SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

FEBRUARY 3, 2017

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. BRIAN F. DEJOSEPH

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. HENRY J. SCUDDER, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

682
CA 15-01907
PRESENT: WHALEN, P.J., SMITH, CENTRA, PERADOTTO, AND CARNI, JJ.

RAEQUEL L. GRAHAM, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHARLESETTA JONES, YASMINE H. KIRKSEY, DEFENDANTS,
AND BUFFALO AUTO RENTAL, INC., DEFENDANT-APPELLANT.

OSBORN, REED & BURKE LLP, ROCHESTER (JEFFREY P. DIPALMA OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered May 28, 2015. The order, insofar as appealed from, denied in part the motion of defendant Buffalo Auto Rental, Inc., for summary judgment dismissing the complaint against it.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when her vehicle collided with a vehicle operated by defendant Yasmine H. Kirksey and owned by defendant Buffalo Auto Rental, Inc. (BAR). Kirksey did not have a driver's license at the time of the accident. The vehicle operated by Kirksey had been rented by defendant Charlesetta Jones from BAR. Jones testified at her deposition that she had rented vehicles from BAR three or four times before the accident. Plaintiff commenced this action and alleged causes of action for negligence, negligent entrustment, and vicarious liability against BAR. With respect to the negligent entrustment cause of action, plaintiff alleged that BAR rented the vehicle to Jones and that BAR knew or should have known that the vehicle would be operated by drivers other than Jones, such as Kirksey, who did not have a driver's license.

Plaintiff previously moved to strike the answer and affirmative defenses of BAR as they pertained to the cause of action for negligent entrustment or, in the alternative, to preclude BAR from offering evidence relevant to negligent entrustment, because of its spoliation of evidence. In a prior order, Supreme Court found that BAR was negligent in destroying its electronic records concerning any vehicle rentals to Jones or Kirksey, and ordered that BAR was precluded from introducing evidence of its electronic rental records with respect to Jones or Kirksey at trial, with the exception of an unsigned rental

agreement between BAR and Jones involving the vehicle in the instant collision that BAR had already disclosed. The court further ordered that plaintiff was permitted to make an application at the time of trial for an adverse inference charge based on BAR's failure to keep electronic records.

BAR moved for summary judgment dismissing the complaint against it, and plaintiff abandoned the negligence cause of action and withdrew the vicarious liability cause of action, leaving only the negligent entrustment cause of action. The court granted the motion in part by dismissing the vicarious liability cause of action and denied that part of the motion seeking dismissal of the negligent entrustment cause of action, and we now affirm. "The owner or possessor of a dangerous instrument is under a duty to entrust it to a responsible person whose use does not create an unreasonable risk of harm to others" (*Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 236; *see Kelly v DiCerbo*, 27 AD3d 1082, 1083). "The duty may extend through successive, reasonably anticipated entrustees" (*Hamilton*, 96 NY2d at 237). "The tort of negligent entrustment is based on the degree of knowledge the supplier of a chattel has or should have concerning the entrustee's propensity to use the chattel in an improper or dangerous fashion" (*id.* at 237; *see Earsing v Nelson*, 212 AD2d 66, 70). To establish a negligent entrustment cause of action, a plaintiff must show that the defendant had "some *special knowledge concerning a characteristic or condition peculiar to the [person to whom a particular chattel is given]* which renders [that person's] use of the chattel unreasonably dangerous" (*Monette v Trummer*, 105 AD3d 1328, 1330, *affd* 22 NY3d 944 [internal quotation marks omitted]; *see Byrne v Collins*, 77 AD3d 782, 784, *lv denied* 17 NY3d 702). With respect to motor vehicles, an owner may be liable "if [it] had control over the vehicle and if [it] was negligent in entrusting [the vehicle] to one who [it] knew, or in the exercise of ordinary care should have known, was incompetent to operate [the vehicle]" (*Bennett v Geblein*, 71 AD2d 96, 98).

Even assuming, arguendo, that BAR met its initial burden of establishing its entitlement to judgment as a matter of law with respect to the negligent entrustment cause of action, we conclude that plaintiff raised a triable issue of fact. We agree with plaintiff that Vlad Kats, the president of BAR, as well as Jones and Kirksey, "gave wildly differing testimon[y] [at their depositions] concerning all issues relevant to the negligent entrustment cause of action." In the event they so testify at trial, such inconsistent testimony may warrant a falsus in uno charge (*see generally DiPalma v State of New York*, 90 AD3d 1659, 1660). That conflicting evidence, together with the adverse inference to which plaintiff may be entitled at trial, raised a question of fact whether BAR had special knowledge that Kirksey would be driving the vehicle and doing so without a driver's license.

We reject BAR's contention that it cannot be held liable even if it knew that Kirksey would be driving the vehicle without a driver's license. The fact that Kirksey did not possess a driver's license is

a factor to consider in determining whether BAR knew that Kirksey was incompetent to operate the vehicle (*see Nolechek v Gesuale*, 46 NY2d 332, 336-337, 340 [negligent entrustment cause of action stated where the father purchased a motorcycle for his son who, inter alia, did not possess a license]; *Cone v Williams* [appeal No. 1], 182 AD2d 1102, 1102, *lv denied* 80 NY2d 758 [in support of the counterclaim for negligent entrustment, the defendants were allowed to elicit testimony from the father of the infant plaintiff that his son was not a licensed operator of the all-terrain vehicle]; *Calhoun v Allen*, 38 Misc 3d 171, 178-179 [car rental business failed to meet its burden because it failed to establish that the driver to whom it rented the vehicle had a valid driver's license]; *cf. Monette*, 105 AD3d at 1330-1331 [the vehicle repair shop verified that the driver, inter alia, had a valid driver's license]). While we agree with the dissent that "the absence or possession of a driver's license is not relevant to the issue of negligence" in the operation of a motor vehicle (*Huff v Rodriguez*, 88 AD3d 1274, 1275, *appeal dismissed* 18 NY3d 869, *lv denied* 18 NY3d 919), this is a negligent entrustment cause of action, where the issue does not concern the manner in which the accident occurred. Rather, the issue is whether BAR should have entrusted the vehicle to Kirksey in the first instance.

All concur except PERADOTTO, and CARNI, JJ., who dissent and vote to reverse the order insofar as appealed from in accordance with the following memorandum: We respectfully dissent. Plaintiff's cause of action for negligent entrustment is premised upon the theory that, in renting the vehicle to defendant Charlesetta Jones, defendant Buffalo Auto Rental, Inc. (BAR) knew the vehicle would be used by defendant Jasmine H. Kirksey and that BAR also knew, or in the exercise of ordinary care should have known, that Kirksey was incompetent to operate it (*see Bennett v Geblein*, 71 AD2d 96, 98). It is well settled that, without a showing that the owner of the vehicle was or should have been aware of incompetence on the part of the operator, there can be no negligent entrustment (*see Guay v Winner*, 189 AD2d 1081, 1083). Here, plaintiff's theory that Kirksey was not competent to operate a motor vehicle is based entirely upon the undisputed fact that Kirksey did not possess a driver's license at the time of the accident.

However, it is well settled that "the absence or possession of a driver's license relates only to the authority for operating a vehicle, and not to its manner of operation" (*Almonte v Marsha Operating Corp.*, 265 AD2d 357, 357; *see Huff v Rodriguez*, 88 AD3d 1274, 1275, *appeal dismissed* 18 NY3d 869, *lv denied* 18 NY3d 919; *Firmes v Chase Manhattan Auto. Fin. Corp.*, 50 AD3d 18, 27, *lv denied* 11 NY3d 705). Because a driver's license relates only to the authority to operate a motor vehicle and not the manner of operation, the absence of a license is not presumptive evidence of negligence (*see Phass v MacClenathen*, 274 App Div 535, 538). Indeed, we have held that evidence that a driver did not possess a valid driver's license at the time of the subject motor vehicle accident is inadmissible on the issue of negligence (*see Huff*, 88 AD3d at 1275).

Here, we conclude that in moving for summary judgment, BAR met its initial burden of proof by submitting evidence that when it rented the vehicle to Jones it had no knowledge that Kirksey would be operating the vehicle or that Kirksey was incompetent to operate a motor vehicle (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). In opposition, plaintiff had the burden of raising a material issue of fact as to both BAR's knowledge of Kirksey's use and of Kirksey's alleged incompetence to operate the vehicle (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

There is no dispute that Kirksey was beyond infancy in that she was 21 years of age at the time of the accident (*see* CPLR 105 [j]). Plaintiff does not allege that Kirksey was, for example, intoxicated (*see Bennett*, 71 AD2d at 98-99), mentally incapacitated (*see Splawnik v Di Caprio*, 146 AD2d 333, 335-336), physically impaired (*see generally Golembe v Blumberg*, 262 App Div 759, 759; *Schneider v Van Wyckhouse*, 54 NYS2d 446, 447), or otherwise incompetent to operate a motor vehicle at the time of the rental or the accident (*see* Restatement [Second] of Torts § 390, Chattel for Use by Person Known to be Incompetent).

Nolechek v Gesuale (46 NY2d 332), cited by the majority, involves an infant with impaired vision entrusted with a motorcycle by his father, and "key to [that] case [was] the duty owed by parents to third parties to control their children's use of dangerous instruments to avoid harm to third parties" (*id.* at 339). Such duty is not at issue here. We note that the Court of Appeals, in discussing *Nolechek* in *Rios v Smith* (95 NY2d 647), a case involving a parent's entrustment of an all-terrain vehicle (ATV) to an infant, addressed the negligent entrustment theory in that case only with reference to the fact "that [in *Nolechek*] the father had negligently entrusted the motorcycle to his child, who was blind in one eye and had impaired vision in the other eye," and, notably, the Court of Appeals made no reference to whether the infant possessed a driver's license (*Rios*, 95 NY2d at 652).

Cone v Williams ([appeal No. 1] 182 AD2d 1102, 1102, *lv denied* 80 NY2d 758), also cited by the majority, likewise involved a parent's entrustment of an ATV to a 14-year-old child (*see Cone v Nationwide Mut. Fire Ins. Co.*, 75 NY2d 747, 748), who, at 14 years of age, could not have under any circumstances held a driver's license at the time of the accident. We have no quarrel with the conclusion that an infant, forbidden by statute to operate a motor vehicle because of his or her age, is presumptively an incompetent operator (*see e.g. Keller v Wellensiek*, 186 Neb 201, 206-207, 181 NW2d 854, 858). But that is not the situation here.

Even assuming, arguendo, that BAR knew of Kirksey's lack of a driver's license, we note that the majority fails to account for our jurisprudence establishing that the lack of a driver's license is not admissible on the issue of the operator's negligence (*see Huff*, 88 AD3d at 1275). Moreover, on the undisputed facts in this record, any entrustment of the vehicle to Kirksey by BAR was not and could not

have been a proximate cause of the accident (*see Hanley v Albano*, 20 AD2d 644, 645).

Lastly, with respect to the majority's conclusion that BAR's motion should be denied on the *possibility* that plaintiff *may* be entitled to a *permissive* adverse inference instruction (*see* PJI 1:77) at trial with respect to whether BAR knew that Kirksey would be driving the vehicle without a driver's license, we conclude that such a prospect is untenably remote to defeat summary judgment (*see generally Zuckerman*, 49 NY2d at 562), and that, in any event, such an inference would not overcome the rule that the lack of a driver's license is inadmissible on the issue of negligence in the operation of a motor vehicle (*see Huff*, 88 AD3d at 1275). Likewise, the possibility that inconsistent testimony by Jones, BAR and/or Kirksey on the issue whether BAR knew at the time of the rental that Kirksey would be driving and was unlicensed might yield a falsus in uno instruction at trial is, in our view, insufficient to raise a material issue of fact on the issues whether Kirksey was incompetent to operate the vehicle (*see id.*), and whether such incompetence was a proximate cause of the accident (*see Hanley*, 20 AD2d at 645).

We would therefore reverse the order insofar as appealed from and grant BAR's motion for summary judgment dismissing the complaint against it in its entirety.

Frances E. Cafarell

Entered: February 3, 2017

Clerk of the Court

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

816
KA 14-01733
PRESENT: PERADOTTO, J.P., CARNI, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RANDOLPH HARRIS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), entered July 2, 2014. The judgment convicted defendant, upon his plea of guilty, of falsely reporting an incident in the third degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Harris* ([appeal No. 4] ___ AD3d ___ [Feb. 3, 2017]).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

817
KA 14-01734
PRESENT: PERADOTTO, J.P., CARNI, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RANDOLPH HARRIS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), entered July 2, 2014. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Harris* ([appeal No. 4] ___ AD3d ___ [Feb. 3, 2017]).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

818
KA 14-01735
PRESENT: PERADOTTO, J.P., CARNI, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V — MEMORANDUM AND ORDER

RANDOLPH HARRIS, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), entered July 2, 2014. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Harris* ([appeal No. 4] ___ AD3d ___ [Feb. 3, 2017]).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

819
KA 14-01736
PRESENT: PERADOTTO, J.P., CARNI, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RANDOLPH HARRIS, DEFENDANT-APPELLANT.
(APPEAL NO. 4.)

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), entered July 2, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that the sentence shall run concurrently with the sentences imposed for the violation of probation convictions under indictment Nos. 2013-01024I and 2013-1025I and as modified the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of falsely reporting an incident in the third degree (Penal Law § 240.50 [3] [a]). In appeal No. 2, defendant appeals from a judgment revoking his sentence of probation imposed upon his conviction, following his plea of guilty, of criminal contempt in the second degree (§ 215.50 [3]), and sentencing him to a term of imprisonment. In appeal No. 3, defendant appeals from a judgment revoking his sentence of probation imposed upon his conviction, following his plea of guilty, of criminal contempt in the second degree (§ 215.50 [3]), and sentencing him to a term of imprisonment. In appeal No. 4, defendant appeals from a judgment convicting him upon his plea of guilty of criminal contempt in the first degree (§ 215.51 [c]). Defendant pleaded guilty to the respective crimes and violations of probation in one plea proceeding.

Inasmuch as defendant has completed serving the sentences imposed in appeal Nos. 1 through 3, his contention in each appeal that the sentence is unduly harsh and severe has been rendered moot (*see People v Anderson*, 66 AD3d 1431, 1431, *lv denied* 13 NY3d 905).

We reject defendant's contention in appeal No. 4 that his waiver of the right to appeal is invalid. Supreme Court advised defendant of the maximum sentences that could be imposed on each conviction (*see People v Lococo*, 92 NY2d 825, 827), and the record, which includes an oral and written waiver of the right to appeal, establishes that defendant understood that he was waiving his right to appeal both the conviction and the sentence in each appeal. We thus conclude that the waiver of the right to appeal was knowing, intelligent, and voluntary (*see People v Lopez*, 6 NY3d 248, 256), and that valid waiver encompasses defendant's contention concerning the severity of the sentence imposed in appeal No. 4 (*see id.* at 256).

Nonetheless, we conclude that the court erred in directing that the definite sentences imposed in appeal Nos. 2 and 3 run consecutively to the 2 to 4 year indeterminate sentence imposed in appeal No. 4 (*see* Penal Law § 70.35; *People v Morris*, 101 AD3d 1631, 1632, *lv denied* 21 NY3d 1007, *reconsideration denied* 21 NY3d 1075). "Although this issue was not raised before the [sentencing] court or on appeal, we cannot allow an [illegal] sentence to stand" (*People v Price*, 140 AD2d 927, 928). We therefore modify the judgment in appeal No. 4 by directing that the indeterminate sentence imposed therein shall run concurrently with the definite sentences imposed in appeal Nos. 2 and 3.

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

878
CA 16-00160
PRESENT: WHALEN, P.J., SMITH, LINDLEY, TROUTMAN, AND SCUDDER, JJ.

MAVEN TECHNOLOGIES, LLC AND TODD R. WHEATON,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

GAYLE A. VASILE, AS EXECUTOR OF THE ESTATE OF
ANTHONY R. VASILE, DEFENDANT-RESPONDENT-APPELLANT.

JASON S. DIPONZIO, ROCHESTER, FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

KAMAN, BERLOVE, MARAFIOTI, JACOBSTEIN & GOLDMAN, LLP, ROCHESTER
(RICHARD GLEN CURTIS OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered May 1, 2015. The order denied defendant's motion for partial summary judgment and denied plaintiffs' cross motion for summary judgment.

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

Memorandum: Plaintiff Maven Technologies, LLC (Maven), was organized by Anthony R. Vasile (decedent) and others pursuant to an operating agreement. After the other owners died, decedent prepared Maven's Amended and Restated Operating Agreement (Agreement), which is at issue here. Pursuant to the Agreement, plaintiff Todd R. Wheaton became Maven's president and owner of 30% of Maven's shares, and decedent owned the remaining 70%. The Agreement also contained numerous provisions limiting the parties' ability to dispose of their shares, the manner in which the shares were transferred, and the price that must be paid for them. After decedent's demise, plaintiffs commenced this action seeking, inter alia, a declaration that the Agreement's terms mandated that defendant, decedent's executor, sell the shares formerly owned by decedent to Maven at their net book value. In her answer, defendant contended that decedent bequeathed his shares to a trust, of which defendant was the trustee, and thus that the trust was a member of Maven within the meaning of the Agreement. The answer included a counterclaim in which defendant sought, among other relief, a declaration that decedent's trust was the owner of 70% of Maven's shares, and an accounting. Plaintiffs appeal and defendant cross-appeals from an order that denied both defendant's motion for partial summary judgment declaring the rights of the parties and plaintiffs' cross motion for summary judgment on the complaint. We affirm.

Initially, we note that the parties fail to address in their respective briefs on appeal the denial of the motion and cross motion with respect to the cause of action seeking specific performance, and thus they have abandoned any contentions concerning that cause of action (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Resolution of the remainder of this appeal depends on the principles of contract interpretation. "It is well settled that a contract must be read as a whole to give effect and meaning to every term . . . Indeed, '[a] contract should be interpreted in a way [that] reconciles all [of] its provisions, if possible' " (*New York State Thruway Auth. v KTA-Tator Eng'g Servs., P.C.*, 78 AD3d 1566, 1567; *see RLI Ins. Co. v Smiedala*, 96 AD3d 1409, 1411). Therefore, "[e]ffect and meaning must be given to every term of the contract . . . , and reasonable effort must be made to harmonize all of its terms" (*Village of Hamburg v American Ref-Fuel Co. of Niagara*, 284 AD2d 85, 89, *lv denied* 97 NY2d 603; *see Matter of El-Roh Realty Corp.*, 74 AD3d 1796, 1799). It is equally well settled that "[t]he interpretation of an unambiguous contractual provision is a function for the court . . . , and [t]he proper inquiry in determining whether a contract is ambiguous is whether the agreement on its face is reasonably susceptible of more than one interpretation . . . To be entitled to summary judgment, the moving party has the burden of establishing that its construction of the [contract] is the only construction [that] can fairly be placed thereon" (*Nancy Rose Stormer, P.C. v County of Oneida*, 66 AD3d 1449, 1450 [internal quotation marks omitted]).

Here, neither party established that its interpretation of the Agreement is the only reasonable interpretation thereof (*see Arrow Communication Labs. v Pico Prods.*, 206 AD2d 922, 923). Consequently, summary judgment is inappropriate at this juncture because a "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" (*P&B Capital Group, LLC v RAB Performance Recoveries, LLC*, 128 AD3d 1534, 1535 [internal quotation marks omitted]; *see Matter of Wilson*, 138 AD3d 1441, 1442-1443; *Kibler v Gillard Constr., Inc.*, 53 AD3d 1040, 1041-1042; *Arrow Communication Labs.*, 206 AD2d at 923).

All concur except WHALEN, P.J., and TROUTMAN, J., who dissent and vote to modify in accordance with the following memorandum: We respectfully dissent. Although we agree with the majority that the Amended and Restated Operating Agreement (Agreement) is ambiguous, we do not agree that the interpretation of the Agreement depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence. Here, the interpretation of the Agreement is the exclusive function of a court, and we conclude that plaintiffs have established that their construction is " 'the only construction [that] can fairly be placed thereon' " (*DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp.*, 120 AD3d 905, 906). We therefore vote to modify the order by granting plaintiffs' cross motion for summary judgment in part and granting judgment in plaintiffs' favor, declaring that defendant Gayle A. Vasile, as executor of the Estate of Anthony R. Vasile (decedent),

must transfer decedent's 70% interest in plaintiff Maven Technologies, LLC (Maven) to that company at net book value.

The dispute underlying this action arose following the February 2014 death of decedent, the owner of a 70% membership interest in Maven. Maven's president, Todd R. Wheaton (plaintiff), owns the remaining 30%. At issue is the disposition of decedent's 70% interest under the terms of the Agreement.

Article 6 of the Agreement governs the transfer of membership interests and the withdrawal of existing members. Section 6.1.1 provides that a member who owns "more than 50% in Membership Interest may transfer all, or any portion of, or any interest in, the Membership Interest owned by the Member." Conversely, section 6.1.2 prohibits a member with a minority membership interest from transferring any portion of his or her interest and renders any such transfer "invalid, null and void, and of no force or effect." Section 1.21 defines a "transfer" as "any sale, hypothecation, pledge, assignment, gift, bequest, attachment, or other transfer." A member's "involuntary withdrawal," which section 1.11 (iv) defines as including "the occurrence" of the "death" of "any Member," triggers section 6.3, which provides: "Immediately upon the occurrence of an Involuntary Withdrawal, other than for Cause, the successor of the Withdrawn Member shall thereupon become an Interest Holder but shall not become a Member." Section 6.3 further provides that, within 180 days of the involuntary withdrawal, Maven "shall pay the successor Interest Holder the Net Book Value per unit of his Interest." The Agreement, which was executed by both decedent and plaintiff, went into effect December 31, 2007.

In his pour-over will, decedent purportedly bequeathed his membership interest in Maven to a living trust. After his death, plaintiffs commenced this action seeking, inter alia, a declaration that defendant as executor of the estate is obligated under section 6.3 to sell decedent's 70% interest back to Maven at net book value. Defendant interposed an answer and thereafter moved for "partial summary judgment" seeking, inter alia, a declaration that section 6.1 allowed decedent as the owner of a majority interest to bequeath his membership interest to his living trust. In support of her motion, defendant submitted the affirmation of her attorney, who described a conversation he had with the attorney whom decedent purportedly contacted to amend Maven's original operating agreement. During that process, decedent reportedly directed his attorney to insert section 6.1.1, a new provision allowing transfer only by the owner of a majority interest. Attached to the affirmation was a copy of the original operating agreement and an excerpt from decedent's living trust instrument executed in October 2011, which provided the trustee with specific instructions concerning the disposition of decedent's interest in Maven. In addition, defendant submitted a second attorney affirmation and her own affidavit, which primarily contained speculation with respect to decedent's intent in amending the original operating agreement. Plaintiffs then cross-moved for summary judgment on their complaint and submitted the affirmation of their attorney, who contended that the language of the Agreement was unambiguous, and

objected to the use of extrinsic evidence to interpret unambiguous contract language.

Supreme Court denied the motion and cross motion, reasoning that the conflict between sections 6.1 and 6.3 "creates an issue of fact as to [d]ecedent's intent which [cannot] be resolved in favor of either party on a motion for summary judgment." In our view, that was error.

It is well established 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). Neither party submitted admissible evidence concerning decedent's intent at the time the Agreement was executed, nor have they identified where such evidence might be found (*see id.*). Moreover, both parties have steadfastly maintained that the issue should be resolved as a matter of law, and "it is well settled that 'parties to a civil dispute are free to chart their own litigation course' (*Mitchell v New York Hosp.*, 61 NY2d 208, 214), and 'may fashion the bases upon which a particular controversy will be resolved' (*Cullen v Naples*, 31 NY2d 818, 820)" (*Austin Harvard LLC v City of Canandaigua*, 141 AD3d 1158, 1158). Therefore, because the ambiguity " 'must be resolved wholly without reference to extrinsic evidence[,] the issue is to be determined as a question of law for the court' " (*P&B Capital Group, LLC v RAB Performance Recoveries, LLC*, 128 AD3d 1534, 1535, quoting *Hartford Acc. & Indem. Co.*, 33 NY2d at 172). Furthermore, the principles of contract interpretation require that we give effect and meaning to every provision and make a reasonable effort to harmonize all of the contract's terms (*see DiPizio Constr. Co., Inc.*, 120 AD3d at 906). To that end, "[w]here two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give both effect" (*id.* at 907 [internal quotation marks omitted]).

We conclude that plaintiffs established as a matter of law that their construction of the contract is " 'the only construction [that] can fairly be placed thereon' " (*id.* at 906). Only plaintiffs' construction, in our view, harmonizes and gives full effect to all of the Agreement's provisions. Section 6.3 contains mandatory language that provides for membership "immediately" to cease upon the death of a member, and compels Maven's repurchase of the deceased member's interest. By contrast, section 6.1.1 contains permissive language that allows a transfer of interest to be made by a member "holding more than 50% in Membership Interest." When read together, those provisions allow the owner of a majority interest to transfer all or some of that interest during his or her lifetime; however, upon that member's death, his or her interest ceases to be a membership interest at the time it passes to his or her successor, who is then obligated to sell the interest back to Maven at net book value.

We reject defendant's contention that the Agreement limits the application of section 6.3 to owners of a minority interest. To the

contrary, that provision is triggered "upon the occurrence of an Involuntary Withdrawal" and, as previously noted herein, section 1.11 (iv) defines an involuntary withdrawal as including "the occurrence" of the "death" of "any Member." Contrary to defendant's further contention, our construction of the Agreement does not render meaningless the terms contained in section 6.1.1, which permit transfers to be made by a person who owns a membership interest of more than 50%. Nor does our construction render meaningless the terms contained in section 1.21, which provide a broad definition of "transfer" to include virtually any lawful means of passing ownership of personal property from one person to another. Indeed, it is undisputed that the Agreement allowed decedent to transfer his interest in Maven to his living trust during his lifetime and that he did not do so. Inasmuch as the language of the Agreement supports plaintiffs' rather than defendant's construction thereof, we conclude that the court erred in denying that part of plaintiffs' cross motion for summary judgment seeking a declaration to that effect.

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1055
CA 16-01077
PRESENT: CARNI, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

IN THE MATTER OF ARBITRATION BETWEEN TOWN OF GREECE, PETITIONER-APPELLANT,

AND MEMORANDUM AND ORDER

THE UNIFORMED PATROLMEN'S ASSOCIATION OF THE GREECE POLICE DEPARTMENT, ON BEHALF OF MICHAEL HAUGH, RESPONDENT-RESPONDENT.

HARRIS BEACH PLLC, PITTSFORD (KYLE W. STURGESS OF COUNSEL), FOR PETITIONER-APPELLANT.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (MICHAEL F. GERACI OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered October 28, 2015 in a proceeding pursuant to CPLR article 75. The order denied the petition for a stay of arbitration.

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

Memorandum: Petitioner commenced this proceeding seeking a permanent stay of arbitration pursuant to CPLR 7503 (b) after respondent filed a demand for arbitration concerning disciplinary charges against former Town of Greece police officer Michael Haugh. Supreme Court denied the petition, and we affirm.

We reject petitioner's contention that its newly-adopted disciplinary rules and regulations applied retroactively to this disciplinary matter. In August 2013, petitioner provided Haugh with written notice of the charges and specifications of misconduct and, in reliance upon the provisions of the collective bargaining agreement (CBA) between petitioner and respondent, Haugh elected to waive his rights under Civil Service Law § 75 and to proceed under the grievance procedure set forth in the CBA. On October 1, 2013, respondent requested that the matter proceed to Step 3 of the grievance procedure, which provided for arbitration. On December 17, 2013, the Town Board of petitioner adopted a resolution to amend the disciplinary rules and regulations for petitioner's Police Department, which superseded the grievance provisions of the CBA and applied to all prospective police disciplinary matters. On November 19, 2014, respondent served the demand for arbitration.

"[T]he general presumption against retroactive application of statutes is . . . designed . . . to prevent impairment of vested rights," such as those derived from a contractual agreement (*Rooney v City of Long Beach*, 42 AD2d 34, 39, *appeal dismissed* 33 NY2d 897). A legislative "amendment will have prospective application only, unless its language clearly indicates that a contrary interpretation is to be applied" (*Matter of Deutsch v Catherwood*, 31 NY2d 487, 489-490; *see* McKinney's Cons Laws of NY, Book 1, Statutes § 51 [b]; *Becker v Huss Co.*, 43 NY2d 527, 539). Although an "exception is generally made for so-called remedial legislation or statutes dealing with procedural matters" (*Becker*, 43 NY2d at 540), "statutes affecting substantive rights and liabilities are presumed to have only prospective effect" (*Bennett v New Jersey*, 470 US 632, 639).

Here, we conclude that Haugh's contractual right to proceed under the CBA's arbitration provision had vested before petitioner adopted its new rules and regulations (*see generally Rooney*, 42 AD2d at 39). The new rules and regulations altered Haugh's substantive contractual remedy by removing any prospect of arbitration (*see generally Matter of Schlaifer v Sedlow*, 51 NY2d 181, 185), and are therefore presumed to have only prospective effect (*see generally Bennett*, 470 US at 639).

Furthermore, the new rules and regulations do not expressly set forth the date on which they went into effect. Even assuming, arguendo, that they were intended to become effective immediately upon adoption, we conclude that they provide no indication that they were intended to operate retroactively upon a disciplinary matter that had commenced prior to their adoption, had gone through the first two steps of the CBA's grievance procedure, and was about to proceed to arbitration (*see Brooks v County of Onondaga*, 167 AD2d 862, 862; *see generally Becker*, 43 NY2d at 540). Moreover, "there is no indication that the purpose of the [regulations] was remedial in nature" (*Matter of Yasiel P. [Lisuan P.]*, 79 AD3d 1744, 1745, *lv denied* 16 NY3d 710). Petitioner's reliance upon *Matter of Town of Wallkill v Civil Serv. Empls. Assoc., Inc.* (*Local 1000, AFSCME, AFL-CIO, Town of Wallkill Police Dept. Unit, Orange County Local 836*) (19 NY3d 1066) is misplaced inasmuch as, in that case, the Town of Wallkill enacted its new disciplinary procedures before it initiated disciplinary action against the police officers (*id.* at 1068). Therefore, under the circumstances of this case, we conclude that the new regulations did not retroactively supersede the CBA's grievance procedure with respect to the pending disciplinary matter (*see generally Morales v Gross*, 230 AD2d 7, 12).

We reject petitioner's further contention that the demand for arbitration is an attempt to challenge the validity of the new disciplinary rules and regulations and is untimely because it should have been asserted in a proceeding pursuant to CPLR article 78, which is subject to a four-month statute of limitations (*see* CPLR 217 [1]). Upon our review of the record, we conclude that the demand for arbitration was based upon alleged breaches of the CBA and did not advance a challenge to the newly enacted rules and regulations (*cf.*

Matter of County of Nassau v Civil Serv. Empls. Assn., 265 AD2d 326, 326, *lv denied* 94 NY2d 759).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1074
CA 16-00211
PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

MARY ESPOSITO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CONTEC, INC., DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

THE ROB COHEN LAW OFFICE, LLC, WILMETTE, ILLINOIS (ROBERT A. COHEN, OF THE ILLINOIS BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND GREENE & REID, PLLC, SYRACUSE, FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, ALBANY (MATTHEW S. LERNER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered April 24, 2015. The order, among other things, granted the motion of defendant Contec, Inc. to dismiss the amended complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the third, fifth, and sixth causes of action of the amended complaint, as well as the fourth cause of action insofar as it alleges theories of defective design and manufacture, and as modified the order is affirmed without costs.

Memorandum: In this action to recover damages for personal injuries allegedly sustained by plaintiff as a result of the use of a fungicide product manufactured by Contec, Inc. (defendant), plaintiff appeals from an order that, among other things, dismissed plaintiff's amended complaint against defendant. Plaintiff contends that Supreme Court erred in dismissing the amended complaint against defendant on the ground that the amended complaint is preempted by the Federal Insecticide, Fungicide, and Rodenticide Act ([FIFRA] 7 USC § 136 *et seq.*). We agree with plaintiff with respect to the third, fifth, and sixth causes of action of the amended complaint, as well as with respect to those parts of her fourth cause of action that assert claims on theories other than failure to warn. We modify the order accordingly.

The doctrine of federal preemption flows from the Supremacy Clause of the Federal Constitution, which states that the laws of the United States "shall be the supreme Law of the Land" (US Const, art VI, cl 2). Under the doctrine, "[s]tate action may be foreclosed by

express language in a congressional enactment" (*Lorillard Tobacco Co. v Reilly*, 533 US 525, 541). State action includes both positive enactments, such as statutes and regulations, and common-law rules and obligations (*see Cipollone v Liggett Group, Inc.*, 505 US 504, 521). "In preemption analysis, courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress' " (*Arizona v United States*, ___ US ___, ___, 132 S Ct 2492, 2501, quoting *Rice v Santa Fe Elevator Corp.*, 331 US 218, 230). "Congressional purpose is the ultimate touchstone in determining whether federal law preempts a particular state action" and, in searching for legislative intent to preempt, a court must "examine the statute's express objectives, its structure, the plain meaning of its language, and its interpretation by the courts" (*Smith v Dunham-Bush, Inc.*, 959 F2d 6, 8 [internal quotation marks omitted]; *see FMC Corp. v Holliday*, 498 US 52, 57; *Allis-Chalmers Corp. v Lueck*, 471 US 202, 208).

Generally, FIFRA and the regulations promulgated thereunder impose approval and labeling requirements on manufacturers of insecticides, fungicides, and rodenticides based on each product's effectiveness and potential harmfulness to humans. FIFRA also establishes a complex process of review by the Environmental Protection Agency (EPA), culminating in the approval of the label under which the product is to be marketed and packaged (*see* 7 USC § 136a [c]; *Worm v American Cyanamid Co.*, 5 F3d 744, 747). With regard to the standards for such labeling and packaging, FIFRA requires that a product not be "misbranded," which requirement precludes the product label from containing any statement that is "false or misleading in any particular" (7 USC § 136 [q] [1] [A]), and prohibits the omission from the label of any necessary instructions, warnings, or cautionary statements (*see* 7 USC § 136 [q] [1] [F], [G]; *see also* 40 CFR § 156.10 [a] [5] [ii]). The preemption provision of FIFRA provides that, "[i]n general[,] . . . a State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter" (7 USC § 136v [a]). On the other hand, FIFRA provides that, in the interest of "[u]niformity[,] . . . [s]uch State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter" (7 USC § 136v [b]).

Prior to 2005, many courts analyzing whether a state cause of action was preempted by FIFRA applied the "inducement" test, under which a state cause of action, irrespective of its legal theory, was held to be preempted if a verdict in favor of the plaintiff might induce the manufacturer to change its label on a product subject to FIFRA regulation, even if such change were to be made voluntarily (*see e.g. DOW Agrosciences v Bates*, 332 F3d 323, 331-333, *vacated and remanded* 544 US 431; *Andrus v AgrEvo USA, Co.*, 178 F3d 395, 399-400). However, in its 2005 decision in *Bates v DOW Agrosciences*, the United States Supreme Court clarified and significantly narrowed the FIFRA preemption analysis, holding that the "inducement" test "finds no support in the text" of section 136v (b) (*Bates*, 544 US at 445), and

further holding that a state rule is preempted only to the extent that it constitutes a "requirement[] for labeling and packaging" that is "in addition to or different from those [things] required under [FIFRA]" (*id.* at 444). The Supreme Court thus recognized that a state rule is not preempted merely because it relates to labeling and packaging while merely imposing requirements "equivalent" (*id.* at 453), or "parallel" (*id.* at 447) to those imposed by FIFRA. The Court held, however, that nonfederal rules are preempted to the extent that they impose "competing state labeling standards" (*id.* at 452). "[I]magine" the difficulties for manufacturers, the Court noted, if there existed "50 different labeling regimes prescribing the color, font size, and wording of warnings" on nationally distributed products (*id.*).

Applying the foregoing standards to the claims pleaded in this case, we conclude that the court properly granted defendant's motion to dismiss, on preemption grounds, plaintiff's first and second causes of action and those parts of her fourth cause of action asserting failure to warn claims. The first and second causes of action allege that defendant promoted or encouraged an unsafe use of its product and thus failed to instruct users against such unsafe use. We conclude that any jury verdict or court determination in favor of plaintiff on those causes of action would amount to a state rule or requirement at odds with the EPA-approved warning label on the product, i.e., a state rule relating to labeling and packaging that would impose requirements additional to or different from those imposed by the federal statute and regulations. We reach the same conclusion with regard to the fourth cause of action insofar as it alleges defendant's strict liability to plaintiff for "failing to provide adequate warnings" and for "failing to provide adequate instruction and direction of a safe use of the product" (*see In re Syngenta AG MIR 162 Corn Litig.*, 131 F Supp 3d 1177, 1207-1208; *see generally Bates*, 544 US at 452-454; *Villano v Builders Sq.*, 275 AD2d 565, 566-567; *Wallace v Parks Corp.*, 212 AD2d 132, 137).

On the other hand, we conclude that the court erred in dismissing the third, fifth, and sixth causes of action of plaintiff's amended complaint, as well as those parts of the fourth cause of action that do not allege a failure to warn. Plaintiff's causes of action and claims alleging defendant's breach of warranty, ordinary negligence, and defective design and manufacture of its product, i.e., theories unrelated to labeling or packaging, are not preempted by FIFRA (*see Bates*, 544 US at 444-445; *Mortellite v Novartis Crop Protection, Inc.*, 460 F3d 483, 489-490; *Wallace*, 212 AD2d at 137).

Entered: February 3, 2017 Frances E. Cafarell
Clerk of the Court

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

1091
KA 14-01743
PRESENT: WHALEN, P.J., CENTRA, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES A. COOK, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (ROBERT TUCKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (HEATHER PARKER HINES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered January 15, 2014. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class D felony, aggravated unlicensed operation of a motor vehicle in the first degree and endangering the welfare of a child (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, driving while intoxicated as a class D felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [ii]). We agree with defendant that the waiver of the right to appeal from his conviction does not encompass his challenge to the severity of the sentence and thus does not foreclose our review of that challenge (*see People v Maracle*, 19 NY3d 925, 927-928; *People v Tomeno*, 141 AD3d 1120, 1120-1121, *lv denied* 28 NY3d 974). County Court failed to advise defendant during the course of the allocution that he was waiving his right to appeal any issue concerning the severity of the sentence (*see People v Banks*, 125 AD3d 1276, 1277, *lv denied* 25 NY3d 1159). Further, "[a]lthough defendant executed a written waiver of the right to appeal, there was no colloquy between [the c]ourt and defendant regarding the written waiver to ensure that defendant read and understood it and that he was waiving his right to challenge the length of the sentence" (*People v Mack*, 124 AD3d 1362, 1363). We nevertheless reject defendant's contention that the sentence is unduly harsh and severe.

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1095

KA 15-01804

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JULIE R. WISNIEWSKI, DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (ERIN E. MCCAMPBELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered August 17, 2015. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated, a class D felony, and driving while ability impaired.

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

Memorandum: On appeal from a judgment convicting her upon a jury verdict of driving while intoxicated (Vehicle and Traffic Law §§ 1192 [2]; 1193 [1] [c] [ii]) and driving while ability impaired (§ 1192 [1]), defendant contends that County Court erred in denying her motion to suppress evidence arising from the allegedly improper stop of her vehicle. We reject that contention. The police may stop a vehicle "when there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime" (*People v Robinson*, 122 AD3d 1282, 1283 [internal quotation marks omitted]). We conclude that the police had reasonable suspicion to stop defendant's vehicle based on the contents of the 911 call from an identified citizen informant (*see People v Argyris*, 24 NY3d 1138, 1140-1141, *rearg denied* 24 NY3d 1211, *cert denied* ___ US ___, 136 S Ct 793; *People v Torres*, 125 AD3d 1481, 1482, *lv denied* 25 NY3d 1172; *People v Van Every*, 1 AD3d 977, 978-979, *lv denied* 1 NY3d 602). The evidence in the record establishes that the information provided by the identified citizen informant "was reliable under the totality of the circumstances, satisfied the two-pronged *Aguilar-Spinelli* test for the reliability of hearsay tips in this particular context and contained sufficient information about" defendant's commission of the crime of driving while intoxicated (*Argyris*, 24 NY3d

at 1140-1141; *see Torres*, 125 AD3d at 1482).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1112/16
CA 16-00694
PRESENT: WHALEN, P.J., CENTRA, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

JAMES M. COSTANZO, PLAINTIFF-RESPONDENT,

V ORDER

CITY OF LOCKPORT HOUSING AUTHORITY,
DEFENDANT-APPELLANT.

COUTU LANE, PLLC, BUFFALO (MICHAEL T. COUTU OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (CHERIE L. PETERSON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered July 30, 2015. The order denied defendant's motion for summary judgment dismissing plaintiff's complaint.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on December 16, 2016, and filed in the Niagara County Clerk's Office on January 18, 2017,

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

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1131
CA 16-00569
PRESENT: SMITH, J.P., DEJOSEPH, CURRAN, AND SCUDDER, JJ.

CLINTON STREET SOMA PROJECT, LLC,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RAPID RESPONSE MONITORING SERVICES, INC.,
DEFENDANT-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (JAMES P. YOUNGS OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANKLIN A. JOSEF, FAYETTEVILLE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Hugh A. Gilbert, J.), entered August 19, 2015. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Defendant signed a five-year lease for a residential loft in an industrial building in the City of Syracuse that plaintiff was in the midst of converting. When defendant did not ultimately take possession of the unit, plaintiff commenced the instant action for the full balance of rent owing under the lease term. Defendant moved for summary judgment dismissing the complaint, arguing that the lease was void *ab initio* because plaintiff failed to satisfy a condition precedent, namely, obtaining defendant's pre-approval for all designs, materials, and finishes in the loft. Alternatively, defendant sought partial summary judgment limiting the damages sought by plaintiff. Supreme Court denied the motion, and we affirm.

We conclude that defendant failed to meet its initial burden of proving that, as a condition precedent to enforceability of the lease, plaintiff was obligated to secure its approval for all designs, materials, and finishes in the loft (*see generally Ruttenberg v Davidge Data Sys. Corp.*, 215 AD2d 191, 196-197). Although defendant's obligation to pay rent was conditioned on its approval of the "building plans," nothing in the lease equates "building plans" with all specifications for designs, materials and finishes. Indeed, the lease does not provide any definition of the critical term "building plans," and one could certainly interpret that term to encompass only the unit's floor plan, which defendant indisputably saw and approved before construction commenced. Thus, given the ambiguity in the lease

concerning the extent of defendant's approval rights over designs, materials, and finishes, and given the lack of parol evidence sufficient to authoritatively construe the ambiguous term "building plans" as a matter of law, we conclude that the court properly denied the motion (*see White Plains Equities Assoc., Inc. v Vista Devs. Corp.*, 82 AD3d 569, 569).

Since it "remains to be determined whether . . . the [lease]" is void *ab initio* in light of the alleged condition precedent, we decline, "in effect, to render an advisory opinion concerning the availability of [particular forms of] damages" (*Matter of Flintlock Constr. Servs., LLC v Weiss*, 122 AD3d 51, 54, *appeal dismissed* 24 NY3d 1209; *see Madison 96th Assoc., LLC v 17 E. 96th Owners Corp.*, 120 AD3d 409, 411).

Entered: February 3, 2017 Frances E. Cafarell
Clerk of the Court

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

1138
KA 12-00790
PRESENT: WHALEN, P.J., SMITH, PERADOTTO, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V — ORDER

WILLIAM J. CASSIDY, 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 (Alex R. Renzi, J.), rendered April 4, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of forgery devices.

