its cross motion, plaintiff submitted the statements and depositions of various witnesses who observed LeVea strike the back of decedent's vehicle several times before the final strike that caused decedent to lose control of his vehicle and collide with an oncoming vehicle. Certainly an ordinary person would not construe this as an "accident" in any sense (*see Christodoulides v First Unum Life Ins. Co.*, 96 AD3d 1603, 1605). This evidence, considered by itself, would support the conclusion that decedent's death was inherent in the nature of LeVea's conduct in repeatedly ramming decedent's vehicle while they were traveling at high speeds (*see Progressive N. Ins. Co.*, 17 AD3d at 889; *Westchester Med. Ctr. v Travelers Prop. Cas. Ins. Co.*, 309 AD2d 927, 927-928; *Allstate Ins. Co. v Bostic*, 228 AD2d 628, 628-629).

Nevertheless, plaintiff also submitted the deposition testimony of LeVea in support of its cross motion. LeVea, who had no recollection of the accident immediately after it occurred or at the time of his *Alford* plea, testified at his deposition that his dog jumped into his lap while he was driving and, when he took his hands off the steering wheel to move the dog, he collided with the back of decedent's stopped vehicle. LeVea claimed that decedent then drove down the road, turned a corner onto route 370, and hit a truck head-on. LeVea further testified that he did not intentionally strike decedent's vehicle. We conclude that part of LeVea's testimony concerning his description of the event, i.e., that he did not strike decedent's vehicle on route 370, is completely contradicted by the evidence in the record and is incredible as a matter of law (*see Pennsylvania Millers Mut. Ins. Co. v Rigo*, 256 AD2d 769, 770-771). While we disregard that part of his testimony, we further conclude that the other parts of his testimony, i.e., that he was distracted by his dog and did not intentionally strike decedent's vehicle, must be accepted as true for purposes of this motion for summary judgment (*see Rizk v Cohen*, 73 NY2d 98, 103).

Plaintiff contends that we should disregard LeVea's testimony because he is collaterally estopped from denying an intent to injure decedent. We reject that contention. LeVea pleaded guilty to a crime that alleged that he acted recklessly; the intent to cause injury to decedent was not an element of the crime (*see* Penal Law § 125.14 [5]; *Allegany Co-op Ins. Co.*, 254 AD2d at 744). In addition, LeVea did not make any factual admissions regarding the incident during the *Alford* plea. We therefore conclude that LeVea's testimony raised a question of fact, precluding summary judgment on the issue of plaintiff's duty to indemnify LeVea (*see General Acc. Ins. Co.*, 229 AD2d at 921; *Aetna Cas. & Sur. Co. v Gigante*, 229 AD2d 975, 976). As noted, however, the court properly granted that part of LeVea's cross motion and should

have granted that part of Ellis's motion with respect to plaintiff's duty to defend LeVea. An insurer must "provide a defense unless it can 'demonstrate that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and, further, that the allegations, *in toto*, are subject to no other interpretation' " (*Allstate Ins. Co.*, 79 NY2d at 159; *see Pennsylvania Millers Mut. Ins. Co.*, 256 AD2d at 770). Here, the underlying wrongful death action alleged negligence, not any intentional conduct by LeVea.

Finally, we reject Ellis's contention that plaintiff must indemnify LeVea because LeVea was too intoxicated to form the intent to injure decedent as a matter of law. We note that there are cases where the intentional injury exclusion in a policy is applied even where the insured had been drinking (*see Peters v State Farm Fire & Cas. Co.*, 306 AD2d 817, 817-818, *mod on other grounds* 100 NY2d 634; *Pennsylvania Millers Mut. Ins. Co.*, 256 AD2d at 771).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

603

CA 14-01999

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND VALENTINO, JJ.

RICH PRODUCTS CORPORATION,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

KENYON & KENYON, LLP,
DEFENDANT-RESPONDENT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (ROBERT J. LANE, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

HISCOCK & BARCLAY, LLP, BUFFALO (DENNIS R. MCCOY 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 June 19, 2014. The order granted in part defendant's motion for summary judgment and dismissed the first, second and fourth causes of action, and granted that part of plaintiff's cross motion for partial summary judgment on liability with respect to the third cause of action.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying plaintiff's cross motion in its entirety and as modified the order is affirmed without costs.

