SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MARCH 31, 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

934

KA 16-00078

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN P. BROCKWAY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

BETZJITOMIR LAW OFFICE, BATH (SUSAN BETZJITOMIR 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 July 31, 2013. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him, upon an *Alford* plea, of burglary in the second degree (Penal Law § 140.25 [2]). In appeal No. 2, he appeals from a judgment convicting him, upon a plea of guilty, of tampering with a witness in the third degree (§ 215.11 [2]).

We reject defendant's contention in appeal No. 1 that his claim of actual innocence may be reviewed on direct appeal following his *Alford* plea. A claim of actual innocence "must be based upon reliable evidence which was not presented at the [time of the plea]" (*People v Hamilton*, 115 AD3d 12, 23), and thus must be raised by a motion pursuant to CPL article 440 (*see generally id.* at 26-27). Moreover, a plea of guilty " 'should not be permitted to be used as a device for a defendant to avoid a trial while maintaining a claim of factual innocence' " (*People v Conway*, 118 AD3d 1290, 1290, quoting *People v Plunkett*, 19 NY3d 400, 406), and we conclude that the same is true of an *Alford* plea (*see generally Matter of Silmon v Travis*, 95 NY2d 470, 475). Even assuming, arguendo, that defendant's contention survived the plea, we conclude that defendant has "failed to demonstrate [his] factual innocence" (*People v Caldavado*, 26 NY3d 1034, 1037; *see People v Larock*, 139 AD3d 1241, 1244, *lv denied* 28 NY3d 932).

Defendant had over $15,000 in cash on his person when he was arrested on the charges in appeal No. 1. He contends that this money

was unrelated to the charged crimes, and that the People's refusal to return it left him unable to retain counsel and denied him his right to counsel of his choice (*see generally Luis v United States*, ___ US ___, ___, 136 S Ct 1083, 1089; *United States v Gonzalez-Lopez*, 548 US 140, 144). Although this contention survives defendant's plea (*see People v Griffin*, 20 NY3d 626, 630-632), we conclude that it is encompassed by the waiver of the right to appeal set forth in the "settlement agreement" signed by defendant in connection with the guilty plea. That agreement provided that, for the purpose of resolving potential civil forfeiture claims available to the District Attorney under CPLR article 13-A, the cash was subject to forfeiture as the proceeds or instrumentality of a crime (*see* CPLR 1311 [1]; *see generally Morgenthau v Citisource, Inc*., 68 NY2d 211, 217-218), and defendant "waive[d] any right of appeal he may have regarding the forfeiture of the property." In any event, even assuming that the waiver did not encompass defendant's contention that he was denied his right to counsel of his choice as the result of the People's refusal to return the cash, we conclude that his contention is unpreserved for our review (*see People v Kamp*, 129 AD3d 1339, 1341, *lv denied* 26 NY3d 969; *People v Sims*, 105 AD3d 415, 416, *lv denied* 21 NY3d 1009; *see generally People v Tineo*, 64 NY2d 531, 535-536). While defendant repeatedly questioned why the money was not being returned to him, he never made the specific argument that County Court should order it returned to protect his right to counsel of his choice (*see* CPL 470.05 [2]), nor did he request a hearing to test the People's assertion that the money was related to the charged crimes (*cf. Kaley v United States*, ___ US ___, ___, 134 S Ct 1090, 1095).