Now, upon reading and filing the stipulation of discontinuance signed by the defendant on December 21, 2016, and by the attorneys for the parties on December 21 and 22, 2016,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1139
KA 13-01470
PRESENT: WHALEN, P.J., SMITH, PERADOTTO, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN BINET, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (ROMANA A. LAVALAS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered August 1, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that County Court erred in denying his motion to suppress the gun seized from his person and his pre- and postarrest statements to police. We reject that contention. We conclude that the officers were authorized to stop defendant, who was walking in the street, based upon their observation of his violation of Vehicle and Traffic Law § 1156 (a) and (b), entitled "Pedestrians on roadways" (*see People v Robinson*, 97 NY2d 341, 349-356; *see also People v Ellis*, 62 NY2d 393, 396; *People v Sobotker*, 43 NY2d 559, 563-564). Upon approaching defendant, one of the officers observed that defendant was generally nervous and moreover was engaging in suspicious conduct by repeatedly placing his hands into his pockets despite the officer's repeated requests that he take his hands out of his pockets. Those observations, in conjunction with the fact that the encounter took place in a known high-crime area, provided the officer with at least a " 'founded suspicion that criminal activity was afoot,' " thereby warranting the officer in asking defendant whether he had any illegal or dangerous item, i.e., a weapon, on his person (*People v Robinson*, 278 AD2d 808, 809, *lv denied* 96 NY2d 787; *see People v Hensen*, 21 AD3d 172, 174-176, *lv denied* 5 NY3d 828; *see also People v Sims*, 106 AD3d 1473, 1473-1474, *appeal dismissed* 22 NY3d 992). We additionally conclude that defendant's statement to the officer that he had a handgun in his pocket

established a reasonable suspicion of a threat to the officer's safety, and that the officer was justified in reaching into that pocket and removing the gun (*see Hensen*, 21 AD3d at 174-176; *Robinson*, 278 AD2d at 809). Finally, we conclude that defendant's possession of the gun gave the officer probable cause to arrest him and subsequently question him at the police station (*see People v Niles*, 237 AD2d 537, 538, *lv denied* 90 NY2d 861; *see also People v Hightower*, 261 AD2d 871, 871-872, *lv denied* 93 NY2d 971).

Insofar as defendant challenges the severity of the period of postrelease supervision, we decline to exercise our power to modify that part of the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1157
KA 15-01659
PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

RICKY D. PEGLOW, II, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered January 13, 2015. The judgment convicted defendant, upon his plea of guilty, of grand larceny 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 his plea of guilty of grand larceny in the fourth degree (Penal Law § 155.30 [1]). In appeal No. 2, he appeals from a judgment convicting him, upon the same plea of guilty, of falsifying business records in the first degree (§ 175.10). With respect to appeal No. 1, defendant's valid waiver of the right to appeal encompasses his challenge to the factual sufficiency of the plea allocution (*see People v Grimes*, 53 AD3d 1055, 1056, *lv denied* 11 NY3d 789) and, in any event, defendant failed to preserve that challenge for our review by failing to move to withdraw the plea or to vacate the judgment of conviction (*see People v Jackson*, 50 AD3d 1615, 1615-1616, *lv denied* 10 NY3d 960).

Contrary to defendant's further contention in both appeals, the sentence is not illegal. Furthermore, his valid waiver of the right to appeal with respect to both the conviction and sentence encompasses his contention in both appeals that the sentence is unduly harsh and severe (*see People v Lopez*, 6 NY3d 248, 255-256; *cf. People v Maracle*, 19 NY3d 925, 928).

Entered: February 3, 2017   Frances E. Cafarell
                                             Clerk of the Court

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

1161
KA 14-01968
PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARSHALL DANIELS, DEFENDANT-APPELLANT.

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (JULIE BENDER FISKE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered July 21, 2014. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a nonjury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that County Court erred in refusing to suppress the gun that he discarded while he was being pursued by the police, as well as statements that he made to the police after his arrest. We reject that contention.

" 'Great weight must be accorded to the determination of the suppression court because of its ability to observe and assess the credibility of the witnesses, and its findings should not be disturbed unless clearly erroneous or unsupported by the hearing evidence' " (*People v Johnson*, 138 AD3d 1454, 1454, *lv denied* 28 NY3d 931; *see People v Layou*, 134 AD3d 1510, 1511, *lv denied* 27 NY3d 1070, *reconsideration denied* 28 NY3d 932). At the suppression hearing, two police officers testified that they were traveling in a marked patrol vehicle on a warm summer day when they observed defendant walking down the street wearing black gloves. When the officer who was operating the vehicle slowed down, defendant turned and looked at the vehicle, and he then pulled out a gun and started to run. The officer stopped the vehicle, and the other officer exited the vehicle, pursued defendant on foot, and observed defendant throw the gun toward a house. Eventually, defendant was apprehended and a loaded gun was recovered from the lawn outside the house.

We conclude that the presence of a gun on defendant's person combined with his flight gave the police " 'reasonable suspicion that defendant may have been engaged in criminal activity justifying police pursuit' " (*People v Wilson*, 49 AD3d 1224, 1224, *lv denied* 10 NY3d 966; *see People v Knight*, 94 AD3d 1527, 1529, *lv denied* 19 NY3d 998). Defendant's abandonment of the gun during that pursuit provided the police with probable cause for defendant's arrest (*see People v Gayden*, 126 AD3d 1518, 1518-1519, *affd* 28 NY3d 1035; *Wilson*, 49 AD3d at 1224-1225), and their recovery of the abandoned gun was lawful inasmuch as the pursuit of defendant was lawful (*see Gayden*, 126 AD3d at 1519). Furthermore, because the officers' conduct was lawful, the court properly refused to suppress as fruit of the poisonous tree the oral statements defendant made to the police after his arrest (*see People v Sims*, 106 AD3d 1473, 1474, *appeal dismissed* 22 NY3d 992).

We also reject defendant's contention that the conviction is not supported by legally sufficient evidence because of breaks in the chain of custody of the gun recovered from the lawn of the house. It is well settled that "breaks in the chain of custody affect only the weight to be given to that evidence" (*People v Craven*, 48 AD3d 1183, 1185, *lv denied* 10 NY3d 861; *see People v Brown-Fort*, 13 AD3d 731, 732; *see generally People v Jefferson*, 125 AD3d 1463, 1464, *lv denied* 25 NY3d 990). Viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Finally, the sentence is not unduly harsh or severe.

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1162
KA 15-01660
PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

RICKY D. PEGLOW, II, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered January 13, 2015. The judgment convicted defendant, upon his plea of guilty, of falsifying business records in the first degree.

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

Same memorandum as in *People v Peglow* ([appeal No. 1] ___ AD3d ___ [Feb. 3, 2017]).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1167
CAF 15-01575
PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF MICHELLE K. RUSIECKI,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

AARON J. MARSHALL, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

DEBORAH J. SCINTA, ORCHARD PARK, FOR PETITIONER-APPELLANT.

NUCHERENO & NAGEL, BUFFALO (MARTEN R. VIOLANTE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

MICHELE A. BROWN, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered August 18, 2015 in a proceeding pursuant to Family Court Act article 6. The order granted respondent's motion to dismiss the petition and dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, the petition is reinstated, and the matter is remitted to Family Court, Erie County, for further proceedings in accordance with the following memorandum: Petitioner mother commenced this proceeding seeking to modify a June 2011 custody order, entered by a court in the State of Florida, which granted respondent father permission to relocate with the child to New York. The father and the child relocated to New York in June 2011, and the mother relocated to New York in August 2011. The parties continued to reside in New York through March 2015, when the mother commenced the instant proceeding. We agree with the mother that Family Court erred in granting the father's motion to dismiss her petition for lack of jurisdiction on the ground that the Florida court's order expressly provided that it retained jurisdiction over the matter.

Preliminarily, we note that the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) has been adopted by both New York and Florida (*see* Domestic Relations Law art 5-A; Fla Stat § 61.501 *et seq.*).

We conclude that the New York court has jurisdiction to modify the order of the Florida court, notwithstanding the Florida court's reservation of jurisdiction. Pursuant to Domestic Relations Law

§§ 76-b (2) and 76 (1) (a), a New York court may modify a child custody determination of another state when "[a] court of this state . . . determines that the child[and] the child's parents . . . do not presently reside in the other state" (§ 76-b [2]), and New York "is the home state of the child on the date of the commencement of the proceeding" (§ 76 [1] [a]). Here, it is undisputed that New York was the child's home state as of the commencement of the proceeding (*see* § 75-a [7]), and that the child and both of the parties had lived in New York since 2011 (*see Matter of Guzman v Guzman*, 92 AD3d 679, 680; *cf. Matter of Saunders v Hamilton*, 75 AD3d 1172, 1173, *lv denied* 15 NY3d 713). Contrary to the father's contention, the four-year period during which the child lived in New York cannot be considered a temporary absence from Florida for purposes of the UCCJEA inasmuch as the child was enrolled in school in New York and there is no indication in the record that she returned to Florida during that period (*see Matter of Clouse v Clouse*, 110 AD3d 1181, 1182-1183, *lv denied* 22 NY3d 858; *see generally Matter of Felty v Felty*, 66 AD3d 64, 70-72).

Contrary to the contention of the Attorney for the Child, this appeal has not been rendered moot by the commencement of subsequent proceedings in Florida inasmuch as no orders have been entered in those proceedings (*cf. Matter of Morgia v Horning*, 119 AD3d 1355, 1355). We conclude, however, that the New York court was required by Domestic Relations Law § 76-e to confer with the Florida court upon learning that the father commenced a subsequent proceeding in Florida, and the court failed to do so (*see Guzman*, 92 AD3d at 681). Consequently, we reverse the order, deny the motion to dismiss, reinstate the petition, and remit the matter to Family Court to make the requisite contact with "the Florida court so that the courts of the two states may confer with each other and determine which state is the more appropriate forum for this proceeding at this juncture" (*id.*; *see generally Matter of Andrews v Catanzano*, 44 AD3d 1109, 1110-1111).

In light of the foregoing, we do not address the mother's remaining contentions.

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1168
CAF 15-01576
PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF MICHELLE K. RUSIECKI,
PETITIONER-APPELLANT,

V ORDER

AARON J. MARSHALL, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

DEBORAH J. SCINTA, ORCHARD PARK, FOR PETITIONER-APPELLANT.

NUCHERENO & NAGEL, BUFFALO (MARTEN R. VIOLANTE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

MICHELE A. BROWN, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered August 18, 2015 in a proceeding pursuant to Family Court Act article 6. The order granted the motion of respondent to dismiss the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see generally Matter of Chendo O.*, 175 AD2d 635, 635).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1170
CA 16-00554
PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

JACKUELINE WATERS AND JAMES WATERS,
PLAINTIFFS-RESPONDENTS,

V   MEMORANDUM AND ORDER

CIMINELLI DEVELOPMENT COMPANY, INC., 205
PARK CLUB LANE, LLC AND JB LANDSCAPING &
SNOWPLOWING, LLC, DEFENDANTS-APPELLANTS.

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

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

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered December 8, 2015. The order denied the motion of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion seeking dismissal of the complaint against defendant JB Landscaping & Snowplowing, LLC, and granting that part of the motion seeking dismissal of the complaint against defendants Ciminelli Development Company, Inc., and 205 Park Club Lane, LLC, to the extent that the complaint, as amplified by the bill of particulars, alleges that they created or had actual notice of the allegedly dangerous condition, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced the instant action seeking damages for injuries allegedly sustained by Jackueline Waters (plaintiff) when she slipped and fell on ice in a parking lot owned by defendant 205 Park Club Lane, LLC (205 Park), and managed by defendant Ciminelli Development Company, Inc. (Ciminelli). Defendant JB Landscaping & Snowplowing, LLC (JB Landscaping) was the snowplowing contractor for the property. Defendants collectively moved for summary judgment dismissing the complaint, and Supreme Court denied the motion.

With respect to JB Landcaping, the only issue before us, as limited by the parties' briefs on appeal, is whether the court erred in finding that there are triable issues of fact under the third exception set forth in *Espinal v Melville Snow Contrs*. (98 NY2d 136), i.e., "where the contracting party has entirely displaced the other

party's duty to maintain the premises safely" (*id.* at 140). We agree with JB Landscaping that the court erred in determining that there are triable issues of fact precluding summary judgment dismissing the complaint against it, and we therefore modify the order accordingly. We conclude that the contract between JB Landscaping and Ciminelli was not so comprehensive and exclusive that it entirely displaced Ciminelli's and 205 Park's duty to maintain the premises safely, such that JB Landscaping assumed a duty to plaintiff. Although the contract in the case at bar delegated all of the snow and ice removal to JB Landscaping, along with responsibility for monitoring the property 24 hours per day, seven days per week, the contract also provided that 205 Park and the tenant of the property could request additional services from JB Landscaping, including snow and ice removal. In addition, the contract reserved Ciminelli's rights "to determine the depth of snow at locations where JB Landscaping performs snowplowing" and to direct JB Landscaping to reposition or remove accumulated snow piles. The contract also required weekly submission of maintenance logs to Ciminelli and preapproval from Ciminelli to engage a subcontractor to assist with snow and ice removal. In view of the foregoing, we conclude that Ciminelli continued to "monitor[] the performance of the snow plowing contract" (*Torella v Benderson Dev. Co.*, 307 AD2d 727, 728; *see Eisleben v Dean*, 136 AD3d 1306, 1307; *Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 214-215), and therefore JB Landscaping did not assume a duty of care to plaintiff (*see Espinal*, 98 NY2d at 140).

With respect to the remaining defendants, we note that plaintiffs, by briefing the issue of constructive notice only, have abandoned any claims that defendants had actual notice of or created the dangerous condition (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984), and we therefore further modify the order accordingly. With respect to constructive notice, we conclude that the court properly denied the motion. To receive summary judgment with respect to plaintiffs' claim of constructive notice, defendants had the initial burden of establishing as a matter of law that the alleged icy condition was not visible and apparent or " 'that the ice formed so close in time to the accident that [defendants] could not reasonably have been expected to notice and remedy the condition' " (*Gwitt v Denny's, Inc.*, 92 AD3d 1231, 1231-1232). In support of their motion, defendants submitted, inter alia, the deposition testimony of plaintiff, who testified that when she pulled into the subject parking lot she observed a "sheen" or a "shine" on the lot and that, when she exited her car and started walking through the lot, the condition of the parking lot was "icy" and "slippery." She further described where she fell as a "large ice condition" and testified that she did not encounter any dry pavement or pavement that was not covered by ice. Thus, we conclude that defendants failed to satisfy their initial burden of establishing that the alleged icy condition was not visible and apparent (*see Hagenbuch v Victoria Woods HOA, Inc.*, 125 AD3d 1520, 1521; *Gwitt*, 92 AD3d at 1232; *Kimpland v Camillus Mall Assoc., L.P.*, 37 AD3d 1128, 1128-1129).

Contrary to defendants' further contention, they failed to meet their initial burden of establishing as a matter of law " 'that the

ice formed so close in time to the accident that [they] could not reasonably have been expected to notice and remedy the condition' " (*Gwitt*, 92 AD3d at 1231-1232; *see Conklin v Ulm*, 41 AD3d 1290, 1291). In support of their motion, defendants submitted the deposition testimony of a JB Landscaping employee, who testified that he conducted his inspection of the subject parking lot between 4:30 a.m. and 5:00 a.m. on the morning plaintiff was injured and did not observe any ice. After he left the parking lot and went home, he continued to monitor the weather; specifically, he recalled a weather newscast that the temperature was currently 33 or 34 degrees and would be rising to 37 degrees. Defendants also submitted the affidavit of an expert meteorologist, who opined that temperatures dropped to near freezing between 4:30 a.m. and 7:45 a.m. on the day in question and therefore, in his view, the formation of ice occurred between 4:30 a.m. and 7:45 a.m. The weather records attached to his affidavit recited, however, that from 3:01 a.m. until 6:24 a.m. the short term forecasts called for falling temperatures, and that any wet or untreated pavement could result in patchy black ice. Plaintiff testified that she fell at 7:45 a.m. In our view, the inspection of the area approximately three hours before the plaintiff fell does not establish " 'that the ice formed so close in time to the accident that [defendant(s)] could not reasonably have been expected to notice and remedy the condition' " (*Conklin*, 41 AD3d at 1291; *see Piersielak v Amyell Dev. Corp.*, 57 AD3d 1422, 1423; *Bullard v Pfohl's Tavern, Inc.*, 11 AD3d 1026, 1027).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1172
CA 16-00597
PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

GORDON J. KING AND BRENDA KING,
CLAIMANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

NIAGARA FALLS WATER AUTHORITY AND NIAGARA
FALLS WATER BOARD, RESPONDENTS-APPELLANTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (CORY J. WEBER OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered July 7, 2015. The order granted the application of claimants for leave to serve a late notice of claim.

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

Memorandum: Respondents appeal from an order that granted claimants' application for leave to serve a late notice of claim pursuant to General Municipal Law § 50-e (5). On April 18, 2014, Gordon J. King (claimant) allegedly sustained injuries after his motor vehicle struck a depression in a roadway in the City of Niagara Falls (City). Claimants filed a timely notice of claim against the City, among others, and thereafter commenced a negligence action against them. In February 2015, in response to a Freedom of Information Law request, the City provided claimants with a copy of a permit, issued February 26, 2014, for the replacement of a water line in the vicinity of the accident. The permit listed respondent Niagara Falls Water Board (Water Board) as the general contractor on the project. On April 17, 2015, claimants applied for leave to serve a late notice of claim upon respondents.

Contrary to respondents' contention, Supreme Court did not abuse its discretion in granting claimants' application. The decision whether to grant such an application requires the court to consider several factors, none of which is determinative (*see* General Municipal Law § 50-e [5]; *Dalton v Akron Cent. Schs.*, 107 AD3d 1517, 1518, *affd* 22 NY3d 1000). "The three main factors are 'whether the claimant has shown a reasonable excuse for the delay, whether the [governmental entity] had actual knowledge of the facts surrounding the claim within

90 days of its accrual, and whether the delay would cause substantial prejudice to the [governmental entity]' " (*Dalton*, 107 AD3d at 1518; *see generally* § 50-e [5]). An "[e]rror concerning the identity of the governmental entity to be served" can constitute a reasonable excuse for the delay "provided that a prompt application for relief is made after discovery of the error" (*Matter of Farrell v City of New York*, 191 AD2d 698, 699; *see Santana v Western Regional Off-Track Betting Corp.*, 2 AD3d 1304, 1305, *lv denied* 2 NY3d 704). "The court is vested with broad discretion to grant or deny the application" (*Wetzel Servs. Corp. v Town of Amherst*, 207 AD2d 965, 965) and, "absent a clear abuse of the . . . court's broad discretion, the 'determination of an application for leave to serve a late notice of claim will not be disturbed' " (*Matter of Hubbard v County of Madison*, 71 AD3d 1313, 1315; *see Dalton*, 107 AD3d at 1518).

Here, claimants demonstrated a reasonable excuse for the delay inasmuch as they served a timely notice of claim upon the City, and then promptly applied for leave to serve a late notice of claim upon respondents after discovering respondents' alleged involvement in causing claimant's injuries (*see Matter of Ruffino v City of New York*, 57 AD3d 550, 551; *cf. Santana*, 2 AD3d at 1305). Furthermore, although respondents lacked actual knowledge of claimant's injuries, respondents have " 'made no particularized or persuasive showing that the delay caused [them] substantial prejudice' " (*Shaul v Hamburg Cent. Sch. Dist.*, 128 AD3d 1389, 1389). Indeed, we note that the Water Board was the general contractor for the construction project that allegedly created the defect in the roadway, and thus respondents' ability to investigate the facts underlying the claim is furthered by their possession of documents and other information related to the construction project. Under the particular circumstances of this case, we cannot conclude that there was a clear abuse of the court's broad discretion (*see generally Dalton*, 107 AD3d at 1518).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1173
CA 16-00768
PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

ANGELA BERARDI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NIAGARA COUNTY, ET AL., DEFENDANTS,
AND NIAGARA COUNTY SHERIFF JAMES R.
VOUTOUR, DEFENDANT-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ELIZABETH M. BERGEN OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, LLP, BUFFALO (ANDREW CONNELLY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered July 21, 2015. The order, insofar as appealed from, reinstated plaintiff's amended complaint against defendant Niagara County Sheriff James R. Voutour.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, and the amended complaint against defendant Niagara County Sheriff James R. Voutour is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained after being sexually assaulted and subjected to verbal sexual harassment by defendant Brian M. Meacham (Meacham) while plaintiff was incarcerated in the Niagara County Jail. Meacham was employed by defendant Eastern Niagara Hospital, Inc. (ENH) and, on the date of the incident, he was providing radiology services to inmates at the jail, including plaintiff. Defendant Niagara County contracted with defendant Armor Correctional Health Services of New York, Inc. (Armor) to provide medical services at the jail, and Armor subcontracted with ENH to provide radiology services.

Supreme Court previously granted the pre-answer motion of, inter alia, defendant Niagara County Sheriff James R. Voutour (Sheriff) to dismiss the amended complaint against him and thereafter, upon granting plaintiff's motion for leave to reargue pursuant to CPLR 2221 (d) (2), reinstated the amended complaint against him. We agree with the Sheriff that the amended complaint was properly dismissed against him, and we therefore reverse the order insofar as appealed from.

Plaintiff was not required to file a notice of claim or comply

with General Municipal Law §§ 50-h and 50-i prior to the commencement of the action against the Sheriff (*see generally Mosey v County of Erie*, 117 AD3d 1381, 1386), and we thus agree with plaintiff that the Sheriff was not entitled to dismissal on that ground. We conclude, however, that the amended complaint failed to state a cause of action against the Sheriff, which was asserted as an alternative basis for dismissal. The allegations against him were based only on respondeat superior and, even assuming, arguendo, that Meacham was the Sheriff's agent, servant or employee, we conclude that the Sheriff is not liable for Meacham's alleged sexual assault of plaintiff (*see generally D'Amico v Correctional Med. Care, Inc.*, 120 AD3d 956, 959; *Hooper v Meloni*, 123 AD2d 511, 512). It is well settled that a principal or employer may be vicariously liable for the tortious acts of its employees only if those acts were "committed in furtherance of the employer's business and within the scope of employment" (*N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 251; *see Riviello v Waldron*, 47 NY2d 297, 302) and, here, the sexual assault allegedly perpetrated by Meacham was not an act committed in furtherance of the Sheriff's business and was "a clear departure from the scope of employment" (*N.X.*, 97 NY2d at 251; *see Krioutchkova v Gaad Realty Corp.*, 28 AD3d 427, 428). We further conclude that the Sheriff is not liable for Meacham's alleged verbal sexual harassment of plaintiff because "the doctrine of respondeat superior, or vicarious liability based on the agency relationship, is not available in cases involving . . . sex-based discrimination and its sexual harassment component" (*Matter of Father Belle Community Ctr. v New York State Div. of Human Rights*, 221 AD2d 44, 53, *lv denied* 89 NY2d 809).

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

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1175
CA 16-00212
PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

WAYNE CLARKE AND KATHLEEN CLARKE, INDIVIDUALLY
AND AS HUSBAND AND WIFE, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

WEGMANS FOOD MARKETS, INC., DEFENDANT-APPELLANT.

WALSH ROBERTS & GRACE, BUFFALO (ROBERT P. GOODWIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (ANDREW CONNELLY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered May 5, 2015. The order denied the motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting defendant's motion in part and dismissing the complaint to the extent that the complaint, as amplified by the bill of particulars, alleges that defendant created or had actual notice of the allegedly dangerous condition, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by plaintiff Wayne Clarke when he slipped on a puddle in the bathroom of defendant's store. Supreme Court erred in denying that part of defendant's motion for summary judgment dismissing the complaint to the extent that the complaint, as amplified by the bill of particulars, alleges that defendant was negligent because it created or had actual notice of the allegedly dangerous condition. We therefore modify the order accordingly. Defendant met its initial burden with respect to those issues and plaintiffs did not address them in their opposition to the motion, "thus implicitly conceding that defendants were entitled to summary judgment to that extent" (*Hagenbuch v Victoria Woods HOA, Inc.*, 125 AD3d 1520, 1521). Plaintiffs' contention that defendant created the allegedly dangerous condition 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).

Contrary to defendant's contention, we conclude that the court properly denied the motion with respect to the claim that defendant had constructive notice of the allegedly dangerous condition.

Defendant failed to meet its initial burden of establishing that the puddle was not visible and apparent or that it formed so close in time to the incident that defendant could not reasonably have been expected to notice and remedy the condition (*see Rivera v Tops Mkts., LLC*, 125 AD3d 1504, 1505-1506; *Navetta v Onondaga Galleries LLC*, 106 AD3d 1468, 1469-1470; *King v Sam's E., Inc.*, 81 AD3d 1414, 1415).

Entered: February 3, 2017 Frances E. Cafarell
Clerk of the Court

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

1176
CA 16-01094
PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

BRANDI HARDY, ET AL., PLAINTIFFS,

V MEMORANDUM AND ORDER

THOMAS KULWICKI, CARLO V. MADONIA, JR.,
KAREN MADONIA, ET AL., DEFENDANTS.

CARLO V. MADONIA, JR., AND KAREN MADONIA,
THIRD-PARTY PLAINTIFFS-RESPONDENTS-APPELLANTS,

V

HARLEYSVILLE WORCESTER INSURANCE COMPANY,
THIRD-PARTY DEFENDANT-APPELLANT-RESPONDENT.

HURWITZ & FINE, P.C., BUFFALO (AGNIESZKA A. WILEWICZ OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT-RESPONDENT.

WEBSTER SZANYI, LLP, BUFFALO (ANDREW O. MILLER OF COUNSEL), FOR THIRD-PARTY PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from a judgment (denominated order) of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered November 10, 2015. The judgment, among other things, denied that part of the motion of third-party plaintiffs seeking attorneys' fees and denied the cross motion of third-party defendant for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting that part of the motion seeking attorneys' fees incurred in defending the underlying action, and as modified, the judgment is affirmed without costs, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Plaintiffs commenced this litigation seeking damages for injuries they allegedly sustained as a result of negligent lead paint abatement at a property owned by third-party plaintiffs. Third-party plaintiffs subsequently commenced a third-party action and moved for summary judgment therein seeking, inter alia, a declaration that third-party defendant is obligated to defend and indemnify them in the underlying negligence action and attorneys' fees incurred in defending the underlying action and bringing the third-party action. Third-party defendant cross-moved for a declaration that it is not obligated to defend or indemnify third-party plaintiffs in the underlying action. Third-party defendant appeals and third-party plaintiffs cross-appeal from a

judgment that, inter alia, declared that third-party defendant is obligated to defend and indemnify third-party plaintiffs in the underlying action, denied third-party plaintiffs' request for attorneys' fees, and denied third-party defendant's cross motion.

We reject third-party defendant's contention that Supreme Court erred in issuing the declaration sought by third-party plaintiffs. The lead exclusion in the insurance policy issued by third-party defendant provides that it "applies to any owned locations containing habitational units constructed prior to 1980, which have a *significant* potential lead loss exposure and have not undergone lead abatement procedures" (emphasis added). We conclude that the lead exclusion is ambiguous because the meaning of the term "significant" " 'is in doubt [and] is subject to more than one reasonable interpretation' " (*Venigalla v Penn Mut. Ins. Co.*, 130 AD2d 974, 975, *lv dismissed* 70 NY2d 747). Here, there is a " 'reasonable basis for a difference of opinion' " whether the property's potential lead loss exposure is significant and is therefore subject to the exclusion (*Federal Ins. Co. v International Bus. Machs. Corp.*, 18 NY3d 642, 646, quoting *Greenfield v Philles Records*, 98 NY2d 562, 569). Thus, we construe the ambiguity in the lead exclusion in favor of the insured (*see Cragg v Allstate Indem. Corp.*, 17 NY3d 118, 122), and we conclude that the lead exclusion is not applicable and therefore that third-party defendant is obligated to defend and indemnify third-party plaintiffs in the underlying action (*see generally Crouse W. Holding Corp. v Sphere Drake Ins. Co.*, 248 AD2d 932, 933, *affd* 92 NY2d 1017; *Handelsman v Sea Ins. Co.*, 85 NY2d 96, 101-102, *rearg denied* 85 NY2d 924; *cf. Preferred Mut. Ins. Co. v Donnelly*, 111 AD3d 1242, 1245, *affd* 22 NY3d 1169).

We reject third-party plaintiffs' contention that they are entitled to attorneys' fees incurred in bringing the third-party action. "It is well established that an insured may not recover the expenses incurred in bringing an affirmative action against an insurer to settle its rights under the policy" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 324; *see Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12, 21). We agree with third-party plaintiffs, however, that the court erred in denying that part of their motion seeking reimbursement of attorneys' fees incurred in defending the underlying action (*see ACP Servs. Corp. v St. Paul Fire & Mar. Ins. Co.*, 224 AD2d 961, 963; *cf. Essex Ins. Co. v Young*, 17 AD3d 1134, 1136). We therefore modify the judgment accordingly, and we remit the matter to Supreme Court to determine the amount of those attorneys' fees.

Entered: February 3, 2017 Frances E. Cafarell
Clerk of the Court

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

1179
TP 16-00683
PRESENT: CENTRA, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF LARBI ADOUI, DOING BUSINESS
AS THE CORNER STORE, PETITIONER,

V MEMORANDUM AND ORDER

COMMISSIONER OF PERMIT AND INSPECTION SERVICES
AND CITY OF BUFFALO, RESPONDENTS.

SHAW & SHAW, P.C., HAMBURG (JACOB A. PIORKOWSKI OF COUNSEL), FOR PETITIONER.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Tracey A. Bannister, J.], entered April 13, 2016) to review a determination of respondent Commissioner of Permit and Inspection Services. The determination revoked the food store license and restaurant take-out license of petitioner.

It is hereby ORDERED that the order insofar as it transferred the proceeding to this Court is unanimously vacated without costs, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: In this CPLR article 78 proceeding transferred to this Court pursuant to CPLR 7804 (g), petitioner seeks review of a determination of respondent Commissioner of Permit and Inspection Services to revoke petitioner's food store license and restaurant take-out license. We note that respondents did not file and serve an answer before the matter was transferred, and they did not subsequently do so "within 25 days of filing and service of the order of transfer" (22 NYCRR 1000.8 [a]). However, "[s]hould the body or officer fail either to file and serve an answer or to move to dismiss, the court may either issue a judgment in favor of the petitioner or order that an answer be submitted" (CPLR 7804 [e]). In light of this State's policy against annulling an administrative body's determination on the basis of a failure to answer the petition (*see generally Matter of Abrams v Kern*, 35 AD2d 971, 971), we vacate the order insofar as it transferred the proceeding to this Court and remit the matter to Supreme Court with instructions to direct respondents to file an answer with the complete administrative record, and for further proceedings in accordance with CPLR 7804 (g) as may be appropriate following joinder of issue.

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1186
KA 16-00609
PRESENT: CARNI, J.P., NEMOYER, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

LAURA VIEIRA-SUAREZ, DEFENDANT-RESPONDENT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (VICTORIA M. WHITE OF COUNSEL), FOR APPELLANT.

TISDELL MOORE AND WALTER, SYRACUSE (ROBERT L. TISDELL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Onondaga County Court (Thomas J. Miller, J.), dated September 14, 2015. The order, insofar as appealed from, granted that part of the motion of defendant seeking to dismiss the first count of the indictment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law, that part of defendant's omnibus motion seeking to dismiss the first count of the indictment is denied, that count is reinstated, and the matter is remitted to Onondaga County Court for further proceedings on the indictment.

Memorandum: The People appeal from an order granting defendant's motion to dismiss the first count of the indictment, which charged her with perjury in the first degree (Penal Law § 210.15), on the ground that the evidence before the grand jury is legally insufficient to establish that offense or any lesser included offense (*see* CPL 210.20 [1] [b]). The People contend that County Court erred in dismissing that count because the evidence satisfies the elements of perjury and might warrant a conviction, and because there is sufficient corroboration that defendant testified falsely. We agree.

Pursuant to Penal Law § 210.15, one "is guilty of perjury in the first degree when he [or she] swears falsely and when his [or her] false statement (a) consists of testimony, and (b) is material to the action, proceeding or matter in which it is made." Penal Law § 210.50 states, "In any prosecution for perjury, except a prosecution based upon inconsistent statements pursuant to section 210.20 . . . , falsity of a statement may not be established by the uncorroborated testimony of a single witness." In reviewing the sufficiency of the evidence presented to the grand jury, the court must view it in the light most favorable to the People (*see People v Bello*, 92 NY2d 523, 525; *People v Jennings*, 69 NY2d 103, 114). Evidence is legally

sufficient where it is "competent" and where it, "if accepted as true, would establish every element of an offense charged and defendant's commission thereof; except that such evidence is not legally sufficient when corroboration required by law is absent" (CPL 70.10 [1]). Thus, the question is whether the evidence adduced before the grand jury, if unexplained and uncontradicted, would warrant conviction by a petit jury (*see Jennings*, 69 NY2d at 115; *People v Pelchat*, 62 NY2d 97, 105).

Here, we conclude that the evidence, if accepted as true by a petit jury, would establish every element of perjury in the first degree and defendant's commission of that crime. In particular, the grand jury evidence demonstrates that defendant made statements under oath that were material to a prior grand jury proceeding, and tends to show that some such statements were false and were believed by defendant to be false at the time she made them (*see* Penal Law § 210.15; *see also* § 210.00 [5]). We further conclude that there is sufficient corroboration of the testimony of at least one witness tending to establish the falsity of defendant's statement before the first grand jury that she "did not instruct anybody" to use the subject room as a "time-out" room for the student in question or to place the student in that room (*see* § 210.50; *see generally People v Rosner*, 67 NY2d 290, 294-296; *People v Sabella*, 35 NY2d 158, 168-169). Specifically, defendant's statement before the first grand jury that she "did not instruct anybody" was refuted by the testimony of the acting vice-principal before the second grand jury that defendant had so instructed the acting vice-principal, and it likewise was refuted by the testimony of the school nurse before the second grand jury that defendant had so instructed the school nurse. Thus, there is corroborative proof "sufficient to connect the accused with the perpetration of the offense and [to] lead to the inference of guilt" (*People v Skibinski*, 55 AD2d, 48, 51; *see People v Fitzpatrick*, 47 AD2d 70, 71, *revd on other grounds* 40 NY2d 44), and to thereby satisfy the factfinder that either of those witnesses against defendant was telling the truth (*see Sabella*, 35 NY2d at 168; *Fitzpatrick*, 47 AD2d at 71). In other words, we conclude that the testimony of either witness suffices to corroborate the testimony of the other witness (*see* CPL 210.50).

We agree with the court, however, that the evidence before the grand jury is legally insufficient to establish that defendant testified before the first grand jury, whether falsely or not, that she lacked any knowledge of the room's being used as a time-out room. Therefore, as to that specification of perjury set forth in the People's bill of particulars, the charge of perjury against defendant cannot stand.

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1194
CA 16-00601
PRESENT: CENTRA, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ.

VIRGINIA L. CAUM LAKE AND GREGORY M. LAKE,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

SAFECO INSURANCE COMPANY OF AMERICA,
DEFENDANT-APPELLANT.

LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (SHANE COSTA OF COUNSEL), FOR DEFENDANT-APPELLANT.

WELCH, DONLON & CZARPLES, PLLC, CORNING (MICHAEL DONLON OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Steuben County (Elma A. Bellini, J.), dated August 12, 2015. The order, among other things, denied in part defendant's motion for summary judgment.

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

Memorandum: Virginia L. Caum Lake (plaintiff) allegedly sustained injuries when she was involved in a rear-end motor vehicle accident. Following the settlement of their claims against the other driver involved in the accident, plaintiffs commenced this action to recover supplementary uninsured motorist benefits under a provision of the automobile insurance policy issued to them by defendant. Insofar as relevant to this appeal, defendant moved for summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a serious injury, i.e., a permanent consequential limitation of use and significant limitation of use, within the meaning of Insurance Law § 5102 (d), and that she did not sustain economic loss in excess of basic economic loss. Supreme Court denied the motion to that extent.

We agree with plaintiff that the court properly denied the motion with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury. Defendant failed to establish as a matter of law that plaintiff did not sustain a qualifying injury as a result of the motor vehicle accident (*see Nyhlen v Giles*, 138 AD3d 1428, 1429). Although defendant submitted an independent medical examination (IME) report/affirmation establishing that plaintiff had preexisting degenerative changes to her cervical spine and further establishing that all of plaintiff's mobility limitations were attributable to such degenerative changes or to a

subsequent motor vehicle accident, defendant also submitted a second IME report/affirmation tending to establish that plaintiff had sustained a qualifying injury as a result of the subject motor vehicle accident. Moreover, defendant submitted records and reports of plaintiff's treating physicians and chiropractors, and some of those documents, which predate the subsequent accident, recite that plaintiff's cervical injuries were the result of the subject accident. Some of those contemporaneous records and reports also set forth qualitative or quantative assessments of plaintiff's limited range of motion in her neck. Thus, defendant failed to eliminate all issues of fact concerning whether plaintiff sustained a permanent consequential limitation of use or a significant limitation of use of her cervical spine as a result of the subject accident (*see id.* at 1429-1430; *Clark v Aquino*, 113 AD3d 1076, 1077-1078). In any event, we conclude that plaintiff raised triable issues of fact concerning the nature, extent, cause, and permanency of the alleged injuries to her neck (*see Barron v Northtown World Auto*, 137 AD3d 1708, 1709; *Parkhill v Cleary*, 305 AD2d 1088, 1088-1089).

We further conclude that the court properly denied the motion insofar as it sought dismissal of plaintiff's claim for economic loss in excess of basic economic loss (*see Colvin v Slawoniewski*, 15 AD3d 900, 900; *Mainella v Allstate Ins. Co.*, 269 AD2d 365, 366; *Tortorello v Landi*, 136 AD2d 545, 545-546; *cf. Hartman-Jweid v Overbaugh*, 70 AD3d 1399, 1400-1401; *see also* Insurance Law § 5104 [a]).

Entered: February 3, 2017 Frances E. Cafarell
Clerk of the Court

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

1217
CA 15-01673
PRESENT: SMITH, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

NORMAN JOHN PERRY, AS EXECUTOR OF THE ESTATE OF NORMAN M. PERRY, DECEASED, AND THE ESTATE OF NORMAN M. PERRY, DECEASED, AND NORMAN JOHN PERRY, AS EXECUTOR OF THE ESTATE OF WANDA M. PERRY, DECEASED, AND THE ESTATE OF WANDA M. PERRY, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JAMES W. EDWARDS AND DIANNE L. EDWARDS, DEFENDANTS-RESPONDENTS.

MICHAEL J. WRONA, BUFFALO, FOR PLAINTIFF-APPELLANT.

LAWRENCE A. SCHULZ, ORCHARD PARK, FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (John A. Michalek, J.), entered March 10, 2015. The judgment awarded defendants money damages upon a nonjury verdict.

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

Memorandum: Plaintiff's decedents commenced this RPAPL article 15 action seeking a determination that they were the sole owners of a wedge-shaped strip of property between their parcel of property and defendants' adjacent parcel of property. On the first of two prior appeals, this Court affirmed that part of an order granting the motion of defendants for summary judgment insofar as it sought dismissal of the cause of action based on the deeds to the properties (*Perry v Edwards*, 79 AD3d 1629, 1630). We further concluded on the first appeal that plaintiff's decedents raised a triable issue of fact whether they had gained title to the strip by adverse possession, and we deemed the amended complaint to be further amended to assert that cause of action (*id.* at 1631). On the second prior appeal, we affirmed an order granting the motion of defendants for summary judgment dismissing the second amended complaint in its entirety, including the cause of action for adverse possession (*Perry v Edwards*, 118 AD3d 1346). Plaintiff now appeals from a judgment that, insofar as relevant to this appeal, awarded money damages to defendants after a nonjury trial on their counterclaims seeking, inter alia, counsel fees and litigation costs.

We agree with plaintiff that Supreme Court improperly awarded counsel fees and litigation costs to defendants, and we therefore reverse. The general rule in New York is that litigants are required to absorb their own counsel fees and litigation costs unless there is a contractual or statutory basis for imposing them (*see Larsen v Rotolo*, 78 AD3d 1683, 1683-1684), and "[t]here is neither a contractual nor a statutory basis for the award of [counsel] fees to [defendants] in this case" (*Erie Petroleum v County of Chautauqua*, 286 AD2d 854, 854). Furthermore, although a court may award counsel fees as a sanction for frivolous conduct pursuant to 22 NYCRR 130-1.1, it may do so "only upon a written decision setting forth the conduct on which the award . . . is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded . . . to be appropriate" (22 NYCRR 130-1.2; *see Matter of Gigliotti v Bianco*, 82 AD3d 1636, 1638). Here, defendants did not seek sanctions for frivolous conduct, and the court did not issue a written decision or make any finding that plaintiff or decedents engaged in such conduct. Furthermore, we conclude that the counterclaim seeking to recover counsel fees failed to state a cause of action inasmuch as defendants did not allege any proper basis upon which such fees would be recoverable. We therefore dismiss the counterclaims (*see Rich v Orlando*, 108 AD3d 1039, 1041; *Dune Deck Owners Corp. v Liggett*, 85 AD3d 1093, 1096). Plaintiff's alternative contention concerning the amount of the judgment is academic in light of our determination.

Finally, we note that defendants' cross appeal from the judgment was deemed abandoned and dismissed pursuant to 22 NYCRR 1000.12 (b), and thus defendants' contention that the court improperly reduced the amount of damages is not properly before us.

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1220
CA 16-00089
PRESENT: SMITH, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

IN THE MATTER OF CITY OF ROME,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BOARD OF ASSESSORS AND/OR ASSESSOR OF TOWN
OF LEWIS, BOARD OF ASSESSMENT REVIEW, COUNTY
OF LEWIS, RESPONDENTS-APPELLANTS,
ET AL., RESPONDENT.
(APPEAL NO. 1.)

C. LOUIS ABELOVE, UTICA, FOR RESPONDENTS-APPELLANTS BOARD OF ASSESSORS AND/OR ASSESSOR OF TOWN OF LEWIS, AND BOARD OF ASSESSMENT REVIEW.

JOAN E. MCNICHOL, COUNTY ATTORNEY, LOWVILLE, FOR RESPONDENT-APPELLANT COUNTY OF LEWIS.

GOLDMAN ATTORNEYS PLLC, ALBANY (PAUL J. GOLDMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeals from an order of the Supreme Court, Lewis County (Charles C. Merrell, J.), entered August 27, 2015. The order, inter alia, granted the motion of petitioner for partial summary judgment on the ground of selective reassessment.

It is hereby ORDERED that said appeals are unanimously dismissed without costs.

Same memorandum as in *Matter of City of Rome v Board of Assessors and/or Assessor of Town of Lewis* ([appeal No. 2] ___ AD3d ___ [Feb. 3, 2017]).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1221
CA 16-00090
PRESENT: SMITH, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

IN THE MATTER OF CITY OF ROME,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BOARD OF ASSESSORS AND/OR ASSESSOR OF TOWN OF
LEWIS, BOARD OF ASSESSMENT REVIEW, ADIRONDACK
CENTRAL SCHOOL DISTRICT AND COUNTY OF LEWIS,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

C. LOUIS ABELOVE, UTICA, FOR RESPONDENTS-APPELLANTS BOARD OF ASSESSORS AND/OR ASSESSOR OF TOWN OF LEWIS, AND BOARD OF ASSESSMENT REVIEW.

FERRARA FIORENZA, PC, EAST SYRACUSE (KATHERINE E. GAVETT OF COUNSEL), FOR RESPONDENT-APPELLANT ADIRONDACK CENTRAL SCHOOL DISTRICT.

JOAN E. MCNICHOL, COUNTY ATTORNEY, LOWVILLE, FOR RESPONDENT-APPELLANT COUNTY OF LEWIS.

GOLDMAN ATTORNEYS PLLC, ALBANY (PAUL J. GOLDMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeals from a judgment of the Supreme Court, Lewis County (Charles C. Merrell, J.), entered October 16, 2015. The judgment, inter alia, reduced certain tax assessments for the years 2012 through 2014 upon petitioner's motion for partial summary judgment.

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

Memorandum: Petitioner commenced these consolidated proceedings pursuant to RPTL article 7 to challenge the real property tax assessments on one of its properties, a 725-acre dam and drinking-water reservoir and adjoining uplands (hereafter, parcel) located in the Town of Lewis (Town), for the years 2012 through 2014. Respondents appeal from a judgment granting petitioner's motion for partial summary judgment on the ground that respondents had improperly selectively reassessed the parcel, vacating the $18 million assessments placed on the parcel for the tax years in question, ordering that the assessments for the years in question be returned to the level of the 2011 assessment, i.e., approximately $11.45 million, and directing a refund of overpaid taxes, with interest. We conclude

that the court erred in granting the motion, and we therefore reverse.