Memorandum: In this legal malpractice and breach of contract action, plaintiff appeals and defendant cross-appeals from an order that granted in part defendant's motion for summary judgment and dismissed the first, second and fourth causes of action, and granted that part of plaintiff's cross motion for partial summary judgment on liability with respect to the third cause of action. Plaintiff retained defendant to file and prosecute domestic and international patent applications for its invention of a nondairy pourable dessert product (hereafter, invention). Mexican authorities issued a patent for plaintiff's invention, but a Mexican competitor successfully obtained its invalidation seven years after issuance on the ground that the application was not filed within 30 months of the priority date, a decision that was upheld on appeal. Although defendant had also applied for a patent for plaintiff's invention in Colombia with the assistance of local counsel, the application was denied. Plaintiff commenced this action, asserting in the first and second causes of action of the amended complaint that defendant committed malpractice by "carelessly failing to timely file the Mexican national phase application of the invention" and breached its contract with

plaintiff by "failing to timely file the Mexican national phase application." Plaintiff asserted in the third and fourth causes of action that defendant committed malpractice by "carelessly failing to file the proper documents in Colombia . . . and carelessly failing to timely file the additional required documents in Colombia," and that defendant breached its contract with plaintiff by "failing to file the proper documents in Colombia, and failing to timely file the additional required documents in Colombia."

We note at the outset that, although plaintiff's notice of appeal states, inter alia, that plaintiff is appealing from those parts of the order granting defendant's motion to the extent that it sought summary judgment dismissing the first, second and fourth causes of action, plaintiff did not raise any contention in its brief with respect to the dismissal of the fourth cause of action and thus has abandoned any contention with respect to that cause of action (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Contrary to plaintiff's contention, Supreme Court properly granted defendant's motion with respect to the first cause of action because the record establishes that defendant did not commit legal malpractice at the time of the representation. The patent was cancelled seven years after it was issued due to a retroactive change in Mexican law, and it is well settled that an attorney's representation is "measured at the time of representation" (*Darby & Darby v VSI Intl.*, 95 NY2d 308, 313). In support of its motion, defendant submitted the affidavit of an expert on Mexican patent law establishing that the application was timely when it was filed. We conclude that plaintiff failed to raise a triable issue of fact in opposition to that part of defendant's motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We further conclude that the court properly granted defendant's motion with respect to the second cause of action, for breach of contract, because it was duplicative of the malpractice cause of action (*see Long v Cellino & Barnes, P.C.*, 59 AD3d 1062, 1062). We likewise conclude that the court properly denied plaintiff's motion for leave to serve a second amended complaint, because plaintiff sought only to add duplicative claims (*see generally Matter of HSBC Bank U.S.A. [Littleton]*, 70 AD3d 1324, 1325, *lv denied* 14 NY3d 710).

We agree with defendant on its cross appeal, however, that the court erred in granting that part of plaintiff's cross motion for partial summary judgment on liability on the third cause of action. Plaintiff failed to meet its initial burden with respect to that part of the cross motion, inasmuch as plaintiff failed to submit an affidavit from an expert on Colombian patent law concerning the interpretation of the Colombian legal documents and laws (*see Sea Trade Mar. Corp. v Coutsodontis*, 111 AD3d 483, 484-485; *Warin v Wildenstein & Co.*, 297 AD2d 214, 215; *Jann v Cassidy*, 265 AD2d 873, 874-875). We therefore modify the order accordingly.

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

606

CA 14-01927

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND VALENTINO, JJ.

P&B CAPITAL GROUP, LLC AND
P&B ACQUISITIONS, LLC,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

RAB PERFORMANCE RECOVERIES, LLC,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

CHRISTOPHER W. MCMASTER, BUFFALO, FOR PLAINTIFFS-APPELLANTS.

HISCOCK & BARCLAY, LLP, BUFFALO (DENNIS R. MCCOY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered June 24, 2014. The judgment, inter alia, granted the cross motion of defendant RAB Performance Recoveries, LLC, for summary judgment dismissing the amended complaint against it and declaring that said defendant is the owner of certain consumer accounts receivable.

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

Memorandum: Plaintiffs appeal from a judgment that, inter alia, granted the cross motion of RAB Performance Recoveries, LLC (defendant) for summary judgment dismissing the amended complaint against it and declaring, as sought in defendant's first counterclaim, that defendant is the owner of certain consumer accounts receivable. Plaintiffs, debt collection agencies, commenced this action for money had and received and a declaration that they are the sole owners of certain accounts receivable. Throughout 2007, plaintiff P&B Acquisitions, LLC entered into a series of agreements "concerning acquisition of portfolio" with defendant Leddy Bear Ltd., doing business as Platinum Capital Investments (PCI), to purchase approximately 13,500 consumer accounts receivable. The agreements provided that PCI would hold title to the portfolios and sell the accounts that were not collected within six to eight months. Contemporaneously with its execution of those agreements, PCI also executed bills of sale, which transferred ownership of certain of those portfolios to plaintiffs. In January 2008, PCI sold a number of the accounts, including 171 accounts that were purchased by defendant. Defendant successfully collected on several of the accounts, and

plaintiffs, claiming to be the rightful owners thereof, commenced this action seeking to recover that money so collected and seeking a declaration that they were the rightful owners of the remaining uncollected accounts.