Defendant further contends in appeal No. 1 that the court should have directed that the grand jury minutes be disclosed to him. Even assuming, arguendo, that this contention survives his plea (*cf. People v Ippolito*, 114 AD3d 703, 703), we conclude that he failed to show the requisite "compelling and particularized need" for disclosure of the minutes to overcome the statutory presumption of grand jury secrecy (*People v Robinson*, 98 NY2d 755, 756; *see People v Eun Sil Jang*, 17 AD3d 693, 694; *see generally* CPL 190.25 [4] [a]). His related constitutional claim is unpreserved for our review (*see People v Lane*, 7 NY3d 888, 889), and it is without merit in any event (*see generally Robinson*, 98 NY2d at 756-757). Defendant's contention in appeal No. 1 that the People violated their *Brady* obligation is forfeited by his guilty plea and is in any event without merit (*see People v Chinn*, 104 AD3d 1167, 1168, *lv denied* 21 NY3d 1014). Defendant has not established that the People had access to his text messages prior to his plea or that those messages are exculpatory (*see People v Hotaling*, 135 AD3d 1171, 1173*; see generally People v Santorelli*, 95 NY2d 412, 421-422), and his " 'speculation concerning the existence of [allegedly exculpatory video evidence] is insufficient to establish a *. . . Brady* violation' " (*People v Bryant*, 298 AD2d 845, 846, *lv denied* 99 NY2d 556; *see People v Burton*, 126 AD3d 1324, 1325-1326, *lv denied* 25 NY3d 1199; *People v Johnson*, 60 AD3d 1496, 1497, *lv denied* 12 NY3d 926).

We further conclude in appeal No. 1 that the court properly

refused to suppress evidence recovered from defendant's vehicle without conducting a hearing. It was apparent from information available to defendant at the time of his request that the search of his vehicle was based on the automobile exception to the warrant requirement, i.e., probable cause to believe that the vehicle contained evidence of the charged crimes (*see People v Jackson*, 52 AD3d 1318, 1319, *lv denied* 11 NY3d 737; *People v Brown*, 24 AD3d 884, 886, *lv denied* 6 NY3d 832; *see generally People v Blasich*, 73 NY2d 673, 678-680). Inasmuch as defendant made no allegations questioning the applicability of that exception, he "did not raise any factual issue warranting a hearing" (*People v Thomason*, 37 AD3d 304, 305; *see generally* CPL 710.60 [3]; *People v Mendoza*, 82 NY2d 415, 421-422).

Even assuming, arguendo, that defendant's request for dismissal of the indictment in each appeal based on police misconduct survives his pleas and is preserved for our review (*cf. People v Zer*, 276 AD2d 259, 259, *lv denied* 96 NY2d 837), we conclude that the record does not establish any misconduct sufficiently egregious to warrant that relief (*see People v Peterkin*, 12 AD3d 1026, 1027, *lv denied* 4 NY3d 766; *People v Ranta*, 203 AD2d 307, 307, *lv denied* 83 NY2d 970, *reconsideration denied* 85 NY2d 979; *cf. People v Isaacson*, 44 NY2d 511, 518-519, *rearg denied* 45 NY2d 776).

Defendant's further contention in appeal No. 1 that the court erred in accepting his *Alford* plea in the absence of " 'strong evidence of actual guilt' " in the record is not preserved for our review because he failed to move to withdraw his plea or to vacate the judgment of conviction (*People v Elliott*, 107 AD3d 1466, 1466, *lv denied* 22 NY3d 996; *see People v Heidgen*, 22 NY3d 981, 981-982; *see also People v Sherman*, 8 AD3d 1026, 1026, *lv denied* 3 NY3d 681). In any event, we conclude that the record contains the requisite evidence of guilt to support the plea (*see People v Richardson*, 132 AD3d 1313, 1316, *lv denied* 26 NY3d 1149; *Elliott*, 107 AD3d at 1466; *People v Stewart*, 307 AD2d 533, 534). Defendant's remaining challenges to the voluntariness of his plea in each appeal are likewise unpreserved for our review (*see generally People v Gilbert*, 111 AD3d 1437, 1437, *lv denied* 22 NY3d 1138; *Sherman*, 8 AD3d at 1026), and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Defendant further contends with respect to each appeal that he was denied effective assistance of counsel because the attorney who represented him at the time of his pleas had previously represented one of the victims of the incident underlying appeal No. 1, and thus had a conflict of interest. Defendant was informed of that potential conflict, however, and agreed to waive it, "thereby waiving any claim of possible prejudice resulting from the potential conflict" (*People v Little*, 139 AD3d 1356, 1357, *lv denied* 28 NY3d 933; *see generally People v Roberts*, 251 AD2d 431, 432, *lv denied* 92 NY2d 882, *reconsideration denied* 92 NY2d 904). We reject defendant's additional claims of ineffective assistance of counsel, "inasmuch as he received 'an advantageous plea [bargain] and nothing in the record casts doubt on the apparent effectiveness of counsel' " (*People v Hoyer*, 119 AD3d

1457, 1458, quoting *People v Ford*, 86 NY2d 397, 404).