As a preliminary matter, we dismiss appeal No. 1 on the ground that the order is subsumed in the judgment in appeal No. 2 (*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]). We note that respondent Adirondack Central School District filed a notice of appeal from the order in appeal No. 1, but not from the judgment in appeal No. 2. We exercise our discretion to "treat the notice of appeal as one taken from the judgment" (*Hughes*, 140 AD2d at 988; *see* CPLR 5520 [c]).

Contrary to the contention of respondents, Supreme Court was not precluded from entertaining the motion by the mere fact that petitioner had been accorded, but thereafter waived, the right to engage in some further disclosure proceedings. We agree with respondents, however, that the court erred in summarily reducing petitioner's assessments for the tax years in question by $6.55 million. Contrary to the court's apparent holding, the absence from the record of a "comprehensive written plan of reassessment" did not, by itself, warrant the granting of partial summary judgment to petitioner on its claim that the parcel had been excessively and/or unequally reassessed on a selective basis. We do not read the cases cited by the court as requiring the formulation of a written plan, but rather as merely forbidding a scheme of reassessment that is ad hoc and unexplained and hence without a rational basis (*see e.g. Matter of Leone Props., LLC v Board of Assessors for Town of Cornwall*, 81 AD3d 649, 650-651, *affg* 24 Misc 3d 1218[A]; *Matter of Stern v Assessor of the City of Rye*, 268 AD2d 482, 483; *Matter of Krugman v Board of Assessors of Vil. of Atl. Beach*, 141 AD2d 175, 183-184; *see also Matter of Young v Town of Bedford*, 9 Misc 3d 1107[A], *9-18, *affd* 37 AD3d 729). We further conclude that the court erred insofar as it concluded or suggested that the assessments must be set aside based merely on the fact that only about 400 of the approximately 800 tax parcels in the Town had their assessments changed from 2011 to 2012 (*see Nash v Assessor of Town of Southampton*, 168 AD2d 102, 105-109; *see also Matter of Mundinger v Assessor of City of Rye*, 187 AD2d 594, 595; *Parisi v Assessor of Town of Southampton*, 14 Misc 3d 1220[A], *5).

It is the rule in an RPTL article 7 proceeding that the "locality's tax assessment is presumptively valid," but that "[the] petitioner may overcome that presumption by bringing forth substantial evidence that its property has been overvalued" (*Matter of Niagara Mohawk Power Corp. v Assessor of the Town of Geddes*, 92 NY2d 192, 196; *see Matter of FMC Corp. [Peroxygen Chems. Div.] v Unmack*, 92 NY2d 179, 188). "In the context of a proceeding to challenge a tax assessment, substantial evidence will often consist of a detailed, competent appraisal based on standard, accepted appraisal techniques and prepared by a qualified appraiser" (*Niagara Mohawk Power Corp.*, 92 NY2d at 196). Until the presumption of the validity of the assessment is overcome, there is no obligation on the part of the assessor to come forward with proof of correctness of the assessment (*see FMC*

Corp. [Peroxygen Chems. Div.], 92 NY2d at 187). Only if the petitioner rebuts the presumption of validity must the court then examine and "weigh the entire record, including evidence of claimed deficiencies in the assessment, to determine whether petitioner has established by a preponderance of the evidence that its property has been overvalued" (*id.* at 188; *see Matter of Goodhue Wilton Props., Inc. v Assessor of Town of Wilton*, 121 AD3d 1360, 1361). Certainly, where it is ultimately determined that the assessment is excessive or unequal, the court may correct the assessment to a level warranted by the proof adduced on the issue of valuation (*see* RPTL 720 [1] [b]; *see also* RPTL 706 [2]).

Here, the record contains no competent appraisal evidence by which the court plausibly might have determined that the fair value of the parcel was, on each of the taxable dates in question, $11.45 million. Given that lack of proof of valuation, it must be concluded that petitioner failed to carry its evidentiary burden in challenging its tax assessment (*see Nash*, 168 AD2d at 108; *see generally FMC Corp. [Peroxygen Chems. Div.]*, 92 NY2d at 188). "[I]t cannot be said, on the present record, that the Town acted in bad faith in this case or that [petitioner was] 'singled out for selective enforcement of tax laws that apply equally to all similarly situated taxpayers' . . . A record must be developed and factual findings made with respect to these material questions" (*Nash*, 168 AD2d at 109; *see Mundinger*, 187 AD2d at 595).

Entered: February 3, 2017 Frances E. Cafarell
Clerk of the Court

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

1222
CA 15-01740
PRESENT: SMITH, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

TRAVIS KEEGAN, PLAINTIFF-RESPONDENT,

V   ORDER

BRONWEN L. KEEGAN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

PAUL M. DEEP, UTICA, FOR DEFENDANT-APPELLANT.

LUCILLE M. RIGNANESE, ROME, FOR PLAINTIFF-RESPONDENT.

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

Appeal from an order of the Supreme Court, Oneida County (Joan E. Shkane, A.J.), entered January 13, 2015. The order, inter alia, granted primary physical custody of the parties' children to plaintiff.

It is hereby ORDERED that said appeal is unanimously 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: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1223
CA 15-01741
PRESENT: SMITH, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

TRAVIS KEEGAN, PLAINTIFF-RESPONDENT,

V ORDER

BRONWEN L. KEEGAN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

PAUL M. DEEP, UTICA, FOR DEFENDANT-APPELLANT.

LUCILLE M. RIGNANESE, ROME, FOR PLAINTIFF-RESPONDENT.

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

Appeal from an amended order of the Supreme Court, Oneida County (Joan E. Shkane, A.J.), entered June 3, 2015. The amended order, inter alia, awarded primary physical custody of the parties' children to plaintiff.

It is hereby ORDERED that said appeal is unanimously 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: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1224.1
CA 16-01337
PRESENT: SMITH, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

IN THE MATTER OF ISKALO 5000 MAIN LLC, AND
ISKALO 5010 MAIN LLC, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

TOWN OF AMHERST INDUSTRIAL DEVELOPMENT AGENCY,
RESPONDENT-APPELLANT.

COUNTY OF ERIE, INTERVENOR-RESPONDENT.
(APPEAL NO. 1.)

HURWITZ & FINE, P.C., BUFFALO (ANDREA SCHILLACI OF COUNSEL), FOR
RESPONDENT-APPELLANT.

HOPKINS, SORGI & ROMANOWSKI PLLC, WILLIAMSVILLE (SEAN W. HOPKINS OF
COUNSEL), FOR PETITIONERS-RESPONDENTS.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (JEREMY C. TOTH OF
COUNSEL), FOR INTERVENOR-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (John L. Michalski, A.J.), entered June 30, 2016 in a proceeding pursuant to CPLR article 78. The judgment reversed the determination of respondent denying the application of petitioners, granted the application of petitioners and denied the request of respondent for attorney's fees.

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

Same memorandum as in *Matter of Iskalo 5000 Main LLC v Town of Amherst Indus. Dev. Agency* ([appeal No. 2] ___ AD3d ___ [Feb. 3, 2017]).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1224.2
CA 16-01425
PRESENT: SMITH, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

IN THE MATTER OF ISKALO 5000 MAIN LLC AND
ISKALO 5010 MAIN LLC, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

TOWN OF AMHERST INDUSTRIAL DEVELOPMENT AGENCY,
RESPONDENT-APPELLANT.

COUNTY OF ERIE, INTERVENOR-RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

HURWITZ & FINE, P.C., BUFFALO (ANDREA SCHILLACI OF COUNSEL), FOR RESPONDENT-APPELLANT.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (JEREMY C. TOTH OF COUNSEL), FOR INTERVENOR-RESPONDENT-APPELLANT.

HOPKINS, SORGI & ROMANOWSKI PLLC, WILLIAMSVILLE (SEAN W. HOPKINS OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeals from a judgment (denominated order) of the Supreme Court, Erie County (John L. Michalski, A.J.), entered July 29, 2016 in a proceeding pursuant to CPLR article 78. The judgment reversed the determination of respondent denying the application of petitioners, granted the application of petitioners and denied the request of respondent for attorney's fees.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by dismissing the petition and reinstating the determination, and as modified the judgment is affirmed without costs.

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking to annul and reverse the determination of respondent, Town of Amherst Industrial Development Agency (AIDA), denying petitioners' application for financial assistance in the form of various tax exemptions in connection with a renovation project of the former Lord Amherst Hotel and an on-site restaurant. In appeal No. 1, AIDA and intervenor-respondent, County of Erie (County), appeal from a judgment entered June 30, 2016, by which Supreme Court reversed AIDA's determination denying petitioners' application, granted the application, and denied AIDA's request for attorney's fees. In appeal No. 2, AIDA appeals from a subsequent judgment entered July 29, 2016, by which the court reiterated the terms of its judgment entered June

30, 2016, but added a written decision. We note at the outset that appeal No. 1 must be dismissed inasmuch as the earlier judgment was superseded by the later judgment (*see Legarreta v Neal*, 108 AD3d 1067, 1068; *see generally Matter of Eric D.* [appeal No. 1], 162 AD2d 1051, 1051). Further, although the County appealed from only the earlier judgment, we exercise our discretion to treat its notice of appeal as valid and deem its appeal to be from the superseding judgment (*see generally* CPLR 5520 [c]).

We agree with AIDA and the County (collectively, respondents) that the court erred in reversing AIDA's determination denying petitioners' application for financial assistance, and we modify the judgment in appeal No. 2 accordingly. Pursuant to a 2013 amendment to General Municipal Law § 862, industrial development agencies such as AIDA are prohibited from providing financial assistance "in respect of any project where facilities or property that are primarily used in making retail sales to customers who personally visit such facilities constitute more than one-third of the total project cost" (§ 862 [2] [a]). In addition to other exceptions not relevant to this appeal, however, the prohibition does not apply to "tourism destination projects" (*id.*). The statute defines a "tourism destination" as "a location or facility which is likely to attract a significant number of visitors from outside the economic development region . . . in which the project is located" (*id.*).

"It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature . . . , and where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used" (*Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208; *see Matter of Synergy, LLC v Kibler*, 124 AD3d 1261, 1262, *lv denied* 25 NY3d 967). In section 862 (2) (a), the Legislature chose to use the word *attract*, which, in the context of this case, means "to cause to approach or adhere" or "to draw to or toward oneself" (Webster's Third New International Dictionary 141 [2002]). We thus conclude that the Legislature intended there to be a causal link between a project's location or facilities and visitors coming from outside the economic development region. Here, however, the materials submitted by petitioners to AIDA in connection with their application demonstrate, at most, that the project location or facilities would *be used by* or *cater to* visitors from outside the economic development region. Those visitors may come to the economic development region for any number of reasons independent of petitioners' project and simply choose to use the project's facilities rather than lodge or dine at any of the other available options. Petitioners made no showing that the project location or facilities would likely *cause* visitors to come from outside the economic development region, as required by the plain language of section 862 (2) (a). Inasmuch as petitioners failed to show that the project fell within the "tourism destination" exception to the general prohibition on providing financial assistance in connection with retail projects (§ 862 [2] [a]), AIDA's determination must be sustained because it is supported by a rational basis in the record (*see Matter of Peckham v Calogero*, 12 NY3d 424, 431; *Matter of Civil Serv. Empls. Assn., Local

1000, AFSCME, AFL-CIO v New York State Unified Ct. Sys., 138 AD3d 1444, 1445). Moreover, we further conclude that AIDA's determination was not affected by an error of law inasmuch as its interpretation of section 862 is not "irrational or unreasonable" (*Matter of Koch v Sheehan*, 95 AD3d 82, 89, *affd* 21 NY3d 697).

Contrary to petitioners' contention, we conclude that AIDA's previous determinations did not render its instant determination arbitrary and capricious. Although "[a] decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reasons for reaching a different result on essentially the same facts is arbitrary and capricious" (*Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington*, 97 NY2d 86, 93 [internal quotation marks omitted]), that rule is not applicable here. The denial of petitioners' instant application is not inconsistent with AIDA's determinations on petitioners' 2011 and 2012 applications or on applications submitted by other applicants because those applications did not involve "essentially the same facts" (*id.* [internal quotation marks omitted]).

Petitioners contend that AIDA's determination was rendered arbitrary and capricious by an AIDA Board member's refusal to recuse herself based on an alleged conflict of interest. To the extent that such contention is properly before us, we reject it as without merit. At most, petitioners established that the Board member may have made " 'expressions of personal opinion' . . . on matters of public concern[,]" which are insufficient to constitute a basis for finding a conflict of interest (*Matter of Pittsford Canalside Props., LLC v Village of Pittsford*, 137 AD3d 1566, 1568, *lv dismissed* 27 NY3d 1080).

We reject respondents' contention that the court erred in denying AIDA's request for attorney's fees. It is well established that a court should not infer a party's intention to waive the benefit of the general rule that parties are responsible for their own attorney's fees "unless the intention to do so is unmistakably clear from the language of the promise" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 492). The indemnification provision in AIDA's application form, upon which respondents rely, contains only general language that the "applicant shall be and is responsible for all expenses incurred by [AIDA] in connection with this application." We conclude that such broad language, which does not refer to litigation or attorney's fees, does not make it "unmistakably clear" that the parties intended that petitioners must indemnify AIDA for attorney's fees arising from the instant litigation (*id.; see Parkway Pediatric & Adolescent Medicine LLC v Vitullo*, 72 AD3d 1513, 1513).

Entered: February 3, 2017 Frances E. Cafarell
Clerk of the Court

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

1224
CA 15-01742
PRESENT: SMITH, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

TRAVIS KEEGAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BRONWEN L. KEEGAN, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

PAUL M. DEEP, UTICA, FOR DEFENDANT-APPELLANT.

LUCILLE M. RIGNANESE, ROME, FOR PLAINTIFF-RESPONDENT.

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

Appeal from a judgment of the Supreme Court, Oneida County (Joan E. Shkane, A.J.), entered June 3, 2015. The judgment, inter alia, granted primary physical custody of the parties' children to plaintiff.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating every decretal paragraph, except for the 2nd, 16th and 17th decretal paragraphs, and a new trial is granted on the issues of custody, visitation, child support, and equitable distribution.

Memorandum: Defendant appeals from a judgment of divorce that, inter alia, granted primary physical custody of the parties' children to plaintiff. On appeal, defendant contends that Supreme Court committed numerous errors, and that the judgment of divorce fails to conform with the mandatory provisions of the Domestic Relations Law and is deficient as it pertains to the issues of custody, visitation, child support, and equitable distribution. We agree and therefore modify the judgment by vacating every decretal paragraph therein, except for the 2nd decretal paragraph granting the divorce, the 16th decretal paragraph allowing the parties to resume the use of their premarriage surnames and the 17th decretal paragraph regarding service. In light of the pervasive errors in this case, we grant a new trial on the above-mentioned issues before a different justice.

We conclude that the court erred in refusing to allow the parties to enter into a settlement agreement. In the midst of trial, the parties' attorneys indicated that an agreement had been reached granting custody to defendant and regular visitation to plaintiff. It became apparent that the parties agreed on all the material terms of the proposed agreement and disagreed only about the location where

pickups for visitation would occur. At that point, the court stated that it was "very unhappy" with the length of the trial and immediately terminated all discussions concerning the parties' agreement. When defendant's attorney attempted to explain his position, the court cut him off, thereby virtually assuring the failure of the parties' agreement. The trial continued and, after the close of proof that same day, the court granted custody to plaintiff without regular visitation to defendant.

"Marital settlement agreements are judicially favored and are not to be easily set aside" (*Simkin v Blank*, 19 NY3d 46, 52; *see Maving v Maving*, 125 AD3d 1290, 1290). As a general matter, open court stipulations are especially favored by the courts inasmuch as they promote efficient dispute resolution, timely management of court calendars, and the "integrity of the litigation process" (*Hallock v State of New York*, 64 NY2d 224, 230). In matrimonial actions, however, an open court stipulation is unenforceable absent a writing that complies with the requirements for marital settlement agreements (*see Tomei v Tomei*, 39 AD3d 1149, 1150; *see generally* Domestic Relations Law § 236 [B] [3]). More particularly, to be valid and enforceable, marital settlement agreements must be "in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded" (§ 236 [B] [3]). Under the unusual circumstances of this case, i.e., where the parties evinced their agreement in open court to the material terms of a settlement agreement, there were no indicia of fraud or manifest injustice, and the court prevented the parties from ratifying their agreement but instead made a ruling directly contrary to the terms of that agreement, we conclude that the court erred in granting primary physical custody to plaintiff. That error was compounded when the court entered a visitation schedule that erroneously denied meaningful visitation to defendant (*see Williams v Williams*, 100 AD3d 1347, 1348-1349; *Matter of Brown v Brown*, 97 AD3d 673, 674; *see generally Weiss v Weiss*, 52 NY2d 170, 175).

If those were the only errors, we would modify the judgment by vacating only those provisions pertaining to custody and visitation. We further conclude, however, that the judgment is deficient for additional reasons. Specifically, it fails to conform with the mandatory provisions of the Domestic Relations Law pertaining to child support and equitable distribution.

We agree with defendant that the court erred in failing to award her child support arrears. Before trial, on August 23, 2013, defendant made an application for an order awarding her child support and other relief. That application resulted in a temporary order awarding her child support in the amount of $385.00 every two weeks, effective the following Friday. That was error. An order directing the payment of child support "shall be effective as of the date of the application therefor, and any retroactive amount of child support due shall be support arrears[]" (Domestic Relations Law § 240 [1] [j]). Thus, the court "should have awarded . . . child support retroactive to [August 23, 2013], the date of the application therefor" (*DiSanto v DiSanto*, 198 AD2d 838, 838; *see Petroci v Petroci*, 130 AD3d 1573,

1574). Moreover, as the parties acknowledged at oral argument of this appeal, the final judgment contains no provision at all for child support. That was also error (*see generally* § 240).

Furthermore, we note that in any matrimonial action the court "shall determine the respective rights of the parties in their separate or marital property, and shall provide for the disposition thereof in the final judgment" (Domestic Relations Law § 236 [B] [5]), and we conclude that the judgment of divorce is deficient in that respect as well.

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1225
KA 02-00049
PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES KENDRICK, DEFENDANT-APPELLANT.

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

JAMES KENDRICK, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), rendered February 1, 2001. The appeal was held by this Court by order entered May 8, 2015, decision was reserved and the matter was remitted to Supreme Court, Monroe County, for further proceedings (128 AD3d 1482). The proceedings were held and completed.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, that part of the motion seeking to suppress physical evidence from the vehicle is granted, and the matter is remitted to Supreme Court, Monroe County, for further proceedings on the indictment.

Memorandum: Defendant appeals 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]). When this appeal was previously before us, we concluded that, as the People correctly conceded, Supreme Court (Fisher, J.) erred in determining that defendant lacked standing to challenge the legality of the police search of a vehicle in which a large quantity of cocaine was found in the back seat (*People v Kendrick*, 128 AD3d 1482, 1482-1483). We further concluded that the error was not harmless because there was a reasonable possibility that the error contributed to defendant's decision to plead guilty. Upon remittal, the court (Winslow, J.) conducted a suppression hearing, following which it refused to suppress the cocaine, ruling that the People proved that the driver of the vehicle voluntarily consented to the search of the vehicle, and that the warrantless search was therefore lawful. We now reverse.

"It is the People's burden to establish the voluntariness of

defendant's consent, and that burden is not easily carried, for a consent to search is not voluntary unless 'it is a true act of the will, an unequivocal product of an essentially free and unconstrained choice. Voluntariness is incompatible with official coercion, actual or implicit, overt or subtle' " (*People v Packer*, 49 AD3d 184, 187, *affd* 10 NY3d 915, quoting *People v Gonzalez*, 39 NY2d 122, 128). "An important, although not dispositive, factor in determining the voluntariness of an apparent consent is whether the consenter is in custody or under arrest, and the circumstances surrounding the custody or arrest" (*Gonzalez*, 39 NY2d at 128).

Here, defendant was a front seat passenger in the vehicle in which the cocaine was found by the police. The only other occupant was the driver, who owned the vehicle and consented to the police search. At the suppression hearing, the sole witness called by the People was the police officer who obtained consent to search from the driver. That officer acknowledged, however, that she was not involved in the stop of the vehicle and did not know the basis for the stop. She was unaware whether the driver committed any traffic infractions and did not know why the driver was taken into custody. According to the officer, she came into contact with the driver in an interview room at the police station at approximately 8:00 p.m., which was more than 4½ hours after the vehicle was stopped. The officer did not know who, if anyone, had questioned the driver before she entered the interview room; did not know whether anyone had advised him of his *Miranda* rights; did not know whether he had been handcuffed prior to her arrival; did not know whether he had been given any food or drink; and did not know whether he had been allowed to make any telephone calls. The officer merely testified that the driver spontaneously told her during the interview that there was cocaine in the back seat of his vehicle, and that he then voluntarily consented to the search by signing a consent to search form.

We conclude that, "[b]ecause the People failed to present evidence at the suppression hearing establishing the legality of the police conduct, [the driver's] purported consent to the search of his vehicle was involuntary[,] and all evidence seized from the vehicle as a result of that consent should have been suppressed" (*People v Purdy*, 106 AD3d 1521, 1523; *see Packer*, 49 AD3d at 187-189). We therefore reverse the judgment, vacate the plea, grant defendant's omnibus motion insofar as it sought suppression of the cocaine found in the vehicle, and remit the matter to Supreme Court for further proceedings on the indictment.

In light of our determination, we do not address the contention raised by defendant in his pro se supplemental brief.

Entered: February 3, 2017 Frances E. Cafarell
Clerk of the Court

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

1239
CA 16-00690
PRESENT: PERADOTTO, J.P., CARNI, CURRAN, TROUTMAN, AND SCUDDER, JJ.

PEGGY HALL, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

SCHRADER, ISRAELY, DELUCA & WATERS, LLP,
DEFENDANT-APPELLANT-RESPONDENT.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP, ALBANY (PETER A. LAURICELLA OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

TREVETT, CRISTO, SALZER & ANDOLINA, P.C., ROCHESTER (DAVID L. MURPHY OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered March 7, 2016. The order denied the motion of defendant for summary judgment and denied the cross motion of plaintiff for summary judgment.

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

Memorandum: Plaintiff commenced this legal malpractice action alleging that defendant did not properly advise her during settlement negotiations of an action it commenced on her behalf. Plaintiff retained defendant to pursue benefits under the Employee Retirement Income Security Act of 1974 ([ERISA] 29 USC § 1001 *et seq.*) for her, and defendant's efforts resulted in a $60,000 settlement offer soon after the action was commenced. Plaintiff agreed to the amount of the settlement but wanted defendant to negotiate further in an attempt to secure terms that would allow plaintiff to pursue other benefits under a related ERISA benefit plan. After 18 months of negotiations, opposing counsel withdrew the settlement offer and successfully moved to dismiss the action. Following the commencement of this action and completion of discovery, defendant moved for summary judgment dismissing the complaint, and plaintiff cross-moved for summary judgment. Supreme Court properly denied the motion and cross motion.

Addressing first plaintiff's cross appeal, we note that, in an action to recover damages for legal malpractice, a plaintiff must demonstrate that the "attorney failed to exercise 'the ordinary reasonable skill and knowledge' commonly possessed by a member of the legal profession" (*Darby & Darby v VSI Intl.*, 95 NY2d 308, 313), and that "the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages" (*Rudolf v Shayne, Dachs,*

Stanisci, Corker & Sauer, 8 NY3d 438, 442; *see Chamberlain, D'Amanda, Oppenheimer & Greenfield, LLP v Wilson*, 136 AD3d 1326, 1327, *lv dismissed* 28 NY3d 942). We conclude that plaintiff's cross motion was properly denied, inasmuch as she failed to establish that defendant's alleged malpractice proximately caused her damages. In support of her cross motion, plaintiff submitted no evidence that she would have accepted the $60,000 offer if she had been properly advised, i.e., she failed to establish that, but for defendant's deviation from the standard of care, she would not have been harmed (*see Miazga v Assaf*, 136 AD3d 1131, 1134-1135, *lv dismissed* 27 NY3d 1078; *Kluczka v Lecci*, 63 AD3d 796, 797-798).

We conclude with respect to defendant's appeal that its motion also was properly denied. To establish its compliance with an attorney's duty to keep his or her client reasonably informed, and to provide enough information to allow plaintiff to reasonably participate in settlement negotiations, defendant cited only to a single letter that was sent to plaintiff as a cover sheet with the original settlement offer in the underlying litigation. The letter stated that settlement "could be a quick way to resolve this case, without the need for spending a lot of money on a claim that the Plan may prevail on (despite our best efforts)." Even assuming, arguendo, that a reasonable factfinder could ultimately conclude that the letter satisfied defendant's duty to "exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession" (*Bua v Purcell & Ingrao, P.C.*, 99 AD3d 843, 845, *lv denied* 20 NY3d 857; *see Magnacoustics, Inc. v Ostrolenk, Faber, Gerb & Soffen*, 303 AD2d 561, 562, *lv denied* 100 NY2d 511), plaintiff raised a triable issue of fact by submitting an expert affirmation asserting, inter alia, that defendant failed to provide plaintiff with adequate advice (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Defendant also failed to establish as a matter of law that its conduct did not proximately cause plaintiff's damages, inasmuch as it did not affirmatively eliminate every material issue of fact with respect to whether plaintiff would have accepted the settlement offer but for its deficient conduct (*see generally Dempster v Liotti*, 86 AD3d 169, 180-181).

Lastly, we reject defendant's contention that it was entitled to summary judgment on the ground that plaintiff's damages were not reasonably ascertainable. Plaintiff's damages in this case were the $60,000 settlement offer that she lost, less the attorney's fees and costs she incurred in pursuing the settlement. Thus, plaintiff's damages were indeed ascertainable (*see generally Plymouth Org., Inc. v Silverman, Collura & Chernis, P.C.*, 21 AD3d 464, 465).

Entered: February 3, 2017 Frances E. Cafarell
Clerk of the Court

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

1252
KA 13-02164
PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW ROACH, DEFENDANT-APPELLANT.

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

MATTHEW ROACH, 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 September 20, 2013. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the third degree and resisting arrest.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the third degree ([CPW] Penal Law § 265.02 [1]) and resisting arrest (§ 205.30). Defendant is convicted of possessing a machete during a dispute with a man in defendant's apartment. When the police arrived in response to the man's 911 call, they met the man outside and proceeded to defendant's apartment. Defendant refused to open the door in response to their knock and announcement as police officers, and the police entered the apartment after hearing a male voice making threats and a female voice saying words to the effect of "stop it, put it down." After defendant refused to comply with police directives to show his hands, the police used force to effect his arrest.

We reject defendant's contention in his main and pro se supplemental briefs that Supreme Court erred in denying that part of his motion to dismiss the indictment with respect to the count charging CPW on the ground that the grand jury proceedings were defective because the prosecutor failed to instruct the grand jury on the defense of justification (*see* Penal Law § 35.15). Although defendant testified before the grand jury that he possessed the machete to protect himself and his girlfriend from the man at defendant's apartment, who had a board with nails in it, it is well

established that, "[b]ecause the possession of a weapon is distinct from the use of such weapon, 'there are no circumstances when justification . . . can be a defense to the crime of criminal possession of a weapon' " (*People v Cohens*, 81 AD3d 1442, 1444, *lv denied* 16 NY3d 894, quoting *People v Pons*, 68 NY2d 264, 267; *see People v Taylor*, 140 AD3d 1738, 1740). Defendant failed to make a pretrial motion to dismiss the count of the indictment charging him with resisting arrest on the ground that the prosecutor failed to instruct the grand jury on the defense of justification, and thus his challenge to that count of the indictment is not preserved for our review (*see People v Fisher*, 101 AD3d 1786, 1786, *lv denied* 20 NY3d 1098). In any event, that contention is without merit (*see generally* § 35.27).

We reject defendant's contention in his main brief that the verdict is against the weight of the evidence based upon the lack of credibility of the victim with respect to the conviction of CPW and the lack of credibility of the police witnesses with respect to the conviction of resisting arrest. 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). Although a verdict of not guilty of CPW would not have been unreasonable (*see generally id.*), we nevertheless decline to disturb the credibility determinations of the jury (*see People v Medley*, 132 AD3d 1255, 1255, *lv denied* 26 NY3d 1110, *reconsideration denied* 27 NY3d 967; *see generally Bleakley*, 69 NY2d at 495). We likewise decline to disturb the jury's credibility determination regarding the police witnesses (*see Medley*, 132 AD3d at 1255).

We reject defendant's further contention in his main brief that he was denied a fair trial and the right to confront witnesses by the court's determination that an adjudication of the Citizens Review Board (CRB) with respect to the police action in effecting defendant's arrest was not admissible. It is well settled that "[o]ut-of-court statements offered for the truth of the matters they assert are hearsay and may be received in evidence only if they fall within one of the recognized exceptions to the hearsay rule, and then only if the proponent demonstrates that the evidence is reliable" (*People v Meadow*, 140 AD3d 1596, 1598, *lv denied* 28 NY3d 933, *reconsideration denied* 28 NY3d 972 [internal quotation marks omitted]). Here, the determination of the CRB did not fall within any of the recognized exceptions to the hearsay rule. Although defendant asserted that he wanted to use the determination to establish that the police witnesses had a reason to fabricate their trial testimony, "[t]he right to present a defense does not give criminal defendants carte blanche to circumvent the rules of evidence . . . The courts therefore have the discretion to exclude evidence sought to be introduced by a defendant where such evidence is irrelevant or constitutes hearsay, and its probative value is outweighed by the dangers of speculation, confusion, and prejudice" (*People v Williams*, 94 AD3d 1555, 1556 [internal quotation marks omitted]). We note that defendant cross-examined the officers with respect to their knowledge that a complaint with the CRB had been lodged against them.

Defendant failed to preserve for our review his contention in his main brief that the court erred in its charge to the jury on resisting arrest because the court should not have instructed the jury regarding Penal Law § 35.27 (*see People v Spillman*, 57 AD3d 580, 581, *lv denied* 12 NY3d 788, *cert denied* 558 US 1013). In any event, that contention is without merit. Upon our review of the charge as a whole against the background of the evidence at trial, we conclude that the charge properly conveyed the People's burden of proof with respect to the count of resisting arrest and was not likely to confuse the jury on the issue whether defendant could be convicted of resisting arrest if the arrest was unauthorized (*see id.*; *see generally People v Walker*, 26 NY3d 170, 174-175). Defendant also failed to preserve for our review his contention in his main brief that the court erred in failing to instruct the jury that it must determine whether the machete was a dangerous knife before it applied the statutory presumption that "possession by any person of any . . . dangerous knife . . . is presumptive evidence of intent to use the same unlawfully against another" (§ 265.15 [4]). Nevertheless, that contention also is without merit inasmuch as there is ample evidence that defendant possessed the machete as a weapon (*see generally Matter of Antwaine T.*, 23 NY3d 512, 516-517), which provided support for the court's instruction that the machete was a "dangerous instrument" (*see generally People v Campos*, 93 AD3d 581, 582, *lv denied* 19 NY3d 971).

We have reviewed the remaining contentions in defendant's pro se supplemental brief and conclude that none requires reversal or modification of the judgment.

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1256
KA 12-02263
PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ZACHARY STRAUSS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered January 30, 2012. The judgment convicted defendant, upon a jury verdict, of rape in the first degree.

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

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of rape in the first degree (Penal Law § 130.35 [1]), defendant contends that the verdict is against the weight of the evidence on the issue of forcible compulsion. 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 People v Black*, 137 AD3d 1679, 1680, *lv denied* 27 NY3d 1128; *see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant's contention that the People improperly failed to seek an advance ruling concerning the admissibility of evidence of defendant's involvement in a drug transaction and threats to commit suicide is not preserved for our review (*see People v Thomas*, 226 AD2d 1071, 1071-1072, *lv denied* 88 NY2d 995; *People v Clark*, 203 AD2d 935, 936, *lv denied* 83 NY2d 965). Likewise, defendant's challenge to the admissibility of an unredacted videotape of his interview with the police is not preserved for our review (*see* CPL 470.05 [2]). 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]).

Defendant also failed to preserve for our review his contention that the verdict is inconsistent insofar as the jury found defendant guilty of rape in the first degree but not guilty of unlawful imprisonment in the second degree. Defendant failed to object to the verdict before the jurors were discharged (*see People v Alfaro*, 66

NY2d 985, 987; *People v Brooks*, 139 AD3d 1391, 1392). In any event, viewing the elements of those two crimes as charged to the jury without regard to the accuracy of those instructions (*see People v DeLee*, 24 NY3d 603, 608; *People v Tucker*, 55 NY2d 1, 7-8, *rearg denied* 55 NY2d 1039), we conclude that there is no inconsistency in the verdict because an acquittal on the charge of unlawful imprisonment in the second degree is not "conclusive as to a necessary element" of rape in the first degree (*Tucker*, 55 NY2d at 7; *see generally People v Barfield*, 138 AD2d 497, 497, *lv denied* 71 NY2d 1023).

Defendant did not preserve for our review his contention that he was deprived of a fair trial by prosecutorial misconduct on summation (*see People v Symonds*, 140 AD3d 1685, 1685, *lv denied* 28 NY3d 937). In any event, we conclude that the prosecutor's remarks constituted fair comment upon the evidence or fair response to the summation of defense counsel (*see People v Jackson*, 141 AD3d 1095, 1096; *see also People v Lyon*, 77 AD3d 1338, 1339, *lv denied* 15 NY3d 954).

Finally, we reject defendant's contention that he was denied effective assistance of counsel. "There 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).

Entered: February 3, 2017 Frances E. Cafarell
Clerk of the Court

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

1265
CA 16-00600
PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND SCUDDER, JJ.

IN THE MATTER OF EXPRESSVIEW DEVELOPMENT, INC., ON ITS OWN BEHALF AND AS AGENT OF CANANDAIGUA NATIONAL BANK, TRUSTEE OF THE MAX M. FARASH DECLARATION OF TRUST DATED JULY 6, 2007, AND CANANDAIGUA NATIONAL BANK, TRUSTEE OF THE MAX M. FARASH DECLARATION OF TRUST, DATED JULY 6, 2007, PETITIONERS-PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF GATES ZONING BOARD OF APPEALS AND TOWN OF GATES, RESPONDENTS-DEFENDANTS-RESPONDENTS.

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-APPELLANTS.

SHAPIRO, DICARO & BARAK, LLC, ROCHESTER (ELLIS OSTER OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered January 21, 2016 in a hybrid CPLR article 78 proceeding and declaratory judgment action. The judgment, insofar as appealed from, granted the cross motion of respondents-defendants to dismiss the amended petition-complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the cross motion to the extent that it sought dismissal of the declaratory judgment causes of action, reinstating those causes of action, and granting judgment in favor of respondents-defendants as follows:

> It is ADJUDGED AND DECLARED that the Town of Gates Code § 190-22 (E) is constitutional,

and as modified the judgment is affirmed without costs.

Memorandum: As relevant in this zoning dispute, the Max M. Farash Declaration of Trust, dated July 6, 2007 (Trust), of which petitioner-plaintiff Canandaigua National Bank is the trustee, owns real property located within the boundaries of respondent-defendant Town of Gates (Town) adjacent to Interstate 390 (hereafter, highway). Five of the six landlocked, undeveloped parcels that make up the subject property were purchased by an individual in the 1960s and

1970s, and a plan was subsequently approved in 1982 for the development of an industrial park on the property. Developer Max M. Farash purchased the parcels and a sixth adjacent parcel in 1986, but he never developed the property in accordance with the industrial park plan. Farash was declared incompetent prior to his death, and the Trust became the owner of the property. The Trust attempted to sell the property in 2009, and the only offer came from petitioner-plaintiff Expressview Development, Inc., contingent upon its receipt of variances that would allow it to construct billboards that would be visible from the highway. The billboards, as planned, would violate the Town of Gates Code § 190-22 (E) which, in sum, prohibits commercial signs not located on the site of the business for which they advertise. Following an initial application that was denied without prejudice, petitioners-plaintiffs (petitioners) again sought use and area variances permitting the installation of the billboards, but respondent-defendant Town of Gates Zoning Board of Appeals (ZBA) denied their application after considering the matter at a hearing. Petitioners commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, to annul the determination of the ZBA, and a declaration that the Town of Gates Code § 190-22 (E) is unconstitutional. Supreme Court, inter alia, granted the cross motion of respondents-defendants (respondents) dismissing the amended petition-complaint (amended petition).

It is well established that "[c]ourts may set aside a zoning board determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure . . . 'It matters not whether, in close cases, a court would have, or should have, decided the matter differently. The judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them' " (*Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613). Thus, "[a] reviewing court may not substitute its judgment for that of a local zoning board . . . , 'even if there is substantial evidence supporting a contrary determination' " (*Matter of People, Inc. v City of Tonawanda Zoning Bd. of Appeals*, 126 AD3d 1334, 1335). Indeed, "[w]hen reviewing the determinations of a Zoning Board, courts consider 'substantial evidence' only to determine whether the record contains sufficient evidence to support the rationality of the Board's determination" (*Matter of Sasso v Osgood*, 86 NY2d 374, 384 n 2).

Petitioners' contention that the determination was arbitrary and capricious because the ZBA failed to adhere to its precedent is without merit inasmuch as petitioners failed to establish the existence of earlier determinations by the ZBA that were based on essentially the same facts as petitioners' present application (*see Matter of Mimassi v Town of Whitestown Zoning Bd. of Appeals*, 124 AD3d 1329, 1330; *see generally Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington*, 97 NY2d 86, 93). The settlement of a federal lawsuit in 1999 by the executive and legislative branches of the Town permitting the installation of certain billboards along the highway by a pair of outdoor advertisers—which was not a determination made by the ZBA as a result of its administrative

variance process—did not constitute precedent from which the ZBA was required to explain any departure (*see Matter of Conversions for Real Estate, LLC v Zoning Bd. of Appeals of Inc. Vil. of Roslyn*, 31 AD3d 635, 636; *see generally Mimassi*, 124 AD3d at 1330; *Matter of Brady v Town of Islip Zoning Bd. of Appeals*, 65 AD3d 1337, 1340, *lv denied* 14 NY3d 703). Contrary to petitioners' further contention, they did not raise the argument that the settlement constituted precedential grounds for granting the requested variances until they served the amended petition, and thus the court did not engage in an impermissible post-hoc rationalization of the ZBA's determination when it addressed and rejected that argument (*see generally Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758; *Matter of Millpond Mgt., Inc. v Town of Ulster Zoning Bd. of Appeals*, 42 AD3d 804, 805 n).

We reject petitioners' contention that the ZBA acted arbitrarily and capriciously in determining that they failed to establish the factors constituting unnecessary hardship required for the issuance of the use variances (*see* Town Law § 267-b [2] [b]). The court properly determined, upon review of the record as a whole, including the evidence submitted to the ZBA, the findings and conclusions articulated by the ZBA during the hearing, and its subsequent letter decision (*see generally Matter of Duchmann v Town of Hamburg*, 90 AD3d 1642, 1644; *Matter of East Coast Props. v City of Oneida Planning Bd.*, 167 AD2d 641, 643), that there is substantial evidence supporting the ZBA's determination that the hardship was self-created (*see* § 267-b [2] [b] [4]). The record evidence did not establish whether Farash originally intended to develop the industrial park, and it is undisputed that the plan was never pursued. Although subsequent changes in economic conditions may have rendered the industrial park plan financially infeasible, the record establishes that the extent of the limitations on the property of which Farash knew or should have known at the time of his purchase have remained. Indeed, Farash purchased the property after the approval of the industrial park plan, the adoption of applicable zoning restrictions, and the construction of the highway adjacent to the property. Thus, the Trust possesses the same unused, oddly-shaped, difficult-to-develop property that Farash purchased, and although the purchase may now be viewed as a poor investment, courts are not responsible for "guarantee[ing] the investments of careless land buyers" (*Matter of Barby Land Corp. v Ziegner*, 65 AD2d 793, 794, *affd for reasons stated* 49 NY2d 729; *cf. Matter of Kontogiannis v Fritts*, 131 AD2d 944, 946; *see generally Matter of Carriage Works Enters. v Siegel*, 118 AD2d 568, 570).

Contrary to petitioners' contention, the court properly concluded that there is substantial evidence supporting the ZBA's determination that the billboards would have a negative and adverse effect upon the character of the neighborhood inasmuch as the relevant area could not aesthetically support additional signs (*see* Town Law § 267-b [2] [b] [3]; *see generally Matter of Cromwell v Ferrier*, 19 NY2d 263, 272, *rearg denied* 19 NY2d 862). We conclude, contrary to petitioners' further contention, that members of the ZBA did not act upon consideration of their own surveys, and thus the members of the ZBA

were not required to place on the record their personal observations of the area inasmuch as there was evidence contained in petitioners' submissions, including maps and photographs, establishing the quantity and nature of the billboards already in existence along the relevant portion of the highway (*cf. Matter of Community Synagogue v Bates*, 1 NY2d 445, 454).

Based on the foregoing, we conclude that the court properly determined that the ZBA's determination has a rational basis and is not arbitrary and capricious (*see* CPLR 7803 [3]). We have considered petitioners' remaining contentions with respect to the ZBA's denial of their application for the variances and conclude that none of those contentions require reversal or modification of the judgment.

We reject petitioners' contention that the court erred in dismissing those parts of the amended petition alleging that the ZBA violated their constitutional rights to equal protection through selective enforcement of the zoning regulations. Even assuming, arguendo, that petitioners and the other outdoor advertisers were similarly situated, petitioners failed to allege that respondents singled them out "with an 'evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances' " (*Bower Assoc. v Town of Pleasant Val.*, 2 NY3d 617, 631; *see Masi Mgt., Inc. v Town of Ogden* [appeal No. 3], 273 AD2d 837, 838). We also conclude that the court properly dismissed the amended petition to the extent that it asserted additional claims based upon alleged violations of petitioners' due process and equal protection rights under the Federal and State Constitutions (*see Bower Assoc.*, 2 NY3d at 627-630; *Fike v Town of Webster*, 11 AD3d 888, 889).

We reject petitioners' further contention that the Town of Gates Code § 190-22 (E) is an unconstitutional restraint of freedom of speech under the First Amendment on the ground that it improperly distinguishes between on-site and off-site commercial signs. The decision by the United States Supreme Court in *Reed v Town of Gilbert, Arizona* (___ US ___, 135 S Ct 2218) did not overturn the prevailing intermediate scrutiny test for restrictions on commercial speech set forth in *Central Hudson Gas & Elec. Corp. v Public Serv. Commn. of N.Y.* (447 US 557, 561-566; *see e.g. Lone Star Sec. & Video, Inc. v City of Los Angeles*, 827 F3d 1192, 1198 n 3; *Dana's R.R. Supply v Attorney Gen., State of Florida*, 807 F3d 1235, 1246-1247; *Boelter v Advance Mag. Publs. Inc.*, ___ F Supp 3d ___, ___ n 15). When evaluated under the *Central Hudson* test, petitioners' contention lacks merit (*see Metromedia, Inc. v City of San Diego*, 453 US 490, 498-499, 510-512; *Suffolk Outdoor Adv. Co. v Hulse*, 43 NY2d 483, 488-489).

The court nonetheless erred in granting that part of respondents' cross motion seeking dismissal of the declaratory judgment causes of action rather than declaring the rights of the parties (*see Mead Sq. Commons, LLC v Village of Victor*, 97 AD3d 1162, 1164; *Matter of Lindberg v Town of Manlius Planning Bd.*, 41 AD3d 1231, 1232). We therefore modify the judgment by denying respondents' cross motion to the extent that it sought dismissal of the declaratory judgment causes

of action, reinstating those causes of action, and granting judgment in favor of respondents by adjudging and declaring that the Town of Gates Code § 190-22 (E) is constitutional.

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1266
CA 16-00062
PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND SCUDDER, JJ.

IN THE MATTER OF COR ROUTE 5 COMPANY, LLC,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

VILLAGE OF FAYETTEVILLE, VILLAGE OF FAYETTEVILLE
BOARD OF TRUSTEES AND GOODFELLOW CONSTRUCTION
MANAGEMENT, LTD., RESPONDENTS-RESPONDENTS.