Plaintiffs contend that Supreme Court erred in construing the language of the agreements and the bills of sale and that there are triable issues of fact precluding summary judgment. We reject those contentions. It is well settled that, where "a contract is ambiguous, its interpretation remains the exclusive function of the court unless 'determination of the intent of the parties depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence' " (*Town of Eden v American Ref-Fuel Co. of Niagara*, 284 AD2d 85, 88, *lv denied* 97 NY2d 603, quoting *Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169, 172). "On the other hand, if the equivocality must be resolved wholly without reference to extrinsic evidence the issue is to be determined as a question of law for the court" (*Hartford Acc. & Indem. Co.*, 33 NY2d at 172). In support of their motion, plaintiffs submitted evidence that, due to a crash of their email server, "there is no relevant evidence extrinsic to the [agreements] bearing on the intention of the parties at the time of [their] execution" and, "[t]hus, there is no question of credibility and there are no inferences to be drawn from extrinsic evidence" (*id.*). To the extent that the bills of sale modified the agreements, we note that the modification of a contract "supplants [only] the affected provisions of the original agreement while leaving the balance of it intact" (*Cappelli v State Farm Mut. Auto. Ins. Co.*, 259 AD2d 581, 581, *lv denied* 93 NY2d 810). The bills of sale did not affect the language of the agreements that directed PCI to sell the uncollected accounts, and thus parol evidence, even if admissible to interpret the ambiguous portion of the agreements, cannot be used to contradict the express, unambiguous terms of the agreements (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162; *Judnick Realty Corp. v 32 W. 32nd St. Corp.*, 61 NY2d 819, 822).

Finally, we reject plaintiffs' further contention that the sales from PCI to later purchasers were invalid because plaintiffs held title to the accounts. When a principal expressly authorizes its agent to sell its property and the agent sells the property as occurred here, title to that property passes without regard to a collateral breach of the agency agreement (*see Stanton Motor Corp. v Rosetti*, 11 AD2d 296, 297-298; *see also Cory v Nintendo of Am.*, 185 AD2d 70, 72-73).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

608

KA 13-00521

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DERRELL A.E., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JAMES RITTS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered October 3, 2012. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the second degree (Penal Law § 160.10 [2] [b]). In appeal No. 2, defendant appeals from an adjudication that, upon his admission to violating conditions of probation, revoked the sentence of probation imposed on his prior youthful offender adjudication of attempted robbery in the third degree (§§ 110.00, 160.05) and sentenced him to a term of imprisonment. Defendant concedes in both appeals that he failed to preserve for our review his contention that the guilty plea and admission, respectively, were not knowing, voluntary or intelligent "inasmuch as [he] failed to move to withdraw [his] [plea or] admission on that ground" or to vacate the judgment or adjudication (*People v Shaw*, 118 AD3d 1461, 1461, *lv denied* 24 NY3d 1005; *see People v McKeon*, 78 AD3d 1617, 1618, *lv denied* 16 NY3d 799; *see generally People v Lopez*, 71 NY2d 662, 665). Contrary to defendant's contention in both appeals, neither case falls within the narrow exception to the preservation requirement set forth in *Lopez* (71 NY2d at 666). Finally, we conclude that the sentences in both appeals are not unduly harsh or severe.

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

609

KA 13-00667

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DERRELL A.E., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JAMES RITTS OF COUNSEL), FOR RESPONDENT.

Appeal from an adjudication of the Ontario County Court (William F. Kocher, J.), rendered October 3, 2012. The adjudication revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Same memorandum as in *People v Derrell A.E.* ([appeal No. 1] ___ AD3d ___ [May 8, 2015]).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

610

KA 13-01849

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALAN D. TIDD, SR., DEFENDANT-APPELLANT.

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Genesee County Court (Robert C. Noonan, J.), entered September 13, 2013. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court's upward departure from his presumptive classification as a level one risk is not supported by clear and convincing evidence. We reject that contention. "The court's discretionary upward departure [to a level three risk] was based on clear and convincing evidence of aggravating factors to a degree not taken into account by the risk assessment instrument" (*People v Sherard*, 73 AD3d 537, 537, *lv denied* 15 NY3d 707; *see People v Howe*, 49 AD3d 1302, 1302). Statements in a presentence report and case summary constitute "reliable hearsay" upon which a court may properly rely in making an upward departure (§ 168-n [3]; *see People v Mingo*, 12 NY3d 563, 572-573) and, here, the court premised its upward departure on information contained in those documents, including evidence of the number of victims whom defendant sexually abused, the lengthy period over which defendant committed that sexual abuse, defendant's lack of "insight into his offending," and the risk of recidivism. Finally, we reject defendant's further contention that he was deprived of effective assistance of counsel (*see People v Russell*, 115 AD3d 1236, 1236).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

612

KA 14-01090

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY CORSARO, DEFENDANT-APPELLANT.