We have reviewed defendant's remaining contentions and conclude that none warrants reversal or modification of the judgment in either appeal.

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

935

KA 16-00087

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN P. BROCKWAY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

BETZJITOMIR LAW OFFICE, BATH (SUSAN BETZJITOMIR 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 July 31, 2013. The judgment convicted defendant, upon his plea of guilty, of tampering with a witness in the third degree.

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

Same memorandum as in *People v Brockway* ([appeal No. 1] ___ AD3d ___ [Mar. 31, 2017]).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

1174

CA 16-00478

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

TAMMY GRIER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ACEA M. MOSEY, AS VOLUNTARY ADMINISTRATOR FOR THE ESTATE OF TARA L. HALLAM AND DAVID C. MOORE, DEFENDANTS-APPELLANTS.

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

PETER M. JASEN, P.C., BUFFALO (PETER M. JASEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, Jr., J.), entered November 4, 2015. The order, insofar as appealed from, denied in part the motion of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when her vehicle was struck from behind by a vehicle operated by Tara L. Hallam (decedent) and owned by defendant David C. Moore (Moore). Moore and defendant Acea M. Mosey, as voluntary administrator for decedent's estate, moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). Defendants appeal from an order that granted their motion only in part, dismissing plaintiff's claims under four of the six categories of serious injury alleged by her. We reject defendants' contention that the court erred in denying the motion with respect to the two remaining categories, i.e., permanent consequential limitation of use and significant limitation of use.

Although defendants met their initial burden on the motion by submitting "competent medical evidence establishing as a matter of law that plaintiff did not sustain a serious injury under either of those categories" (*Robinson v Polasky*, 32 AD3d 1215, 1216; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562), plaintiff raised a triable issue of fact whether she sustained a serious injury under both categories (*see Strangio v Vasquez*, 144 AD3d 1579, 1580; *Pastuszynski v Lofaso*, 140 AD3d 1710, 1711). "Whether a limitation of

use or function is 'significant' or 'consequential' (i.e., important . . .) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Dufel v Green*, 84 NY2d 795, 798). Here, in opposition to the motion, plaintiff submitted evidence that she sustained limitations to the range of motion of her cervical spine exceeding 20% when compared to the normal range of motion. Injuries to that degree have been deemed serious injuries within the meaning of Insurance Law § 5102 (d) (*see e.g. Garner v Tong*, 27 AD3d 401, 401; *Mazo v Wolofsky*, 9 AD3d 452, 453; *Campbell v Cloverleaf Transp.*, 5 AD3d 169, 170; *cf. Baker v Donahue*, 199 AD2d 661, 661). Further, plaintiff submitted the affirmation of her orthopedic surgeon, who treated plaintiff for two years following the accident and concluded that plaintiff's condition is permanent and that the only medical option remaining is surgery.

Defendants also contend that they are entitled to summary judgment dismissing the complaint because plaintiff's injuries resulted from a preexisting condition and did not constitute the aggravation or exacerbation of a preexisting injury. We reject that contention inasmuch as one of defendants' experts stated that "[t]here is no evidence of any contributing preexisting condition" (*see Tate v Brown*, 125 AD3d 1397, 1398; *Gawron v Town of Cheektowaga*, 125 AD3d 1467, 1468). In any event, plaintiff raised a triable issue of fact whether her injuries were caused by the accident inasmuch as her treating orthopedic surgeon concluded in his affirmation that the accident was the "competent and producing cause" of plaintiff's spinal condition (*see LoGrasso v City of Tonawanda*, 87 AD3d 1390, 1391), and that the accident "activated latent degenerative conditions in [plaintiff's] cervical spine causing them to be symptomatic," i.e., that the accident exacerbated a preexisting condition (*see generally Houston v Geerlings*, 83 AD3d 1448, 1450). Contrary to defendants' contention, "even though plaintiff did not plead the aggravation or exacerbation of a preexisting injury, defendant[s themselves] raised that issue in [their] motion papers and thus plaintiff could properly rely on that theory in opposition to the motion" (*id.* at 1448-1449).