MANNION & COPANI, SYRACUSE (GABRIELLE MARDANY HOPE OF COUNSEL), FOR PETITIONER-APPELLANT.

MACKENZIE HUGHES LLP, SYRACUSE (W. BRADLEY HUNT OF COUNSEL), FOR RESPONDENTS-RESPONDENTS VILLAGE OF FAYETTEVILLE AND VILLAGE OF FAYETTEVILLE BOARD OF TRUSTEES.

WALTER D. KOGUT, P.C., FAYETTEVILLE (WALTER D. KOGUT OF COUNSEL), FOR RESPONDENT-RESPONDENT GOODFELLOW CONSTRUCTION MANAGEMENT, LTD.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered August 18, 2015 in a CPLR article 78 proceeding. The judgment granted the motion of respondents to dismiss the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motion is denied, the petition is reinstated, and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul certain determinations of respondent Village of Fayetteville Board of Trustees (Board of Trustees), which resulted in the enactment of Local Law No. 1 of 2015. That local law amended the zoning district classification of two parcels following the issuance of a negative declaration of environmental significance under the State Environmental Quality Review Act ([SEQRA] ECL art 8), but provided that the amendment would "take effect only after approval by [the] Onondaga County Department of Transportation and final site plan approval by the Village of Fayetteville Planning Board has been granted."

Before answering, respondent Village of Fayetteville (Village) and the Board of Trustees filed a joint motion seeking, inter alia, dismissal of the petition pursuant to CPLR 3211 and 7804 (f). Respondent Goodfellow Construction Management, Ltd., who had applied

for the rezoning as part of a proposed retail development project, submitted an answer and joined in the motion. Supreme Court granted the motion, concluding that the petitioner's proceeding was "premature" and that the Board of Trustee's action under SEQRA was "not ripe for judicial review."

We agree with petitioner that the court erred in granting the motion. "Generally, a CPLR article 78 proceeding may not be used to challenge a nonfinal determination by a body or officer" (*Matter of Young v Board of Trustees of Vil. of Blasdell*, 221 AD2d 975, 977, *affd* 89 NY2d 846). In order to determine whether an action is " 'final and binding upon the petitioner' " (*Matter of Ranco Sand & Stone Corp. v Vecchio*, 27 NY3d 92, 98), courts follow a two-step approach: "[f]irst, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party" (*Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34, *rearg denied* 5 NY3d 824). In our view, the Board of Trustees' simultaneous issuance of a negative declaration and adoption of the zoning amendment rendered petitioner's challenges to the Board of Trustees' action ripe for review (*see generally Matter of Eadie v Town Bd. of Town of N. Greenbush*, 7 NY3d 306, 317). The mere fact that the zoning amendment "was conditioned upon successful reviews and approvals by other agencies did not alter the fact that [it] became final and binding as to petitioner[] on the date it was filed" (*Matter of O'Connell v Zoning Bd. of Appeals of Town of New Scotland*, 267 AD2d 742, 744, *lv dismissed in part and denied in part* 94 NY2d 938; *see Matter of Long Is. Pine Barrens Socy. v Planning Bd. of Town of Brookhaven*, 247 AD2d 395, 396; *Matter of Price v County of Westchester*, 225 AD2d 217, 220).

Moreover, although "rezoning is an 'action' subject to SEQRA" (*Matter of Neville v Koch*, 79 NY2d 416, 426; *see Matter of Bergami v Town Bd. of Town of Rotterdam*, 97 AD3d 1018, 1021; *Matter of Kirk-Astor Dr. Neighborhood Assn. v Town Bd. of Town of Pittsford*, 106 AD2d 868, 869, *appeal dismissed* 66 NY2d 896), and the future site plan approval process may also constitute an action under SEQRA (*see Matter of Schweichler v Village of Caledonia*, 45 AD3d 1281, 1282, *lv denied* 10 NY3d 703; *Matter of Ferrari v Town of Penfield Planning Bd.*, 181 AD2d 149, 151; *see also* 6 NYCRR 617.2 [b]), the fact that petitioner may ultimately be aggrieved by a future SEQRA action does not affect the judicial ripeness of the SEQRA challenge relating to a prior action. The fact remains that, at the time the Board of Trustees issued the negative declaration and amended the zoning laws, the Board of Trustees' "decision-making process with respect to [those issues] was complete and petitioner[] became aggrieved by the SEQRA violation of which [it] complain[s]" (*Matter of Young v Board of Trustees of Vil. of Blasdell*, 89 NY2d 846, 849).

We therefore conclude that the adoption of the zoning amendment committed the Board of Trustees to a definitive position (*see Red Wing Props., Inc. v Town of Milan*, 71 AD3d 1109, 1110-1111, *lv denied* 15

NY3d 703; *Matter of Wing v Coyne*, 129 AD2d 213, 217; *see generally Matter of Gordon v Rush*, 100 NY2d 236, 242) and, as a result of that position, petitioner is aggrieved by the Board of Trustees' alleged failure to comply with SEQRA prior to the adoption of the zoning amendment (*see* 6 NYCRR 617.3 [a]; *Young*, 89 NY2d at 848-849).

We thus reverse the judgment, deny the motion, reinstate the petition, and remit the matter to Supreme Court to allow the Village and the Board of Trustees to submit an answer, and for further proceedings on the petition (*see* CPLR 7804 [f]; *Matter of Bethelite Community Church, Great Tomorrows Elementary Sch. v Department of Envtl. Protection of City of N.Y.*, 8 NY3d 1001, 1002; *Matter of Degnan v Rahn*, 24 AD3d 1232, 1233).

Based on our determination, we do not address petitioner's remaining contentions.

Entered: February 3, 2017 Frances E. Cafarell
Clerk of the Court

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

1267
CA 15-00185

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

ARTHUR GERBER, DOING BUSINESS AS NOOTEN SCALE SERVICE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

EMPIRE SCALE, DOING BUSINESS AS PRECISION SCALE & BALANCE, DEFENDANT-RESPONDENT.

ANGELO T. CALLERI, P.C., ROCHESTER (ANGELO T. CALLERI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HARTER SECREST & EMERY LLP, ROCHESTER (CANDACE M. CURRAN ESPINOSA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered April 2, 2014. The order and judgment denied plaintiff's motion to compel discovery and granted the cross motion of defendant for summary judgment dismissing the complaint and for attorney's fees.

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

Memorandum: Plaintiff appeals from an order and judgment that denied his motion to compel discovery and granted the cross motion of defendant for summary judgment dismissing the complaint and for attorneys' fees. We affirm.

Contrary to plaintiff's contention, Supreme Court properly denied his motion to compel discovery because plaintiff offered mere speculation that facts essential to opposing defendant's cross motion for summary judgment were in defendant's "exclusive knowledge and possession and could be obtained by discovery" (*Resetarits Constr. Corp. v Elizabeth Pierce Olmsted, M.D. Ctr. for the Visually Impaired* [appeal No. 2], 118 AD3d at 1456 [internal quotation marks omitted]; *see Eagen v Harlequin Books*, 229 AD2d 935, 936).

Contrary to plaintiff's further contention, defendant met its initial burden of establishing its entitlement to summary judgment dismissing plaintiff's first cause of action alleging a breach of the parties' nondisclosure agreement. Defendant tendered evidentiary proof in admissible form that it did not breach the agreement (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562), a necessary element of a breach of contract cause of action (*see Resetarits*

Constr. Corp., 118 AD3d at 1455). Although the affidavits submitted by defendant contained some hearsay statements (*see generally People v Johnson*, 79 AD3d 1264, 1266-1267, *lv denied* 16 NY3d 832), defendant established through nonhearsay evidence that it did not use plaintiff's confidential information to solicit plaintiff's customers in violation of the nondisclosure agreement. In opposition to defendant's motion, plaintiff failed to establish the existence of a material triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

We further conclude that defendant was entitled to summary judgment dismissing plaintiff's second cause of action alleging defendant's failure to negotiate in good faith. Although the nondisclosure agreement provided that defendant "desire[d] to participate in discussions regarding the purchase of" plaintiff's business, it is clear from the language of the agreement that neither party was obligated to continue negotiating to the completion of such a transaction (*see Goodstein Constr. Corp. v City of New York*, 80 NY2d 366, 373; *see generally 180 Water St. Assoc. v Lehman Bros. Holdings*, 7 AD3d 316, 317).

With respect to plaintiff's third cause of action, for fraud, "[i]t is axiomatic that a cause of action for fraud does not arise where . . . the fraud alleged relates to a breach of contract" (*Egan v New York Care Plus Ins. Co.*, 277 AD2d 652, 653; *see Genovese v State Farm Mut. Auto. Ins. Co.*, 106 AD3d 866, 867), and "[a] fraud claim is not sufficiently stated where it alleges that a defendant did not intend to perform a contract with a plaintiff when he made it" (*Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436). Here, plaintiff's cause of action for fraud is based upon allegations that defendant made false representations that it was interested in purchasing plaintiff's business in order to gain plaintiff's confidential information. Thus, that cause of action fails because "the supporting allegations do not concern representations which are collateral or extraneous to the terms of the parties' agreement" (*Genovese*, 106 AD3d at 867 [internal quotation marks omitted]).

Finally, we note that the parties' agreement specifically provides for an award of attorneys' fees and expenses to the prevailing party "in the event of litigation relating to [the] [a]greement." Plaintiff failed to preserve for our review his contention that the court erred in awarding attorneys' fees and expenses to defendant without first conducting a hearing inasmuch as plaintiff failed to request such a hearing (*see Thompson v McQueeney*, 56 AD3d 1254, 1259; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1274
KA 13-01282
PRESENT: WHALEN, P.J., SMITH, CARNI, DEJOSEPH, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

RICHARD E. VANGORDEN, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON 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 (Joseph W. Latham, J.), rendered January 11, 2013. The judgment convicted defendant, upon a jury verdict, of attempted murder in the first degree (two counts), tampering with physical evidence (two counts), criminal mischief in the second degree, criminal use of a firearm in the first degree, criminal possession of a weapon in the fourth degree and reckless endangerment 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 and on the law by reducing the conviction of attempted murder in the first degree under counts one and two of the indictment to attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), reducing the conviction of reckless endangerment in the first degree under count ten of the indictment to reckless endangerment in the second degree (§ 120.20), and vacating the sentence imposed, and as modified the judgment is affirmed, and the matter is remitted to Steuben County Court for the filing of a predicate felony offender statement, sentencing on the counts reduced herein, and resentencing on the remaining counts.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of attempted murder in the first degree (Penal Law §§ 110.00, 125.27 [1] [a] [i]; [b]), criminal use of a firearm in the first degree (§ 265.09 [1] [b]), and reckless endangerment in the first degree (§ 120.25). Defendant was driving a pickup truck, with his girlfriend as a passenger, when two State Police officers attempted to stop him for a traffic violation. Defendant fled from the officers at high speeds, stopped for a short time, and then tried to drive off again. After briefly driving off the road and getting stuck, defendant backed out onto the road and was facing the police vehicle from a distance of about 50 feet. He

accelerated toward the police vehicle, swerved to his left, "rammed" the passenger side of the police vehicle with the passenger side of his truck, and then drove away. The officers kept pursuing defendant, and he slowed down, held a rifle out the rear window of the truck, and fired at least two shots, one of which struck the police vehicle near its driver's seat from an estimated distance of 36 feet. Defendant was convicted of, inter alia, attempted murder in the first degree with respect to each officer and reckless endangerment in the first degree with respect to his girlfriend. He was acquitted of two additional counts of reckless endangerment in the first degree pertaining to the officers.

We reject defendant's contention that the counts of the indictment charging attempted murder in the first degree were jurisdictionally defective because they failed to allege that he was more than 18 years old when the crimes occurred (*see* Penal Law § 125.27 [1] [b]; *see generally People v Iannone*, 45 NY2d 589, 600). By alleging that defendant committed "Attempted Murder in the First Degree," those counts "adopt[ed] the title of" the first-degree murder statute and incorporated all of the elements of that crime, including the age element, thereby affording defendant fair notice of the charges against him (*People v Ray*, 71 NY2d 849, 850; *see People v Real*, 293 AD2d 251, 251, *lv denied* 98 NY2d 860; *see generally People v D'Angelo*, 98 NY2d 733, 735; *People v Cohen*, 52 NY2d 584, 586).

Defendant further contends that the attempted murder counts were duplicitous as indicted inasmuch as they failed to specify which of his shots was intended to kill each officer. Even assuming, arguendo, that defendant's contention is preserved for our review as a result of County Court's rejection of defendant's generalized assertion in his omnibus motion that the indictment "include[d] duplicitous counts" (*cf. People v Rivera*, 257 AD2d 425, 425-426, *lv denied* 93 NY2d 901; *see generally People v Allen*, 24 NY3d 441, 448-450), we conclude that it is without merit. " '[T]here is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict,' " such as which shot was intended for each officer (*People v Mateo*, 2 NY3d 383, 408, *cert denied* 542 US 946; *see People v Del-Debbio*, 244 AD2d 195, 195, *lv denied* 91 NY2d 925).

As the People correctly concede, however, the evidence is legally insufficient to establish that defendant was more than 18 years old at the time of the crimes. Although defendant failed to preserve that contention for our review (*see People v Castro*, 286 AD2d 989, 989-990, *lv denied* 97 NY2d 680), we exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant was in fact 38 years old at the time of the crimes in September 2011, and the jury naturally had the opportunity to observe his appearance during his trial in 2012, but that opportunity "does not, by itself, satisfy the People's obligation to prove defendant's age" (*Castro*, 286 AD2d at 990; *see People v Blodgett*, 160 AD2d 1105, 1106, *lv denied* 76 NY2d 731), and there was no evidence at trial bearing on his age (*cf. People v Kessler*, 122 AD3d 1402, 1403, *lv denied* 25 NY3d 990; *People v Perryman*, 178 AD2d 916, 917-918, *lv denied* 79 NY2d 1005). The evidence is sufficient to establish that

defendant intended to kill each of the officers (*see generally People v Cabassa*, 79 NY2d 722, 728, *cert denied sub nom. Lind v New York*, 506 US 1011), and we reject defendant's further contention that the verdict is against the weight of the evidence with respect to his intent (*see People v Simcoe*, 75 AD3d 1107, 1108-1109, *lv denied* 15 NY3d 924; *see generally People v Bleakley*, 69 NY2d 490, 495). We therefore modify the judgment by reducing the conviction under counts one and two to attempted murder in the second degree (§§ 110.00, 125.25 [1]), and we remit the matter to County Court for sentencing on those counts.

Again assuming, arguendo, that defendant's duplicity contention is preserved for our review, we conclude that the reckless endangerment count of which he was convicted was not duplicitous. Reckless endangerment may be charged as a continuing offense, and defendant's conduct took place in the course of a single incident without "cessation or suspension in the criminal activity," such that a single count of reckless endangerment with respect to his girlfriend was proper even if, as he contends on appeal, she was exposed to multiple dangers over the course of the incident (*People v Flanders*, 111 AD3d 1263, 1265-1266, *affd* 25 NY3d 997; *see People v Wells*, 141 AD3d 1013, 1014-1015; *cf. People v Boykins*, 85 AD3d 1554, 1555, *lv denied* 17 NY3d 814). Moreover, we agree with the court that the three counts of reckless endangerment in the indictment were not multiplicitous inasmuch as each count involved a different victim (*see generally People v Cunningham*, 12 AD3d 1131, 1132, *lv denied* 4 NY3d 829, *reconsideration denied* 5 NY3d 761). Defendant correctly notes that conduct endangering multiple victims may be charged in a single count of reckless endangerment without violating the prohibition against duplicity (*see People v Stockholm*, 279 AD2d 704, 706, *lv denied* 96 NY2d 807), but in our view a single count is not *required* in such cases (*see generally People v Payne*, 71 AD3d 1289, 1290-1291, *lv denied* 15 NY3d 777). In any event, we note that the remedy for multiplicitous counts is dismissal of all but one of the affected counts (*see People v Pruchnicki*, 74 AD3d 1820, 1822, *lv denied* 15 NY3d 855) and defendant was convicted of only one of the counts in question.

We agree with defendant that the reckless endangerment count of which he was convicted is not supported by legally sufficient evidence inasmuch as the record fails to establish that his conduct exposed his girlfriend to "a grave risk of death" (Penal Law § 120.25; *see People v Hatch*, 66 AD3d 1494, 1495). There was evidence that defendant "rammed" the side of the police vehicle with the part of his truck in which his girlfriend was sitting, but neither officer could estimate how fast defendant was going at impact, and the relatively short distance he traveled toward the police vehicle tended to show that he could not have been going very fast. Furthermore, both vehicles remained operable after the collision, and there was no evidence that anyone sustained any injury from it. Even viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that it is legally insufficient to establish that the collision created a grave risk of death to defendant's girlfriend

(*see People v Ostraticky*, 117 AD2d 759, 759-760; *see generally People v Hurdle*, 106 AD3d 1100, 1101-1103, *lv denied* 22 NY3d 956, 996; *Hatch*, 66 AD3d at 1495). We also conclude that the evidence does not establish that defendant's girlfriend was exposed to a grave risk of death at any other time during the incident as a whole. Because the evidence concerning the collision is sufficient to establish that defendant's reckless conduct created a significant risk of serious physical injury to his girlfriend, we further modify the judgment by reducing the conviction under count ten to reckless endangerment in the second degree (§ 120.20; *see Ostraticky*, 117 AD2d at 760), and we remit the matter to County Court for sentencing on that count as well.

By failing to request different jury instructions or to object to the charge as given, defendant failed to preserve his challenges to the jury instructions on the counts charging attempted murder and criminal use of a firearm (*see People v Autry*, 75 NY2d 836, 838-839; *People v Townsley*, 50 AD3d 1610, 1611, *lv denied* 11 NY3d 742). We reject his contention that the alleged error in the jury instructions on criminal use of a firearm constitutes a mode of proceedings error (*see generally Autry*, 75 NY2d at 839), and we decline to review his unpreserved challenges as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Although defendant is correct that attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]) is not a lesser included offense of attempted murder in the first degree (*see People v Thomson*, 13 AD3d 805, 806-807, *lv denied* 4 NY3d 836), he waived his right to complain of the court's error in that regard by failing to object (*see People v Ford*, 62 NY2d 275, 280-281). In addition, we conclude that the defendant's conviction of attempted murder when the jury had before it the purported lesser included offense of attempted assault in the first degree "forecloses [his] challenge to the court's refusal to charge" attempted assault in the second degree under Penal Law §§ 110.00 and 120.05 (1) as a lesser included offense (*People v Boettcher*, 69 NY2d 174, 180; *see People v Cordato*, 85 AD3d 1304, 1307-1308, *lv denied* 17 NY3d 815). Even though attempted assault in the first degree is not an actual lesser included offense of attempted murder, the failure to submit lesser degrees of attempted assault could not have affected the jury's deliberations under the circumstances of this case (*see generally Boettcher*, 69 NY2d at 180).

We reject defendant's contention that he was denied effective assistance of counsel. In particular, defendant has not demonstrated that counsel was ineffective in not pursuing an extreme emotional disturbance defense inasmuch as there is no indication in the record that any basis existed for such a defense (*see People v Schumaker*, 136 AD3d 1369, 1372, *lv denied* 27 NY3d 1075, *reconsideration denied* 28 NY3d 974; *People v Naqvi*, 132 AD3d 779, 780-781, *lv denied* 27 NY3d 1072), nor has he demonstrated that counsel lacked a strategic or other legitimate reason for not challenging a certain prospective juror for cause (*see People v Barboni*, 21 NY3d 393, 405-407; *People v Anderson*, 113 AD3d 1102, 1103, *lv denied* 22 NY3d 1196). We have reviewed the remaining allegations of ineffective assistance raised by defendant, and we conclude that he received meaningful representation (*see generally People v Carver*, 27 NY3d 418, 422; *People v Benevento*,

91 NY2d 708, 712-713).

Finally, defendant contends that the People failed to comply with the procedural requirements of CPL 400.21 in seeking to have him sentenced as a second felony offender given that they did not file a predicate felony offender statement as required by CPL 400.21 (2). That contention is not preserved for our review (*see People v Pellegrino*, 60 NY2d 636, 637; *People v Guillory*, 98 AD3d 835, 835-836, *lv denied* 20 NY3d 932), but we exercise our discretion to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Loper*, 118 AD3d 1394, 1395-1396, *lv denied* 25 NY3d 1204), and we agree with defendant. Contrary to the contention of the prosecutor at sentencing, the need for a predicate felony offender statement was not obviated by defendant's pretrial admission to a special information setting forth his prior felony conviction as an element of a count charging criminal possession of a weapon. The special information did not permit defendant to raise constitutional challenges to his prior conviction, as he had the right to do before being sentenced as a second felony offender (*see People v Brown*, 13 AD3d 667, 669, *lv denied* 4 NY3d 742, *reconsideration denied* 4 NY3d 884; *see generally* CPL 200.60 [3]; 400.21 [7] [b]). We therefore further modify the judgment by vacating the sentence and remitting the matter to County Court for resentencing on the counts not otherwise reduced herein. In light of our determination, we do not reach defendant's challenge to the severity of the sentence.

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1275
KA 15-01475
PRESENT: WHALEN, P.J., SMITH, CARNI, DEJOSEPH, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER A. TYLER, DEFENDANT-APPELLANT.

WILLIAM MASELLI, PORTLAND, MAINE, OF THE MAINE BAR, ADMITTED PRO HAC VICE, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JEFFREY L. TAYLOR OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered July 22, 2015. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (three counts) and menacing 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 three counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]) and one count of menacing in the second degree (§ 120.14 [1]). Defendant failed to preserve for our review his contention that he was deprived of a fair trial by comments the prosecutor made during his opening statement (*see* CPL 470.05 [2]; *People v Cullen*, 110 AD3d 1474, 1475, *affd* 24 NY3d 1014). Defendant also failed to preserve for our review the majority of instances of alleged prosecutorial misconduct on summation (*see People v Justice*, 99 AD3d 1213, 1216, *lv denied* 20 NY3d 1012) and, in any event, we conclude that the prosecutor's summation was either fair response to defense counsel's summation (*see People v Melendez*, 11 AD3d 983, 984, *lv denied* 4 NY3d 888), or fair comment on the evidence (*see People v Graham*, 125 AD3d 1496, 1498, *lv denied* 26 NY3d 1008). Even assuming, arguendo, that any of the prosecutor's comments during his opening statement or on summation were improper, we further conclude that they were not so egregious as to deprive defendant of a fair trial (*see People v Figgins*, 72 AD3d 1599, 1600, *lv denied* 15 NY3d 893; *People v Sweney*, 55 AD3d 1350, 1351, *lv denied* 11 NY3d 901). Defendant's contention that the prosecutor engaged in misconduct during his examination of the complaining witness and during cross-examination is without merit.

Defendant contends that the court erred in instructing the jury

that justification is not a defense to counts one and four of the indictment, which charged him with criminal possession of a loaded firearm with intent to use it unlawfully against another and menacing, respectively (Penal Law §§ 265.03 [1] [b]; 120.14 [1]). We reject that contention. As defendant correctly concedes, "because possession of a weapon does not involve the use of physical force . . . , there are no circumstances when justification (Penal Law § 35.15) can be a defense to the crime of criminal possession of a weapon" (*People v Pons*, 68 NY2d 264, 267). In addition, with respect to both counts one and four, "[i]t is well settled that, '[i]n evaluating a challenged jury instruction, we view the charge as a whole in order to determine whether a claimed deficiency in the jury charge requires reversal . . . .' Reversal is appropriate—even if the standard criminal jury instruction is given—when the charge, 'read . . . as a whole against the background of the evidence produced at the trial,' likely confused the jury regarding the correct rules to be applied in arriving at a decision" (*People v Walker*, 26 NY3d 170, 174-175). Here, we conclude that the court's instructions, viewed in their entirety, "fairly instructed the jury on the correct principles of law to be applied to the case and do[ ] not require reversal" (*People v Ladd*, 89 NY2d 893, 896; *see People v Coleman*, 70 NY2d 817, 819).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1277
CAF 16-00134
PRESENT: WHALEN, P.J., SMITH, CARNI, DEJOSEPH, AND CURRAN, JJ.

IN THE MATTER OF KEVIN P. BRINK,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KIMBERLY M. BRINK, RESPONDENT-RESPONDENT.

GERALD J. VELLA, SPRINGVILLE, FOR PETITIONER-APPELLANT.

BENNETT, DIFILIPPO & KURTZHALTS, LLP, EAST AURORA (MAURA C. SEIBOLD OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered April 14, 2015 in a proceeding pursuant to Family Court Act article 4. The order denied the objections of petitioner to an order of a Support Magistrate denying his petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is reinstated, and the matter is remitted to Family Court, Cattaraugus County, for further proceedings in accordance with the following memorandum: Petitioner father commenced this proceeding seeking a downward modification of his child support obligation. We agree with the father that Family Court erred in concluding, following a hearing, that he failed to establish a sufficient change in circumstances to warrant such a modification.

The father and respondent mother are the parents of two minor children, born in 2001 and 2004, respectively. The parties were divorced in 2006, and the judgment incorporated a voluntary agreement concerning, inter alia, child custody, visitation, and support. With respect to child custody and visitation, the parties agreed to joint custody and to “reasonable” but unspecified amounts of visitation “consistent with the current arrangement.” With respect to child support, the parties explicitly agreed to opt out of the requirements of the Child Support Standards Act in favor of a provision requiring the father to pay the mother $185 per week. In 2008, the parties informally agreed to increase the father’s child support obligation from $185 weekly to $407.36 biweekly. In 2010, the parties informally agreed to increase the father’s visitation by one additional day per week. The visitation arrangement has remained essentially unchanged since that time.

In 2012, the father filed a petition to reduce his child support obligation, arguing that the increased visitation since 2010 and a reduction in his income warranted a downward modification; the mother also filed a petition seeking to enforce and incorporate the 2008 informal agreement into the 2006 divorce judgment. The court (William Gabler, S.M.) denied the father's petition and granted the mother's petition in 2013. Despite noting that the father "offer[ed] proof that his income for 2013 will be less than his earnings in . . . 2012," the court explicitly declined to consider income data from calendar year 2013 in adjudicating the father's petition.

The father subsequently filed the instant modification petition in 2014, arguing that a downward modification was warranted given the increased visitation level since 2010 and the fact that, owing to a job loss, the father made significantly less money in 2013 than he did in 2012. The court (Schavon R. Morgan, S.M.) denied the petition following an evidentiary hearing. In its written decision, the court held that the father failed to demonstrate any change in circumstances since the 2013 order. In particular, the court held that the father's income reduction from 2012 to 2013 did not constitute the requisite change in circumstances "because this [income reduction] took place before the hearing whereby the current [2013] order of support was determined." Family Court (Michael L. Nenno, J.) thereafter overruled the father's objections to the Support Magistrate's determination and confirmed the order denying the petition. That was error.

"A parent seeking to modify a child support order arising out of an agreement or stipulation must demonstrate that the agreement was unfair when entered into or that there has been a substantial, unanticipated and unreasonable change in circumstances warranting a downward modification" (*Matter of Hoyle v Hoyle*, 121 AD3d 1194, 1195; *see Merl v Merl*, 67 NY2d 359, 362; *Matter of Cooper v Cooper*, 74 AD3d 1868, 1868). Inasmuch as the father is seeking to modify the 2013 order, the relevant period for evaluating a change of circumstances is the period between the issuance of the 2013 order and the filing of the instant petition in 2014 (*see Klapper v Klapper*, 204 AD2d 518, 519; *see also Leroy v Leroy*, 298 AD2d 923, 923-924; *Matter of Dukes v White*, 295 AD2d 899, 899; *see generally Matter of Loveless v Goldbloom*, 141 AD3d 662, 663).

The father identifies two circumstances that, in his view, have changed sufficiently to warrant a recalculation of his child support obligation. First, he claims that "the parties now have the children an equal amount of time." As he admitted at the hearing, however, that change in the visitation schedule occurred years before the 2013 order and thus cannot serve as the basis for any recalculation of his child support obligation (*see Matter of Hrostowski v Micha*, 132 AD3d 1103, 1104-1105; *Matter of DiCiacco v DiCiacco*, 89 AD3d 937, 938; *Matter of Grayson v Fenton*, 13 AD3d 914, 915).

Second, the father cites his significantly reduced income from 2012 to 2013 as the requisite change in circumstances. We agree with the father that such income reduction—approximately 18%—constitutes a sufficient change in circumstances to warrant a recalculation of his

child support obligation (*cf.* Family Ct Act § 451 [3] [b] [ii]; *see generally Matter of Zibell v Zibell*, 112 AD3d 1101, 1102). Contrary to the Support Magistrate's determination, the father's income changes in 2013 were not before the court in connection with the prior modification petition inasmuch as the Support Magistrate in that proceeding explicitly declined to consider any income data from calendar year 2013, instead limiting his analysis to the parties' income data from 2012 and years prior. We therefore reverse the order, reinstate the petition, and remit the matter to Family Court for a determination of the appropriate amount of child support to be paid by the father, after a further hearing, if necessary (*see Matter of Gallagher v Gallagher*, 109 AD3d 1176, 1177).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1278
CAF 15-01029
PRESENT: WHALEN, P.J., SMITH, CARNI, DEJOSEPH, AND CURRAN, JJ.

IN THE MATTER OF AMBER L. ORLOWSKI,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CRYSTAL M. ZWACK AND JOHN J. ZWACK,
RESPONDENTS-APPELLANTS.

MICHAEL J. SULLIVAN, ESQ., ATTORNEY FOR
THE CHILD, APPELLANT.

MICHAEL J. SULLIVAN, ATTORNEY FOR THE CHILD, FREDONIA, APPELLANT PRO SE.

MARY S. HAJDU, LAKEWOOD, FOR RESPONDENTS-APPELLANTS.

Appeals from an order of the Family Court, Cattaraugus County (Judith E. Samber, R.), entered June 2, 2015 in a proceeding pursuant to Family Court Act article 6. The order granted the amended petition.

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, Cattaraugus County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, respondents and the Attorney for the Child appeal from an order granting full custody of respondents' grandson to petitioner, the child's biological mother. We note that, pursuant to a prior consent order, respondents have had primary physical custody of the child, with visitation to petitioner, since shortly after his birth. Nearly six years later, petitioner filed the modification petition at issue herein, seeking primary physical custody of the child. The order on appeal was entered following a trial, and Family Court, relying in part on this Court's decision in *Matter of Suarez v Williams* (128 AD3d 20, *revd* 26 NY3d 440), found that respondents had failed to establish standing by making the requisite showing of extraordinary circumstances. As a consequence, the court further concluded that it was unable to reach the issue of the best interests of the child in determining custody.

"It is well established that, as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting

neglect, unfitness or other like extraordinary circumstances . . . The nonparent has the burden of proving that extraordinary circumstances exist, and until such circumstances are shown, the court does not reach the issue of the best interests of the child" (*Matter of Wolfford v Stephens*, 145 AD3d 1569, ___). The rule governing the nonparent's burden applies even if there is, as here, "an existing order of custody concerning that child unless there is a prior determination that extraordinary circumstances exist" (*Matter of Gary G. v Roslyn P.*, 248 AD2d 980, 981; *see Wolfford*, 145 AD3d at ___). Here, there is no prior determination of extraordinary circumstances, and thus respondents had the burden of establishing them.

Approximately six months after the court issued its order, the Court of Appeals reversed our decision in *Suarez* and clarified what constitutes extraordinary circumstances when the nonparent seeking custody is a grandparent of the child. In that context, extraordinary circumstances may be demonstrated by an "extended disruption of custody, specifically: (1) a 24-month separation of the parent and child, which is identified as prolonged, (2) the parent's voluntary relinquishment of care and control of the child during such period, and (3) the residence of the child in the grandparents' household" (*Suarez*, 26 NY3d at 448 [internal quotation marks omitted]; *see* Domestic Relations Law § 72 [2]).

Evaluating those three elements in light of the facts of this case, we agree with respondents and the Attorney for the Child that respondents met their burden of establishing extraordinary circumstances, thereby giving them standing to seek custody of the child. It is undisputed that the child has lived in respondents' home since he was born, when petitioner consented to give respondents primary physical custody of him. Although the child has a good relationship with petitioner and has frequent visitation with her, petitioner has never made, in nearly six years, any serious attempts to regain custody or resume a parental role in the child's life. Inasmuch as petitioner voluntarily relinquished custody to respondents and has been separated from the child for a prolonged period of well over 24 months, during which time the child has resided in respondents' home, we conclude that respondents established the requisite extraordinary circumstances (*see id.* at 448-449). We therefore reverse and remit the matter to Family Court to make a determination regarding the best interests of the child, following an additional hearing if necessary.

Entered: February 3, 2017 Frances E. Cafarell
Clerk of the Court

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

1284/16
CA 16-00081
PRESENT: WHALEN, P.J., SMITH, CARNI, DEJOSEPH, AND CURRAN, JJ.

JEFFREY BURNS, PLAINTIFF-RESPONDENT,

V ORDER

LECESSE CONSTRUCTION SERVICES, LLC, THE MILLS AT HIGH FALLS HOUSING DEVELOPMENT FUND COMPANY, INC., URBAN LEAGUE OF ROCHESTER, NY, INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

LECESSE CONSTRUCTION SERVICES, LLC, THE MILLS AT HIGH FALLS HOUSING DEVELOPMENT FUND COMPANY, INC., AND URBAN LEAGUE OF ROCHESTER, NY, INC., THIRD-PARTY PLAINTIFFS-APPELLANTS,

V

JEFFREY W. BURNS, DOING BUSINESS AS BURNS FLOORING, THIRD-PARTY DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

BURDEN, GULISANO & HANSEN, LLC, BUFFALO (PHYLLIS A. HAFNER OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND THIRD-PARTY PLAINTIFFS-APPELLANTS.

CELLINO & BARNES, P.C., ROCHESTER (K. JOHN WRIGHT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

TREVETT CRISTO SALZER & ANDOLINA, P.C., ROCHESTER (MELANIE S. WOLK OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

LIPPMAN O'CONNOR, BUFFALO (ROBERT H. FLYNN OF COUNSEL), FOR DEFENDANT U.S. CEILING CORP.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM, ROCHESTER (MATTHEW A. LENHARD OF COUNSEL), FOR DEFENDANT DUKES PROPERTY DEVELOPMENT, LLC.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered January 12, 2015. The order, among other things, denied the cross motion of defendants/third-party plaintiffs Lecesse Construction Services, LLC, The Mills at High Falls Housing Development Fund Company, Inc., and Urban League of Rochester, NY, Inc., for summary judgment.

Now, upon reading and filing the stipulation withdrawing appeals signed by the attorneys for the parties on December 28, 2016,

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

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1285/16
CA 16-00243
PRESENT: WHALEN, P.J., SMITH, CARNI, DEJOSEPH, AND CURRAN, JJ.

JEFFREY BURNS, PLAINTIFF-RESPONDENT,

V   ORDER

LECESSE CONSTRUCTION SERVICES, LLC, THE MILLS AT HIGH FALLS HOUSING DEVELOPMENT FUND COMPANY, INC., URBAN LEAGUE OF ROCHESTER, NY, INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

LECESSE CONSTRUCTION SERVICES, LLC, THE MILLS AT HIGH FALLS HOUSING DEVELOPMENT FUND COMPANY, INC., AND URBAN LEAGUE OF ROCHESTER, NY, INC., THIRD-PARTY PLAINTIFFS-APPELLANTS,

V

JEFFREY W. BURNS, DOING BUSINESS AS BURNS FLOORING, THIRD-PARTY DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

BURDEN, GULISANO & HANSEN, LLC, BUFFALO (PHYLLIS A. HAFNER OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND THIRD-PARTY PLAINTIFFS-APPELLANTS.

CELLINO & BARNES, P.C., ROCHESTER (K. JOHN WRIGHT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

TREVETT CRISTO SALZER & ANDOLINA, P.C., ROCHESTER (MELANIE S. WOLK OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

LIPPMAN O'CONNOR, BUFFALO (ROBERT H. FLYNN OF COUNSEL), FOR DEFENDANT U.S. CEILING CORP.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM, ROCHESTER (MATTHEW A. LENHARD OF COUNSEL), FOR DEFENDANT DUKES PROPERTY DEVELOPMENT, LLC.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered December 18, 2015. The order, among other things, denied the motion of defendants/third-party plaintiffs Lecesse Construction Services, LLC, The Mills at High Falls Housing Development Fund Company, Inc., and Urban League of Rochester, NY, Inc., for indemnification against third-party defendant Jeffrey W.

Burns, doing business as Burns Flooring.

Now, upon reading and filing the stipulation withdrawing appeals signed by the attorneys for the parties on December 28, 2016,

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

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1287
CA 15-01957
PRESENT: WHALEN, P.J., SMITH, CARNI, DEJOSEPH, AND CURRAN, JJ.

ANTONIO GIORGIONE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CORRY F. GIBAUD AND DANIEL F. GIBAUD,
DEFENDANTS-RESPONDENTS.

CELLINO & BARNES, P.C., ROCHESTER (RICHARD AMICO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HAGELIN SPENCER LLC, BUFFALO (BENJAMIN R. WOLF OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered September 9, 2015. The judgment, among other things, dismissed plaintiff’s complaint upon a jury verdict.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when the vehicle he was driving was rear-ended by a vehicle owned by defendant Daniel F. Gibaud and operated by defendant Corry F. Gibaud. Specifically, plaintiff sought recovery under three categories of serious injury, i.e., the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories (*see* Insurance Law § 5102 [d]). After a trial, plaintiff moved for a directed verdict on the issue of serious injury with respect to his significant limitation claim. Supreme Court denied plaintiff’s motion, and the jury returned a verdict in favor of defendants, finding that plaintiff did not suffer a serious injury. Plaintiff made a posttrial motion to set aside the jury verdict as against the weight of the evidence. The court denied that motion, and plaintiff appeals from the posttrial order. We note, however, that, “[b]ecause that [posttrial] order is subsumed in the judgment . . . , the appeal lies from the judgment” (*Huther v Sickler*, 21 AD3d 1303, 1303; *see* CPLR 5501 [a] [1]). We exercise our discretion to “treat [plaintiff’s] notice of appeal as valid and deem the appeal as taken from the judgment” (*Huther*, 21 AD3d at 1303). We further note that plaintiff has abandoned any contentions with respect to the 90/180-day category of serious injury (*see Harris v Campbell*, 132 AD3d 1270, 1270).

Plaintiff contends that the court erred in denying his motion for

a directed verdict on the issue of serious injury with respect to his significant limitation claim. We reject that contention and conclude that the court properly denied his motion. "[G]iven the conflicting testimony of plaintiff['s] experts and defendants' expert[] both on the issues of serious injury and causation, we conclude that this is not an instance in which plaintiff [is] entitled to judgment as a matter of law" (*Dennis v Massey*, 134 AD3d 1532, 1532 [internal quotation marks omitted]; *see Pawlaczyk v Jones*, 26 AD3d 822, 823, *lv denied* 7 NY3d 701; *see also* CPLR 4404 [a]). Although plaintiff adduced evidence to the contrary, a physician who examined plaintiff on defendants' behalf testified that plaintiff had a preexisting degenerative condition and did not sustain a serious injury in the accident (*see Harris*, 132 AD3d at 1271; *see also Quigg v Murphy*, 37 AD3d 1191, 1193). Thus, contrary to plaintiff's contention, "it cannot be said that there is 'simply no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial' " (*Dennis*, 134 AD3d at 1532, quoting *Cohen v Hallmark Cards*, 45 NY2d 493, 499).

The court also properly denied plaintiff's motion to set aside the verdict as against the weight of the evidence because plaintiff failed to establish that "the evidence so preponderate[d] in [his] favor . . . that [the verdict] could not have been reached on any fair interpretation of the evidence" (*Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [internal quotation marks omitted]; *see also Dennis*, 134 AD3d at 1533). Upon our review of the record, we conclude that the jury's finding that plaintiff did not sustain a serious injury is "one that reasonably could have been rendered upon the conflicting evidence adduced at trial" (*Ruddock v Happell*, 307 AD2d 719, 721). Because "the conflicting medical expert testimony 'raised issues of credibility for the jury to determine,' " the court properly denied plaintiff's posttrial motion to set aside the jury verdict (*Campo v Neary*, 52 AD3d 1194, 1198; *see Dennis*, 134 AD3d at 1533).

Frances E. Cafarell

Entered: February 3, 2017

Clerk of the Court

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

1292
KA 11-02329
PRESENT: WHALEN, P.J., CENTRA, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARRELL GUNN, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (VICTORIA M. WHITE OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Onondaga County Court (Joseph E. Fahey, J.), rendered October 18, 2011. Defendant was resentenced upon his conviction of attempted murder in the first degree.

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

Memorandum: Defendant was convicted upon his plea of guilty of murder in the first degree (Penal Law § 125.27 [1] [a] [vii]; [b]) and attempted murder in the first degree (§§ 110.00, 125.27 [1] [a] [vii]; [b]), and he now appeals from a resentence with respect to that conviction. County Court originally sentenced defendant to a determinate term of imprisonment for the count of attempted murder, and we affirmed the judgment of conviction (*People v Gunn*, 35 AD3d 1243, *lv denied* 8 NY3d 923, *reconsideration denied* 8 NY3d 985). The court had failed, however, to impose a period of postrelease supervision with respect to that count, as required by Penal Law § 70.45 (1). To remedy that error (*see* Correction Law § 601-d; *People v Sparber*, 10 NY3d 457, 465), with the People's consent, the court resentenced defendant prior to the completion of his sentence to the same term of imprisonment without imposing a period of postrelease supervision (*see* Penal Law § 70.85).

Defendant failed to preserve for our review his contention that he was denied due process because the resentence violated his statutory right to have his sentence pronounced "without unreasonable delay" (CPL 380.30 [1]), and because he was not given notice pursuant to Correction Law § 601-d (2) that he was a "designated person" (*see People v Woods*, 122 AD3d 1400, 1401, *lv denied* 25 NY3d 1210; *People v Diggs*, 98 AD3d 1255, 1256, *lv denied* 20 NY3d 986). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Contrary to

defendant's further contention, he was not denied effective assistance of counsel at the resentencing proceeding (*see Woods*, 122 AD3d at 1401-1402; *People v Williams*, 82 AD3d 1576, 1578, *lv denied* 17 NY3d 810; *see generally People v Baldi*, 54 NY2d 137, 147).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1293
KA 13-01485
PRESENT: WHALEN, P.J., CENTRA, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANGEL GUZMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

JAMES S. KERNAN, PUBLIC DEFENDER, LYONS, THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (BRUCE A. ROSEKRANS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Daniel G. Barrett, J.), rendered January 26, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree and petit larceny (three counts).

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 plea of guilty of, inter alia, burglary in the second degree (Penal Law § 140.25 [2]). In appeal No. 2, defendant appeals from a judgment convicting him upon a plea of guilty of four counts of burglary in the second degree (§ 140.25 [2]). In both appeals, defendant contends that he has standing to challenge the placement of GPS devices on two vehicles owned by and registered to his girlfriend, and that the warrants and extensions authorizing the placement of the devices were issued without probable cause.

County Court properly determined that defendant lacked standing because he failed to establish the existence of a legitimate expectation of privacy in the subject vehicles (*see People v Cooper*, 128 AD3d 1431, 1433, *lv denied* 26 NY3d 966; *People v Lacey*, 66 AD3d 704, 705, *lv denied* 14 NY3d 772). Here, as in *Lacey*, the evidence at the suppression hearing established that the vehicles were owned by and registered to defendant's girlfriend, and there was no "evidence that . . . defendant took precautions to maintain privacy in the subject vehicle[s] or that he had the right to exclude others therefrom" (*Lacey*, 66 AD3d at 706; *see People v Di Lucchio*, 115 AD2d 555, 556-557, *lv denied* 67 NY2d 942). Moreover, although an investigator testified that he saw defendant driving one of the

subject vehicles on two occasions, that evidence "is insufficient to meet defendant's burden of establishing a reasonable expectation of privacy in the vehicle" (*People v Rivera*, 83 AD3d 1370, 1372, *lv denied* 17 NY3d 904). Based on our determination that defendant lacked standing to challenge the placement of the GPS devices on the vehicles, we do not address defendant's remaining contentions concerning the placement of the devices on the vehicles.