ANN M. NICHOLS, BUFFALO, FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (LAURA T. BITTNER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Angelo J. Morinello, A.J.), rendered August 29, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree and robbery in the third degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, and the matter is remitted to Niagara County Court for further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). We agree with defendant that vacatur of the plea and reversal of the judgment of conviction are required because County Court failed to advise him, at the time of the plea, of the period of postrelease supervision that would be imposed at sentencing (*see People v Turner*, 24 NY3d 254, 259; *People v Catu*, 4 NY3d 242, 245; *People v Colon*, 101 AD3d 1635, 1637-1638; *People v Dean*, 52 AD3d 1308, 1308, *lv denied* 11 NY3d 736). In light of our determination, we do not address defendant's remaining contentions.

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

613

KA 14-01742

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TOBIAS BOYLAND, DEFENDANT-APPELLANT.

ANTHONY J. LANA, BUFFALO, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered April 13, 2012. The judgment convicted defendant, upon his plea of guilty, of bail jumping 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 bail jumping in the second degree (Penal Law § 215.56), defendant contends that County Court erred in granting the People's motion to disqualify defense counsel, which the People made to prevent defense counsel from violating the advocate-witness rule (*see* Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.7), and the unsworn witness rule (*see generally People v Paperno*, 54 NY2d 294, 300-301). Contrary to defendant's contention, the court properly discharged the attorney on the ground that his continued representation of defendant would violate the advocate-witness rule (*see Paperno*, 54 NY2d at 299-300; *People v Lawson*, 65 AD3d 1380, 1380, *lv denied* 13 NY3d 908; *People v Swanson*, 43 AD3d 1331, 1332, *lv denied* 9 NY3d 1010).

Finally, insofar as defendant contends that the People could not establish that he received proper notice to appear in court and surrender, we note that such contention is a challenge to the sufficiency of the evidence, and was therefore forfeited by his plea of guilty (*see People v Nichols*, 37 AD3d 1097, 1098, *lv denied* 8 NY3d 948). Indeed, "it would be logically inconsistent to permit a defendant to enter a plea of guilty based on particular admitted facts, yet to allow that defendant . . . to challenge on appeal the sufficiency of those facts to support a conviction, had there been a

trial" (*People v Plunkett*, 19 NY3d 400, 405-406).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

614

KA 12-01040

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEREMY M. JOHNSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Joseph G. Nesser, A.J.), rendered March 13, 2012. The judgment convicted defendant, upon his plea of guilty, of rape 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 rape in the second degree (Penal Law § 130.30 [1]). Defendant failed to preserve for our review his contention that his plea of guilty was not knowing, voluntary or intelligent because he did not "move to withdraw the plea on the same grounds [now] alleged on appeal or else file a motion to vacate the judgment of conviction pursuant to CPL 440.10" (*People v Peque*, 22 NY3d 168, 182, *cert denied* ___ US ___, 135 S Ct 90; *see People v Robinson*, 64 AD3d 1248, 1248, *lv denied* 13 NY3d 862; *see generally People v Lopez*, 71 NY2d 662, 665). Further, we conclude that this is not one of those "rare case[s]" in which, during the plea allocution, "defendant's recitation of the facts underlying the crime pleaded to clearly casts significant doubt upon . . . defendant's guilt or otherwise calls into question the voluntariness of the plea" (*Lopez*, 71 NY2d at 666).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

620

CAF 13-02169

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

IN THE MATTER OF MAKIA R.J. AND NAKIA M.J.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MICHAEL A.J., RESPONDENT-APPELLANT.

JENNIFER M. LORENZ, LANCASTER, FOR RESPONDENT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered November 12, 2013. The order determined that respondent is not a father whose consent to the adoption of the subject children was required.

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

Memorandum: Respondent, the biological father of the subject children, contends that Family Court erred in determining, following an evidentiary hearing, that he is not a father whose consent to the adoption of the subject children was required pursuant to Domestic Relations Law § 111. We reject that contention. Section 111 (1) (d) provides that a child born out of wedlock may be adopted without the consent of the child's biological father unless the father shows that he "maintained substantial and continuous or repeated contact with the child as manifested by: (i) the payment by the father toward the support of the child . . . , *and* either (ii) the father's visiting the child at least monthly when physically and financially able to do so . . . , or (iii) the father's regular communication with the child or with the person or agency having the care or custody of the child, when physically and financially unable to visit the child or prevented from doing so" (emphasis added). Here, it is undisputed that respondent paid only $99.99 in child support since July 2003, and nothing between 2006-2012, notwithstanding a prior order directing him to pay at least $25.00 per month. Thus, regardless of whether respondent visited the child monthly or regularly communicated with the child, the court properly determined that he was a mere notice father whose consent was not required for the adoption of the subject children (*see Matter of Jules S. [Julio S.]*, 96 AD3d 448, 449, *lv*

denied 19 NY3d 814; *see generally* Social Services Law § 384-c).