Entered: March 31, 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 16-01003

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

FREDERICK G. KNIGHT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT HOLLAND AND CIRCLE L, LLC,
DEFENDANTS-APPELLANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (CAROL R. FINOCCHIO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered January 28, 2016. The judgment, among other things, awarded plaintiff money damages as against defendants.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting the posttrial motion in part and setting aside the verdict with respect to damages for past and future loss of household services and as modified the judgment is affirmed without costs, and a new trial is granted on damages for future loss of household services only unless plaintiff, within 20 days of service of a copy of the order of this Court with notice of entry, stipulates to reduce the award of damages for future loss of household services to $100,000, in which event the judgment is modified accordingly and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained at an automobile race track operated by defendant Circle L, LLC (Circle L). Plaintiff's son was racing on the night plaintiff was injured, and plaintiff paid a fee to enter the pit area and signed a liability waiver form. While he was in the pit area, plaintiff was struck by a race car driven by defendant Robert Holland (Holland), who was backing up the vehicle with the assistance of two spotters on his way to the track for a qualifying heat. Plaintiff alleged that Holland was negligent in the operation of his vehicle and that Circle L was negligent in the operation of the pit area, in which there were no speed limits or designated parking areas, and both vehicles and pedestrians were permitted to travel freely through it. Following a trial, the jury apportioned liability for the accident 50% to Circle L, 30% to Holland, and 20% to plaintiff, and

awarded plaintiff damages for past and future pain and suffering and past and future loss of household services. Supreme Court denied defendants' posttrial motion to set aside the verdict, and this appeal ensued.

Contrary to defendants' contention, the court properly granted plaintiff's motion for a directed verdict establishing that the liability waiver was invalid and that the action was not barred by the doctrine of primary assumption of the risk, inasmuch as there was "no rational process" by which the jury could have found in favor of defendants on those issues (*Szczerbiak v Pilat*, 90 NY2d 553, 556). With respect to the waiver, General Obligations Law § 5-326 voids any such agreement entered into in connection with, as relevant here, the payment of a fee by a "user" to enter a place of recreation. Plaintiff testified at trial that he was a mere spectator on the night of the accident, thereby establishing that he was a user entitled to the benefit of section 5-326 (*see Gilkeson v Five Mile Point Speedway*, 232 AD2d 960, 960-961; *Gaskey v Vollertsen*, 110 AD2d 1066, 1066-1067), and there was no evidence from which the jury could have rationally found that plaintiff was a participant in the event whose attendance was "meant to further the speedway venture" (*Smith v Lebanon Val. Auto Racing*, 167 AD2d 779, 780; *see generally Howell v Dundee Fair Assn.*, 73 NY2d 804, 806). Although defendants' expert witness testified that "[e]veryone in the pits is a participant," that opinion was not supported by any evidentiary foundation and therefore lacked probative force (*see generally Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544; *Wittman v Nice*, 144 AD3d 1675, 1676).

With respect to the doctrine of primary assumption of the risk, we conclude that the risk that a pedestrian will be struck by a driver backing up in the pit area, well before the driver is participating in a race, is not inherent in the activity of automobile racing (*see Hawkes v Catatonk Golf Club*, 288 AD2d 528, 529-530; *Green v WLS Promotions*, 132 AD2d 521, 521-522, *lv dismissed* 70 NY2d 951; *see generally Morgan v State of New York*, 90 NY2d 471, 488), and thus that the doctrine is inapplicable to this case (*see Morgan*, 90 NY2d at 488; *Repka v Arctic Cat, Inc.*, 20 AD3d 916, 919-920; *see generally Custodi v Town of Amherst*, 20 NY3d 83, 87-90).