We reject defendant's further contention in appeal No. 2 that the court erred in refusing to suppress statements that he made to the police because they were obtained in violation of his right to counsel. First, defendant contends that his right to counsel was violated when the police unlawfully delayed his arraignment for the purpose of obtaining a statement in the absence of counsel. That contention lacks merit. Defendant's right to counsel had not attached inasmuch as he had not requested an attorney and formal proceedings had not begun with respect to the charges underlying appeal No. 2 (*see People v Ramos*, 99 NY2d 27, 34), and it is well settled that "a delay in arraignment for the purpose of further police questioning does not establish a deprivation of the State constitutional right to counsel" (*id.* at 37). Second, defendant contends that his right to counsel had attached with respect to the charges underlying appeal No. 2 because the charges underlying appeal Nos. 1 and 2 were all related, and his right to counsel had indisputably attached with respect to the burglary at issue in appeal No. 1. Although defendant is correct that his right to counsel had attached with respect to the charges underlying appeal No. 1 inasmuch as the indictment on those charges was filed before defendant was questioned by law enforcement officials (*see generally People v Kazmarick*, 52 NY2d 322, 324; *People v Brinson*, 28 AD3d 1189, 1189-1190, *lv denied* 7 NY3d 810), we conclude that the law enforcement officials were not prohibited from questioning defendant in the absence of counsel with respect to the charges in appeal No. 2. Defendant was not represented by counsel with respect to the charges underlying appeal No. 1, and the charges underlying each appeal are unrelated because they arose from separate burglaries occurring at different dwellings (*see People v Hooks*, 71 AD3d 1184, 1185; *People v Brown*, 216 AD2d 670, 672, *lv denied* 86 NY2d 791; *People v Ferringer*, 120 AD2d 101, 107).

Entered: February 3, 2017 Frances E. Cafarell
Clerk of the Court

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

1294
KA 13-01593
PRESENT: WHALEN, P.J., CENTRA, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANGEL GUZMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

JAMES S. KERNAN, PUBLIC DEFENDER, LYONS, THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (BRUCE A. ROSEKRANS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Daniel G. Barrett, J.), rendered January 26, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree (four counts).

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

Same memorandum as in *People v Guzman* ([appeal No. 1] ___ AD3d ___ [Feb. 3, 2017]).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1295
KA 14-01430
PRESENT: WHALEN, P.J., CENTRA, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAIGTH A. OLLMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

CARA A. WALDMAN, FAIRPORT, 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 (Peter C. Bradstreet, J.), rendered August 19, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from three judgments, each of which convicted him, upon his plea of guilty, of one count of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]). Each count arose from a distinct occurrence involving oxycodone pills. In all three appeals, defendant contends that his pleas should be vacated because, during the plea colloquy, County Court failed to conduct the requisite further inquiry after defendant negated an essential element of the crimes to which he pleaded guilty by stating that he had a valid prescription for the oxycodone pills and thus that his attempted possession was not unlawful. We reject that contention. The record establishes that, during the plea colloquy, defendant did not state that he had a prescription for oxycodone but, rather, he stated that he had a prescription for a "different . . . medication." We therefore conclude that the colloquy did not negate an essential element of attempted criminal possession of a controlled substance in the third degree, and thus the court had no duty to conduct a further inquiry to ensure that defendant understood the nature of the charges and that the pleas were intelligently entered (*see generally People v Lopez*, 71 NY2d 662, 666).

Although defendant's contention that he received ineffective assistance of counsel during the plea bargaining stage survives his guilty pleas to the extent that he contends that his pleas were

infected by the alleged ineffective assistance (*see People v Neil*, 112 AD3d 1335, 1336, *lv denied* 23 NY3d 1040), we reject that contention (*see generally People v Ford*, 86 NY2d 397, 404). Specifically, defendant contends that defense counsel erred in allowing him to plead guilty after he stated during the colloquy that he lawfully possessed the oxycodone but, as noted herein, defendant did not in fact state that he had a prescription for the oxycodone pills.

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1296
KA 14-01431
PRESENT: WHALEN, P.J., CENTRA, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAIGTH A. OLLMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

CARA A. WALDMAN, FAIRPORT, 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 (Peter C. Bradstreet, J.), rendered August 19, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

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

Same memorandum as in *People v Ollman* ([appeal No. 1] ___ AD3d ___ [Feb. 3, 2017]).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1297
KA 14-01432
PRESENT: WHALEN, P.J., CENTRA, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAIGTH A. OLLMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

CARA A. WALDMAN, FAIRPORT, 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 (Peter C. Bradstreet, J.), rendered August 19, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

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

Same memorandum as in *People v Ollman* ([appeal No. 1] ___ AD3d ___ [Feb. 3, 2017]).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1303
CA 16-01142
PRESENT: WHALEN, P.J., CENTRA, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

SONYA J. O'HARA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

HOLIDAY FARM, DONALD SCHWARTZ, MARCIA SCHWARTZ
AND CHRISTINA PIEMONTE, DEFENDANTS-RESPONDENTS.

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

BARCLAY DAMON, LLP, SYRACUSE (MATTHEW J. LARKIN OF COUNSEL), FOR DEFENDANT-RESPONDENT CHRISTINA PIEMONTE.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered March 4, 2016. The order, among other things, granted the motion of defendant Christina Piemonte for summary judgment dismissing the amended complaint against her.

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 her vehicle collided with a horse owned by Christina Piemonte (defendant). The horse had escaped from a stall at defendant Holiday Farm, which was owned and operated by defendants Donald Schwartz and Marcia Schwartz. Plaintiff, as limited by her brief, appeals from an order that, inter alia, granted defendant's motion for summary judgment dismissing the amended complaint against her. As a preliminary matter, we note Supreme Court's failure to set forth its reasons for granting defendant's motion (*see generally McMillian v Burden*, 136 AD3d 1342, 1343).

Contrary to plaintiff's contention, the court properly granted that part of defendant's motion for summary judgment dismissing the amended complaint against her insofar as it alleges common-law negligence. A horse is classified as a "[d]omestic animal" in Agriculture and Markets Law § 108 (7), and it is well established that "a landowner or the owner of an animal may be liable under ordinary tort-law principles when a farm animal—i.e., a domestic animal as that term is defined in Agriculture and Markets Law § 108 (7)—is negligently allowed to stray from the property on which the animal is kept" (*Hastings v Suave*, 21 NY3d 122, 125-126). Nevertheless, defendant established as a matter of law that " 'the animal's presence on the [road] was not caused by [her] negligence' " (*Johnson v Waugh*,

244 AD2d 594, 596, *lv denied* 91 NY2d 810), inasmuch as Holiday Farm was solely responsible for keeping the horse confined in a stall or other enclosure at the facility at all times, and defendant last visited the horse at Holiday Farm four days prior to the incident. Although "[a]n inference of negligence arises under the doctrine of res ipsa loquitur when the plaintiff establishes that the event does not ordinarily occur in the absence of negligence and that the agency or instrumentality causing the injury is within the exclusive control of the defendant" (*Loeffler v Rogers*, 136 AD2d 824, 824; *see Emlaw v Clark*, 26 AD3d 790, 791), the record establishes that defendant was not in exclusive control of the horse or the barn and stalls where the horse was kept. Plaintiff's contention that defendant is vicariously liable for the negligence of a horse trainer who was at Holiday Farm the day before the incident is not properly before us inasmuch as it is raised for the first time on appeal (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Contrary to plaintiff's further contention, the court properly granted that part of defendant's motion for summary judgment dismissing the amended complaint against her insofar as it alleges strict liability (*see generally Vichot v Day*, 80 AD3d 851, 852). Defendant met her initial burden by "establishing that [she] did not know of any vicious propensities on the part of [her horse]" (*Doerr v Goldsmith*, 25 NY3d 1114, 1116; *see Tennant v Tabor*, 89 AD3d 1461, 1462), inasmuch as the testimony and sworn statements of defendant and Donald Schwartz established that, prior to the incident, defendant's horse had never escaped from a stall or any other similar enclosure, was never violent, and had never harmed anyone. In opposition, plaintiff failed to demonstrate the existence of a triable issue of fact whether defendant had notice of any harmful or vicious propensities. There is no evidence in the record that the horse's behavior was " 'abnormal to its class' " (*Tennant*, 89 AD3d at 1463), or constituted "atypical equine behavior" (*Bloomer v Shauger*, 94 AD3d 1273, 1275, *affd* 21 NY3d 917). Furthermore, even assuming, arguendo, that the horse had a propensity to kick or destroy his stall, we conclude that such propensity did not result in the injury giving rise to the lawsuit (*see Bloomer*, 94 AD3d at 1275). Here, after the horse's escape, there was no damage to his stall, and plaintiff's own expert concluded that "[w]ithin a reasonable degree of certainty in the stable management field, and seeing as there was no damage to the latch or stall door, it was impossible for [the horse] to escape from the stall and stable without the door being unlatched."

Entered: February 3, 2017 Frances E. Cafarell
Clerk of the Court

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

1308
CA 16-00508
PRESENT: WHALEN, P.J., CENTRA, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

JOSEPH P. GALLAGHER, JR. AND KELLYANN E.
GALLAGHER, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

DOMINIC RUZZINE, JR., ANDREA RUZZINE,
TIMOTHY R. MALCHOW, LORA L. MALCHOW,
ROBITAILLE RELOCATION CENTER, INC., SARAH
ROBITAILLE, REALTY USA.COM AND GERALDINE
BROSKY, DEFENDANTS-RESPONDENTS.

JAMES I. MYERS, PLLC, WILLIAMSVILLE (JAMES I. MYERS OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

FLYNN WIRKUS YOUNG, P.C., BUFFALO (SCOTT R. ORNDOFF OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS DOMINIC RUZZINE, JR. AND ANDREA RUZZINE.

PHILLIPS LYTLE LLP, BUFFALO (JENNIFER A. BECKAGE OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS TIMOTHY R. MALCHOW AND LORA L. MALCHOW.

BARCLAY DAMON, LLP, BUFFALO (JAMES P. MILBRAND OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS ROBITAILLE RELOCATION CENTER, INC. AND SARAH
ROBITAILLE.

AMIGONE, SANCHEZ & MATTREY, LLP, BUFFALO (RICHARD A. CLACK OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS REALTY USA.COM AND GERALDINE
BROSKY.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered January 6, 2016. The order, among other things, granted the motions of defendants for summary judgment and dismissed the complaint.

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

Memorandum: In 1999, defendants Timothy R. Malchow and Lora L. Malchow purchased a home in Amherst. In or around June 2005, the Malchows hired Siracuse Engineers, LLP, who inspected the foundation of the residence. The inspection report was prepared by Peter Grace, P.E. (hereafter, Grace report), and Grace stated therein that he “did not observe any evidence of current or past history of vertical movement of the soils at the level of the basement foundations,” and that he would be “very surprised if after many years of stable

conditions, differential settlements would be encountered in the future." The Malchows sold the residence to defendants Dominic Ruzzine, Jr. and Andrea Ruzzine in December 2005. The Malchows provided the Ruzzines with the Grace report and the property condition disclosure statement, which both the Malchows and the Ruzzines had signed. The property condition disclosure statement recited, inter alia, that: (1) there were some basement water seepage issues; (2) there were some drainage problems on the property, i.e., "slight accumulation after heavy rain in back of lot"; and (3) "basement cracks [were] repaired."

During their time at the subject residence, the Ruzzines discovered a crack in the basement wall and had it repaired on November 6, 2009. When they decided to sell the residence, the Ruzzines retained defendants Robitaille Relocation Center, Inc., and Sarah Robitaille (Robitaille defendants) to act as their realtor.

Plaintiffs purchased the property from the Ruzzines in January 2010, with defendants Realty USA.com and Geraldine Brosky (collectively, Realty USA) acting as plaintiffs' realtor. Prior to the transaction, the Ruzzines did not disclose the Grace report to plaintiffs, but plaintiffs and the Ruzzines executed a property condition disclosure statement reciting that there were no problems with water seepage into the basement and that there were no known material defects on the subject property. In addition, plaintiffs hired a home inspector, who concluded that there were no concerns with the property.

Plaintiffs did not notice any "signs of damage" until February or March 2010, about a month after moving in. Cracks appeared repeatedly in the walls on the first and second floors, there was evidence of past repairs, and water began leaking into the basement. In August 2010, the house "popped," waking plaintiffs during the night. The cracks in the basement walls "separated and shifted," extending into the interior of the walls, and plaintiffs had trouble getting any doors and windows to close. A toilet fell off its flange and flooded the bathroom; the garage door cable broke; a fireplace pulled away from a wall; and the front porch pulled away from the house.

Plaintiffs thereafter commenced this action seeking damages for fraud, breach of contract, gross negligence, and breach of fiduciary and statutory duties. The Malchows, the Ruzzines, the Robitaille defendants, and Realty USA made separate motions for summary judgment dismissing the complaint insofar as asserted against them, and Supreme Court granted the motions. We affirm.

We conclude that the court properly granted the motion of the Malchows with respect to the cause of action for fraud asserted against them. "[I]t is well settled that, [t]o establish a cause of action for fraud, plaintiff[s] must demonstrate that defendant[s] knowingly misrepresented a material fact upon which plaintiff[s] justifiably relied and which caused plaintiff[s] to sustain damages" (*Sample v Yokel*, 94 AD3d 1413, 1415 [internal quotation marks omitted]). The Malchows established as a matter of law that, as the

prior seller, they did not have a relationship with plaintiffs, did not make any statements or representations to plaintiffs and therefore did not and could not induce any reliance on the part of plaintiffs. Plaintiffs failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Furthermore, we conclude, contrary to plaintiffs' contention, that the Malchows established as a matter of law that they did not aid and assist the Ruzzines in perpetrating a fraud upon plaintiffs. "The elements of a cause of action alleging aiding and abetting fraud are an underlying fraud, [the] defendants' knowledge of this fraud, and [the] defendants' substantial assistance in the achievement of the fraud" (*Ginsburg Dev. Cos., LLC v Carbone*, 134 AD3d 890, 894 [internal quotation marks omitted]). Here, there is no record evidence that the Malchows had "actual knowledge" of any purported fraud between the Ruzzines and plaintiffs, and there is no evidence that the Malchows provided any substantial assistance in the achievement of any fraud (*Decana Inc. v Contogouris*, 55 AD3d 325, 326, *lv dismissed* 11 NY3d 920).

We further conclude that the court properly granted the motion of the Ruzzines with respect to the causes of action asserted against them for fraud and breach of contract. "Although New York traditionally adheres to the doctrine of caveat emptor in an arm's length real property transfer . . . , Real Property Law article 14 codifies a seller's disclosure obligations for certain residential real property transfers, including the transaction between the parties in this case . . . The mechanism for disclosure is the [property condition disclosure statement], the particulars of which are mandated by statute . . . Disclosure is based on the seller's actual knowledge of a defect or condition affecting the property at the time the seller signs the disclosure . . . While false representation in a disclosure statement may constitute active concealment in the context of fraudulent nondisclosure . . . , to maintain such a cause of action, the buyer must show, in effect, that the seller thwarted the buyer's efforts to fulfill the buyer's responsibilities fixed by the doctrine of caveat emptor" (*Klafehn v Morrison*, 75 AD3d 808, 810 [internal quotation marks omitted]). Furthermore, "[t]he mere fact that [a] defendant undertook previous repair work on the house is not tantamount to concealment of a defective condition" (*Hecker v Paschke*, 133 AD3d 713, 717). Here, while there was evidence that the Ruzzines were aware that there was dampness in the basement, there was also evidence that they repaired the crack in the basement foundation that was causing the dampness, thereby establishing their entitlement to judgment on the fraud cause of action as a matter of law (*see Klafehn*, 75 AD3d at 810). In addition, although the Ruzzines' property condition disclosure statement was silent with respect to any water seepage or water dampness in the basement, plaintiffs' home inspection report put them on notice of that issue, and plaintiffs therefore cannot assert that they justifiably relied on the fact that the Ruzzines' property condition disclosure statement failed to mention it (*see Pettis v Haag*, 84 AD3d 1553, 1554-1555; *Daly v Kochanowicz*, 67 AD3d 78, 91).

Similar to plaintiffs' cause of action asserting fraud against the Ruzzines, plaintiffs' cause of action for breach of contract

against the Ruzzines is based upon the property condition disclosure statement, and we therefore conclude that, for the same reasons discussed above, the Ruzzines satisfied their initial burden of proof on their motion, and plaintiffs failed to raise a triable issue of fact (*see generally Zuckerman*, 49 NY2d at 562).

We reject plaintiffs' contention that the court erred in granting the motion of the Robitaille defendants and dismissing the claims asserted against those defendants based on plaintiffs' allegations of fraud, the violation of Real Property Law § 443, and gross negligence. Even assuming, arguendo, that plaintiffs pleaded their fraud claim with sufficient particularity (*see* CPLR 3016 [b]), we conclude that the claims based on fraud and section 443 were properly dismissed. Section 443 (4) (a) provides that "[a] seller's agent does not represent the interests of the buyer," and section 443 (6) provides that section 443 as a whole does not "limit or alter the application of the common law of agency with respect to residential real estate transactions." As previously noted, "[u]nder the common law, New York adheres to the doctrine of caveat emptor and imposes no liability on the seller or the seller's agent to disclose any information concerning the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller or the seller's agent which constitutes active concealment" (*Ader v Guzman*, 135 AD3d 668, 670). Again, we conclude that neither the Ruzzines nor their agent, the Robitaille defendants, engaged in such misconduct (*see Daly*, 67 AD3d at 97-98).

As for plaintiffs' gross negligence claim against the Robitaille defendants, it is well established that, "[t]o constitute gross negligence, a party's conduct must smack of intentional wrongdoing or evince[] a reckless indifference to the rights of others . . . Stated differently, a party is grossly negligent when it fails to exercise even slight care . . . or slight diligence" (*Ryan v IM Kapco, Inc.*, 88 AD3d 682, 683 [internal quotation marks omitted]). Here, plaintiffs' complaint does not allege any intentional and/or reckless acts on the part of the Robitaille defendants. In any event, the Robitaille defendants satisfied their initial burden by establishing that they did not actively conceal any defect or have actual knowledge of any defect, and therefore that their conduct did not rise to the level of intentional wrongdoing or reckless indifference to the rights of plaintiffs, and plaintiffs failed to raise a triable issue of fact (*see generally Zuckerman*, 49 NY2d at 562).

Finally, we conclude that the court properly dismissed the cause of action for breach of fiduciary duty asserted against Realty USA based on Real Property Law § 443. We agree with Realty USA that it had a duty not to conceal or misrepresent known facts, but that it had no duty to investigate unknown facts (*see generally Marcy v Roser*, 269 AD2d 855, 855; *Sirles v Harvey*, 256 AD2d 1227, 1228; *Rudolph v Turecek*, 240 AD2d 935, 938, *lv denied* 90 NY2d 811). Realty USA met its initial burden by establishing that it had no actual knowledge of the alleged defects in the property, and plaintiffs failed to raise a

triable issue of fact (*see generally Zuckerman*, 49 NY2d at 562).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1310
CA 16-00548
PRESENT: WHALEN, P.J., CENTRA, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

WORKERS' COMPENSATION BOARD OF STATE OF NEW YORK,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

OLD LAMSON STATION, INC., DEFENDANT-APPELLANT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FREDERICK A. BRODIE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered June 16, 2015. The order denied the motion of defendant to vacate a money judgment.

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

Memorandum: Defendant appeals from an order that denied its motion to vacate a judgment against it that was entered by plaintiff pursuant to Workers' Compensation Law § 26. The record establishes that, pursuant to its authority under section 26, plaintiff unilaterally vacated the challenged judgment prior to Supreme Court's denial of defendant's motion. We therefore conclude that the appeal is moot inasmuch as defendant "is no longer aggrieved by the [judgment]" (*Matter of McGrath*, 245 AD2d 1081, 1082), and defendant failed to establish that this case falls within the exception to the mootness doctrine (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

1

TP 16-00249

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

IN THE MATTER OF NATHAN BROWN, PETITIONER,

V MEMORANDUM AND ORDER

ALBERT PRACK, DIRECTOR OF SPECIAL HOUSING,
R. CALIDONNA, DEPUTY SUPERINTENDENT
ADMINISTRATION, AND MOHAWK CORRECTIONAL
FACILITY, RESPONDENTS.

NATHAN BROWN, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Oneida County [Norman I. Siegel, J.], entered July 2, 2015) to review a determination of respondents. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Memorandum: Petitioner commenced this proceeding seeking to annul a determination finding him guilty, following a tier III hearing, of violating various inmate rules, and imposing a penalty. At the outset, we note that, " '[b]ecause the petition did not raise a substantial evidence issue, Supreme Court erred in transferring the proceeding to this Court' " (*Matter of Wearen v Deputy Supt. Bish*, 2 AD3d 1361, 1362). In the interest of judicial economy, we nevertheless address petitioner's contention that he was denied his right to contact his attorney (*see id.*). Nothing in the record indicates that petitioner sought to contact his attorney prior to the hearing (*cf. Matter of Jeckel v New York State Dept. of Corr.*, 111 AD3d 1180, 1181). Rather, the record establishes that petitioner asked to consult with his attorney after the tier III hearing commenced, and it is well established that an inmate does not have a right to counsel at that hearing (*see Wolff v McDonnell*, 418 US 539, 570; *Matter of Laureano v Kuhlmann*, 75 NY2d 141, 146). We therefore confirm the determination and dismiss the petition.

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

3

KA 12-00320

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAWN OBBAGY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

JEANNIE D. MICHALSKI, CONFLICT DEFENDER, GENESEO, FOR DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered October 20, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal mischief in the third degree, driving while intoxicated, a misdemeanor, and resisting arrest.

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, inter alia, criminal mischief in the third degree (Penal Law § 145.05 [2]) and resisting arrest (§ 205.30) arising from his conduct upon being arrested for driving while intoxicated in a parking lot. In appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of criminal mischief in the third degree (§ 145.05 [2]) arising from the damage that defendant caused to an SUV in the parking lot while operating his vehicle. Defendant contends in both appeals that his pleas of guilty to the counts of criminal mischief in the third degree, which were made during a single plea colloquy, were not knowingly, voluntarily, and intelligently entered. By failing to move to withdraw his pleas or to vacate the judgment of conviction in each appeal, defendant failed to preserve his contention for our review (*see People v Boyden*, 112 AD3d 1372, 1372-1373, *lv denied* 23 NY3d 960). We conclude that this case does not fall within the narrow exception to the preservation requirement because the plea colloquy with respect to the criminal mischief crimes did not "clearly cast[] significant doubt upon the defendant's guilt or otherwise call[] into question the voluntariness of the plea[s]" (*People v Lopez*, 71 NY2d 662, 666).

In any event, inasmuch as the record establishes that defendant understood the consequences of his guilty pleas and that he was pleading guilty in exchange for a negotiated sentence that was less than the maximum term of imprisonment, we conclude that the pleas were knowingly and voluntarily entered (*see People v Cubi*, 104 AD3d 1225, 1226-1227, *lv denied* 21 NY3d 1003). Contrary to defendant's contention, County Court did not err in advising him that he faced the possibility of consecutive sentences if convicted following trial because the criminal mischief charges arose from separate and distinct acts as part of a single criminal episode (*see People v Couser*, 28 NY3d 368, ___; *People v Peterson*, 71 AD3d 1419, 1420, *lv denied* 14 NY3d 891, *reconsideration denied* 21 NY3d 1008). Contrary to defendant's further contention, "[a]lthough it is well settled that '[a] defendant may not be induced to plead guilty by the threat of a heavier sentence if he [or she] decides to proceed to trial,' " we conclude that the statements made by the court and the prosecutor during the pre-plea proceedings " 'amount to a description of the range of the potential sentences' rather than impermissible coercion" (*People v Boyde*, 71 AD3d 1442, 1443, *lv denied* 15 NY3d 747; *see People v Boyd*, 101 AD3d 1683, 1683-1684). " 'The fact that defendant may have pleaded guilty to avoid receiving a harsher sentence does not render his plea[s] coerced' " (*Boyde*, 71 AD3d at 1443).

Finally, defendant's challenge in appeal No. 1 to the sufficiency of the evidence of his guilt with respect to resisting arrest was forfeited by his plea of guilty (*see People v Boyland*, 128 AD3d 1538, 1539, *lv denied* 25 NY3d 1198).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

5
KA 15-00421
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CURTIS MOSS, DEFENDANT-APPELLANT.

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (ASHLEY R. LOWRY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered December 3, 2014. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree and criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously 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: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the first degree (Penal Law § 140.30 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). We conclude that the waiver of the right to appeal with respect to the conviction and the sentence is valid and encompasses defendant's challenge to the severity of the bargained-for sentence (*see People v Lopez*, 6 NY3d 248, 255-256; *cf. People v Maracle*, 19 NY3d 925, 928). Nevertheless, we conclude that the sentence must be vacated because Supreme Court erred in sentencing defendant as a second violent felony offender, and "we cannot allow an illegal sentence to stand" (*People v Terry*, 138 AD3d 1484, 1485, *lv denied* 27 NY3d 1156; *see People v Fields*, 79 AD3d 1448, 1449). The predicate offense of criminal possession of a weapon in the third degree under the subdivision of which defendant was convicted (§ 265.02 [3]) is not a violent felony offense (*see* § 70.02 [1] [c]). We therefore modify the judgment by vacating the sentence, and we remit the matter to Supreme Court for resentencing (*cf. Terry*, 138 AD3d at 1485).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

6
KA 14-01499
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK THOMPSON, ALSO KNOWN AS MARK DAY,
DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered August 4, 2014. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is 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]). The conviction arises out of an incident in which defendant and a codefendant robbed the victim at gunpoint and left the scene in a vehicle driven by another codefendant (*see People v Evans*, 142 AD3d 1291, 1291). Following a high-speed police chase, defendant and the codefendants fled from the vehicle on foot and were apprehended. The victim's property was recovered in the vehicle and on defendant's person, and the victim identified defendant and one of the codefendants in showup identification procedures but testified that he was unable to identify them at trial. The weapon used in the robbery was recovered along the route traveled by the suspects' vehicle, near several bullets and a magazine.

Defendant contends that Supreme Court failed to rule on the part of his omnibus motion seeking to suppress, inter alia, identification testimony and physical evidence on the ground that he was unlawfully detained, and that the matter should therefore be remitted for a ruling on that issue. Although we agree with defendant that the court failed to address the legality of his detention in its suppression decision, we conclude that he abandoned that challenge by failing to seek a ruling on that part of his motion and failing to object at trial to testimony about the showup identification and the recovery of physical evidence from his person (*see People v Linder*, 114 AD3d 1200,

1200-1201, *lv denied* 23 NY3d 1022; *People v Anderson*, 52 AD3d 1320, 1320-1321, *lv denied* 11 NY3d 733). In any event, we conclude that the circumstances in which a police officer encountered defendant in the aftermath of the vehicle chase gave rise to at least a reasonable suspicion that defendant had been one of the occupants of the vehicle and a participant in the robbery (*see People v Butler*, 81 AD3d 484, 485, *lv denied* 16 NY3d 893; *see also People v Carr*, 99 AD3d 1173, 1175, *lv denied* 20 NY3d 1010).

We reject defendant's contention that the court erred in denying his motion for a mistrial when the jury initially returned an incomplete verdict with respect to a codefendant. The decision whether to grant a mistrial is a matter for the discretion of the trial court (*see People v Ortiz*, 54 NY2d 288, 292; *People v Rodriguez*, 112 AD3d 1344, 1345), and we conclude that the court acted within its discretion in denying the motion and instead directing the jury to resume deliberations (*see* CPL 310.50 [2]). Contrary to defendant's contentions, the initial verdict was not "tantamount to a hung jury" (*see generally People v Stephens*, 63 AD3d 624, 624, *lv denied* 13 NY3d 800), and the verdict sheet was not confusing, in view of the jury instructions on the affirmative defense to robbery in the first degree under Penal Law § 160.15 (4) that the weapon allegedly displayed was not loaded and operable (*see generally People v Dombrowski-Bove*, 300 AD2d 1122, 1124).

By making only a general motion for a trial order of dismissal, defendant failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence (*see People v Gray*, 86 NY2d 10, 19). In any event, we conclude that the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). With respect to the affirmative defense to robbery in the first degree, the presence of ammunition in the vicinity of the weapon when it was recovered supports a reasonable inference that the weapon was "loaded at the time of the crime, but unloaded at the time it was recovered" (*People v Williams*, 15 AD3d 244, 245, *lv denied* 5 NY3d 771; *see People v Barrington*, 34 AD3d 341, 342, *lv denied* 8 NY3d 878). 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 Bleakley*, 69 NY2d at 495), including with respect to the affirmative defense (*see People v Brown*, 81 AD3d 499, 500, *lv denied* 17 NY3d 792; *Williams*, 15 AD3d at 245; *cf. People v Moody*, 278 AD2d 862, 862-863). "The challenges defendant raises on appeal to [the victim's] credibility were matters for the jury to determine, and we see no reason to disturb its verdict" (*People v Brooks*, 139 AD3d 1391, 1393; *see People v Vargas*, 60 AD3d 1236, 1238-1239, *lv denied* 13 NY3d 750).

Contrary to defendant's further contention, his Sixth Amendment right of confrontation was not violated by the admission in evidence of statements that a codefendant made to a police officer and in

recorded jail telephone calls. The statements incriminated defendant, if at all, only in light of other evidence produced at trial (*see People v Maschio*, 117 AD3d 1234, 1235; *People v Sutton*, 71 AD3d 1396, 1397, *lv denied* 15 NY3d 778; *cf. People v Johnson*, 27 NY3d 60, 67-72), and the court directed the jury to consider the statements only against the codefendant who made them. Under such circumstances, a codefendant is "not 'considered to be a witness "against" a defendant' " within the meaning of the Sixth Amendment (*People v Pagan*, 87 AD3d 1181, 1183, *lv denied* 18 NY3d 885, quoting *Richardson v Marsh*, 481 US 200, 206).

Finally, we reject defendant's contention that the court erred in permitting an assistant district attorney who had recently prosecuted a case against the victim to testify that the victim had not received any benefit in that case in exchange for his testimony at defendant's trial. Even assuming, arguendo, that such testimony constituted bolstering, we conclude that it was properly admitted after defendant suggested through cross-examination of the victim that his testimony may have been motivated by the possibility of favorable treatment in his own case (*see People v Santana*, 55 AD3d 1338, 1339, *lv denied* 12 NY3d 762; *People v Hayes*, 226 AD2d 1055, 1055-1056, *lv denied* 88 NY2d 936).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

7

KA 15-01193

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MONROE BIBBS, DEFENDANT-APPELLANT.

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered February 11, 2015. The judgment convicted defendant, upon his plea of guilty, 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 his plea of guilty of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [4]). We reject defendant's contention that the waiver of the right to appeal is invalid. We conclude that "[Supreme] Court did not improperly conflate the waiver of the right to appeal with those rights automatically forfeited by a guilty plea" (*People v Bentley*, 63 AD3d 1624, 1625, *lv denied* 13 NY3d 742; *see People v Bradshaw*, 18 NY3d 257, 264; *People v Lopez*, 6 NY3d 248, 256), and that the court engaged defendant "in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Burt*, 101 AD3d 1729, 1730, *lv denied* 20 NY3d 1060 [internal quotation marks omitted]).

Defendant's contention that the court erred in denying his motion to withdraw the plea survives his valid waiver of the right to appeal (*see People v Montgomery*, 63 AD3d 1635, 1635-1636, *lv denied* 13 NY3d 798), but we conclude that the court properly denied that motion. "The decision to permit a defendant to withdraw a guilty plea rests in the sound discretion of the court" (*People v Smith*, 122 AD3d 1300, 1301-1302, *lv denied* 25 NY3d 1172 [internal quotation marks omitted]; *see People v Frederick*, 45 NY2d 520, 524-525). Here, defendant's claims of coercion are belied by his statements during the plea colloquy (*see People v Merritt*, 115 AD3d 1250, 1251), and we conclude that the guilty plea was knowingly, voluntarily, and intelligently entered (*see People v Fiumefreddo*, 82 NY2d 536, 543). To the extent

that defendant’s contention that he was denied effective assistance of counsel when counsel failed to seek an adjournment of the trial and warned defendant that he faced the maximum sentence if convicted after trial survives his guilty plea and valid waiver of the right to appeal (*see People v Strickland*, 103 AD3d 1178, 1178), we conclude that his contention lacks merit (*see People v Mann*, 32 AD3d 865, 866, *lv denied* 8 NY3d 847).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

8
KA 12-00321
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

SHAWN OBBAGY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

JEANNIE D. MICHALSKI, CONFLICT DEFENDER, GENESEO, FOR DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered October 20, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal mischief in the third degree.

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

Same memorandum as in *People v Obbagy* ([appeal No. 1] ___ AD3d ___ [Feb. 3, 2017]).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

10
CA 16-01146
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, AND LINDLEY, JJ.

THE CANANDAIGUA NATIONAL BANK AND TRUST COMPANY,
PLAINTIFF-RESPONDENT,

V ORDER

MATTHEW PALMER, ALSO KNOWN AS MATTHEW J.
PALMER, PALMER AUTOMOTIVE, INC.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

CHENEY & BLAIR, LLP, GENEVA (DAVID D. BENZ OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

HARTER SECREST & EMERY LLP, ROCHESTER (JESSICA A. MYERS OF COUNSEL),
FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered August 24, 2015. The order granted plaintiff’s motion for summary judgment.

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

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

11
CA 15-01607
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, AND LINDLEY, JJ.

INTEGRATED VOICE & DATA SYSTEMS, INC., DOING BUSINESS AS COMTEL, AND COMTEL VOIP, INC., PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MICHAEL GROH, FRANK LEWANDOWSKI AND AT TECHNOLOGY, INC., DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

CHIACCHIA & FLEMING, LLP, HAMBURG (LISA A. POCH OF COUNSEL), FOR DEFENDANT-APPELLANT MICHAEL GROH.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (KEVIN BURKE OF COUNSEL), FOR DEFENDANT-APPELLANT FRANK LEWANDOWSKI.

SCHRÖDER, JOSEPH & ASSOCIATES, LLP, BUFFALO (LINDA H. JOSEPH OF COUNSEL), FOR DEFENDANT-APPELLANT AT TECHNOLOGY, INC.

KAVINOKY COOK LLP, BUFFALO (KELLY E. GUERIN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered August 3, 2015. The order, among other things, struck defendants' answers, granted a permanent injunction against defendants, and imposed a monetary sanction against defendants.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by reinstating the answers, vacating the permanent injunction, and vacating the monetary sanction imposed against defendant AT Technology, Inc., and as modified the order is affirmed without costs.

Memorandum: Plaintiffs and defendant AT Technology, Inc. (AT) are providers of commercial telecommunications services to businesses in the Buffalo area. The individual defendants, Michael Groh and Frank Lewandowski, are plaintiffs' former employees. Groh resigned from his employment with plaintiffs and accepted a position with AT in 2012, and Lewandowski likewise did so in 2014. Shortly after Lewandowski's departure, plaintiffs commenced this action alleging, inter alia, that while he was in plaintiffs' employ, Lewandowski obtained customer lists and other confidential information from plaintiffs, which he provided to the other defendants. Among the

items of relief sought in the complaint are preliminary and permanent injunctions restraining defendants from obtaining, disclosing or utilizing plaintiffs' confidential and proprietary information, and from soliciting plaintiffs' customers or otherwise interfering with plaintiffs' relationships with their customers.

After defendants failed to respond to plaintiffs' first notice for discovery and inspection, plaintiffs moved to compel production of the requested items. Defendants did not timely respond to the motion, and Supreme Court directed the discovery process to proceed in two phases. When defendants failed to meet the deadline in the Phase Two Order, plaintiffs moved for costs and sanctions. Defendants did not timely respond to that motion, but while the motion was pending, defendants produced the items sought by plaintiffs, with the exception of an electronic device or devices, the existence of which is disputed by the parties. The court nevertheless struck defendants' answers, granted the permanent injunctions sought in the first and second causes of action, and imposed a monetary sanction against defendants collectively.

At the outset, we agree with AT that the court erred in awarding any relief against it for violating the Phase Two Order inasmuch as that order required only the individual defendants to produce the items sought by plaintiffs. We also agree with the individual defendants that the court abused its discretion in striking their answers. "Although the nature and degree of a sanction for a party's failure to comply with discovery generally is a matter reserved to the sound discretion of the trial court, the drastic remedy of striking an answer is inappropriate absent a showing that the failure to comply is willful, contumacious, or in bad faith" (*Green v Kingdom Garage Corp.*, 34 AD3d 1373, 1374). Plaintiffs made no such showing here. Indeed, apart from one or more disputed items, the individual defendants fully complied, albeit tardily, with the Phase Two Order while the motion for sanctions was pending. In addition, while those defendants engaged in dilatory conduct that prompted plaintiffs to seek the court's assistance on more than one occasion, the drastic sanction of striking their answers "provided plaintiff[s] with more relief than was necessary to protect [their] interests" (*Gaylord Bros. v RND Co.*, 134 AD2d 848, 849).

Striking defendants' answers unconditionally, moreover, was more relief than plaintiffs sought in their motion. Plaintiffs' motion for costs and sanctions, inter alia, requested an order striking the answers, "provided, however, that Plaintiffs request that this part of the motion for relief be held in abeyance pending further proceedings in this matter." In the event of defendants' continued failure, inter alia, to comply with the court's directives, plaintiffs requested that the court "immediately schedule a hearing on Plaintiffs' request for this relief," i.e., striking the answers.

Inasmuch as the court erred in striking defendants' answers, there was no basis for granting the permanent injunction sought in the first and second causes of action. We therefore modify the order by reinstating the answers, vacating the permanent injunction, and

vacating the monetary sanction imposed against AT.

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

12
CA 15-01608
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, AND LINDLEY, JJ.

INTEGRATED VOICE & DATA SYSTEMS, INC., DOING
BUSINESS AS COMTEL, AND COMTEL VOIP, INC.,
PLAINTIFFS-RESPONDENTS,

V   ORDER

MICHAEL GROH, FRANK LEWANDOWSKI, DEFENDANTS,
AND AT TECHNOLOGY, INC., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

SCHRÖDER, JOSEPH & ASSOCIATES, LLP, BUFFALO (LINDA H. JOSEPH OF COUNSEL), FOR DEFENDANT-APPELLANT AT TECHNOLOGY, INC.

KAVINOKY COOK LLP, BUFFALO (KELLY E. GUERIN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered September 16, 2015. The order, among other things, denied the motion of defendant AT Technology, Inc. for leave to reargue.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984).

Entered: February 3, 2017   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 16-00246
PRESENT: CENTRA, J.P., CARNI, LINDLEY, AND SCUDDER, JJ.

LISA MARIE GUY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ERIC GUY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

JUSTIN S. WHITE, WILLIAMSVILLE, FOR DEFENDANT-APPELLANT.

JOHN P. PIERI, BUFFALO, FOR PLAINTIFF-RESPONDENT.

CHERYL A. ALOI, ATTORNEY FOR THE CHILDREN, BUFFALO.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered August 13, 2015. The order, inter alia, denied the motion of defendant to compel plaintiff to engage in collaborative counseling.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting defendant's motion dated October 8, 2014 to the extent of compelling plaintiff to cooperate with collaborative counseling, and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Plaintiff mother and defendant father entered into a stipulation in October 2011 pursuant to which they agreed that the mother would have sole custody of their two daughters, and the father would have two hours a week of supervised visitation, with the eventual goal of unsupervised visitation. The parties stipulated that the parties and the children would all engage in individual counseling, and at some point they would engage in family therapy with one professional. The parties stipulated that the mother's positive support for the father's parental role, and the mother's participation in the therapy, were essential for any meaningful progress to occur. The father began supervised visits but they ended when, according to the father, the children decided they no longer wanted to go on the visits. The father sought to have the parties engage in family counseling, which the mother resisted. It appears that Supreme Court ordered the parties to engage in such counseling with a named counselor, but after one visit with the counselor, the children refused to attend any more sessions, and the mother cancelled the next scheduled appointment with the counselor and said that the children wanted to talk with the judge. By notice of motion dated October 8, 2014, the father moved, inter alia, to compel the mother to cooperate with collaborative counseling and, if the children continued to refuse

to visit with him, to be relieved of his child support obligation. After reading the submissions of the parties and conducting an in camera interview with the children, the court denied the father's motion in its entirety and concluded that "[t]o force the situation" between the father and the children would not be in their best interests. In appeal No. 1, the father appeals from the order denying that motion (hereafter, motion), as well as a separate motion concerning insurance coverage that is not at issue on appeal. In appeal No. 2, the father appeals from a subsequent order granting the mother's application for attorney's fees.

Addressing first appeal No. 1, we begin by repeating the well-settled principle that visitation with a noncustodial parent is presumed to be in a child's best interests (*see Matter of Granger v Misercola*, 21 NY3d 86, 90) and, thus, there is "a rebuttable presumption that a noncustodial parent will be granted visitation" (*Matter of Merkle v Henry*, 133 AD3d 1266, 1268). That presumption may be rebutted when it is shown, by a preponderance of the evidence, that visitation would be harmful to the child (*see Granger*, 21 NY3d at 92; *Matter of Tuttle v Mateo* [appeal No. 3], 121 AD3d 1602, 1604). Here, the father has not had even supervised visitation with the children for several years. Although the children expressed their wish not to have visitation with the father, there is no showing on this record that collaborative counseling or even supervised visitation would be harmful to them or contrary to their best interests (*see Bubbins v Bubbins*, 136 AD2d 672, 672). The record establishes that the mother has made little to no effort to encourage the relationship between the father and the children, and the father submitted evidence supporting an inference that the mother was alienating the children from the father. In denying the father's motion in its entirety, the court improperly allowed the children essentially to dictate whether visits would ever occur with the father (*see William-Torand v Torand*, 73 AD3d 605, 606; *Matter of Casolari v Zambuto*, 1 AD3d 1031, 1031; *Sturm v Lyding*, 96 AD2d 731, 731-732).

We therefore modify the order in appeal No. 1 by granting the father's motion to the extent that he seeks to compel the mother to cooperate with collaborative counseling, and we remit the matter to Supreme Court for further proceedings before a different justice to fashion an appropriate order consistent with this decision, including collaborative counseling and supervised visitation. In the event that the mother or the children continue to refuse to participate in collaborative counseling or attend visitation, the court should consider whether an order of contempt or an order relieving the father of his child support obligation with respect to the older child would be appropriate (*see Labanowski v Labanowski*, 4 AD3d 690, 691, 694-696).

With respect to appeal No. 2, we agree with the father that the court abused its discretion in granting the mother's application for attorney's fees pursuant to Domestic Relations Law § 237 (b). The father was the less monied spouse and, contrary to the conclusion of the court, his motion had merit (*see generally Johnson v Chapin*, 12

NY3d 461, 467, *rearg denied* 13 NY3d 888; *Wilson v Wilson*, 128 AD3d 1326, 1327).

Frances E. Cafarell

Entered: February 3, 2017

Clerk of the Court

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

14
CA 16-00247
PRESENT: CENTRA, J.P., CARNI, LINDLEY, AND SCUDDER, JJ.

LISA MARIE GUY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ERIC GUY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

JUSTIN S. WHITE, WILLIAMSVILLE, FOR DEFENDANT-APPELLANT.

JOHN P. PIERI, BUFFALO, FOR PLAINTIFF-RESPONDENT.

CHERYL A. ALOI, ATTORNEY FOR THE CHILDREN, BUFFALO.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered October 6, 2015. The order directed defendant to pay attorney’s fees of $13,958.26 to counsel for plaintiff.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, and plaintiff’s application for attorney’s fees is denied.

Same memorandum as in *Guy v Guy* ([appeal No. 1] ___ AD3d ___ [Feb. 3, 2017]).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

15
CA 15-01281
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, AND LINDLEY, JJ.

IN THE MATTER OF THE ADOPTION OF A CHILD
WHOSE FIRST NAME IS ANASTASIA.
-- ORDER
MARK A.B., PETITIONER-RESPONDENT;

AARON I., RESPONDENT-APPELLANT.