In any event, giving great deference to the court's credibility determinations, as we must (*see Matter of Kennedie M. [Douglas M.]*, 89 AD3d 1544, 1544-1545, *lv denied* 18 NY3d 808; *see also Matter of Angelina K. [Eliza W.–Michael K.]*, 105 AD3d 1310, 1312, *lv denied* 21 NY3d 860), we conclude that the court's further determination that respondent failed to visit or communicate with the child regularly is supported by the requisite clear and convincing evidence (*see Matter of Kevina G. [Kevin C.]*, 124 AD3d 889, 890; *Matter of Zachary N. [Paul N.–Hope N.]*, 77 AD3d 1116, 1117).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

622

CA 14-02039

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

MARY WITHERSPOON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOPS MARKETS, LLC, DEFENDANT-RESPONDENT.

DAVID P. FELDMAN, BUFFALO, FOR PLAINTIFF-APPELLANT.

DIXON & HAMILTON, LLP, GETZVILLE (DENNIS HAMILTON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered June 10, 2014. The order granted the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she slipped and fell on snow or ice in defendant's parking lot. Defendant moved for summary judgment dismissing the complaint, contending that it had no duty to correct the hazardous condition because there was a storm in progress at the time plaintiff fell, and Supreme Court granted the motion. We affirm.

Defendant met its initial burden by establishing that a storm was in progress at the time of the accident and, thus, that it "had no duty to remove the snow [or] ice until a reasonable time ha[d] elapsed after cessation of the storm" (*Glover v Botsford*, 109 AD3d 1182, 1183 [internal quotation marks omitted]; *see Gilbert v Tonawanda City Sch. Dist.*, 124 AD3d 1326, 1327). The accident occurred shortly after 10:30 a.m. on January 13, 2012, when plaintiff exited defendant's supermarket. Two supermarket employees testified at their depositions that there was a storm occurring both before and at the time plaintiff fell, and that the storm produced wintry, snowy, and blustery conditions (*see Gilbert*, 124 AD3d at 1327). Even plaintiff acknowledged in her deposition testimony that it was snowing on the morning in question as she drove to the supermarket, as well as when she entered and exited the store (*see Glover*, 109 AD3d at 1183). The above deposition testimony was corroborated by a surveillance video that depicted a steady accumulation of snow in defendant's parking lot before the accident and repeated passes by a snowplow attempting to clear portions of the parking lot.

Contrary to plaintiff's contention, we conclude that she failed to raise an issue of fact whether there was a storm in progress when the accident occurred (*see Mann v Wegmans Food Mkts., Inc.*, 115 AD3d 1249, 1250; *Glover*, 109 AD3d at 1183-1184). Moreover, "[e]ven if there was a lull or break in the storm around the time of plaintiff's accident, this does not establish that defendant had a reasonable time after the cessation of the storm to correct hazardous snow or ice-related conditions" (*Mann*, 115 AD3d at 1250 [internal quotation marks omitted]). Plaintiff further "failed to raise a triable issue of fact whether the accident was caused by a slippery condition . . . that existed prior to the storm, as opposed to precipitation from the storm in progress, and that . . . defendant had actual or constructive notice of the preexisting condition" (*Quill v Churchville-Chili Cent. Sch. Dist.*, 114 AD3d 1211, 1212 [internal quotation marks omitted]).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

623

CA 14-01997

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

KEITH A. BORDERS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN T. BORDERS, ELAINE MARIE PROSSER AND JEFFREY BORDERS, DEFENDANTS-APPELLANTS.

DANIEL P. TIEDE, BUFFALO, FOR DEFENDANTS-APPELLANTS.

COLE, SORRENTINO, HURLEY, HEWNER & GAMBINO, P.C., BUFFALO (MICHAEL F. BARRETT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered January 14, 2014. The judgment settled title to certain property.