We reject defendants' further contention that the doctrine of law of the case precluded the court from directing a verdict in plaintiff's favor after it had denied prior motions by plaintiff directed at the issues of waiver and primary assumption of the risk, including a motion for partial summary judgment. " 'A denial of a motion for summary judgment is not necessarily . . . the law of the case that there is an issue of fact in the case that will be established at the trial' " (*Wyoming County Bank v Ackerman*, 286 AD2d 884, 884; *see Bukowski v Clarkson Univ.*, 86 AD3d 736, 739, *affd* 19 NY3d 353).

Defendants further contend that the court erred in failing to instruct the jury on implied assumption of the risk as an aspect of plaintiff's culpable conduct (*see generally* CPLR 1411). As an initial matter, we agree with defendants that they preserved this contention

for our review. After the court granted plaintiff's motion for a directed verdict, defendants' attorney made an argument addressed to the jury's consideration of assumption of the risk and plaintiff's comparative negligence, and the court stated that assumption of the risk "is not part of this case." While defendants did not specifically request a charge on implied assumption of the risk (*see* PJI 2:55), we conclude that they sufficiently alerted the court to the relevant question and preserved the issue for our review (*see generally Piotrowski v McGuire Manor, Inc.*, 117 AD3d 1390, 1392-1393). We further agree with defendants that a charge on implied assumption of the risk should have been given because there was evidence that plaintiff "disregard[ed] a known risk by voluntarily being in a dangerous area" (*Beadleston v American Tissue Corp.*, 41 AD3d 1074, 1076; *see Romanchick v Havens*, 159 AD2d 1022, 1022). Inasmuch as the jury was properly instructed on comparative negligence and apportioned 20% of the liability for the accident to plaintiff, however, we conclude that this error did not prejudice a substantial right of defendants and thus does not warrant reversal (*see* CPLR 2002; *Wild v Catholic Health Sys.*, 85 AD3d 1715, 1717-1718, *affd* 21 NY3d 951; *Capelli v Prudential Bldg. Maintenance of N.Y.*, 99 AD2d 501, 501-502; *cf. Shire v Mazzilli*, 203 AD2d 275, 275).

Contrary to defendants' contention, the evidence is legally sufficient to support the jury's liability findings. Although plaintiff conceded in his testimony that Holland could not see behind him from inside his race car, that testimony did not constitute a formal judicial admission that would conclusively establish the fact admitted (*see generally Morgenthow & Latham v Bank of N.Y. Co.*, 305 AD2d 74, 79, *lv denied* 100 NY2d 512). Moreover, regardless of whether Holland could have seen plaintiff, the evidence supported a finding of liability against him on the theory that he drove too fast in reverse in the pit area. Defendants' challenge to the finding of liability against Circle L is based on alleged defects in the opinion of plaintiff's expert, and we reject it. Whether the pit area was reasonably safe under the circumstances was within the understanding of the jury and did not require expert proof (*see generally Havas v Victory Paper Stock Co.*, 49 NY2d 381, 386; *Murphy v Crecco*, 255 AD2d 300, 300; *Humiston v Rochester Inst. of Tech.*, 125 AD2d 957, 958), and we conclude in any event that the expert had a sufficient foundation for his opinions (*see generally Cuevas v City of New York*, 32 AD3d 372, 374). The liability verdict is not against the weight of the evidence, inasmuch as "it cannot be said that the preponderance of the evidence in favor of [defendants] is so great that the verdict could not have been reached upon any fair interpretation of the evidence" (*Homan v Herzig* [appeal No. 2], 55 AD3d 1413, 1414 [internal quotation marks omitted]; *see Lolik v Big V Supermarkets*, 86 NY2d 744, 746).

Defendants further contend that the awards of damages for past and future loss of household services are not supported by legally sufficient evidence and are against the weight of the evidence, and we conclude that their posttrial motion adequately preserved this contention for our review notwithstanding their failure to object to the inclusion of loss of household services as a category of damages on the verdict sheet (*see generally* CPLR 4404 [a]; *City of Plattsburgh*

v Borner, 38 AD3d 1047, 1048). We agree with defendants that the award for past loss of household services must be set aside because there was no evidence that plaintiff incurred "any actual expenditures on household services between the accident and the date of verdict" (*Schultz v Harrison Radiator Div. Gen. Motors Corp.*, 90 NY2d 311, 320).