KATHRYN FRIEDMAN, BUFFALO, FOR RESPONDENT-APPELLANT.

V. BRUCE CHAMBERS, NEWARK, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Surrogate’s Court, Wayne County (Daniel G. Barrett, S.), entered June 4, 2015. The order, among other things, adjudged that the adoption of the subject child may proceed without respondent’s consent.

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

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

17

CA 16-01028

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

JAMES SAVAGE, PLAINTIFF-APPELLANT,

V ORDER

EDWARD D. HANCOCK, DEFENDANT-RESPONDENT,
LOURDES MARCIAL, ET AL., DEFENDANTS.

MORRIS & MORRIS, ROCHESTER (DEBORAH M. FIELD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PETRONE & PETRONE, P.C., UTICA (MARK J. HALPIN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

LOURDES MARCIAL, DEFENDANT PRO SE.

Appeal from an order of the Supreme Court, Monroe County (William K. Taylor, J.), entered February 24, 2016. The order denied the motion of plaintiff for partial summary judgment on liability pursuant to Labor Law § 240 (1) against defendant Edward D. Hancock.

Now, upon the stipulation of discontinuance signed by defendant Lourdes Marcial on November 1, 2016, and by the attorneys for the parties on October 26 and 31, 2016, and filed in the Monroe County Clerk’s Office on November 22, 2016,

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

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

18
CA 16-00682
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, AND LINDLEY, JJ.

CHETI CASELLA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

AJAY GLASS & MIRROR CO., INC., PEERLESS
PRODUCTS, INC., DEFENDANTS-RESPONDENTS,
THE PIKE COMPANY, INC., ROCHESTER GLASS, INC.,
AND JHC SALES CORP., DEFENDANTS.

MORRIS & MORRIS, ATTORNEYS, ROCHESTER (DEBORAH M. FIELD OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (MICHAEL F. PERLEY OF COUNSEL), FOR
DEFENDANT-RESPONDENT AJAY GLASS & MIRROR CO., INC.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (THOMAS J. SPEYER OF
COUNSEL), FOR DEFENDANT-RESPONDENT PEERLESS PRODUCTS, INC.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered January 4, 2016. The order, among other things, granted the motion of defendant Peerless Products, Inc., and the cross motion of defendant Ajay Glass & Mirror Co., Inc. for summary judgment dismissing plaintiff's second amended complaint and all cross claims against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion of defendant Peerless Products, Inc. and the cross motion of defendant Ajay Glass & Mirror Co., Inc. and reinstating the second amended complaint against them, except insofar as the second amended complaint alleges breach of warranty, and reinstating all cross claims against them, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when the bottom sash of a window that she was attempting to close fell in and struck her. The accident occurred in a classroom at the middle school where plaintiff was employed as a teacher. The window was designed and manufactured by defendant Peerless Products, Inc. (Peerless). Defendant Ajay Glass & Mirror Co., Inc. (Ajay) purchased the window from Peerless and installed it pursuant to a contract with the general contractor on a remodeling project at the school that included the installation of windows in the classroom where plaintiff was injured.

Plaintiff alleged, inter alia, that the window was defectively designed because the tilt latches, safety devices that were intended to prevent the window from tipping inward, were prone to failure. Plaintiff further alleged that the warnings provided with the windows were inadequate and that Peerless and Ajay were negligent in failing to remedy the hazard arising from the failure of the tilt latches after they had been apprised of ongoing problems with windows of the same model tipping inward.

Supreme Court erred in granting the motion of Peerless and the cross motion of Ajay seeking summary judgment dismissing the second amended complaint and cross claims against them except insofar as the second amended complaint alleges breach of warranty, inasmuch as plaintiff stipulated to withdraw "all causes of action based in breach of warranty." We therefore modify the order accordingly. At the outset, we reject the contention of Ajay that it established as a matter of law that it is not subject to liability for plaintiff's injuries because its role in the remodeling project was limited to that of an installer. To the contrary, Ajay's own submissions establish that its subcontract for that project entailed not only installing the windows, but purchasing them from Peerless and selling them to the general contractor, and that the purchase and sale of windows was a regular part of Ajay's business (*see Perazone v Sears, Roebuck & Co.*, 128 AD2d 15, 20-21). Thus, Ajay failed to establish that it was not part of the chain of distribution and thus may not be held strictly liable for the injuries to plaintiff allegedly resulting from the defectively designed window (*see generally Hoover v New Holland N. Am., Inc.*, 23 NY3d 41, 53-54; *Sprung v MTR Ravensburg*, 99 NY2d 468, 472-473). Peerless failed to meet its burden of establishing that the window was not defectively designed, inasmuch as its own submissions raise triable issues of fact whether, inter alia, the tilt latches on the window model that injured plaintiff were prone to failure. In any event, even assuming, arguendo, that Peerless met its burden, the affidavit of plaintiff's expert raises triable issues of fact whether the window was defectively designed (*see Fronckowiak v King-Kong Mfg. Co.*, 289 AD2d 1054, 1055).

Inasmuch as Peerless and Ajay failed to establish that the window was not defective at the time it was manufactured and sold, they cannot meet their burden of establishing that the window was rendered unsafe by subsequent modifications (*see Hoover*, 23 NY3d at 56). They also failed to meet their burden of establishing their entitlement to judgment with respect to plaintiff's strict liability failure to warn claim, because they failed to establish whether any warnings concerning the failure of the tilt latches to engage were provided to anyone at the school (*see Belsinger v M&M Bowling & Trophy Supplies, Inc.*, 108 AD3d 1041, 1043). Finally, the court erred in granting those parts of the motion and cross motion seeking dismissal of the negligent failure to warn claim, inasmuch as the submissions of Peerless and Ajay included evidence that they were each aware, prior to plaintiff's accident, that the window model at issue had caused injury by tilting inward, thus raising an issue of fact whether they were aware that the window posed a danger without a warning (*see generally Lancaster Silo & Block Co. v Northern Propane Gas Co.*, 75

AD2d 55, 63-64).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

19
CA 16-00868
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, AND LINDLEY, JJ.

DOUGLAS J. DANNER AND DONNA L. DANNER,
PLAINTIFFS-RESPONDENTS,

V — MEMORANDUM AND ORDER

RAYMOND J. CAMPBELL, DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AARON M. ADOFF OF COUNSEL), FOR DEFENDANT-APPELLANT.

VINAL & VINAL, P.C., BUFFALO (GREGG S. MAXWELL OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered November 9, 2015. The order granted the motion of plaintiffs to set aside a verdict and directed a new trial on liability.

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

Memorandum: Defendant appeals from an order granting plaintiffs' motion to set aside the jury verdict as against the weight of the evidence and ordering a new trial. We affirm. "A motion to set aside a jury verdict as against the weight of the evidence . . . . should not be granted 'unless the preponderance of the evidence in favor of the moving party is so great that the verdict could not have been reached upon any fair interpretation of the evidence' " (*Ruddock v Happell*, 307 AD2d 719, 720, quoting *Dannick v County of Onondaga*, 191 AD2d 963, 964; *see Lolik v Big V Supermarkets*, 86 NY2d 744, 746; *McMillian v Burden*, 136 AD3d 1342, 1343). "[T]he question whether a verdict is against the weight of the evidence involves what is in large part a discretionary balancing of many factors" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499). We agree with Supreme Court that the jury's determination finding plaintiff Douglas J. Danner 75% at fault for the accident and defendant only 25% at fault is against the weight of the evidence (*see Bonds v Laidlaw Tr., Inc.*, 61 AD3d 1345, 1346).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

20
CA 16-00334
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, AND LINDLEY, JJ.

SWORMVILLE FIRE COMPANY, INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

K2M ARCHITECTS P.C., DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

HARTER, SECREST & EMERY LLP, ROCHESTER (MICHAEL A. DAMIA OF COUNSEL), FOR DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AMANDA L. MACHACEK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered April 21, 2015. The order, insofar as appealed from, granted in part plaintiff's motion for partial summary judgment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and plaintiff's motion is denied in its entirety.

Memorandum: Plaintiff commenced this action alleging, among other things, that K2M Architects, P.C. (defendant) breached its contract to provide professional architectural services to plaintiff by improperly designing various features of plaintiff's new fire station. On appeal, defendant contends that Supreme Court erred in granting that part of plaintiff's motion seeking partial summary judgment against defendant for breach of contract as a result of its failure to design a fire wall for the fire station that complied with the requirements of the 2002 New York State Building Code (Code). We agree with defendant that the court should have denied plaintiff's motion in its entirety, based upon plaintiff's failure to meet its initial burden of establishing its entitlement to judgment as a matter of law (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Although plaintiff established that its expert was qualified to render the opinions set forth in his affidavit (*see Matott v Ward*, 48 NY2d 455, 459; *Blandin v Marathon Equip. Co.*, 9 AD3d 574, 575), he failed to support his conclusory assertion that a fire wall was required with citation to applicable provisions of the Code and otherwise merely speculated with respect to whether the designed wall was required to comply with the provisions governing the construction of fire walls (*see Buchholz v Trump 767 Fifth Ave., LLC*, 5 NY3d 1, 8-9; *Igbodudu-Edwards v Board of Mgrs. of the Parkchester N. Condominium*,

Inc., 105 AD3d 448, 449; *Fitzgerald v Sears, Roebuck & Co.*, 17 AD3d 522, 523). Even assuming, arguendo, that plaintiff met its initial burden, we nonetheless conclude that defendant raised triable issues of fact sufficient to defeat the motion by submitting the affidavit of its expert (*see generally Zuckerman*, 49 NY2d at 562). The conflicting affidavits of the parties' experts with respect to the applicability of the subject provisions of the Code under the facts of this case and defendant's compliance therewith present issues of credibility that cannot be resolved on a motion for summary judgment (*see Riley v ISS Intl. Serv. Sys.*, 5 AD3d 754, 756; *Slomin v Skaarland Constr. Corp.*, 207 AD2d 639, 641; *see generally Haas v F.F. Thompson Hosp., Inc.*, 86 AD3d 913, 914). In light of our determination, we see no need to address defendant's remaining contention.

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

24
TP 16-00957
PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

IN THE MATTER OF JASON PHILLIPS, PETITIONER,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered June 3, 2016) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated an inmate rule.

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

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

25

KA 12-00685

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CRANDALE FITZPATRICK, DEFENDANT-APPELLANT.

THE GLENNON LAW FIRM, P.C., ROCHESTER (PETER J. GLENNON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered March 21, 2012. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant's contention that the evidence is legally insufficient to support the conviction is not preserved for our review inasmuch as he failed to move for a trial order of dismissal on that ground (*see People v Gray*, 86 NY2d 10, 19). 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 contrary to the weight of the evidence (*see People v Bleakley*, 69 NY2d 490, 495). Finally, the sentence is neither unduly harsh nor severe.

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

27
KA 14-01054
PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LISA E. HENDERSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CARA A. WALDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), entered June 3, 2013. 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 affirmed.

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

28

KA 14-01055

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LISA E. HENDERSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CARA A. WALDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered June 3, 2013. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the third degree.

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

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

29
KA 14-01250
PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHAD L. OWENS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (LINDA M. CAMPBELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered March 21, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). Contrary to defendant’s contention, County Court properly refused to suppress the weapon. The suppression hearing evidence established that, while on routine patrol, the police witness observed defendant walking toward him. The police witness observed a bulge in defendant’s waistband, which he testified was “consistent with somebody concealing a weapon.” When defendant observed the police vehicle operated by the police witness, and the other police vehicles traveling behind it, he covered the bulge with his right hand and turned into an alley, walking at a fast pace. The police witness stopped his vehicle and observed defendant walking quickly in the alley, still holding his waistband. After looking back toward the stopped police vehicle two or three times, defendant began to run. The police witness continued to observe defendant while traveling on a parallel street at a slow rate of speed, and either one or two other police vehicles followed defendant at a distance of 20 to 30 yards. None of the vehicles had its lights or sirens activated. The police witness lost sight of defendant and, when he saw defendant again, defendant ran in front of his vehicle, no longer holding his waistband. A handgun was found in a yard in the area where the police witness lost sight of defendant.

Contrary to defendant’s contention, his action in discarding the

gun was not the result of illegal police conduct (*see People v Brown*, 142 AD3d 1373, 1374-1375). The police "engaged in mere observation, and [were] not in pursuit, when [they] followed defendant . . . [T]he testimony at the suppression hearing established that the officer[s'] conduct was unobtrusive and did not limit defendant's freedom of movement" (*People v Feliciano*, 140 AD3d 1776, 1777; *see People v Rozier*, 143 AD3d 1258, 1259).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

33

KA 08-02281

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

M&M MEDICAL TRANSPORT, INC., DEFENDANT-APPELLANT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (THOMAS B. LITSKY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered September 26, 2008. The judgment convicted defendant, upon a plea of guilty, of grand larceny in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting it, upon its plea of guilty, of grand larceny in the second degree (Penal Law § 155.40 [1]). County Court ordered defendant to pay a fine of $10,000 and $971,267.76 in restitution. We conclude that defendant's challenge to the factual sufficiency of its plea allocution is encompassed by the valid waiver of its right to appeal (*see People v McCrea*, 140 AD3d 1655, 1655, *lv denied* 28 NY3d 933; *People v Oberdorf*, 136 AD3d 1291, 1292, *lv denied* 27 NY3d 1073), and that it is unpreserved for our review in any event (*see People v Lugg*, 108 AD3d 1074, 1075; *see also People v Burney*, 93 AD3d 1334, 1334; *see generally People v Lopez*, 71 NY2d 662, 665). We decline to consider defendant's challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Defendant contends that the criminal action should be dismissed in furtherance of justice but, by pleading guilty, it has forfeited its right to raise that issue on appeal (*see People v Smith*, 100 AD3d 936, 937; *People v Guerra*, 123 AD2d 882, 882; *see also People v Harris*, 15 AD3d 848, 848, *lv denied* 4 NY3d 887), and we likewise decline to consider that contention as a matter of our discretion in the interest of justice (*see* CPL 470.15 [3] [c]). In any event, the valid waiver by defendant of the right to appeal encompasses the contention (*see People v Frazier*, 63 AD3d 1633, 1633, *lv denied* 12 NY3d 925).

We reject defendant's contention that the restitution order is illegal (*see* Penal Law § 60.27 [1]; *see also* § 10.00 [7]; *see*

generally General Construction Law § 37). Defendant's further contentions that the restitution order is excessive and lacks a record basis are encompassed by the valid waiver of the right to appeal inasmuch as the restitution directive was part of the plea bargain (*see People v Short*, 128 AD3d 1414, 1415, *lv denied* 25 NY3d 1208; *People v King*, 20 AD3d 907, 907; *see generally People v Lopez*, 6 NY3d 248, 255-256), and those contentions are not preserved for our review in any event. Defendant waived its right to a restitution hearing in its written plea agreement (*see People v Candalaria*, 128 AD3d 1414, 1414). Moreover, no objection was raised on behalf of defendant, during the plea proceeding or at sentencing, either to the court's alleged failure to follow proper procedures in ordering restitution (*see People v Horne*, 97 NY2d 404, 414 n 3; *People v Callahan*, 80 NY2d 273, 281), or to the specific amount of restitution ultimately directed by the court (*see Horne*, 97 NY2d at 414 n 3; *People v Favreau*, 69 AD3d 1225, 1226; *People v Milazo*, 33 AD3d 1060, 1061, *lv denied* 8 NY3d 883). In any event, we conclude that defendant's promise in its plea agreement to make restitution in the precise amount subsequently ordered by the court, in explicit agreement with the audit conducted by the People with respect to the sum stolen, furnishes an adequate record basis for the court's directive (*see People v Rodwin*, 283 AD2d 242, 242, *lv denied* 96 NY2d 924; *People v Kelsky*, 144 AD2d 386, 387, *lv denied* 73 NY2d 787; *see generally People v Consalvo*, 89 NY2d 140, 145-146). Finally, we conclude that the amount of restitution is not excessive.

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

34

KAH 15-00938

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
JOHN HEMPHILL, PETITIONER-APPELLANT,

V ORDER

BARRY MCCARDLE, SUPERINTENDENT, WATERTOWN
CORRECTIONAL FACILITY AND ANTHONY J. ANNUCCI,
ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT
OF CORRECTIONS AND COMMUNITY SUPERVISION,
RESPONDENTS-RESPONDENTS.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Jefferson County (James P. McClusky, J.), entered March 17, 2015 in a habeas corpus proceeding. The judgment denied the petition.

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

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

35

CA 16-01009

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

RICHARD E. KAPLAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.

RICHARD E. KAPLAN, UTICA, PLAINTIFF-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered March 3, 2016. The order and judgment, among other things, declared that defendant did not violate article XVI, § 1 of the New York State Constitution.

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

Memorandum: Plaintiff, a citizen taxpayer, commenced this declaratory judgment action alleging that defendant State of New York ceded its taxation authority to the Federal government by entering into the Oneida Settlement Agreement (Agreement), thereby violating article XVI, § 1 of the State Constitution. Plaintiff seeks a declaration that the Agreement is null and void and that Executive Law § 11, which incorporates the Agreement, and Indian Law § 16 are unconstitutional. Defendant moved to dismiss the complaint on various grounds, including failure to state a cause of action pursuant to CPLR 3211 (a) (7), and Supreme Court granted the motion. We note at the outset that, "[u]pon a motion to dismiss for failure to state a cause of action, a court may reach the merits of a properly pleaded cause of action for a declaratory judgment where no questions of fact are presented [by the controversy] . . . Under such circumstances, the motion to dismiss the cause of action for failure to state a cause of action should be taken as a motion for a declaration in the defendant's favor and treated accordingly" (*North Oyster Bay Baymen's Assn. v Town of Oyster Bay*, 130 AD3d 885, 890 [internal quotation marks omitted]).

Plaintiff alleges that Section VI B (1-5) of the Agreement violates article XVI of the State Constitution, which prohibits the State from surrendering, suspending or contracting away its power of taxation. Section VI B (1-5) provides that the State will not oppose a future application by the Oneida Indian Nation (Nation) to transfer

to the United States up to 12,366 acres of land to be held in trust pursuant to 25 USC § 5108 (formerly § 465). The land at issue was formerly part of the 300,000-acre reservation, which was established in the 1788 Treaty of Fort Schuyler (*see City of Sherrill, N.Y. v Oneida Indian Nation of N.Y.*, 544 US 197, 203), and which the Nation has reacquired through open-market transactions (*see id.* at 211). In 2008, the United States Secretary of the Interior accepted the transfer into trust of 13,004 acres of reacquired land owned by the Nation, over defendant's objection. We conclude that the court properly declared that Section VI B (1-5) does not violate the State constitutional provision prohibiting defendant from surrendering or contracting away its power of taxation. Indeed, the determination whether to accept additional land owned by the Nation into trust rests solely with the United States Secretary of the Interior, who "must consider, among other things, the [Nation's] need for additional land; 'the purposes for which the land will be used'; 'the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls'; and '[j]urisdictional problems and potential conflicts of land use which may arise' " (*id.* at 221, quoting 25 CFR 151.10 [f]).

To the extent that plaintiff contends that Executive Law § 11 and Indian Law § 16 violate article XVI of the State Constitution, we reject that contention. "[T]here exists a strong presumption of constitutionality which accompanies legislative actions . . . This is not to say, of course, that such actions must always be sustained without question . . . ; they are, however entitled to the benefit of the presumption, and will be sustained absent a clear showing of unconstitutionality" (*Wein v Beame*, 43 NY2d 326, 331 [internal citations omitted]), which plaintiff has not made here.

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

36

TP 16-00819

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

IN THE MATTER OF DANIELLE STEAD, PETITIONER,

V MEMORANDUM AND ORDER

LINDA JOYCE, DIRECTOR, NEW YORK STATE CENTRAL REGISTER FOR CHILD ABUSE AND MALTREATMENT REGISTER, AS PART OF DIVISION OF CHILD WELFARE AND COMMUNITY SERVICES, AND SHEILA POOLE, ACTING COMMISSIONER, NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, RESPONDENTS.

MATTHEW A. ALBERT, BUFFALO, FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (WILLIAM E. STORRS OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Diane Y. Devlin, J.], entered May 6, 2016) to review a determination of respondents. The determination denied petitioner's request that an indicated report of maltreatment be amended to unfounded.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding to review a determination made after a fair hearing that, inter alia, denied her request to amend an indicated report of maltreatment to an unfounded report and to seal it (*see* Social Services Law § 422 [8] [a] [v]; [c] [ii]).

We reject petitioner's contention that the New York State Office of Children and Family Services (OCFS) failed to sustain its burden at the fair hearing of establishing that petitioner committed an act of maltreatment and that such maltreatment was relevant and reasonably related to childcare employment. "It is well established that our review is limited to whether the determination to deny the request to amend and seal the [indicated] report is supported by substantial evidence in the record" (*Matter of Kordasiewicz v Erie County Dept. of Social Servs.*, 119 AD3d 1425, 1426; *see Matter of Dawn M. v New York State Cent. Register of Child Abuse & Maltreatment*, 138 AD3d 1492, 1493; *Matter of Pitts v New York State Off. of Children & Family Servs.*, 128 AD3d 1394, 1395). Substantial evidence is " 'such

relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact' " (*Kordasiewicz*, 119 AD3d at 1426, quoting *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180; *see Matter of Hattie G. v Monroe County Dept. of Social Servs., Children's Servs. Unit*, 48 AD3d 1292, 1293). "To establish maltreatment, the agency was required to show by a fair preponderance of the evidence that the physical, mental or emotional condition of the child had been impaired or was in imminent danger of becoming impaired because of a failure by petitioner to exercise a minimum degree of care in providing the child with appropriate supervision or guardianship" (*Matter of Gerald HH. v Carrion*, 130 AD3d 1174, 1175; *see* Social Services Law § 412 [2] [a]; Family Ct Act § 1012 [f] [i] [B]; 18 NYCRR 432.1 [b] [1] [ii]; *Matter of Brian M. v New York State Off. of Children & Family Servs.*, 98 AD3d 743, 743).

The evidence at the hearing established that petitioner took several children to eat lunch at a busy fast-food restaurant that had a play area, and that one of those children left the play area and remained out of petitioner's sight for several minutes. The evidence, including the video recording of the incident, establishes that petitioner was unaware that the child had wandered away until a restaurant employee returned the child to her. Thus, the Administrative Law Judge's "determination that [OCFS] established by a fair preponderance of the evidence at the fair hearing that petitioner maltreated the subject child[] and that such maltreatment was relevant and reasonably related to childcare employment is supported by substantial evidence" (*Dawn M.*, 138 AD3d at 1494; *see generally Matter of Cheryl Z. v Carrion*, 119 AD3d 1109, 1111; *Matter of Archer v Carrion*, 117 AD3d 733, 734-735; *Matter of Ojofeitimi v New York State Off. of Children & Family Servs.*, 89 AD3d 854, 855; *Matter of Bullock v State of N.Y. Dept. of Social Servs.*, 248 AD2d 380, 382).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

37
TP 16-01253
PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

IN THE MATTER OF TODD SPRING, PETITIONER,

V   MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF HEALTH AND
HOWARD A. ZUCKER, M.D., J.D., AS COMMISSIONER
OF NEW YORK STATE DEPARTMENT OF HEALTH,
RESPONDENTS.

CULLEY, MARKS, TANENBAUM & PEZZULO, LLP, ROCHESTER (GLENN E. PEZZULO OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [Thomas A. Stander, J.], entered April 26, 2016) to review a determination of respondents. The determination found that petitioner had committed an act of mistreatment in violation of 10 NYCRR 81.1 (b) and that petitioner engaged in retaliation in violation of Public Health Law § 2803-d (8) and 10 NYCRR 81.8.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding to challenge the determination of the Commissioner of the New York State Department of Health, who concluded that petitioner committed an act of mistreatment in violation of 10 NYCRR 81.1 (b) and engaged in retaliation in violation of Public Health Law § 2803-d (8) and 10 NYCRR 81.8. Our review of the determination, which adopted the findings of the Administrative Law Judge (ALJ) who conducted a hearing, is limited to the issue whether the determination, based upon a preponderance of the evidence, is supported by substantial evidence (*see Matter of King v New York State Dept. of Health*, 295 AD2d 743, 743). "The assessment of credibility by the ALJ . . . is 'unassailable,' and the determination must be confirmed if the testimony credited by the ALJ provides substantial evidence to support it" (*Matter of Monti v New York State Div. of Human Rights*, 132 AD3d 1263, 1264). In view of that standard, we conclude that substantial evidence supports the determination that petitioner committed an act of mistreatment and engaged in retaliation. We have examined

petitioner's remaining contentions and conclude that they are without merit.

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

38
OP 16-00837

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

IN THE MATTER OF MICHAEL A. GURNETT, PETITIONER,

V MEMORANDUM AND ORDER

JAMES F. BARGNESI, ACTING NIAGARA COUNTY COURT JUDGE, IN HIS CAPACITY AS LICENSING OFFICER FOR PISTOL PERMITS IN NIAGARA COUNTY AND INDIVIDUALLY, RESPONDENT.

JAMES OSTROWSKI, BUFFALO, FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to annul a determination of respondent. The determination revoked the pistol permit of petitioner.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination revoking his pistol permit. We reject the contention of petitioner that he was denied his right to due process of law. "It is well settled that a formal hearing is not required prior to the revocation of a pistol permit [where, as here,] the licensee is given notice of the charges and has an adequate opportunity to submit proof in response" (*Matter of Chomyn v Boller*, 137 AD3d 1705, 1706, *appeal dismissed* 27 NY3d 1119, *lv denied* 28 NY3d 908 [internal quotation marks omitted]; *see Matter of Cuda v Dwyer*, 107 AD3d 1409, 1409-1410; *Matter of Strom v Erie County Pistol Permit Dept.*, 6 AD3d 1110, 1111). Contrary to petitioner's further contention, we conclude that the determination is neither arbitrary and capricious nor an abuse of discretion (*see Chomyn*, 137 AD3d at 1706). "It is well established that '[a licensing officer] is vested with broad discretion in determining whether to revoke a pistol permit and may do so for any good cause,' including 'a finding that the petitioner lack[s] the essential temperament or character which should be present in one entrusted with a dangerous [weapon] . . . , or that he or she does not possess the maturity, prudence, carefulness, good character, temperament, demeanor and judgment necessary to have a pistol permit' " (*Matter of Peters v Randall*, 111

AD3d 1391, 1392; *see Chomyn*, 137 AD3d at 1706). Here, the record before the licensing officer demonstrated that petitioner had been involved in several verbal or physical altercations with his then wife, that the second of such altercations had resulted in petitioner's being charged with harassment in the second degree and the issuance of a temporary order of protection, and that the third had occurred in violation of that temporary order of protection, giving rise to a charge of criminal contempt. Further, the transcript of petitioner's appearance before the licencing officer supports the determination that the petitioner lacked credibility and was not forthcoming about his history of mental health treatment and his apparently ongoing treatment for depression. Finally, to the extent that the contention is properly before us, we conclude that petitioner's contention that the revocation of his pistol permit violates his rights under the Second and Fourteenth Amendments of the United States Constitution is without merit (*see Chomyn*, 137 AD3d at 1706-1707; *Cuda*, 107 AD3d at 1410; *see also Kachalsky v County of Westchester*, 701 F3d 81, 93-101, *cert denied* ___ US ___, 133 S Ct 1806).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

39

TP 16-00864

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

IN THE MATTER OF KATE LI, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS,
RESPONDENT-PETITIONER,
AND HOUSING OPPORTUNITIES MADE EQUAL, INC.,
(H.O.M.E.), RESPONDENT.

JOHN J. LAVIN, BUFFALO, FOR PETITIONER-RESPONDENT.

CAROLINE J. DOWNEY, GENERAL COUNSEL, BRONX (MICHAEL K. SWIRSKY OF COUNSEL), FOR RESPONDENT-PETITIONER NEW YORK STATE DIVISION OF HUMAN RIGHTS.

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court, Erie County [Diane Y. Devlin, J.], entered May 17, 2016) to review a determination of respondent-petitioner New York State Division of Human Rights. The determination found that petitioner-respondent had engaged in unlawful discriminatory practices related to housing and ordered petitioner-respondent to pay money damages and a civil fine and penalty.

It is hereby ORDERED that the determination is unanimously confirmed without costs, the petition is dismissed, the cross petition is granted, and petitioner-respondent is directed to pay respondent Housing Opportunities Made Equal, Inc., the sum of $3,396.50 for economic damages, with interest at a rate of 9% per annum, commencing February 24, 2016, and the sum of $8,000 for punitive damages, with interest at a rate of 9% per annum, commencing February 24, 2016; and to pay the Comptroller of the State of New York the sum of $3,000 for a civil fine and penalty, with interest at the rate of 9% per annum, commencing February 24, 2016.

Memorandum: Petitioner-respondent (petitioner) commenced this proceeding pursuant to Executive Law § 298 seeking to annul the determination of the Commissioner of respondent-petitioner New York State Division of Human Rights (respondent) that she engaged in unlawful discriminatory practices with respect to housing. We agree with respondent that its determination that petitioner discriminated against respondent Housing Opportunities Made Equal, Inc., (complainant) based on familial status is supported by substantial evidence (*see* § 296 [5] [a] [1]; *Matter of Sherwood Terrace Apts. v*

New York State Div. of Human Rights, 61 AD3d 1333, 1334). Contrary to petitioner's contention, the award of $8,000 in punitive damages to complainant is both appropriate "as a deterrent against housing discrimination" and "is supported by the evidence" herein (*Matter of Woehrling v New York State Div. of Human Rights*, 56 AD3d 1304, 1305; *see Sherwood Terrace Apts.*, 61 AD3d at 1334-1335; *see generally* § 297 [4] [c] [iv]). Contrary to petitioner's further contention that the record lacks a sufficient basis for the imposition of a $3,000 civil fine, we conclude that the fine was properly imposed upon respondent's determination that petitioner "committed an unlawful discriminatory act" (§ 297 [4] [c] [vi]).

Entered: February 3, 2017

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 15-01836

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

IN THE MATTER OF ANGEL SANTIAGO,
PETITIONER-APPELLANT,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK
STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT-RESPONDENT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered September 22, 2015 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

44
TP 16-00843

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

IN THE MATTER OF LISA LAUREN, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, RESPONDENT.

LAW OFFICE OF SAMUEL R. MISERENDINO, ESQ., BUFFALO (SAMUEL R. MISERENDINO OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (LAURA ETLINGER OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [James H. Dillon, J.], entered May 13, 2016) to review a determination of respondent. The determination denied petitioner's request that an indicated report of maltreatment be amended to unfounded.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul a determination made after a fair hearing that denied her request to amend an indicated report of maltreatment with respect to a foster child to an unfounded report, and to seal it (*see* Social Services Law § 422 [8] [a] [v]; [c] [ii]). Petitioner contends that the determination that she committed an act of maltreatment and that such maltreatment was relevant and reasonably related to childcare is not supported by substantial evidence. We reject that contention. " 'It is well established that our review is limited to whether the determination to deny the request to amend and seal the [indicated] report is supported by substantial evidence in the record' " (*Matter of Dawn M. v New York State Cent. Register of Child Abuse & Maltreatment*, 138 AD3d 1492, 1493; *see Matter of Theresa WW. v New York State Off. of Children & Family Servs.*, 123 AD3d 1174, 1175). "Substantial evidence is such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact . . . [,] [and] hearsay evidence alone, if it is sufficiently reliable and probative, may constitute sufficient evidence to support a determination" (*Dawn M.*, 138 AD3d at 1493 [internal quotation marks omitted]; *see Matter of Bounds v Village of Clifton Springs Zoning Bd. of Appeals*, 137 AD3d 1759, 1760). "To establish maltreatment, the

agency was required to show by a fair preponderance of the evidence that the physical, mental or emotional condition of the child had been impaired or was in imminent danger of becoming impaired because of a failure by petitioner to exercise a minimum degree of care in providing the child with appropriate supervision or guardianship" (*Matter of Gerald HH. v Carrion*, 130 AD3d 1174, 1175; *see* 18 NYCRR 432.1 [b] [1] [ii]). If there is substantial evidence in the record supporting the administrative agency's determination, we "cannot substitute [our] own judgment for that of the administrative agency, even if a contrary result is viable" (*Matter of Danielle G. v Schauseil*, 292 AD2d 853, 854; *see Matter of Fermin-Perea v Swarts*, 95 AD3d 439, 440). Upon our review of the testimony and the evidence presented at the fair hearing, we conclude that the determination "that petitioner maltreated the subject child[] and that such maltreatment was relevant and reasonably related to childcare . . . is supported by substantial evidence" (*Dawn M.*, 138 AD3d at 1494).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

45
CA 16-00938
PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

ASHLEY B. JONES, PLAINTIFF-APPELLANT,

V ORDER

ERIC R. SWEDE, DEFENDANT,
AND DARRYLE R. SWEDE, DEFENDANT-RESPONDENT.

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

BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Wyoming County (Mark J. Grisanti, A.J.), entered August 12, 2015. The order and judgment granted the motion of defendant Darryle R. Swede for summary judgment and dismissed the complaint against him.

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

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

47
TP 16-01143
PRESENT: WHALEN, P.J., SMITH, PERADOTTO, DEJOSEPH, AND CURRAN, JJ.

IN THE MATTER OF PATRICK JEANTY, PETITIONER,

V MEMORANDUM AND ORDER

HAROLD GRAHAM, SUPERINTENDENT, AUBURN
CORRECTIONAL FACILITY, RESPONDENT.

PATRICK JEANTY, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Thomas G. Leone, A.J.], entered June 27, 2016) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by annulling those parts of the determination finding that petitioner violated inmate rules 107.10 (7 NYCRR 270.2 [B] [8] [i]) and 107.11 (7 NYCRR 270.2 [B] [8] [ii]), and as modified the determination is confirmed without costs, and respondent is directed to expunge from petitioner's institutional record all references to the violation of those inmate rules.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier II disciplinary hearing, that he violated various inmate rules. As respondent correctly concedes, those parts of the determination finding that petitioner violated inmate rules 107.10 (7 NYCRR 270.2 [B] [8] [i] [interference with employee]) and 107.11 (7 NYCRR 270.2 [B] [8] [ii] [harassment]) are not supported by substantial evidence. We therefore modify the determination and grant the petition in part by annulling those parts of the determination finding that petitioner violated those inmate rules, and we direct respondent to expunge from petitioner's institutional record all references to the violation of those rules. "Because the penalty has already been served and there was no recommended loss of good time, there is no need to remit the matter to respondent for reconsideration of the penalty" (*Matter of Reid v Saj*, 119 AD3d 1445, 1446).

Contrary to petitioner's contention, those parts of the determination finding that he violated inmate rules 106.10 (7 NYCRR 270.2 [B] [7] [i] [refusal to obey order]) and 115.10 (7 NYCRR 270.2 [B] [16] [i] [refusal to comply with search or frisk]) are supported by substantial evidence (*see People ex rel. Vega v Smith*, 66 NY2d 130, 139-140; *Matter of Green v Sticht*, 124 AD3d 1338, 1339, *lv denied* 26 NY3d 906; *cf. Matter of Jones v Fischer*, 139 AD3d 1219, 1219-1220). Petitioner's testimony that he did not commit the alleged violations and that the charges were brought against him in retaliation for an earlier dispute "merely presented an issue of credibility that the Hearing Officer was entitled to resolve against him" (*Green*, 124 AD3d at 1339; *see Matter of Foster v Coughlin*, 76 NY2d 964, 966; *Matter of Maybanks v Goord*, 306 AD2d 839, 840).

We reject petitioner's remaining contentions. "[T]he record does not establish that the Hearing Officer was biased or that the determination flowed from the alleged bias" (*Matter of Trapani v Annucci*, 117 AD3d 1473, 1474 [internal quotation marks omitted]; *see Matter of Barnes v Annucci*, 140 AD3d 1779, 1779), the gaps in the hearing transcript "do not preclude meaningful review of petitioner's contentions" (*Matter of Gray v Kirkpatrick*, 59 AD3d 1092, 1093 [internal quotation marks omitted]; *cf. Matter of Baez v Bezio*, 77 AD3d 745, 746, *lv dismissed* 16 NY3d 752), and petitioner has not established that the Hearing Officer conducted an improper off-the-record investigation (*see generally Matter of Jones v Fischer*, 111 AD3d 1362, 1363). Inasmuch as petitioner failed to contend in his administrative appeal that the Hearing Officer improperly declined to admit a misbehavior report against another inmate in evidence, he did not exhaust his administrative remedies with respect to that contention, and we have no discretionary authority to reach it (*see generally Matter of Sabino v Hulihan*, 105 AD3d 1426, 1426). Finally, even assuming, arguendo, that petitioner's challenge to the determination as arbitrary and capricious was adequately raised in his administrative appeal (*cf. Matter of Colon v Fischer*, 83 AD3d 1500, 1502), we conclude that it lacks merit (*see generally Matter of Johnson v Goord*, 280 AD2d 998, 998).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

48
KA 15-01103
PRESENT: WHALEN, P.J., SMITH, PERADOTTO, DEJOSEPH, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW SYMONDS, DEFENDANT-APPELLANT.

CHARLES J. GREENBERG, AMHERST, FOR DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Livingston County Court (Robert B. Wiggins, J.), entered March 5, 2015. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court erred in granting an upward departure from his presumptive classification as a level one risk. We reject that contention. It is well settled that a court may grant an upward departure from a sex offender's presumptive risk level when the People establish, by clear and convincing evidence (*see* § 168-n [3]; *People v Gillotti*, 23 NY3d 841, 861-862), the existence of "an aggravating or mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the [risk assessment] guidelines" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 4 [2006]; *see People v Shepard*, 103 AD3d 1224, 1224, *lv denied* 21 NY3d 856; *People v Wheeler*, 59 AD3d 1007, 1008, *lv denied* 12 NY3d 711). Here, there is clear and convincing evidence of "defendant's exploitation of his relationship of trust with the victim[ ]" over a period of more than a year (*People v Botindari*, 107 AD3d 1607, 1608), which constituted an aggravating factor of a kind or to a degree not otherwise taken into account by the risk assessment guidelines (*see People v Mantilla*, 70 AD3d 477, 478, *lv denied* 15 NY3d 706; *People v Hill*, 50 AD3d 990, 991, *lv denied* 11 NY3d 701; *People v Ferrer*, 35 AD3d 297, 297, *lv denied* 8 NY3d 807).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

49

KA 14-01058

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V — MEMORANDUM AND ORDER

MICHAEL HAND, DEFENDANT-APPELLANT.

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

VALERIE G. GARDNER, DISTRICT ATTORNEY, PENN YAN (LORA J. TRYON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (W. Patrick Falvey, J.), rendered April 1, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted rape in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted rape in the first degree (Penal Law §§ 110.00, 130.35 [1]). Contrary to defendant's contention, we conclude that the record establishes that County Court "conducted an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Davis*, 129 AD3d 1613, 1613, *lv denied* 26 NY3d 966 [internal quotation marks omitted]), and that "defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256). Contrary to defendant's further contentions, his " 'monosyllabic affirmative responses to questioning by [the c]ourt do not render his [waiver] unknowing and involuntary' " (*People v Harris*, 94 AD3d 1484, 1485, *lv denied* 19 NY3d 961), and the court "was not required to specify during the colloquy which specific claims survive the waiver of the right to appeal" (*People v Rodriguez*, 93 AD3d 1334, 1335, *lv denied* 19 NY3d 966; *see People v Kosty*, 122 AD3d 1408, 1408, *lv denied* 24 NY3d 1220). Defendant's contention that "his plea was not knowing, intelligent and voluntary 'because he did not recite the underlying facts of the crime but simply replied to [the c]ourt's questions with monosyllabic responses is actually a challenge to the factual sufficiency of the plea allocution,' which is encompassed by the valid waiver of the right to appeal" (*People v Simcoe*, 74 AD3d 1858, 1859, *lv denied* 15 NY3d 778). Finally, defendant's valid waiver of the right to appeal

encompasses his challenge to the severity of the sentence (*see Davis*, 129 AD3d at 1615; *see generally Lopez*, 6 NY3d at 255-256).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

50
KA 13-02168
PRESENT: WHALEN, P.J., SMITH, PERADOTTO, DEJOSEPH, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JACQUELINE SELDON, ALSO KNOWN AS JACQUELINE MARJI,
DEFENDANT-APPELLANT.

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

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 August 22, 2013. The judgment convicted defendant, upon her plea of guilty, of criminal sale of a controlled substance in the fifth degree, attempted criminal possession of a weapon in the second degree, criminal sale of a firearm in the third degree and attempted robbery in the first degree.

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

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

52
KA 11-01268
PRESENT: WHALEN, P.J., SMITH, PERADOTTO, DEJOSEPH, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

FREDDERICK D. ARNOLD, 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 (Melchor E. Castro, A.J.), rendered September 3, 2010. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of burglary in the second degree (Penal Law § 140.25 [2]), defendant challenges County Court's ruling excluding, as inadmissible hearsay, a recording of phone calls defendant made from jail arranging for a relative to pick him up from jail. Defendant contends that the calls were nonhearsay evidence of his state of mind, that they were relevant to his claim that the police coerced his confession by promising him that he would be released if he confessed, and that the court's ruling denied him the right to present a defense.

" 'The mere utterance of a statement, without regard to its truth, may indicate circumstantially the state of mind of the hearer or of the declarant' " (*People v Cromwell*, 71 AD3d 414, 415, *lv denied* 15 NY3d 803; *see People v Gibian*, 76 AD3d 583, 584-585, *lv denied* 15 NY3d 920), and we agree with defendant that the calls were admissible as circumstantial evidence of his state of mind, i.e., his alleged belief that he would be released (*see People v Barr*, 60 AD3d 864, 864, *lv denied* 12 NY3d 851; *People v Boyd*, 256 AD2d 350, 350-351; *see generally People v Minor*, 69 NY2d 779, 780). Contrary to the People's contention, defendant's state of mind at the time of the calls was relevant to his defense, and his statements were not mere assertions of past facts irrelevant unless offered to prove the truth of the matter asserted (*cf. People v Reynoso*, 73 NY2d 816, 818-819).

We apply the standard for constitutional error to defendant's

preserved contention that the error denied him the right to present a defense (*see People v Powell*, 27 NY3d 523, 529; *cf. People v Kello*, 96 NY2d 740, 743-744), and we conclude that the error is harmless under that standard, inasmuch as the evidence of guilt is overwhelming and there is no reasonable possibility that the error contributed to defendant's conviction (*see People v Crimmins*, 36 NY2d 230, 237; *Barr*, 60 AD3d at 864-865). Notably, defendant and his witnesses testified that defendant called his cousin from jail and that his cousin and uncle attempted to pick him up in response to that call, and the jury thus heard other evidence of defendant's state of mind (*see People v Starostin*, 265 AD2d 267, 268, *lv denied* 94 NY2d 885; *People v Robles*, 201 AD2d 591, 592, *lv denied* 83 NY2d 876).

Entered: February 3, 2017 Frances E. Cafarell
Clerk of the Court

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

53
KA 13-01197
PRESENT: WHALEN, P.J., SMITH, PERADOTTO, DEJOSEPH, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAYMOND HARRIS, DEFENDANT-APPELLANT.

WILLIAM M. ROTH, UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered March 20, 2013. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the fourth degree and criminal possession of a controlled substance in the seventh degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of criminal possession of a controlled substance in the seventh degree and dismissing count three of the indictment with respect to defendant, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]), and criminal possession of a controlled substance in the seventh degree (§ 220.03). To the extent that defendant may be deemed to challenge the legal sufficiency of the evidence, we conclude that his challenge lacks merit (*see People v Torres*, 68 NY2d 677, 678-679; *see generally People v Bleakley*, 69 NY2d 490, 495). Additionally, 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 Bleakley*, 69 NY2d at 495).