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

Memorandum: Plaintiff commenced this action pursuant to RPAPL article 15, seeking a determination of competing claims with respect to a parcel of real property. The parties herein are siblings, and this litigation arises from the transfer of a parcel of real property formerly owned by their parents. After their mother died, their father executed a power of attorney in favor of defendants Brian T. Borders and Elaine Marie Prosser (Brian and Elaine), granting them power to dispose of his property. Defendants contended that several judgments had been lodged against plaintiff, who was living with their father, and that plaintiff was preventing the remaining siblings from having any contact with their father. Purportedly in order to keep plaintiff from obtaining title to the parcel and thereafter using the parcel to satisfy the claims of his creditors, Brian and Elaine used their power of attorney to transfer the parcel to defendants without consideration, reserving a life estate therein to their father, by deed recorded on November 20, 2008. Their father, however, transferred the parcel to plaintiff, reserving a life estate therein to himself, by executing a separate deed that was recorded on November 26, 2008. Plaintiff commenced this action seeking a determination that the deed recorded on November 26, 2008 vested him with title to the parcel and that the deed recorded on November 20, 2008 is null and void. Defendants answered that they were entitled to judgment dismissing the complaint, and the parties moved and cross-moved for summary judgment. Defendants appeal from a judgment that, inter alia, adjudged the deed transferring title to plaintiff to be valid and the

deed transferring title to them to be null and void.

Contrary to defendants' contention, the court properly concluded that the deed transferring title to them is null and void. It is well settled that "[a] power of attorney . . . is clearly given with the intent that the attorney-in-fact will utilize that power for the benefit of the principal" (*Mantella v Mantella*, 268 AD2d 852, 852 [internal quotation marks omitted]). "The relationship of an attorney-in-fact to his principal is that of agent and principal . . . and, thus, the attorney-in-fact 'must act in the utmost good faith and undivided loyalty toward the principal, and must act in accordance with the highest principles of morality, fidelity, loyalty and fair dealing' . . . Consistent with this duty, an agent may not make a gift to himself or a third party of the money or property which is the subject of the agency relationship" (*Semmler v Naples*, 166 AD2d 751, 752, *appeal dismissed* 77 NY2d 936; *see Matter of Ferrara*, 7 NY3d 244, 254). "In the event such a gift is made, there is created a presumption of impropriety [that can] be rebutted [only] with a clear showing that the principal intended to make the gift" (*Mantella*, 268 AD2d at 852-853), or that the gift was in the principal's best interest (*see Ferrara*, 7 NY3d at 254).

Here, the parties' father transferred title of the parcel to plaintiff while reserving a life estate to himself, thus demonstrating that he did not wish to give the remaining interest in the parcel to defendants. Furthermore, the evidence submitted by defendants in support of the deed transferring title to them, including the fact that there was no consideration given for the transfer, indicates that the intent of Brian and Elaine in executing the deed was not to protect their father but, rather, to protect defendants' future inheritance from their brother and his creditors. Consequently, defendants failed to make the required showing under the holding of *Mantella* (*see* 268 AD2d at 852-853), and the court properly determined that the deed transferring title to them is null and void (*see Moglia v Moglia*, 144 AD2d 347, 348).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

625

CA 14-01788

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

JESSICA MANFORD, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FRED M. WILBER, DEFENDANT-APPELLANT.

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

ATHARI & ASSOCIATES, LLC, NEW HARTFORD (MO ATHARI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered December 19, 2013. The order, among other things, denied defendant's 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 arising from her exposure to lead paint as a child when she resided for approximately one year in an apartment owned by defendant. Defendant appeals from an order denying his motion for summary judgment dismissing the complaint. We affirm. Initially, we reject defendant's contention that he was entitled to summary judgment with respect to plaintiff's negligent abatement cause of action. Because there is evidence in the record that plaintiff's blood lead level rose during the period in which the abatement was performed by defendant, there are issues of fact whether the abatement was negligently performed and whether plaintiff "sustained additional injuries after [defendant] received . . . notice" of the lead paint condition (*Ortiz v Lehmann*, 118 AD3d 1389, 1390; *see Pagan v Rafter*, 107 AD3d 1505, 1506-1507).

We also reject defendant's further contention that he is entitled to summary judgment because he met his initial burden on the issue of causation and plaintiff failed to raise a triable issue of fact. The parties submitted opposing affidavits of medical experts on the issue whether plaintiff's claimed injuries were caused by lead paint exposure and, if so, how and when she was exposed, including whether she had been exposed to lead from sources unconnected with defendant. Under those circumstances, "neither party has established entitlement to summary judgment on the issue of causation" (*Derr v Fleming*, 106 AD3d 1240, 1243).