In light of the evidence that plaintiff could no longer perform certain household services that he had performed prior to the accident, the jury was entitled to find that plaintiff was "reasonably certain" to incur damages for future loss of household services (*id.* at 321; *see Presler v Compson Tennis Club Assoc.*, 27 AD3d 1096, 1097; *Merola v Catholic Med. Ctr. of Brooklyn & Queens, Inc.*, 24 AD3d 629, 631). In addition, "[e]xpert testimony, although permissible, is not a prerequisite to establishing the value of household services" (*Kastick v U-Haul Co. of W. Mich.*, 259 AD2d 970, 970). Nonetheless, in view of the lack of any testimony establishing the value of plaintiff's household services, as well as the fact that the future award was intended to cover a period of only nine years, we conclude that the verdict insofar as it awarded damages of $300,000 for future loss of household services is against the weight of the evidence (*see Leto v Amrex Chem. Co., Inc.*, 85 AD3d 1509, 1510-1511; *Hixson v Cotton-Hanlon, Inc.*, 60 AD3d 1297, 1298; *Merola*, 24 AD3d at 631; *cf. Kihl v Pfeffer*, 47 AD3d 154, 161). Based on the evidence presented at trial, we conclude that $100,000 is the maximum amount that the jury could have awarded for future loss of household services. We therefore modify the judgment accordingly, and we grant a new trial on damages for future loss of household services only unless plaintiff, within 20 days of service of a copy of the order of this Court with notice of entry, stipulates to reduce the award of damages for future loss of household services to $100,000, in which event the judgment is modified accordingly.

Entered: March 31, 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 16-00323

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

LUAM K. ABRAHA, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

CRISTINE M. ADAMS, M.D., JEFFREY W. MYERS, D.O., ERIE COUNTY MEDICAL CENTER CORPORATION, UNIVERSITY EMERGENCY MEDICAL SERVICES, INC., DEFENDANTS-APPELLANTS-RESPONDENTS, ET AL., DEFENDANT.

GIBSON MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS CRISTINE M. ADAMS, M.D., JEFFREY W. MYERS, D.O. AND UNIVERSITY EMERGENCY MEDICAL SERVICES, INC.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (ELIZABETH G. ADYMY OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT ERIE COUNTY MEDICAL CENTER CORPORATION.

FRANCIS M. LETRO, BUFFALO (CAREY C. BEYER OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeals and cross appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered June 10, 2015. The order, among other things, directed that the bulk of the records subpoenaed to the court for an in camera review were not subject to disclosure.

It is hereby ORDERED that the order so appealed from is unanimously modified in the exercise of discretion by directing plaintiff to provide defendants-appellants-respondents with a privilege log in compliance with CPLR 3122 (b), 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 commenced this action seeking damages for injuries she allegedly sustained as a result of medical malpractice committed by, inter alia, Cristine M. Adams, M.D., Jeffrey W. Myers, D.O., and University Emergency Medical Services, Inc. (Adams defendants) and Erie County Medical Center Corporation (ECMC) in their treatment of her after she was assaulted by her estranged husband. ECMC and the Adams defendants (collectively, defendants) appeal and plaintiff cross-appeals from an order in which Supreme Court, after an in camera review of plaintiff's records from the shelter for domestic violence victims where she was living at the time of the assault, ordered disclosure of redacted copies of certain records, but

determined that "[t]he bulk of the records are not subject to disclosure."