Defendant did not object to the introduction of evidence that he was on parole at the time of the incident and thus failed to preserve for our review his contention that County Court erred in permitting the prosecutor to present that evidence (*see People v Johnson*, 45 AD3d 606, 606, *lv denied* 9 NY3d 1035; *see also People v Ricks*, 49 AD3d 1265, 1266, *lv denied* 10 NY3d 869, *reconsideration denied* 11 NY3d 740). In any event, we reject defendant's contention. Defendant's parole officer testified that defendant resided at the residence in

which the cocaine was found, and that he had previously observed defendant sleeping in the bedroom in which the drugs were discovered by the police. That evidence was highly relevant to the issues at trial, including, in this constructive possession case, whether defendant exercised dominion and control over the bedroom in which the drugs were found. Evidence that a defendant is on parole is admissible where, as here, it is relevant to the issues at trial and its probative value exceeds its prejudicial effect (*see generally People v Scarver*, 121 AD3d 1539, 1540, *lv denied* 24 NY3d 1123; *People v Johnson*, 94 AD3d 1144, 1145, *lv denied* 19 NY3d 997; *People v Pryor*, 48 AD3d 1217, 1217-1218, *lv denied* 10 NY3d 868). In addition, the court minimized any prejudice to defendant by refusing to admit any evidence detailing the specific crime of which defendant was convicted (*cf. People v Dowdell*, 133 AD3d 1345, 1345-1346), and by giving prompt cautionary instructions to the jury (*see Johnson*, 45 AD3d at 606; *People v Jones*, 276 AD2d 292, 292, *lv denied* 95 NY2d 965; *see generally People v Kims*, 24 NY3d 422, 439).

Defendant further contends that he was denied effective assistance of counsel by a series of purported errors by his trial attorney. We reject that contention. With respect to defendant's contention that trial counsel was ineffective in failing to object to the testimony of defendant's parole officer, it is well settled that "[a] defendant is not denied effective assistance of trial counsel merely because counsel does not make a motion or argument that has little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702; *see People v Gray*, 27 NY3d 78, 88; *People v Caban*, 5 NY3d 143, 152). For the reasons discussed above, the court properly admitted the parole officer's testimony, and defense counsel therefore was not ineffective in failing to object to its introduction. Similarly without merit is defendant's contention that counsel was ineffective in failing to request a circumstantial evidence charge. "Defendant's proximity to the cocaine, which was in plain view, constitutes direct evidence of defendant's possession of the cocaine found in the apartment" (*People v Wilson*, 284 AD2d 958, 958, *lv denied* 96 NY2d 943; *see People v Goodrum*, 72 AD3d 1639, 1639, *lv denied* 15 NY3d 773). Because this case involved both direct and circumstantial evidence of guilt, a circumstantial evidence charge was not warranted, and the failure to request such a charge "cannot be said to have constituted ineffective assistance of counsel" (*People v Jones*, 138 AD3d 1144, 1145, *lv denied* 28 NY3d 932; *see People v Way*, 115 AD3d 558, 558-559, *lv denied* 24 NY3d 1048; *see also People v Johnson*, 303 AD2d 830, 836-837, *lv denied* 99 NY2d 655, *reconsideration denied* 100 NY2d 583).

Furthermore, " 'it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations' for defense counsel's allegedly deficient conduct" (*People v Atkins*, 107 AD3d 1465, 1465, *lv denied* 21 NY3d 1040, quoting *People v Rivera*, 71 NY2d 705, 709; *see People v Benevento*, 91 NY2d 708, 712; *People v Hutchings*, 142 AD3d 1292, 1295), and defendant failed to meet that burden with respect to the remainder of the purported failures of counsel raised on appeal. Viewing the evidence, the law and the

circumstances of this case, in totality and as of the time of the representation, and noting in particular that defendant was acquitted of the most serious charge in the indictment (*see People v Adsit*, 125 AD3d 1430, 1431-1432, *lv denied* 25 NY3d 1068), we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Finally, we agree with defendant that the third count of the indictment, charging him with criminal possession of a controlled substance in the seventh degree, must be dismissed as an inclusory concurrent count of the remaining charge of which defendant was convicted (*see* CPL 300.30 [4]; 300.40 [3] [b]; *People v Lee*, 39 NY2d 388, 390; *People v Smith*, 134 AD3d 1568, 1569). We therefore modify the judgment accordingly.

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

54
KA 14-00810
PRESENT: WHALEN, P.J., SMITH, PERADOTTO, DEJOSEPH, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

IRIS RESTO, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (BRADLEY E. KEEM 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 (Thomas J. Miller, J.), rendered February 21, 2014. The judgment convicted defendant, upon a jury verdict, of murder in the first degree, conspiracy in the first degree, criminal solicitation in the first degree, tampering with a witness in the fourth degree (three counts), bribing a witness, intimidating a witness in the second degree, tampering with a witness in the second degree and conspiracy in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of, inter alia, murder in the first degree (Penal Law § 125.27 [1] [a] [vi]; [b]) and three counts of tampering with a witness in the fourth degree (§ 215.10). Defendant contends that she was denied her due process right to an interpreter at arraignment. We conclude, however, that defendant, who was represented by counsel at her arraignment, failed to preserve her contention for our review because she never objected to the absence of an interpreter at that proceeding (*see* CPL 470.05 [2]; *People v Robles*, 86 NY2d 763, 764-765; *People v Garcia-Cruz*, 138 AD3d 1414, 1414, *lv denied* 28 NY3d 929). 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 further contention, any errors related to the manner and extent of the translations made by the court interpreter during jury selection and pretrial discussions were corrected by County Court (*see People v Singleton*, 59 AD3d 1131, 1131, *lv denied* 12 NY3d 859, *reconsideration denied* 13 NY3d 800; *People v Restivo*, 226 AD2d 1106, 1107, *lv denied* 88 NY2d 883). Defendant's contention that she was unable to understand the court interpreter during the remainder of the trial is unpreserved for our review and, in any

event, not supported by the record (*see People v Zhang Wan*, 203 AD2d 499, 499, *lv denied* 83 NY2d 973).

We reject defendant's contention that the court abused its discretion in denying her request for an adjournment to allow defense counsel to engage in a further review of *Rosario* material in preparation for trial. "Although . . . the court's discretion with respect to a request for an adjournment is more narrowly construed when a fundamental right is impacted . . . , it is well settled that '[t]he court's exercise of discretion in denying a request for an adjournment will not be overturned absent a showing of prejudice' " (*People v Peterkin*, 81 AD3d 1358, 1360, *lv denied* 17 NY3d 799; *see People v Spears*, 64 NY2d 698, 699-700). Here, the court denied defendant's request for an adjournment upon determining that the People had provided defense counsel with unredacted copies of the *Rosario* material a week before trial and that defense counsel would be afforded additional time to prepare until the following day after the early completion of jury selection. Defendant has made no showing that she was prejudiced by the court's ruling (*see Peterkin*, 81 AD3d at 1360; *People v Sargent*, 195 AD2d 987, 988, *lv denied* 82 NY2d 808).

We reject defendant's further contention that the court's pretrial *Molineux* ruling constitutes an abuse of discretion. The evidence regarding defendant's drug dealing enterprise was relevant to material issues other than her criminal propensity, inasmuch as it was inextricably intertwined with the victim's murder, tended to establish defendant's motive for procuring the commission of the killing, and provided necessary background information with respect to defendant's relationship with the People's witnesses (*see People v Stevens*, 87 AD3d 754, 756, *lv denied* 18 NY3d 861; *People v Marrero*, 272 AD2d 77, 77, *lv denied* 95 NY2d 855; *People v Zimmerman*, 212 AD2d 821, 821-822, *lv denied* 85 NY2d 945, *reconsideration denied* 86 NY2d 743; *People v Powell*, 157 AD2d 524, 524, *lv denied* 75 NY2d 923). The probative value of that evidence outweighed its potential for prejudice (*see Powell*, 157 AD2d at 525; *see generally People v Alvino*, 71 NY2d 233, 241-242). Any inconsistencies in the testimony regarding the size of defendant's drug dealing enterprise and the precise nature of the victim's alleged infringement upon that enterprise go to the weight of the evidence, not its admissibility (*see generally People v Kims*, 24 NY3d 422, 439; *People v Zarif*, 290 AD2d 401, 402, *lv denied* 98 NY2d 683).

Contrary to defendant's contention, she was not denied a fair trial by the testimony of a former defense attorney, on direct examination by the prosecutor, that he had previously represented defendant in a felony criminal matter in which she was charged with criminal possession of a controlled substance in the third degree. "The court struck that testimony in response to defendant's objection and gave curative instructions that were sufficient to alleviate any prejudice" (*People v Brooks*, 139 AD3d 1391, 1392; *see People v Santiago*, 52 NY2d 865, 866). Defendant's remaining contention with respect to the admission of evidence of alleged uncharged crimes or prior bad acts is not preserved for our review (*see* CPL 470.05 [2];

see generally People v Gray, 86 NY2d 10, 20-21), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant failed to preserve for our review all but one of her present objections to alleged instances of prosecutorial misconduct on summation (*see* CPL 470.05 [2]) and, in any event, we conclude that "[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Cox*, 21 AD3d 1361, 1364, *lv denied* 6 NY3d 753 [internal quotation marks omitted]).

To the extent that defendant preserved for our review her contention that the conviction of murder in the first degree is not supported by legally sufficient evidence (*see Gray*, 86 NY2d at 19), we conclude that it lacks merit. Viewing the evidence in the light most favorable to the People (*see People v Danielson*, 9 NY3d 342, 349), we conclude that, contrary to defendant's contention, the evidence is legally sufficient to establish beyond a reasonable doubt that the gunmen, with whom defendant was acting in concert, caused the victim's death (*see* Penal Law §§ 20.00, 125.27 [1] [a] [vi]). Defendant preserved the remainder of her challenge to the legal sufficiency of the evidence only with respect to the tampering with a witness counts, which arose in connection with a separate trial (*see Gray*, 86 NY2d at 19). Contrary to defendant's contention, viewing the evidence in the light most favorable to the People, we conclude that the evidence is legally sufficient to support the conviction with respect to those counts (*see generally People v Horton*, 24 NY3d 985, 987; *People v Bleakley*, 69 NY2d 490, 495).

Although defendant failed to preserve for our review any further challenge to the legal sufficiency of the evidence, " 'we necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of defendant's challenge regarding the weight of the evidence' " (*People v Stepney*, 93 AD3d 1297, 1298, *lv denied* 19 NY3d 968; *see Danielson*, 9 NY3d at 349-350). We nonetheless conclude that, viewing the evidence in light of the elements of each crime as charged to the jury (*see Danielson*, 9 NY3d at 349), although an acquittal would not have been unreasonable, the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). It is well settled that "[r]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942 [internal quotation marks omitted]), and we perceive no reason to disturb the jury's resolution of those issues in this case. Contrary to defendant's contention, the testimony of the People's witnesses was not incredible as a matter of law, i.e., it was not " 'impossible of belief because it is manifestly untrue, physically impossible, contrary to experience, or self-contradictory' " (*People v Garafolo*, 44 AD2d 86, 88). The testimony of the People's witness was not rendered incredible as a matter of law by the minor inconsistencies in their testimony (*see People v Williams*, 118 AD3d 1295, 1296, *lv denied* 24 NY3d 1090), or by the fact that many of them had criminal histories

and received favorable treatment in exchange for their testimony (*see People v Carr*, 99 AD3d 1173, 1174, *lv denied* 20 NY3d 1010; *People v Manley*, 60 AD3d 870, 870, *lv denied* 12 NY3d 927).

To the extent that defendant's contention that she was denied effective assistance of counsel is based on matters outside the record on appeal, including her assertion that defense counsel failed to investigate and call certain witnesses, it must be raised by way of a motion pursuant to CPL article 440 (*see People v Bradford*, 126 AD3d 1374, 1375, *lv denied* 26 NY3d 926; *People v Kaminski*, 109 AD3d 1186, 1186, *lv denied* 22 NY3d 1088). To the extent that the record permits review of the claims that defendant raises on appeal, we conclude that they are without merit (*see generally People v Caban*, 5 NY3d 143, 152; *People v Baldi*, 54 NY2d 137, 147; *People v Galens*, 111 AD3d 1322, 1322-1323, *lv denied* 22 NY3d 1088).

Defendant failed to preserve for our review her contention that, in sentencing her, the court "penalized [her] for exercising [her] right to a jury trial" (*People v Campbell*, 118 AD3d 1464, 1466, *lv denied* 24 NY3d 959, *reconsideration denied* 24 NY3d 1218). In any event, "[t]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting [her] right to trial" (*id.* [internal quotation marks omitted]). Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

56

CAF 15-01599

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

IN THE MATTER OF ERIC BESHURES,
PETITIONER-RESPONDENT,

V   ORDER

THERESA GIBSON, RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered September 10, 2015 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole legal and physical custody of the subject child and awarded respondent visitation with the subject child.

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

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

57

CAF 15-01261

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

IN THE MATTER OF JACOB R. BELCHER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MONICA A. MORGADO, RESPONDENT-APPELLANT.

CHARLES J. GREENBERG, AMHERST, FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered July 9, 2015 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted custody of the subject child to petitioner.

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, respondent mother appeals from an order, entered after a hearing, that modified a prior order by awarding petitioner father custody of the parties' child. Contrary to the mother's contention, we conclude that the father established a change in circumstances sufficient to warrant an inquiry into whether a change in custody is in the best interests of the child (*see Matter of Elniski v Junker*, 142 AD3d 1392, 1392-1393; *Matter of Schieble v Swantek*, 129 AD3d 1656, 1657). The mother admitted at the hearing that she was arrested for assault in the second degree and spent about two weeks in jail following an incident with her former boyfriend that occurred with the child asleep in the home (*see Matter of Fountain v Fountain*, 130 AD3d 1107, 1107-1108; *Matter of Bell v Raymond*, 67 AD3d 1410, 1411; *see generally Matter of Pecore v Blodgett*, 111 AD3d 1405, 1405-1406, *lv denied* 22 NY3d 864). Even accepting the assertion in the mother's brief that she was sentenced to time served and probation upon pleading guilty to the assault charge subsequent to the custody hearing, we reject her contention that the arrest has "no current bearing" on this proceeding, inasmuch as the underlying incident is plainly relevant to her fitness as a parent (*see generally Matter of Jeker v Weiss*, 77 AD3d 1069, 1072-1073).

Although Family Court should have made explicit findings concerning the best interests of the child, the record is sufficiently complete for us to make our own findings (*see Matter of Howell v*

Lovell, 103 AD3d 1229, 1231; *Matter of Moore v Kazacos*, 89 AD3d 1546, 1546, *lv denied* 18 NY3d 806), and we are satisfied that the award of custody to the father is in the child's best interests in view of the evidence of domestic violence at the mother's home (*see Pecore*, 111 AD3d at 1406; *Matter of Brothers v Chapman*, 83 AD3d 1598, 1599-1600, *lv denied* 17 NY3d 707; *cf. Schieble*, 129 AD3d at 1657). Notably, the court found the mother's testimony that she no longer had any relationship with her former boyfriend to be "not entirely credible," and we perceive no basis for disturbing that credibility determination (*see Matter of Sanchez v Rexhepi*, 138 AD3d 869, 869; *Howell*, 103 AD3d at 1231).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

60
CA 16-01225
PRESENT: WHALEN, P.J., SMITH, PERADOTTO, AND CURRAN, JJ.

JEFFREY SIMPSON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, DEFENDANT-APPELLANT.

ROBERT P. STAMEY, CORPORATION COUNSEL, SYRACUSE (TODD M. LONG OF COUNSEL), FOR DEFENDANT-APPELLANT.

SIDNEY P. COMINSKY, LLC, SYRACUSE (SIDNEY P. COMINSKY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered March 29, 2016. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he tripped and fell on a sidewalk owned and maintained by defendant. We agree with defendant that Supreme Court erred in denying its motion for summary judgment dismissing the complaint. Defendant met its initial burden by establishing that it did not receive prior written notice of the allegedly dangerous or defective condition of the sidewalk as required by its local law (*see Craig v Town of Richmond*, 122 AD3d 1429, 1429; *Benson v City of Tonawanda*, 114 AD3d 1262, 1263; *Davison v City of Buffalo*, 96 AD3d 1516, 1518), and plaintiff does not dispute the absence of prior written notice (*see Craig*, 122 AD3d at 1429; *Sola v Village of Great Neck Plaza*, 115 AD3d 661, 662). The burden thus shifted to plaintiff to demonstrate, as relevant here, that defendant "affirmatively created the defect through an act of negligence . . . 'that immediately result[ed] in the existence of a dangerous condition' " (*Yarborough v City of New York*, 10 NY3d 726, 728; *see Christy v City of Niagara Falls*, 103 AD3d 1234, 1234; *Horan v Town of Tonawanda*, 83 AD3d 1565, 1566-1567). We agree with defendant that plaintiff failed to meet his burden (*see Christy*, 103 AD3d at 1234-1235; *Duffel v City of Syracuse*, 103 AD3d 1235, 1235-1236). Plaintiff failed to present any evidence that the depression in the bricks was present immediately after completion of the work following removal of the temporary traffic pole (*see Duffel*, 103 AD3d at 1236), and it is well settled that the affirmative negligence exception "does not apply to

conditions that develop over time" (*Horan*, 83 AD3d at 1567; *see Christy*, 103 AD3d at 1234-1235; *Davison*, 96 AD3d at 1518).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

61
CA 16-00983
PRESENT: WHALEN, P.J., SMITH, PERADOTTO, DEJOSEPH, AND CURRAN, JJ.

JILL R. WELDUM, PLAINTIFF-RESPONDENT,

V ORDER

SHOPPINGTOWN MALL, LLC, MACERICH MANAGEMENT
COMPANY, SOUTHEAST SERVICE CORPORATION, ALSO
KNOWN AS SSC SERVICE SOLUTIONS,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

GOLDBERG SEGALLA LLP, SYRACUSE (HEATHER ZIMMERMAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS SHOPPINGTOWN MALL, LLC, AND MACERICH MANAGEMENT COMPANY.

BROWN, GRUTTADARO, GAUJEAN AND PRATO, LLC, ROCHESTER (DAVID BROWN OF COUNSEL), FOR DEFENDANT-APPELLANT SOUTHEAST SERVICE CORPORATION, ALSO KNOWN AS SSC SERVICE SOLUTIONS.

SIDNEY P. COMINSKY, LLC, SYRACUSE (SIDNEY P. COMINSKY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered January 11, 2016. The order, insofar as appealed from, denied the motion of defendant Southeast Service Corporation, also known as SSC Service Solutions, for summary judgment dismissing the complaint against it, and denied that part of the motion of defendants Shoppingtown Mall, LLC, Macerich Management Company, Macerich Property Management Company, LLC, and Macerich Niagara LLC seeking summary judgment dismissing the complaint against defendants Shoppingtown Mall, LLC and Macerich Management Company.

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

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

63
CA 16-00028

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

IN THE MATTER OF COUNTY OF ONEIDA,
PETITIONER-PLAINTIFF-RESPONDENT,

V   MEMORANDUM AND ORDER

HOWARD A. ZUCKER, M.D., J.D., AS COMMISSIONER
OF NEW YORK STATE DEPARTMENT OF HEALTH AND NEW
YORK STATE DEPARTMENT OF HEALTH,
RESPONDENTS-DEFENDANTS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-APPELLANTS.

WHITEMAN, OSTERMAN & HANNA LLP, ALBANY (CHRISTOPHER E. BUCKEY OF COUNSEL), FOR PETITIONER-PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered December 7, 2015 in a CPLR article 78 proceeding and declaratory judgment action. The judgment denied the motion of respondents to dismiss petitioner’s first cause of action and directed respondents to pay petitioner’s reimbursement claim in the amount of $251,467.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the second decretal paragraph is vacated, the motion is granted and the first cause of action is dismissed.

Memorandum: Petitioner-plaintiff (petitioner) commenced this combined CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, to compel respondents-defendants (respondents) to pay claims that petitioner submitted to respondents, in which petitioner sought reimbursement for Medicaid expenditures known as overburden expenditures (*see e.g. Matter of County of Chautauqua v Shah*, 126 AD3d 1317, 1317, *affd sub nom. Matter of County of Chemung v Shah*, 28 NY3d 244). In the first cause of action in the petition-complaint (petition), petitioner alleged that respondents failed to act upon a claim within the time limits set forth in 18 NYCRR 601.4, and that respondents therefore had a ministerial duty to pay the claim without regard to its underlying merits. Respondents appeal from a judgment that denied their motion to dismiss the first cause of action and granted petitioner’s request for judgment in its favor on that cause of action. We agree with respondents that Supreme Court erred in denying their motion.

The regulation at issue states that respondents are responsible for examining claims such as the one at issue here, and respondents' "[i]nitial determinations objecting to the allowability of a claim for reimbursement will be made in a timely manner not to exceed 90 days from the time of receipt by [respondents], unless [respondents notify petitioner] that a specified amount of additional time, not to exceed an additional 90 days, is necessary to complete examination of the claim" (18 NYCRR 601.4). In the claim at issue on this appeal, the court concluded that respondents notified petitioner, on the 87th day after receipt of the claim, that they required up to an additional 90 days in which to determine the claim, and then denied it on the 179th day after receiving the claim. The court found that the denial of the claim was untimely because the court interpreted the regulation as mandating that the additional 90 days began to run on the day that petitioner received the notice that respondents required additional time, with the result that the denial was issued 92 days after the notice was received.

It is well settled that "the interpretation given to a regulation by the agency which promulgated it and is responsible for its administration is entitled to deference if that interpretation is not irrational or unreasonable" (*Matter of Gaines v New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 548-549; *see Matter of IG Second Generation Partners L.P. v New York State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 10 NY3d 474, 481). "Put another way, the courts will not disturb an administrative agency's determination unless it lacks any rational basis" (*IG Second Generation Partners L.P.*, 10 NY3d at 481, citing *Matter of Gilman v New York State Div. of Hous. & Community Renewal*, 99 NY2d 144, 149).

Respondents' interpretation of the regulation is that the additional 90 days is added to the initial 90 days so that, upon notifying petitioner that it required additional time in which to determine the claim, respondents had a total of 180 days in which to make the determination. We agree with respondents that their interpretation of the regulation is rational and entitled to deference. There is no indication in the part of the regulation at issue that the additional time began to run upon receipt of notice by petitioner, whereas a subdivision of the same regulation states that "reductions, recoupments or adjustments when made by [respondents] are final and binding when [petitioner] is notified that the reduction, recoupment or adjustment has been or will be made" (18 NYCRR 601.4 [h]). Three other subdivisions contain similar references to receipt of notice by a claimant (*see* 18 NYCRR 601.4 [e], [f], [g]). Regulations are generally subject to the same canons of construction as statutes (*see Matter of ATM One v Landaverde*, 2 NY3d 472, 477). One such canon provides that, " '[w]here a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded' " (*Matter of Town of Riverhead v New York State Bd. of Real Prop. Servs.*, 5 NY3d 36, 42-43). Thus, respondents rationally concluded that, inasmuch as the part of the regulation at issue contains no language supporting the interpretation advanced by petitioner and adopted by the court, that

language was " 'intended to be omitted or excluded' " (*id.* at 43).

Contrary to petitioner's contention, there is no evidence that respondents previously interpreted the regulation in the manner advanced by petitioner. The mere fact that respondents issued their denials prior to the expiration of the full 180 days on three other claims, all decided at the same time, is not evidence that such action was meant to indicate that such a course of action was required, particularly in view of the unique circumstances of those simultaneous denials.

Finally, it is well settled that, "[a]bsent an express limitation upon the power of a particular agency to act after the expiration of the relevant statutory period, the time limits within which an administrative agency must act generally are construed as discretionary" (*Matter of Meyers v Maul*, 249 AD2d 796, 797, *lv denied* 92 NY2d 807). As the Court of Appeals noted, " '[a] rule that rendered every administrative decision void unless it was determined in strict literal compliance with statutory [or regulatory] procedure would not only be impractical but would also fail to recognize the degree to which broader public concerns, not merely the interests of the parties, are affected by administrative proceedings' " (*Matter of Dickinson v Daines*, 15 NY3d 571, 575). Even assuming, arguendo, that the regulatory time limit was exceeded by one or two days, we conclude that the court erred in granting the petition in part and directing respondents to pay a claim that the Court of Appeals has unequivocally stated was extinguished by statute (*see County of Chemung*, 28 NY3d at 256).

Respondents' remaining contentions are academic in light of our determination.

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

67
TP 16-01039
PRESENT: CARNI, J.P., LINDLEY, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

IN THE MATER OF ABDUL ALI KARIM-RASHID,
PETITIONER,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK
STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered June 20, 2016) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

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

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

68

KA 14-01599

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

DEREK A. STORMS, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON 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 (Joseph W. Latham, J.), rendered September 4, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [1]), defendant contends that the orders of protection issued by County Court exceed the limits of the plea bargain and the durational requirements of CPL 530.13 (4) (A) (i) and (ii). Defendant, however, "did not object to the orders of protection at sentencing" and thus did not preserve his contentions for our review (*People v Nieves*, 2 NY3d 310, 315). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]; *People v Cook*, 118 AD3d 1499, 1500, *lv denied* 24 NY3d 959).

Even assuming, arguendo, that defendant's valid waiver of the right to appeal does not encompass his challenge to the severity of the sentence (*see People v Franklin*, 141 AD3d 1103, 1103, *lv denied* 28 NY3d 929; *People v Williams*, 141 AD3d 1109, 1110, *lv denied* 28 NY3d 1032), we nevertheless reject that challenge.

Entered: February 3, 2017   Frances E. Cafarell
                                                             Clerk of the Court

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

72
KA 15-00995
PRESENT: CARNI, J.P., LINDLEY, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V — MEMORANDUM AND ORDER

MARK D. ABBOTT, DEFENDANT-APPELLANT.

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered September 15, 2014. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, as a class E felony.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of felony driving while intoxicated (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i] [A]). Even assuming, arguendo, that defendant did not knowingly and voluntarily waive the right to appeal the severity of the sentence (*see generally People v Maracle*, 19 NY3d 925, 928), we reject defendant's contention that the sentence is unduly harsh and severe.

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

81
CAF 15-00152
PRESENT: CARNI, J.P., LINDLEY, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

IN THE MATTER OF DESIRAE C. HEINSLER,
PETITIONER-APPELLANT,

V — MEMORANDUM AND ORDER

ROSEMARIE SERO, RESPONDENT-RESPONDENT.

IN THE MATTER OF ROSEMARIE SERO,
PETITIONER-RESPONDENT,

V

DESIRAE C. HEINSLER, RESPONDENT-APPELLANT.

KELIANN M. ARGY, ORCHARD PARK, FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

BRIAN P. DEGNAN, BATAVIA, FOR RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT.

JACQUELINE M. GRASSO, ATTORNEY FOR THE CHILDREN, BATAVIA.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered January 8, 2015 in a proceeding pursuant to Family Court Act article 6. The order, among other things, adjudged that Rosemarie Sero shall continue to have sole custody of the subject children.

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

Memorandum: We affirm for reasons stated in the decision at Family Court. We add only that, even assuming, arguendo, that the court erred in admitting in evidence a document concerning the criminal history of petitioner-respondent's husband, we conclude that the error is harmless "because the record otherwise contains ample admissible evidence to support the court's determination" (*Matter of Matthews v Matthews*, 72 AD3d 1631, 1632, *lv denied* 15 NY3d 704).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

86
CA 16-00809
PRESENT: CARNI, J.P., LINDLEY, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

LARRY E. BROWN, PLAINTIFF-RESPONDENT,

V   ORDER

BG THRUWAY, LLC, DDR CORP., DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

BARCLAY DAMON LLP, BUFFALO (PETER S. MARLETTE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered February 9, 2016. The order, among other things, denied in part the motion of defendants BG Thruway, LLC and DDR Corp. for summary judgment dismissing plaintiff’s complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on November 14, 2016,

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

Entered: February 3, 2017   Frances E. Cafarell
Clerk of the Court

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

90

KA 15-00208

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHERYL A. POOL, DEFENDANT-APPELLANT.

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

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered December 1, 2014. The judgment convicted defendant, upon her plea of guilty, of criminal possession of a controlled substance in the fifth degree.

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

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

92
KA 14-01031
PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PHILLIP A. DODSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered January 8, 2014. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of assault in the first degree (Penal Law § 120.10 [1]). Defendant contends that County Court erred in denying his request, which he made just prior to sentencing, for the assignment of new counsel to advise him on whether he should move to withdraw his plea. We conclude that defendant's contention implicates the voluntariness of the plea and thus survives his plea and his waiver of the right to appeal (*see People v Morris*, 94 AD3d 1450, 1451, *lv denied* 19 NY3d 976; *see also People v Guantero*, 100 AD3d 1386, 1387, *lv denied* 21 NY3d 1004; *People v Phillips*, 56 AD3d 1163, 1164, *lv denied* 12 NY3d 761).

We nonetheless reject defendant's contention that the court abused its discretion in denying his request for a substitution of counsel. We conclude that the court made the requisite "minimal inquiry" into defendant's complaints concerning his attorney and his request for a substitution of counsel (*People v Sides*, 75 NY2d 822, 825; *see People v Porto*, 16 NY3d 93, 99-100; *People v Linares*, 2 NY3d 507, 511). Although it was incumbent upon defendant to show "good cause" for the substitution of counsel (*Sides*, 75 NY2d at 824; *see People v Sawyer*, 57 NY2d 12, 18, *rearg dismissed* 57 NY2d 776, *cert denied* 459 US 1178), defendant expressed only "vague and generic" complaints having "no merit or substance" and thus failed to show that assigned counsel "was in any way deficient in representing him" (*Linares*, 2 NY3d at 511). Further, the circumstances of this case

evince that defendant's request for a substitution of counsel was simply a delaying tactic to allow him to avoid or postpone his imminent sentencing and thereby " 'delay the orderly administration of justice' " (*People v Johnson*, 292 AD2d 871, 872, *lv denied* 98 NY2d 652, quoting *Sides*, 75 NY2d at 824).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

93
KA 13-00142
PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KAREEM H. FULLER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered October 9, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree and robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of robbery in the first degree (Penal Law § 160.15 [4]) and burglary in the first degree (§ 140.30 [4]). County Court imposed upon defendant the bargained-for sentence of 12 years of incarceration to be followed by five years of postrelease supervision.

Contrary to defendant's contention, the court properly denied without a hearing that part of defendant's omnibus motion seeking suppression of evidence on the ground that the police lacked probable cause to detain him. Evaluating "(1) the face of the pleadings, (2) assessed in conjunction with the context of the motion, and (3) defendant's access to information" (*People v Mendoza*, 82 NY2d 415, 426), we conclude that defendant's factual allegations were too conclusory to warrant a hearing (*see Matter of Elvin G.*, 12 NY3d 834, 835; *People v Burton*, 6 NY3d 584, 587; *see also People v Bakerx*, 114 AD3d 1244, 1246, *lv denied* 22 NY3d 1196). Specifically, defendant, despite having such information available to him, failed to make any averments with respect to the circumstances of his arrest, the police actions prior to detaining him, or his conduct before or during the encounter. Thus, defendant failed to put forth sufficient facts that "as a matter of law support the ground alleged" (CPL 710.60 [3] [b]).

Finally, we decline to reduce defendant's bargained-for sentence as a matter of discretion in the interest of justice (*see* CPL 470.15

[6] [b]).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

95
KA 08-00133
PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V — MEMORANDUM AND ORDER

GEORGE C. HERRING, DEFENDANT-APPELLANT.

STEPHEN BIRD, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered December 12, 2007. The judgment convicted defendant, upon a jury verdict, of attempted aggravated murder, attempted aggravated assault upon a police officer or a peace officer, criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree and criminal possession of stolen property in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, attempted aggravated murder (Penal Law §§ 110.00, 125.26 [1] [a] [i]; [b]) and attempted aggravated assault upon a police officer or a peace officer (§§ 110.00, 120.11). Contrary to defendant’s contention, the verdict is not against the weight of the evidence. A police officer testified that he was responding to a dispatch regarding multiple gun shots fired when he encountered defendant, who matched the description of one of the suspects. The officer exited his vehicle and shouted to defendant to “hold up a second.” Defendant at first lunged forward as if he were preparing to run away, but then he suddenly stopped, turned around, said “F*** this,” and pulled out a handgun and fired three shots in the officer’s direction. After a foot chase, defendant was apprehended in a backyard. The following morning, the police found a handgun on a rooftop in the vicinity of the backyard where defendant had been arrested, and a ballistics test determined that it was the gun that had fired three casings collected at the scene of the crime. After defendant was arrested, an officer observed that defendant had a cut on his hand between his thumb and index finger, and the previous owner of the handgun testified that he had sustained a similar cut on his hand after firing the weapon. Finally, the People introduced evidence that DNA from a bloodstain found on the gun matched

defendant's DNA. 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 a different verdict would have been unreasonable and thus 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 defense counsel's summation deprived him of the effective assistance of counsel. Defense counsel's theory of police fabrication and malfeasance was " 'a reasonable trial strategy in the face of strong opposing evidence' " (*People v Maxwell*, 103 AD3d 1239, 1241, *lv denied* 21 NY3d 945; *see People v Zada* [appeal No. 1], 98 AD2d 733, 733; *see generally People v Benevento*, 91 NY2d 708, 712-713). Finally, the sentence is not unduly harsh or severe.

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

96

KA 11-02373

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONALD SWICK, DEFENDANT-APPELLANT.

JEANNIE D. MICHALSKI, CONFLICT DEFENDER, GENESEO, FOR DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered July 26, 2011. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is affirmed.

Memorandum: Defendant appeals from a judgment revoking his sentence of probation imposed upon his conviction, following his plea of guilty, of attempted use of a child in a sexual performance (Penal Law §§ 110.00, 263.05), and imposing a sentence of imprisonment. "Inasmuch as defendant has completed serving the sentence imposed, his contention that the sentence is unduly harsh and severe has been rendered moot" (*People v Anderson*, 66 AD3d 1431, 1431, *lv denied* 13 NY3d 905 [internal quotation marks omitted]; *see People v Benson*, 6 AD3d 1173, 1173, *lv denied* 3 NY3d 636).

Defendant further contends that County Court violated his due process rights by revoking his probationary sentence based on a de minimis violation of the terms and conditions of probation. At no time during the probation revocation proceedings did defendant raise any challenge to the allegedly "de minimis" nature of the violation or raise any due process challenge to the proceeding. We thus conclude that defendant's contention is not preserved for our review (*see People v Ebert*, 18 AD3d 963, 964; *People v Villar*, 10 AD3d 564, 564, *lv denied* 3 NY3d 761; *see generally* CPL 470.05 [2]). In any event, we conclude that defendant's admitted "violation of probation was [neither] de minimis nor a mere technicality" (*People v Cummings*, 134 AD3d 1566, 1566, *lv denied* 27 NY3d 995; *see People v Burton*, 234 AD2d

972, 973, *lv denied* 89 NY2d 1033).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

100
CAF 15-02028
PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF ANDREA L. CROCE,
PETITIONER-RESPONDENT,

V ORDER

NICHOLAS J. DESANTIS, RESPONDENT-APPELLANT.

THE LAW OFFICES OF MATTHEW ALBERT, ESQ., BUFFALO (MATTHEW A. ALBERT OF COUNSEL), FOR RESPONDENT-APPELLANT.

CHARLES A. MESSINA, BLASDELL, FOR PETITIONER-RESPONDENT.

JENNIFER M. LORENZ, ATTORNEY FOR THE CHILD, LANCASTER.

Appeal from an order of the Family Court, Erie County (Tracey A. Kassman, R.), entered August 13, 2015 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted the petition of petitioner for leave to relocate with the child to Columbus, Ohio.

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

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

104
CA 16-00527
PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ.

HUMAN TECHNOLOGIES CORPORATION,
PLAINTIFF-RESPONDENT,

V   MEMORANDUM AND ORDER

TENNESSEE-ALABAMA MANUFACTURING, INC.,
DEFENDANT-APPELLANT.

CENTOLELLA LYNN D'ELIA & TEMES LLC, SYRACUSE (DAVID C. TEMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

SAUNDERS KAHLER, LLP, UTICA (MERRITT S. LOCKE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Erin P. Gall, J.), entered June 2, 2015. The order granted the motion of plaintiff for summary judgment, denied the cross motion of defendant for summary judgment and dismissed the counterclaims of defendant.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting judgment in favor of plaintiff Human Technologies Corporation as follows:

> It is ADJUDGED and DECLARED that the purchase orders, dated September 25, 2013, and the delivery releases, dated November 8, 2013, do not constitute an enforceable agreement,

and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking a declaration that certain purchase orders and delivery releases are not governed by UCC article 2, and that they do not constitute an enforceable agreement. Plaintiff thereafter moved for, inter alia, summary judgment seeking the relief set forth in its complaint and dismissal of defendant's counterclaims. Supreme Court granted the motion, concluding that the purchase orders and delivery releases are not governed by UCC article 2, and that the purported agreement is void under the statute of frauds (*see* General Obligations Law § 5-701 [a] [1]). We conclude that the court properly granted the motion but erred in failing to declare the rights of the parties (*see generally Hirsch v Lindor Realty Corp.*, 63 NY2d 878, 881), and we therefore modify the order accordingly.

Contrary to defendant's contention, an email from plaintiff's business developer does not satisfy the statute of frauds inasmuch as the full intention of the parties cannot be ascertained from that email without reference to parol evidence (*see Cooley v Lobdell*, 153 NY 596, 600; *Dahan v Weiss*, 120 AD3d 540, 542). Moreover, the email did not "confirm the material elements of [the] alleged agreement" (*Josephberg v Crede Capital Group, LLC*, 140 AD3d 629, 629), but instead confirmed "that the material terms of the agreement were not settled" (*Dahan*, 120 AD3d at 542). Contrary to defendant's further contention, "part performance is not applicable to actions governed by section 5-701" (*American Tower Asset Sub, LLC v Buffalo-Lake Erie Wireless Sys. Co., LLC*, 104 AD3d 1212, 1212; *see Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group*, 93 NY2d 229, 234 n 1).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

105
CA 16-00833
PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF DIXIE D. LEMMON AND CONCERNED
CITIZENS OF SENECA COUNTY, INC.,
PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

SENECA MEADOWS, INC., JAMES CLEERE, SOLELY IN
HIS CAPACITY AS TOWN OF WATERLOO CODE ENFORCEMENT
OFFICER AND TOWN OF WATERLOO ZONING BOARD OF
APPEALS, RESPONDENTS-RESPONDENTS.

DOUGLAS H. ZAMELIS, COOPERSTOWN, FOR PETITIONERS-APPELLANTS.

NIXON PEABODY LLP, ROCHESTER (CHRISTOPHER D. THOMAS OF COUNSEL), FOR RESPONDENT-RESPONDENT SENECA MEADOWS, INC.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS JAMES CLEERE, SOLELY IN HIS CAPACITY AS TOWN OF WATERLOO CODE ENFORCEMENT OFFICER AND TOWN OF WATERLOO ZONING BOARD OF APPEALS.

Appeal from a judgment of the Supreme Court, Seneca County (W. Patrick Falvey, A.J.), entered March 11, 2016 in a proceeding pursuant to CPLR article 78. The judgment granted the motions of respondents to dismiss the petition and dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motions are denied, the petition is reinstated, the petition is granted and the determination is annulled.

Memorandum: Petitioners commenced this CPLR article 78 proceeding against Seneca Meadows, Inc. (SMI), James Cleere in his capacity as the Town of Waterloo Code Enforcement Officer, and the Town of Waterloo Zoning Board of Appeals (ZBA). Petitioners sought, inter alia, to annul the determination of the ZBA confirming Cleere's issuance of a zoning permit allowing SMI to traverse an access road over a residentially zoned parcel in connection with its clay mining operations. SMI's proposed clay mine is located within its agriculturally zoned parcel, but it is bordered by its commercially and residentially zoned parcels that provide access to public roads. The Zoning Law of the Town of Waterloo prohibits commercial excavation operations in residential districts. Nevertheless, the ZBA upheld Cleere's determination that the access road can cross the residential

district because the agricultural portion of the property is landlocked. Supreme Court granted respondents' motions seeking dismissal of the petition.

Petitioners contend that the ZBA erred in its determination. We agree and conclude that the ZBA's determination is irrational and unreasonable (*see generally Matter of New York Botanical Garden v Board of Stds. & Appeals of City of N.Y.*, 91 NY2d 413, 418-419). The ZBA's and the court's reliance on our determination in *Matter of Passucci v Town of W. Seneca* (151 AD2d 984) is misplaced. In that case, similar to this case, the commercially zoned portion of the petitioner's property was landlocked, and the only access was over the residentially zoned portion of the property (*id.* at 984). In that case, however, the Town's ordinance prohibited the petitioner from using the residential portion of his premises to access his commercial portion, and thus enforcing the zoning restriction would be unconstitutionally applied inasmuch as it "would prevent [the petitioner] from making *any use* of the property and would destroy its economic value" (*id.* [emphasis added], citing *Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 500-501). SMI has failed to carry its "heavy burden of establishing that no reasonable return may be obtained from the property under the existing zoning" (*Northern Westchester Professional Park Assoc.*, 60 NY2d at 501). We therefore reverse the judgment, deny respondents' motions, reinstate the petition, grant the petition and annul the determination.

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

106
CA 16-00672
PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF COUNTY OF HERKIMER,
PETITIONER-PLAINTIFF-RESPONDENT,

V ORDER

VILLAGE OF HERKIMER,
RESPONDENT-DEFENDANT-APPELLANT.

LONGSTREET & BERRY, LLP, FAYETTEVILLE (MICHAEL LONGSTREET OF COUNSEL), FOR RESPONDENT-DEFENDANT-APPELLANT.

THE WEST FIRM, PLLC, ALBANY (THOMAS S. WEST OF COUNSEL), FOR PETITIONER-PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Herkimer County (Erin P. Gall, J.) entered February 2, 2016 in a CPLR article 78 proceeding and declaratory judgment action. The judgment declared that petitioner-plaintiff County of Herkimer is immune from the zoning restrictions of respondent-defendant Village of Herkimer in this matter.

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

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

108
CA 16-00815
PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ.

TROY L. SHUKNECHT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DALE SHUKNECHT, MARC SHUKNECHT, TRIPLE S FARMS, A NEW YORK PARTNERSHIP, LEE SHUKNECHT, JOAN SHUKNECHT, LS & SONS FARMS, LLC, AND TRIPLE S ENTERPRISES, LLC, DEFENDANTS-APPELLANTS.

TROY L. SHUKNECHT AND LISA SHUKNECHT, PLAINTIFFS-RESPONDENTS,

V

JOAN SHUKNECHT, DEFENDANT-APPELLANT.

LACY KATZEN LLP, ROCHESTER (MICHAEL J. WEGMAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DADD, NELSON, WILKINSON & WUJCIK, ATTICA (JAMES M. WUJCIK OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Genesee County (Timothy J. Walker, A.J.), entered November 20, 2015. The order and judgment dismissed defendants' counterclaims on the merits with prejudice upon plaintiffs' motion for a directed verdict.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the motion is denied, the counterclaims are reinstated, and a new trial is granted.

Memorandum: Following a trial on their counterclaims, defendants appeal from an order and judgment that granted plaintiffs' motion, made at the close of defendants' proof, for a directed verdict dismissing the counterclaims. Defendants contend that Supreme Court erred in granting the motion. We agree, and we therefore reverse. It is well settled that " 'a directed verdict is appropriate where the . . . court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party . . . In determining whether to grant a motion for a directed verdict pursuant to CPLR 4401, the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be

considered in a light most favorable to the nonmovant' " (*A&M Global Mgt. Corp. v Northtown Urology Assoc., P.C.*, 115 AD3d 1283, 1287-1288; *see Szczerbiak v Pilat*, 90 NY2d 553, 556). Applying those standards here, we conclude that the court erred in granting the motion for a directed verdict dismissing the counterclaims.