Finally, we reject defendant's remaining contention that he was entitled to summary judgment because he established that he had neither actual nor constructive knowledge of the hazards of lead paint to young children, the fourth factor in the five-factor test set forth in *Chapman v Silber* (97 NY2d 9, 20-21), which "remain[s] the bas[is] for determining whether a landlord knew or should have known of the existence of a hazardous lead paint condition" (*Watson v Priore*, 104 AD3d 1304, 1305, *lv dismissed in part and denied in part* 21 NY3d 1052). Despite his persistent denials of any knowledge of the hazards of lead paint to young children, defendant testified that he worked for several years in a painters' union and had experience in remodeling homes and renting apartments that were inspected by the United States Department of Housing and Urban Development. We conclude that defendant's testimony is sufficient evidence "from which a jury could infer that [he] knew or should have known of the dangers of lead paint to children. Therefore, . . . defendant[']s] motion for summary judgment dismissing the complaint was properly denied" (*Abreu v Huang*, 298 AD2d 471, 472; *see Jackson v Vatter*, 121 AD3d 1588, 1589; *cf. Williams v Thomas*, 112 AD3d 1274, 1276, *lv denied* 22 NY3d 865).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court

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

1437/14

CA 14-01056

PRESENT: SCUDDER, P.J., CENTRA, CARNI, AND SCONIERS, JJ.

GEORGE R. PHELPS, PLAINTIFF,

V MEMORANDUM AND ORDER

LISA B. PHELPS, DEFENDANT.

LISA B. PHELPS, THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

STANFORD N. PHELPS, ELIZABETH R. PHELPS AND
S.N.P. ASSOCIATES RETIREMENT PLAN, INC.,
THIRD-PARTY DEFENDANTS-APPELLANTS.
(ACTION NO. 1.)

ELIZABETH R. PHELPS, PLAINTIFF-APPELLANT,

V

GEORGE R. PHELPS, STANFORD N. PHELPS,
DEFENDANTS-APPELLANTS,
LISA B. PHELPS, DEFENDANT-RESPONDENT,
AND CAPITAL ONE BANK (USA) N.A., DEFENDANT.
(ACTION NO. 2.)

S.N.P. ASSOCIATES RETIREMENT PLAN, INC.,
PLAINTIFF-APPELLANT,

V

GEORGE R. PHELPS, STANFORD N. PHELPS,
DEFENDANTS-APPELLANTS,
LISA B. PHELPS, DEFENDANT-RESPONDENT,
AND CAPITAL ONE BANK (USA) N.A., DEFENDANT.
(ACTION NO. 3.)

NIXON PEABODY LLP, ROCHESTER (DAVID H. TENNANT OF COUNSEL), FOR PLAINTIFF-APPELLANT ELIZABETH R. PHELPS, DEFENDANT-APPELLANT STANFORD N. PHELPS AND THIRD-PARTY DEFENDANTS-APPELLANTS.

DAVIDSON FINK LLP, ROCHESTER (DONALD A. WHITE OF COUNSEL), FOR DEFENDANT-APPELLANT GEORGE R. PHELPS.

INCLIMA LAW FIRM, PLLC, ROCHESTER (CHARLES P. INCLIMA OF COUNSEL), FOR

THIRD-PARTY PLAINTIFF-RESPONDENT AND DEFENDANT-RESPONDENT.

Appeals from a judgment (denominated order) of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered January 14, 2014. The judgment, among other things, granted the motion of Lisa B. Phelps for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying that part of the motion of third-party plaintiff-defendant Lisa B. Phelps seeking a declaration in action No. 1 that a mortgage instrument executed in 1997 is null and void and by reinstating the complaint in action No. 2, and as modified the judgment is affirmed without costs.

Memorandum: George R. Phelps, plaintiff in action No. 1, and Lisa B. Phelps, defendant in action No. 1, were married in 1991. In 2011, George R. Phelps initiated a divorce action. Lisa B. Phelps thereafter commenced a third-party action against her husband's parents, Stanford N. Phelps and Elizabeth R. Phelps, and S.N.P. Associates Retirement Plan, Inc. (collectively, third-party defendants), seeking, inter alia, a declaration that two intra-family transactions alleged by third-party defendants to be loans made to George R. Phelps and Lisa B. Phelps, secured by mortgages on the marital residence, were actually gifts. One alleged loan was made in 1992 by S.N.P. Associates Retirement Plan, Inc. (hereafter, SNP). The other alleged loan was made by Elizabeth R. Phelps in 1997.

Elizabeth R. Phelps thereafter commenced an action against George R. Phelps, Lisa B. Phelps, Stanford N. Phelps and Capital One Bank, (USA), N.A. (Capital One), to foreclose the mortgages securing the 1997 alleged loan (action No. 2), and SNP did the same with respect to the mortgage securing the 1992 alleged loan (action No. 3). Capital One was named in both of those actions as a subordinate judgment lienholder.