We first address plaintiff's cross appeal. Contrary to her contention, the shelter records are not protected by any privilege, and they are thus subject to disclosure to the extent that they are material and necessary to the defense of the action (*see Dominique D. v Koerntgen*, 107 AD3d 1433, 1434; *see generally* CPLR 3101 [a]; *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406-407). Even assuming, arguendo, that the records were prepared by licensed social workers, which is not evident from the records themselves, we conclude that plaintiff waived any privilege afforded by CPLR 4508 by affirmatively placing her medical and psychological condition in controversy through the broad allegations of injury in her bills of particulars (*see Schlau v City of Buffalo*, 125 AD3d 1546, 1547; *Velez v Daar*, 41 AD3d 164, 165-166; *Diamond v Ross Orthopedic Group, P.C.*, 41 AD3d 768, 768-769; *cf. Tabone v Lee*, 59 AD3d 1021, 1022). Inasmuch as defendants are not seeking disclosure of the street address of the shelter, we reject plaintiff's contention that Social Services Law § 459-h precludes disclosure of the records. Furthermore, 18 NYCRR 452.10 (a), which renders confidential certain information "relating to the operation of residential programs for victims of domestic violence and to the residents of such programs," does not preclude disclosure of the records because that regulation allows for access to such information "as permitted by an order of a court of competent jurisdiction" (18 NYCRR 452.10 [a] [2]). That regulation does not preclude a court from ordering disclosure of shelter records that are material and necessary to the defense of an action (*see generally Staten v City of New York*, 90 AD3d 893, 895; *Schwahl v Grant*, 47 AD3d 698, 699).

With respect to defendants' appeals, we conclude that defendants are not entitled to " 'unfettered disclosure' " of plaintiff's potentially sensitive shelter records (*Adams v Daughtery*, 110 AD3d 1454, 1455). Indeed, we note that a court is "entitled to consider . . . the personal nature of the information sought" in making a disclosure order (*Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 747; *see Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452, 460). We agree with defendants, however, that the court should have directed plaintiff to provide a copy of her privilege log to them rather than directing her to provide it only to the court as an aid for its in camera review of the records. That contention is unpreserved for our review because defendants failed to object to the court's directive regarding the privilege log before the court ruled on the discoverability of the records (*see Mazzarella v Syracuse Diocese* [appeal No. 2], 100 AD3d 1384, 1385-1386). Nevertheless, we reach this issue as an exercise of our own discretion in discovery matters (*see Andon*, 94 NY2d at 745; *Page v Niagara Falls Mem. Med. Ctr.*, 141 AD3d 1084, 1085), because defendants' lack of any information about the nature of the shelter records deprived them of a reasonable opportunity to be heard on the discovery issues (*see generally Anonymous v High School for Envtl. Studies*, 32 AD3d 353, 359). We agree with plaintiff that providing her existing privilege log to defendants may be prejudicial given that she prepared the log in

reliance on the court's directive that it was to be provided only to the court. We therefore modify the order by directing that plaintiff provide defendants with a new privilege log describing the withheld records and her legal grounds for withholding them, in compliance with CPLR 3122 (b) (*see Stephen v State of New York*, 117 AD3d 820, 820-821; *see generally Matter of Subpoena Duces Tecum to Jane Doe*, 99 NY2d 434, 442). After defendants have received the privilege log, the court should afford them an opportunity to argue that any of those records are subject to disclosure, and the court shall thereafter make a de novo determination in that regard. We express no opinion on the potential merit of any such arguments.

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

189

CA 16-01267

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

TERESA G. SMITH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

UNITED REFINING COMPANY OF PENNSYLVANIA AND
KWIK-FIL, INC., DEFENDANTS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CELLINO & BARNES, P.C., BUFFALO (ELLEN B. STURM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered July 17, 2015. The order denied in part defendants' motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the complaint to the extent that it alleges that defendants created the allegedly dangerous condition and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when she slipped and fell in the parking lot of a gas station/convenience store owned and operated by defendants. Supreme Court properly denied that part of defendants' motion seeking summary judgment dismissing the complaint on the ground that plaintiff's alleged injury was not caused by a dangerous condition on defendants' property. Defendants cannot meet their burden of establishing as a matter of law that the property was in a reasonably safe condition based on the hearsay statement of a customer that the area of plaintiff's fall was shoveled and salted (*see generally Palisades Collection, LLC v Kedik*, 67 AD3d 1329, 1330-1331). Nor did plaintiff's deposition testimony that "I just fell . . . , there was no precursor. I don't remember slipping, I don't remember sliding" establish defendants' entitlement to judgment on that issue, inasmuch as the cause of her fall may be reasonably inferred from the circumstances (*see Lane v Texas Roadhouse Holdings, LLC*, 96 AD3d 1364, 1364-1365; *Nolan v Onondaga County*, 61 AD3d 1431, 1432). Further, the fact that plaintiff did not observe ice does not establish that her fall was not caused by ice (*see generally Gwitt v Denny's Inc.*, 92 AD3d 1231, 1232).