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

110
KAH 16-00389
PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
ANTONIO COLE, PETITIONER-APPELLANT,

V   MEMORANDUM AND ORDER

HAROLD D. GRAHAM, SUPERINTENDENT, AUBURN
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

WILLIAMS, HEINL, MOODY & BUSCHMAN, P.C., AUBURN (RYAN JAMES MULDOON OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered August 21, 2015 in a habeas corpus proceeding. The judgment denied and dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his petition seeking a writ of habeas corpus on the ground that his guilty plea was coerced. Supreme Court properly dismissed the petition inasmuch as petitioner's contention concerning the voluntariness of his plea "was or could have been raised on direct appeal from the judgment of conviction or in a motion pursuant to CPL article 440" (*People ex rel. St. Germain v Walker*, 202 AD2d 1053, 1053, *lv denied* 83 NY2d 758; *see People ex rel. Peoples v New York State Dept. of Corr. Servs.*, 117 AD3d 1486, 1487, *lv denied* 23 NY3d 909). Contrary to petitioner's contention, the allegations in the petition do not warrant departure from traditional orderly procedure (*see People ex rel. Lifrieri v Lee*, 116 AD3d 720, 720, *lv dismissed* 24 NY3d 952, *rearg denied* 24 NY3d 1039; *People ex rel. Hammock v Meloni*, 233 AD2d 929, 929, *lv denied* 89 NY2d 807). Moreover, habeas corpus relief is unavailable to petitioner because, even if his contentions had merit, he would be entitled only to withdraw his guilty plea and not immediate release from custody (*see St. Germain*, 202 AD2d at 1053-1054; *see generally People ex rel. Walker v Dolce*, 125 AD3d 1305, 1305, *lv denied* 25 NY3d 910).

Entered: February 3, 2017   Frances E. Cafarell
                                             Clerk of the Court

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

111
KA 14-02224
PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADAM J. ROBINSON, DEFENDANT-APPELLANT.

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

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (AMY L. HALLENBECK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Donald E. Todd, J.), rendered July 21, 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 affirmed.

Memorandum: Defendant appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of criminal contempt in the first degree (Penal Law § 215.51 [b] [iv]), and sentencing him to a term of imprisonment. We reject defendant's contention that the People failed to establish by a preponderance of the evidence that he violated the terms and conditions of his probation (*see People v Ortiz*, 94 AD3d 1436, 1436, *lv denied* 19 NY3d 999; *People v Wells*, 69 AD3d 1228, 1229). Indeed, after the People presented evidence of the violation, defendant testified that he failed to complete a drug treatment program and repeatedly used marihuana in violation of the terms of his probation. We thus conclude that there was the necessary "residuum of competent legal evidence" that defendant violated a condition of his probation (*People v Pringle*, 72 AD3d 1629, 1630, *lv denied* 15 NY3d 855 [internal quotation marks omitted]; *see People v Cherry*, 238 AD2d 940, 940, *lv denied* 90 NY2d 891; *see generally People v Pettway*, 286 AD2d 865, 865, *lv denied* 97 NY2d 686). "Although defendant offered excuses for his various violations, County Court was entitled to discredit those excuses and instead to credit the testimony of the People's witnesses" (*People v Donohue*, 64 AD3d 1187, 1188; *see People v Strauts*, 67 AD3d 1381, 1381, *lv denied* 14 NY3d 773).

We reject defendant's further contention that the court erred in denying his request for substitution of counsel, inasmuch as "defendant failed to proffer specific allegations of a 'seemingly

serious request’ that would require the court to engage in a minimal inquiry” (*People v Porto*, 16 NY3d 93, 100; *see People v Wilson*, 112 AD3d 1317, 1318, *lv denied* 23 NY3d 1069; *People v Woods*, 110 AD3d 748, 748, *lv denied* 23 NY3d 969).

Finally, the sentence is not unduly harsh or severe.

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

112
KA 13-00143
PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARRYL GOODWIN, ALSO KNOWN AS DARYL GOODWIN,
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 (Thomas E. Moran, J.), rendered November 26, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: 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]), defendant contends that his waiver of the right to appeal was invalid. We reject that contention inasmuch as the record demonstrates that the waiver was knowingly, intelligently, and voluntarily entered (*see generally People v Sanders*, 25 NY3d 337, 341-342). Contrary to defendant's contention, his "waiver [of the right to appeal] is not invalid on the ground that [Supreme Court] did not specifically inform [him] that his general waiver of the right to appeal encompassed the court's suppression rulings" (*People v Brand*, 112 AD3d 1320, 1321, *lv denied* 23 NY3d 961 [internal quotation marks omitted]). Thus, defendant's valid waiver of the right to appeal encompasses his contention that the court erred in denying his suppression motion (*see Sanders*, 25 NY3d at 342).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

116

KA 14-00578

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ULYSSES M. BETANCES, JR., DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, HARTER SECREST & EMERY LLP (MICHAEL J. ROONEY 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 January 21, 2014. The judgment convicted defendant, upon a jury verdict, of aggravated driving while intoxicated.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of aggravated driving while intoxicated (Vehicle and Traffic Law § 1192 [2-a] [b]), defendant contends that Supreme Court abused its discretion in denying his challenge for cause to prospective juror No. 13. We agree. We therefore reverse the judgment and grant a new trial on counts one and two of the indictment.

"It is well settled that 'a prospective juror whose statements raise a serious doubt regarding the ability to be impartial must be excused unless the [prospective] juror states unequivocally on the record that he or she can be fair and impartial' " (*People v Odum*, 67 AD3d 1465, 1465, *lv denied* 14 NY3d 804, *reconsideration denied* 15 NY3d 755, *cert denied* 562 US 931, quoting *People v Chambers*, 97 NY2d 417, 419). Although CPL 270.20 (1) (b) "does not require any particular expurgatory oath or 'talismanic' words . . . , [prospective] jurors must clearly express that any prior experiences or opinions that reveal the potential for bias will not prevent them from reaching an impartial verdict" (*People v Arnold*, 96 NY2d 358, 362; *see People v Mitchum*, 130 AD3d 1466, 1467). "Prospective jurors who make statements that cast serious doubt on their ability to render an impartial verdict, and who have given less-than-unequivocal assurances of impartiality, must be excused" (*Arnold*, 96 NY2d at 363; *see People v Harris*, 19 NY3d 679, 685).

Here, in response to the prosecutor's question regarding whether any member of the panel thought that he or she could not be fair and impartial due to the allegations of driving while intoxicated, prospective juror No. 13 indicated that, due to situations in her past, she did not see any reason why anyone would need to drink and drive, and she could not be fair and impartial. Upon follow-up questioning by the court, she assured the court that she could set those feelings aside. Later, however, in response to defense counsel's questions, prospective juror No. 13 indicated that she had wondered what defendant did wrong when she first walked into the courtroom, and that "obviously" she felt that "he must have done something wrong or he wouldn't have" been in court. The court asked follow-up questions, but cut off the prospective juror before she could reply to one such question, and the court's final substantive question failed to establish the prospective juror's state of mind. Consequently, the court abused its discretion in denying defendant's challenge for cause to prospective juror No. 13. Defendant exhausted all of his peremptory challenges before the completion of jury selection and thus the denial of his challenge for cause is preserved for our review (*see* CPL 270.20 [2]; *Harris*, 19 NY3d at 685), and constitutes reversible error (*see People v Harris*, 23 AD3d 1038, 1038; *People v Brzezicki*, 249 AD2d 917, 918-919; *see also People v Casillas*, 134 AD3d 1394, 1396).

Entered: February 3, 2017 Frances E. Cafarell
Clerk of the Court

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

117
KA 14-00840
PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEEVESTER L. PAYTON, 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 (James J. Piampiano, J.), rendered April 10, 2014. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [2]). Contrary to defendant's contention, 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). "Any inconsistencies in the victim's testimony were highlighted by defense counsel, and the jury's resolution of credibility issues with respect to the testimony of the victim is entitled to great deference" (*People v DiTucci*, 81 AD3d 1249, 1250, *lv denied* 17 NY3d 794). Defendant further contends that County Court abused its discretion in admitting in evidence a crime scene video depicting the victim after the shooting because, although it concededly was relevant, it was highly prejudicial. We reject that contention (*see People v Stevens*, 76 NY2d 833, 835; *People v Pobliner*, 32 NY2d 356, 369-370, *rearg denied* 33 NY2d 657, *cert denied* 416 US 905; *People v Garcia*, 143 AD3d 1283, 1283-1284).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

120
KA 15-00322
PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY HARRIS, DEFENDANT-APPELLANT.

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered January 8, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to defendant's contention, Supreme Court properly refused to suppress the weapon based on defendant's contention that the testimony of the police witness was not credible. "It is well settled that the suppression court's credibility determinations . . . are granted deference and will not be disturbed unless unsupported by the record" (*People v Esquerdo*, 71 AD3d 1424, 1424, *lv denied* 14 NY3d 887 [internal quotation marks omitted]). Here, the police witness testified that he observed a group of men standing outside a gas station holding red plastic cups and long clear bottles, which he believed were liquor bottles. When he asked the group what they were doing, defendant replied that they were having a few drinks to celebrate his birthday. The police witness testified that he intended to issue citations to the men for violating the city ordinance prohibiting the possession of open containers of alcohol in public, and he directed the men to stand by the police car, at which point defendant ran and the police witness chased him in order to issue a citation for the violation of the ordinance (*see People v Basono*, 122 AD3d 553, 553, *lv denied* 25 NY3d 1069). He testified that, while he was chasing defendant, he observed defendant reach into his pocket and throw an object into a yard. The gun was recovered from that area shortly thereafter. Although a defense witness refuted the police witness's testimony that the men

were drinking liquor, the prosecution presented rebuttal evidence, i.e., a recorded telephone call from the jail wherein defendant stated that he was holding a bottle of liquor when the police approached him. We therefore will not disturb the court's credibility determination, and we conclude that the court properly refused to suppress the gun, which defendant had abandoned (*see People v Martinez*, 80 NY2d 444, 448-449).

Contrary to defendant's further contention, he was not denied his constitutional right to participate in the suppression hearing. Although he remained at the counsel table while the court, the police witness and counsel listened to a dispatch recording during cross-examination of the police witness, the record establishes that defense counsel explicitly waived defendant's presence "in open court while defendant was present," after the court had stated on the record that the only means by which to hear the recording was on the court clerk's computer (*People v Taylor*, 136 AD3d 1331, 1332, *lv denied* 27 NY3d 1075). We further conclude that defendant was not denied his right to be present at a material stage of the proceedings when the court reviewed the recorded telephone call from the jail that was admitted in evidence over defense counsel's objection. Defendant was present when the evidence was admitted in evidence, which is a material stage of the hearing (*see People v Monroe*, 90 NY2d 982, 984). Inasmuch as the exhibit had been received in evidence, the court's review of that evidence was "at best an ancillary proceeding," at which he had the right to be present if he had " 'something of value to contribute,' " or if his "exclusion could 'substantially affect the ability to defend against the charge' " (*id.*). We conclude that "on this record defendant's absence did not compromise his ability to advance his position or counter the People's theory, [and thus] defendant's presence was not required" (*id.*).

We further conclude that defendant was not denied effective assistance of counsel based upon defense counsel's waiver of his presence at the court clerk's desk while the dispatch recording was played during the hearing or upon her consent to the court's request that it review the exhibit of the recorded jail call in chambers, rather than in the full courtroom, after it had been received in evidence (*see generally People v Caban*, 5 NY3d 143, 152). We likewise reject defendant's contention that defense counsel's failure to review the recorded telephone call constitutes ineffective assistance of counsel. The record establishes that defense counsel had been apprised by the prosecutor that the exhibit contained a recorded call wherein defendant stated that he was holding a bottle of liquor when the police arrived, and we conclude that her reliance on the prosecutor's statement does not constitute ineffective assistance of counsel (*see generally id.*). Finally, we reject defendant's contention that the failure of defense counsel to submit a post-hearing argument on the suppression issue constitutes ineffective assistance of counsel. The omnibus motion set forth a cogent theory for suppression of the evidence, and defense counsel vigorously pursued that theory through cross-examination of the police witness and by presenting a defense witness (*cf. People v Clermont*, 22 NY3d 931, 933-934; *People v Layou*, 114 AD3d 1195, 1198). We therefore

conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

121
CAF 16-00225
PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF AALIYAH B., ANTONIO B. AND BRITTNEY B.

ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, PETITIONER-RESPONDENT;

ORDER

CHRISTINA B., ALSO KNOWN AS CHRISTINA M., RESPONDENT-APPELLANT.

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

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (MAGGIE SEIKALY OF COUNSEL), FOR PETITIONER-RESPONDENT.

TIMOTHY A. ROULAN, ATTORNEY FOR THE CHILDREN, SYRACUSE.

Appeal from a corrected order of the Family Court, Onondaga County (Julie A. Cecile, J.), entered January 8, 2016 in a proceeding pursuant to Family Court Act article 10. The corrected order, among other things, adjudged that respondent had neglected the subject children.

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

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

123

CAF 15-01356

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

IN THE MATTER OF ALAN R. PFLANZ, SR.,
PETITIONER-APPELLANT,

V   ORDER

ALICIA M. PFLANZ, RESPONDENT-RESPONDENT.

IN THE MATTER OF ALICIA M. PFLANZ, PETITIONER,

V

ALAN R. PFLANZ, SR., RESPONDENT.

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

PAUL M. DEEP, UTICA, FOR RESPONDENT-RESPONDENT.

MICHELE E. DETRAGLIA, ATTORNEY FOR THE CHILDREN, UTICA.

Appeal from an order of the Family Court, Oneida County (Julia M. Brouillette, J.), entered July 22, 2015 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted primary physical custody of the subject children to Alicia M. Pflanz.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Warren v Hibbs*, 136 AD3d 1306, 1306).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

124
CA 16-00270
PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

GARY SKALYO, PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

LAUREL PARK CONDOMINIUM BOARD OF MANAGERS,
CLOVER MANAGEMENT, INC., AND MARRANO MARK
EQUITY, DEFENDANTS-RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

DONALD A. ALESSI, EAST AMHERST (RICHARD G. COLLINS OF COUNSEL), FOR
PLAINTIFF-APPELLANT-RESPONDENT.

COLUCCI & GALLAHER, P.C., BUFFALO (RYAN L. GELLMAN OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered October 8, 2015. The order, inter alia, granted summary judgment to defendants on their first and second counterclaims.

It is hereby ORDERED that said appeal is unanimously dismissed (*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]) and the cross appeal is dismissed without costs (*see Benedetti v Erie County Med. Ctr. Corp*., 126 AD3d 1322, 1323; *see also* CPLR 5511).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

125
CA 16-00505
PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

GARY SKALYO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LAUREL PARK CONDOMINIUM BOARD OF MANAGERS,
CLOVER MANAGEMENT, INC., AND MARRANO MARK
EQUITY, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

DONALD A. ALESSI, EAST AMHERST (RICHARD G. COLLINS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COLUCCI & GALLAHER, P.C., BUFFALO (RYAN L. GELLMAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered December 21, 2015. The judgment awarded money damages to defendants for fines and penalties incurred.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting judgment in favor of defendants as follows:

> It is ADJUDGED AND DECLARED that plaintiff violated section 10.09 (7) of the Declaration of Laurel Park Condominium and section 7.04 (g) of the Bylaws of Laurel Park Condominium,

and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this declaratory judgment action seeking a declaration that the installation of a dog restraint system known as an “invisible fence” did not violate the provisions of the Declaration and Bylaws of Laurel Park Condominium prohibiting the alteration, addition or modification of the lot on which plaintiff’s unit is located without the prior written consent of defendant Laurel Park Condominium Board of Managers. We conclude that Supreme Court properly granted defendants’ motion seeking summary judgment for reasons stated in its decision. The court erred, however, in failing to declare the rights of the parties, and we therefore modify the judgment by making the requisite declaration (*see Maurizzio v*

Lumbermens Mut. Cas. Co., 73 NY2d 951, 954).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

128

KA 15-00949

PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V — MEMORANDUM AND ORDER

DAMONI HALL, DEFENDANT-APPELLANT.

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered January 30, 2015. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily, and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

138

CA 15-02175

PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, TROUTMAN, AND SCUDDER, JJ.

MKCAC, LLC, MICHAEL CACCAVALE AND KARIN CACCAVALE, PLAINTIFFS-APPELLANTS,

V ORDER

COUNTY OF ONEIDA, TONY BAKER, ALSO KNOWN AS ANTHONY BAKER, SHUMAKER CONSULTING, ENGINEERING AND LAND SURVEYING, PC, AND HOGAN ENGINEERING, PC, DEFENDANTS-RESPONDENTS.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

PETRONE & PETRONE, P.C., UTICA (MARK O. CHIECO OF COUNSEL), FOR DEFENDANT-RESPONDENT COUNTY OF ONEIDA.

HARTER, SECREST & EMERY LLP, ROCHESTER (MICHAEL DAMIA OF COUNSEL), FOR DEFENDANT-RESPONDENT SHUMAKER CONSULTING, ENGINEERING AND LAND SURVEYING, PC.

MCMAHON AND GROW, ROME (SARAH C. HUGHES OF COUNSEL), FOR DEFENDANT-RESPONDENT TONY BAKER, ALSO KNOWN AS ANTHONY BAKER.

VERSACE LAW OFFICE, PC, ROME (MEADE H. VERSACE OF COUNSEL), FOR DEFENDANT-RESPONDENT HOGAN ENGINEERING, PC.

Appeal from an order of the Supreme Court, Oneida County (Erin P. Gall, J.), entered March 5, 2015. The order, among other things, denied the motion of plaintiffs for summary judgment, and granted the cross motion of defendant County of Oneida to amend its answer, and for summary judgment dismissing the complaint against it.

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

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

140
CA 16-00986
PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, TROUTMAN, AND SCUDDER, JJ.

VILLAGE OF SCOTTSVILLE, PLAINTIFF-RESPONDENT,

V ORDER

JOHN MCINTOSH, CANDACE MCINTOSH,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

FRANK A. ALOI, ROCHESTER, FOR DEFENDANTS-APPELLANTS.

THE LAW OFFICES OF PETER K. SKIVINGTON, PLLC, GENESEO (DANIEL R. MAGILL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment and order (one paper) of the Supreme Court, Monroe County (Renee Forgensi Minarik, A.J.), entered September 10, 2015. The judgment and order, inter alia, granted the cross motion of plaintiff for summary judgment and a permanent injunction.

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

Frances E. Cafarell

Entered: February 3, 2017

Clerk of the Court

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

141
TP 16-01171
PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, TROUTMAN, AND SCUDDER, JJ.

IN THE MATTER OF KENNETH W. JAMES, PETITIONER,

V   ORDER

TINA M. STANFORD, CHAIRWOMAN, NEW YORK
STATE BOARD OF PAROLE AND SUSAN KICKBUSH,
SUPERINTENDENT, GOWANDA CORRECTIONAL FACILITY,
RESPONDENTS.

KENNETH W. JAMES, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (BRIAN D. GINSBERG OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Penny M. Wolfgang, J.], entered February 19, 2016) to review a determination of respondent Tina M. Stanford, Chairwoman, New York State Board of Parole. The determination revoked the parole of petitioner.

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

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

144
CA 15-02128
PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, TROUTMAN, AND SCUDDER, JJ.

IN THE MATTER OF RICHARD HEIN,
PETITIONER-APPELLANT,

V ORDER

TINA M. STANFORD, CHAIRPERSON, NEW YORK STATE
DIVISION OF PAROLE, AND ANTHONY J. ANNUCCI,
ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT
OF CORRECTIONS AND COMMUNITY SUPERVISION,
RESPONDENTS-RESPONDENTS.

RICHARD HEIN, PETITIONER-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (BRIAN D. GINSBERG OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), entered October 28, 2015 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see Matter of Sanchez v Evans*, 111 AD3d 1315).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

149
TP 16-00205
PRESENT: SMITH, J.P., CARNI, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

IN THE MATTER OF LIONELL NELSON, PETITIONER,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

LIONELL NELSON, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (WILLIAM E. STORRS OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Mark H. Fandrich, A.J.], entered January 28, 2016) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

151
KA 11-01946
PRESENT: SMITH, J.P., CARNI, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DEREK GETMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

GENESEE VALLEY LEGAL AID, INC., GENESEO (JEANNIE D. MICHALSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered June 30, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree.

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

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

152
KA 11-01947
PRESENT: SMITH, J.P., CARNI, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DEREK GETMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

GENESEE VALLEY LEGAL AID, INC., GENESEO (JEANNIE D. MICHALSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered June 30, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted promoting a sexual performance by a child.

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

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

154
KA 13-02062
PRESENT: SMITH, J.P., CARNI, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DELVON HARLEY, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (EVAN HANNAY 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 (Anthony F. Aloi, J.), rendered September 25, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree and robbery in the first degree (two counts).

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 Onondaga 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 murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and two counts of robbery in the first degree (§ 160.15 [4]), defendant contends only that his sentence is unduly harsh and severe. We reject that contention. We note, however, that the sentence cannot stand inasmuch as County Court failed to sentence defendant as a second felony offender. "[I]t is illegal to sentence a known predicate felon as a first offender" (*People v Holley*, 168 AD2d 992, 993; *see People v Stubbs*, 96 AD3d 1448, 1450, *lv denied* 19 NY3d 1001). Here, the People filed a second felony offender statement, and defendant failed to controvert its allegations. By statute, the "[u]ncontroverted allegations in the statement shall be deemed to have been admitted by the defendant" (CPL 400.21 [3]; *see People v Neary*, 56 AD3d 1224, 1224, *lv denied* 11 NY3d 928). Moreover, "[w]here the uncontroverted allegations in the statement are sufficient to support a finding that the defendant has been subjected to a predicate felony conviction[,] the court must enter such finding" (CPL 400.21 [4]). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing in compliance with CPL 400.21 (*see People v*

Halsey, 108 AD3d 1123, 1124-1125).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

157
KA 15-01101
PRESENT: SMITH, J.P., CARNI, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DWIGHT MITCHELL, DEFENDANT-APPELLANT.

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered September 20, 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: On appeal from a judgment convicting him upon a plea of guilty of robbery in the second degree (Penal Law § 160.10 [1]), defendant contends that County Court failed to abide by the procedures set forth in *People v Middlebrooks* (25 NY3d 516) and CPL 720.10 in determining whether to grant him youthful offender status. We reject that contention. First, *Middlebrooks* addresses procedures for when a defendant "has been convicted of an armed felony or an enumerated sex offense" (25 NY3d at 527). It is undisputed that robbery in the second degree under Penal Law § 160.10 (1) is neither an armed felony (*see* CPL 1.20 [41]; *People v Thomas*, 202 AD2d 525, 526, *lv denied* 83 NY2d 915; *People v Walker*, 189 AD2d 564, 564, *lv denied* 81 NY2d 978) nor an enumerated sex offense. Second, inasmuch as defendant was otherwise an "eligible youth" (CPL 720.10 [2] [a] - [c]), the court fulfilled its statutory duty by making an on-the-record determination denying defendant's request for youthful offender treatment (*see* CPL 720.20 [1]; *People v Rudolph*, 21 NY3d 497, 499).

The People correctly concede that the waiver of the right to appeal is not valid "inasmuch as [defendant] pleaded guilty to the sole count in the superior court information without receiving a sentencing commitment or any other consideration" (*People v Gramza*, 140 AD3d 1643, 1644, *lv denied* 28 NY3d 930; *see People v Collins*, 129 AD3d 1676, 1676, *lv denied* 26 NY3d 1038). The waiver thus does not preclude defendant's challenges to the severity of the sentence. We

nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

162
CA 16-01208
PRESENT: SMITH, J.P., CARNI, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

TONI HAJDAJ, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JESSICA M. ZUBIN AND HOWARD N. ZUBIN,
DEFENDANTS-APPELLANTS.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (MARTHA E. DONOVAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

FEROLETO LAW, BUFFALO (JOHN FEROLETO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered May 2, 2016. The order denied the motion of defendants 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 negligence action seeking damages for personal injuries she allegedly sustained while riding in a vehicle owned by defendants, Jessica M. Zubin and Howard N. Zubin, and operated by Jessica (hereafter, defendant), who is plaintiff's coemployee. The accident occurred when defendant had a seizure, lost control of the vehicle, and collided with a vehicle in front of her. Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff's sole remedy is the receipt of workers' compensation benefits, and they appeal from an order denying the motion. We affirm.

It is settled law that receipt of benefits pursuant to "[w]orkers' compensation is the exclusive remedy of an employee injured 'by the negligence or wrong of another in the same employ' " (*Johnson v Del Valle*, 98 AD3d 1290, 1291, quoting Workers' Compensation Law § 29 [6]; *see Macchirole v Giamboi*, 97 NY2d 147, 150; *Naso v Lafata*, 4 NY2d 585, 589, *rearg denied* 5 NY2d 861). Nevertheless, it is equally well settled that the Workers' Compensation Law does "not protect[] the coemployee, even though the injured employee has accepted compensation benefits, when the coemployee was *not* acting within the scope of his employment at the time he [or she] inflicted the injury" (*Maines v Cronomer Val. Fire Dept.*, 50 NY2d 535, 544). Furthermore, "the question of whether defendant was acting within the scope of her employment when the

accident occurred is separate and distinct from the question of whether plaintiff was acting within the scope of her employment when she was injured” (*Jacobsen v Amedio*, 218 AD2d 872, 873).

Here, although defendants submitted evidence in support of their motion establishing as a matter of law that plaintiff was acting within the scope of her employment at the time of the accident (*see Correa v Anderson*, 122 AD3d 1134, 1135), they failed to establish as a matter of law that defendant was also acting within the scope of her employment at the time (*see Connell v Brink* [appeal No. 1], 199 AD2d 1032, 1032; *cf. Power v Frasier*, 131 AD3d 461, 462-463). Consequently, the court properly denied the motion.

Finally, defendants’ further contention that the vicarious liability provisions in Vehicle and Traffic Law § 388 are inapplicable to defendant Howard N. Zubin is without merit. That contention is premised on the applicability of Workers’ Compensation Law § 29 (6) and, as discussed above, defendants failed to establish the applicability of that statute as a matter of law (*cf. Isabella v Hallock*, 22 NY3d 788, 792).

Entered: February 3, 2017 Frances E. Cafarell
Clerk of the Court

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

163
CA 16-00481
PRESENT: SMITH, J.P., CARNI, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

BARBARA TABONI, PLAINTIFF-APPELLANT,

V   ORDER

KALEIDA HEALTH AND WOMEN & CHILDREN'S HOSPITAL
OF BUFFALO, DEFENDANTS-RESPONDENTS.

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

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (AMANDA C. ROSSI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered November 2, 2015. The order granted the motion of defendants for summary judgment dismissing the complaint.

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

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

167
CA 16-00406
PRESENT: SMITH, J.P., CARNI, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

US BANK NATIONAL ASSOCIATION,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PAUL SINAY, LINDA D. SINAY, LARRY GERAW AND
SHIRLEY L. MONTANA, DEFENDANTS-RESPONDENTS.

WOODS OVIATT GILMAN LLP, ROCHESTER (MICHAEL JABLONSKI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered June 24, 2015. The order and judgment, among other things, denied plaintiff's motion seeking to vacate an order and judgment entered on August 27, 2013.

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

Memorandum: In this mortgage foreclosure action, plaintiff appeals from an order and judgment that denied its motion seeking to vacate an order and judgment entered on August 27, 2013, in which Supreme Court sua sponte dismissed the complaint after plaintiff missed a deadline set forth in a scheduling order to file an application for an order of reference. Contrary to plaintiff's contention, the court did not abuse its discretion in denying the motion inasmuch as plaintiff's motion to vacate was brought approximately 19 months after the August 27, 2013 dismissal order (*see generally Nash v Port Auth. of N.Y. & N.J.*, 22 NY3d 220, 225-226).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

168

CA 16-00201

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

RONALD KOZLOWSKI AND DENISE KOZLOWSKI,
PLAINTIFFS-RESPONDENTS,

V ORDER

ALLIED BUILDERS, INC. AND RUSH-HENRIETTA
CENTRAL SCHOOL DISTRICT, DEFENDANTS-APPELLANTS.

LIPPMAN O'CONNOR, BUFFALO (GERARD E. O'CONNOR OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GIBSON MCASKILL & CROSBY, LLP, BUFFALO (CHARLES S. DESMOND, II, OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered November 6, 2015. The order granted plaintiffs' motion for partial summary judgment on the issue of liability under Labor Law § 240 (1).

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on October 11, 2016, and filed in the Monroe County Clerk's office on November 30, 2016,

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

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

172

CA 16-00813

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

STEPHEN M. JONES, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NAZARETH COLLEGE OF ROCHESTER, LECHASE CONSTRUCTION SERVICES, LLC, AND BILLITIER ELECTRIC, INC., DEFENDANTS-RESPONDENTS.

NAZARETH COLLEGE OF ROCHESTER AND LECHASE CONSTRUCTION SERVICES, LLC, THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V

CROSBY-BROWNLIE, INC., THIRD-PARTY DEFENDANT-RESPONDENT.

SMITH, MINER, O'SHEA & SMITH, LLP, BUFFALO (CARRIE L. SMITH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

THE TARANTINO LAW FIRM, LLP, BUFFALO (TAMSIN J. HAGER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS AND THIRD-PARTY PLAINTIFFS-RESPONDENTS.

HURWITZ & FINE, P.C., BUFFALO (DAVID R. ADAMS OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), entered December 10, 2015. The order, inter alia, denied plaintiff's motion for partial summary judgment on the issue of liability with respect to the Labor Law § 240 (1) cause of action.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when he fell from an A-frame ladder. We conclude that Supreme Court properly denied plaintiff's motion for partial summary judgment on the issue of liability with respect to the Labor Law § 240 (1) cause of action. At the time of the accident, plaintiff was using a 10-foot A-frame ladder to install flashing around a duct. The ladder was folded shut and leaning against the wall while plaintiff was using it. Just before the accident, he was using both hands to take a measurement above his head, while standing on "the fourth or fifth rung" of the ladder,

which was “at least four feet off the floor.” As he extended his tape measure, he felt a strong electric shock to his left arm and he fell off the ladder.

Contrary to plaintiff’s contention, we conclude that the court properly denied the motion. “[T]here are questions of fact . . . whether . . . the ladder, which was not shown to be defective in any way, failed to provide proper protection, and whether . . . plaintiff should have been provided with additional safety devices” (*Gange v Tilles Inv. Co.*, 220 AD2d 556, 558; *see Nazario v 222 Broadway, LLC*, 28 NY3d 1054, 1055; *Grogan v Norlite Corp*., 282 AD2d 781, 782-783; *Donovan v CNY Consol. Contrs*., 278 AD2d 881, 881).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

173
CA 16-01147
PRESENT: SMITH, J.P., CARNI, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

CASSANDRA BLAKE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTY OF WYOMING, DEFENDANT-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (RYAN G. SMITH OF COUNSEL), FOR DEFENDANT-APPELLANT.

SMITH, MINER, O'SHEA & SMITH, LLP, BUFFALO (CARRIE L. SMITH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Wyoming County (Michael F. Griffith, A.J.), entered April 18, 2016. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that she sustained when she was bitten by a dog at the Wyoming County Animal Shelter. Plaintiff was working as a volunteer dog walker, and the dog had been surrendered to the shelter approximately two weeks before the incident. Defendant, the County of Wyoming (County), appeals from an order denying its motion for summary judgment dismissing the complaint. We reverse.

We agree with the County that Supreme Court erred in denying the motion with respect to plaintiff's cause of action based on strict liability. We conclude that the County met its "initial burden by establishing that [it] lacked actual or constructive knowledge that the dog had any vicious propensities" (*Hargro v Ross*, 134 AD3d 1461, 1462; *see Doerr v Goldsmith*, 25 NY3d 1114, 1116; *Collier v Zambito*, 1 NY3d 444, 446) and that, in opposition, plaintiff failed to raise a triable issue of fact (*see Hargro*, 134 AD3d at 1462). Contrary to plaintiff's contention, the fact that shelter personnel may have been informed at the time of the dog's surrender that the dog had previously knocked over a child is insufficient to raise an issue of fact as to the dog's vicious propensities to bite. Although a tendency to knock a person over may reflect "a proclivity to act in a way that puts others at risk of harm" (*Collier*, 1 NY3d at 447), plaintiff's injuries were not caused by the dog's knocking her over, and the dog's proclivity to do so, even if established, did not

"result[] in the injury giving rise to the lawsuit" (*id.*; *see Campo v Holland*, 32 AD3d 630, 631).

Plaintiff correctly notes that the record contains evidence of the dog's vicious propensities, i.e., evidence that the dog may have bitten an eight-year-old girl approximately four months before biting plaintiff. We nevertheless reject plaintiff's contention that the County knew or should have known of the prior incident. After that incident, Robert Jines, a County employee in the Wyoming County Health Department, Environmental Division (Health Department), was tasked with examining the dog to ensure that the victim did not require rabies shots. We conclude that, under the circumstances of this case, any knowledge of that incident obtained by Jines and the Health Department should not be imputed to the County or the shelter (*see Caselli v City of New York*, 105 AD2d 251, 255; *see also Matter of Schoen v City of New York*, 86 AD3d 575, 575). "A municipality often will have numerous employees assigned to separate and diverse agencies or departments" (*Caselli*, 105 AD2d at 255), and the record demonstrates that there is no overlap in the respective scopes of authority of the Health Department and the shelter.

We further conclude that the court erred in denying the County's motion with respect to plaintiff's negligence cause of action. "[C]ases involving injuries inflicted by domestic animals may only proceed under strict liability based on the owner's knowledge of the animal's vicious propensities, not on theories of common-law negligence" (*Lista v Newton*, 41 AD3d 1280, 1282 [internal quotation marks omitted]; *see Doerr*, 25 NY3d at 1116; *Bard v Jahnke*, 6 NY3d 592, 598-599).

Entered: February 3, 2017 Frances E. Cafarell
Clerk of the Court

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

175
KA 14-02192
PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRY L. HOLMES, DEFENDANT-APPELLANT.

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

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered September 22, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]). We agree with defendant that his waiver of the right to appeal is not valid inasmuch as County Court conflated the right to appeal with those rights automatically forfeited by the guilty plea (*see People v Sanborn*, 107 AD3d 1457, 1458). Thus, the record fails to establish that "defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256; *see People v Bradshaw*, 18 NY3d 257, 264). To the extent that defendant's contention that he was denied effective assistance of counsel at sentencing survives his guilty plea, we conclude that it lacks merit (*see People v Smith*, 144 AD3d 1547, 1548). " 'Defendant was sentenced in accordance with the plea agreement, and any alleged deficiencies in defense counsel's representation at sentencing do not constitute ineffective assistance' " (*People v Gregg*, 107 AD3d 1451, 1452; *see Smith*, 144 AD3d at 1548; *see generally People v Ford*, 86 NY2d 397, 404). We conclude that the sentence is not unduly harsh or severe, even considering that defendant's accomplice received a lesser sentence (*see People v Shaffner*, 96 AD3d 1689, 1690). We note, however, that the certificate of conviction should be amended because it incorrectly reflects that defendant was sentenced as a second felony offender when he was actually sentenced as a second felony drug

offender (*see People v Smallwood*, 145 AD3d 1447, ___; *People v Easley*, 124 AD3d 1284, 1285, *lv denied* 25 NY3d 1200).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

192
CA 16-01269
PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

ASHTON BLAIR MCEVOY, PLAINTIFF-RESPONDENT,

V ORDER

MULDOON & GETZ AND JON P. GETZ,
DEFENDANTS-APPELLANTS.

BARCLAY DAMON, LLP, BUFFALO (TYSON PRINCE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

VIOLA, CUMMINGS & LINDSAY, LLP, NIAGARA FALLS (MICHAEL J. SKONEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Mark A. Montour, J.), entered May 2, 2016. The order denied defendants' motion for summary judgment dismissing plaintiff's complaint.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on August 17, 2016, and filed in the Niagara County Clerk's Office on September 29, 2016,

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

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

193.1
KA 14-01407
PRESENT: WHALEN, P.J., PERADOTTO, CARNI, DEJOSEPH, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DERRICK L. HALL, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

NIAGARA COUNTY DISTRICT ATTORNEY'S OFFICE, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered March 27, 2013. The appeal was held by this Court by order entered April 29, 2016, decision was reserved and the matter was remitted to Niagara County Court for further proceedings (138 AD3d 1407).

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 9, 2016, with attached affidavit sworn to on November 21, 2016 by defendant,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

199
KA 15-00892
PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   ORDER

WILLIAM O. KUYAL, JR., DEFENDANT-APPELLANT.

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

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered March 2, 2015. The judgment convicted defendant, upon his plea of guilty, of vehicular assault in the second degree and driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs.

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

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

207
CA 16-01209
PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND SCUDDER, JJ.

MICHAEL J. JONES, PLAINTIFF-RESPONDENT,

V   ORDER

MAUREEN E. TORPEY, KATHRYN F. TORPEY,
DEFENDANTS-APPELLANTS,
CANEISHA N. DOSS AND LARRY D. DOSS,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

LAW OFFICES OF VICTOR M. WRIGHT, ORCHARD PARK (RACHEL EMMINGER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DOLCE PANEPINTO, P.C., BUFFALO (JONATHAN M. GORSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (LAUREN M. YANNUZZI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered January 14, 2016. The order, among other things, granted plaintiff’s motion for partial summary judgment.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Loafin’ Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

208
CA 16-01216
PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND SCUDDER, JJ.

MICHAEL J. JONES, PLAINTIFF-RESPONDENT,

V ORDER

MAUREEN E. TORPEY, KATHRYN F. TORPEY,
DEFENDANTS-APPELLANTS,
CANEISHA N. DOSS AND LARRY D. DOSS,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

LAW OFFICES OF VICTOR M. WRIGHT, ORCHARD PARK (RACHEL EMMINGER OF COUNSEL), FOR DEFENDANTS-APPELLANTS

DOLCE PANEPINTO, P.C., BUFFALO (JONATHAN M. GORSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (LAUREN M. YANNUZZI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered April 12, 2016. The order, upon reargument, granted plaintiff’s motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court entered January 14, 2016 (Patrick H. NeMoyer, J.).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

210
CA 16-01203
PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, AND SCUDDER, JJ.

JACK I. DINABURG, PLAINTIFF-RESPONDENT,

V ORDER

UNITED REFINING COMPANY, DEFENDANT-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (JOHN T. KOLAGA OF COUNSEL), FOR DEFENDANT-APPELLANT.

BARCLAY DAMON, LLP, SYRACUSE (ROBERT A. BARRER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered January 22, 2016. The order, insofar as appealed from, denied the motion of defendant to disqualify counsel for plaintiff.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on December 15, 2016,

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

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

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

211
CA 16-00916
PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND SCUDDER, JJ.

JANINE GALLO, PLAINTIFF-RESPONDENT,

V   ORDER

SCOTT T. WICKS, DEFENDANT-APPELLANT.

LAW OFFICES OF JOHN TROP, ROCHESTER (THOMAS P. DURKIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF J. MICHAEL HAYES, BUFFALO (DEANNA RUSSELL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered March 21, 2016. The order, among other things, granted the motion of plaintiff for a directed verdict on liability.

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

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court

MOTION NO. (1117/03) KA 00-02226. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EDWARD BROWN, DEFENDANT-APPELLANT. -- Motion for reargument and other relief denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CARNI, AND TROUTMAN, JJ. (Filed Feb. 3, 2017.)

MOTION NO. (358/10) KA 07-01557. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHAD T. HOLLOWAY, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, TROUTMAN, AND SCUDDER, JJ. (Filed Feb. 3, 2017.)

MOTION NO. (1068/11) KA 09-01028. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V STEFFAN A. JONES, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, CENTRA, TROUTMAN, AND SCUDDER, JJ. (Filed Feb. 3, 2017.)

MOTION NOS. (45/14 AND 50/14) KA 07-01929. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CLEMON JONES, ALSO KNOWN AS CLEMENT/CLEMONT JONES, DEFENDANT-APPELLANT. (APPEAL NO. 1.) KA 08-02408. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CLEMON JONES, ALSO KNOWN AS CLEMENT/CLEMONT JONES, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., PERADOTTO, CARNI, CURRAN, AND TROUTMAN, JJ. (Filed Feb. 3, 2017.)

MOTION NO. (631/14) KA 10-01782. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BRIAN M. FISHER, ALSO KNOWN AS BRYAN MAURICE FISHER, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: WHALEN, P.J., CARNI, NEMOYER, CURRAN, AND SCUDDER, JJ. (Filed Feb. 3, 2017.)

MOTION NO. (678/14) KA 10-01026. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V FELIPE A. ROMERO, ALSO KNOWN AS JOHN DOE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., LINDLEY, DEJOSEPH, CURRAN, AND TROUTMAN, JJ. (Filed Feb. 3, 2017.)

MOTION NO. (1209/14) KA 12-01919. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V AMILCAR RAMOS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, CENTRA, LINDLEY, AND DEJOSEPH, JJ. (Filed Feb. 3, 2017.)

MOTION NO. (827/15) KA 11-00255. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CARL J. HOLMES, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, AND DEJOSEPH, JJ. (Filed Feb. 3, 2017.)

MOTION NOS. (1159/15 AND 534-535/11) KA 12-01818. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DOUGLAS B. WORTH, DEFENDANT-APPELLANT.

KA 06-00414. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DOUGLAS WORTH, DEFENDANT-APPELLANT. (APPEAL NO. 1.) KA 09-01449. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DOUGLAS WORTH, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for reargument and for other relief denied. PRESENT: WHALEN, P.J., CENTRA, CARNI, DEJOSEPH, AND SCUDDER, JJ. (Filed Feb. 3, 2017.)

MOTION NO. (730/16) CA 15-01162. -- MAURA CLUNE, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JAMES CAMPBELL, DECEASED, PLAINTIFF-APPELLANT, V MICHAEL C. MOORE, M.D., DEFENDANT, MERCY HOSPITAL OF BUFFALO AND CATHOLIC HEALTH SYSTEM, INC., DOING BUSINESS AS MERCY HOSPITAL OF BUFFALO, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, AND NEMOYER, JJ. (Filed Feb. 3, 2017.)

MOTION NO. (731/16) CA 15-01163. -- MAURA CLUNE, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JAMES CAMPBELL, DECEASED, PLAINTIFF-APPELLANT, V MICHAEL C. MOORE, M.D., DEFENDANT-RESPONDENT, MERCY HOSPITAL OF BUFFALO, ET AL., DEFENDANTS. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, AND NEMOYER, JJ. (Filed Feb. 3, 2017.)

MOTION NO. (783/16) CA 15-02057. -- BUFFALO BIODIESEL, INC., PLAINTIFF-APPELLANT, V TAJ MAHAL, INC., DEFENDANT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, CURRAN, AND TROUTMAN, JJ. (Filed Feb. 3, 2017.)

MOTION NO. (884/16) CA 16-00208. -- PATRICIA J. CURTO, PLAINTIFF-APPELLANT, V NEW YORK LAW JOURNAL AND ALM MEDIA PROPERTIES, LLC, DEFENDANTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, LINDLEY, TROUTMAN, AND SCUDDER, JJ. (Filed Feb. 3, 2017.)

MOTION NO. (900/16) CA 15-01753. -- IN THE MATTER OF GROTON COMMUNITY HEALTH CARE CENTER, INC., PETITIONER-RESPONDENT, V PHILLIP BEVIER, RESPONDENT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND CURRAN, JJ. (Filed Feb. 3, 2017.)

MOTION NO. (926/16) CA 15-01939. -- IN THE MATTER OF THE ESTATE OF MANSFIELD B. JORDAN, DECEASED. NORMA J. MOBLEY AND MANSFIELD B. JORDAN, JR., CO-EXECUTORS OF THE ESTATE OF MANSFIELD B. JORDAN, DECEASED, PETITIONERS-RESPONDENTS; VERONICA T. REYES, RESPONDENT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: PERADOTTO, J.P., LINDLEY, NEMOYER, AND SCUDDER, JJ. (Filed Feb. 3, 2017.)

MOTION NO. (1041/16) TP 16-00140. -- IN THE MATTER OF LEROY JOHNSON, PETITIONER, V JOHN B. LEMPKE, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY, RESPONDENT. -- Motion for reargument denied. PRESENT: CARNI, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND SCUDDER, JJ. (Filed Feb. 3, 2017.)

KA 15-01109. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL CORREIA, DEFENDANT-APPELLANT. -- Motion to dismiss granted. Memorandum: The matter is remitted to Wayne County Court to vacate the judgment of conviction and dismiss the indictment either sua sponte or on application of either the District Attorney or the counsel for defendant (*see People v Matteson*, 75 NY2d 745). PRESENT: WHALEN, P.J., SMITH, CENTRA, PERADOTTO, AND CARNI, JJ. (Filed Feb. 3, 2017.)