Following discovery, Elizabeth R. Phelps moved for summary judgment seeking a judgment of foreclosure in action No. 2, and Lisa B. Phelps thereafter moved for summary judgment on the third-party complaint in action No. 1 declaring that the mortgages are null and void and for summary judgment dismissing the complaint against her in action Nos. 2 and 3. Supreme Court denied the motion of Elizabeth R. Phelps in action No. 2 and granted the motion of Lisa B. Phelps in action No. 1, declaring that the funds advanced to her by Elizabeth R. Phelps were a gift and thus that the mortgage instrument executed in 1997 is null and void as against her interest in the marital residence, and the court therefore dismissed the complaint in action No. 2 against her. In action No. 3, the court declared the mortgage instrument executed in 1992 to be null and void as against the interest of Lisa B. Phelps in the marital residence and dismissed SNP's complaint in its entirety on the ground that SNP was a nonexistent corporation and therefore lacked "standing" to commence action No. 3.

In these consolidated appeals, Elizabeth R. Phelps, Stanford N. Phelps and SNP appeal from the order in all three actions. George Phelps appeals with respect to the order in action Nos. 2 and 3.

We reject the contention of SNP, Stanford N. Phelps, George R. Phelps and Elizabeth R. Phelps with respect to action No. 3 that the court erred in concluding that SNP had no corporate existence and therefore lacked capacity, denominated "standing" by the court, to sue. Counsel for SNP correctly concedes that, in opposition to the motion of Lisa B. Phelps, no evidence was produced of any corporate formation or existence of "S.N.P. Associates Retirement Plan, Inc." at the time of the alleged mortgage loan, or at any time thereafter. Therefore, on this record we conclude that, at the time of the execution of the mortgage, SNP was at best a "purported entity" that could not acquire rights by contract or otherwise, or sue or be sued (*Kiamesha Dev. Corp. v Guild Props.*, 4 NY2d 378, 389; *see 442 Decatur St., LLC v Spheres Realty, Inc.*, 14 AD3d 535, 535-536). Inasmuch as SNP failed to make a motion to reform the pleadings to identify Stanford N. Phelps as the alleged real party in interest and did not make such argument in its opposition papers to the motion, SNP's contention in this respect is not preserved for our review (*see generally Cavalry Invs., LLC v Kass*, 19 Misc 3d 128[A], *1).

We agree, however, with Stanford N. Phelps, George R. Phelps and Elizabeth R. Phelps that, with respect to actions Nos. 2 and 3, the court erred in applying burden-shifting and substantive principles developed under Federal Tax Law, rather than New York common law, to conclude that the intra-family transactions at issue were gifts rather than bona fide and enforceable loan and mortgage transactions. "It is axiomatic that Supreme Court is bound to apply the law as promulgated by the Appellate Division within its particular Judicial Department (McKinney's Cons Laws of NY, Book 1, Statutes § 72 [b]), and where the issue has not been addressed within the Department, Supreme Court is bound by the doctrine of stare decisis to apply precedent established in another Department, either until a contrary rule is established by the Appellate Division in its own Department or by the Court of Appeals" (*D'Alessandro v Carro*, 123 AD3d 1, 6; *see Mountain View Coach Lines v Storms*, 102 AD2d 663, 664-665). In contrast to the burden-shifting approach under Federal Tax Law principles, it is well settled under the common law of this State that a party claiming that a transfer is a gift has the burden of proof by clear and convincing evidence that the gift was made with the requisite donative intent (*see Gruen v Gruen*, 68 NY2d 48, 53; *Matter of Abramowitz*, 38 AD2d 387, 392-393, *affd* 32 NY2d 654; *Matter of Rinchiuso*, 20 AD2d 254, 255-256).

Applying the above principles, we conclude that the court properly denied the motion for summary judgment of Elizabeth R. Phelps in action No. 2 but erred in granting that part of the motion for summary judgment of Lisa B. Phelps in action No. 1 declaring that the 1997 alleged loan and mortgage instrument was null and void as against her and, in action No. 2, dismissing the complaint against her. We therefore modify the judgment accordingly. We conclude that, in action No. 2, Elizabeth R. Phelps established the presumptive validity of the 1997 mortgage instrument (*see Artigas v Renewal Arts Realty*

Corp., 22 AD3d 327, 328); however, the submissions of Lisa B. Phelps, in support of her own motion and in opposition to that of Elizabeth R. Phelps, raised issues of fact whether the 1997 loan and mortgage documents were part of a "sham" transaction in which the alleged loan was never intended to be repaid (*see Dayan v Yurkowski*, 238 AD2d 541, 541-542; *Lombard & Co. v De La Roche*, 235 AD2d 333, 334; *Paolangeli v Cowles*, 208 AD2d 1174, 1175; *see also Bernstein v Kritzer*, 253 NY 410, 416-417). We further conclude that, even assuming, arguendo, that Lisa B. Phelps established her entitlement to judgment in action No. 1 that the purported loan was a gift, third-party defendants and George R. Phelps raised issues of fact sufficient to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: May 8, 2015

Frances E. Cafarell
Clerk of the Court