The court also properly denied that part of defendants' motion seeking summary judgment based upon the storm in progress doctrine. The affidavit of defendants' expert meteorologist and the climatological data on which he relied were insufficient to establish the weather conditions at the time and location of the accident (*see Calix v New York City Tr. Auth.*, 14 AD3d 583, 584). Further, the statements of witnesses at the gas station/convenience store did not establish as a matter of law that plaintiff's fall occurred during a storm in progress (*see Helms v Regal Cinemas, Inc.*, 49 AD3d 1287, 1288; *Vickery v Estate of Brockman*, 278 AD2d 913, 914).

We agree with defendants, however, that the court erred in denying their motion with respect to plaintiff's claim that defendants' snow removal efforts created or exacerbated the allegedly dangerous condition. Under the storm in progress doctrine, a defendant has no duty to remove the snow and the ice until a reasonable time has elapsed after cessation of the storm (*see Hanifan v COR Dev. Co., LLC*; 144 AD3d 1569, 1569). Where, as here, a defendant has undertaken snow removal efforts during a storm, the relevant inquiry becomes whether the defendant's efforts either created or exacerbated a hazardous condition (*see Glover v Bolsford*, 109 AD3d 1182, 1184). Plaintiff expressly conceded that she was not relying on that theory of liability, and thus the court should have granted defendants' motion to the extent that it sought summary judgment dismissing that claim (*see generally Cullen v Naples*, 31 NY2d 818, 820; *Brown v George*, 138 AD3d 466, 467). We therefore modify the order accordingly.

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

191

CA 16-01263

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

GERALD LANGGOOD, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CARROLS, LLC, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (BRANDON KING OF COUNSEL), FOR DEFENDANT-APPELLANT.

FUHRMAN LAW, ORCHARD PARK (SHANNON S. FUHRMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Mark A. Montour, J.), entered February 25, 2016. The order denied the motion of defendant Carrols, LLC, for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he allegedly tripped and fell on a rug while he was entering a restaurant owned and operated by Carrols, LLC (defendant). We agree with defendant that Supreme Court erred in denying its motion seeking summary judgment dismissing the complaint against it. We therefore reverse the order, grant defendant's motion, and dismiss the complaint against defendant. Although the issue "whether a certain condition qualifies as dangerous or defective is usually a question of fact for the jury to decide . . . , summary judgment in favor of a defendant is appropriate where a plaintiff fails to submit any evidence that a particular condition is actually defective or dangerous" (*Przybyszewski v Wonder Works Constr.*, 303 AD2d 482, 483; *see Bishop v Marsh*, 59 AD3d 483, 483; *Mullaney v Koenig*, 21 AD3d 939, 939). Here, defendant established its entitlement to judgment as a matter of law by submitting evidence that the placement of the rug in the vestibule of the restaurant did not constitute a dangerous condition, and in opposition plaintiff failed to raise a triable issue of fact (*see Leib v Silo Rest., Inc.*, 26 AD3d 359, 360; *Mansueto v Worster*, 1 AD3d 412, 413; *Jacobsohn v New York Hosp.*, 250 AD2d 553, 553-554).

We respectfully disagree with our dissenting colleague that defendant failed to meet its initial burden because it submitted the

deposition testimony of plaintiff who testified that he fell when his right foot went "underneath something" and that he saw the rug "kind of flapped over" after he fell. In our view, defendant satisfied its initial burden inasmuch as the videotape of the accident shows that the rug was flush to the floor, and other patrons of defendant's restaurant walked over the rug without an issue. Thus, plaintiff tripped over the rug because his foot picked up the edge of the rug and caused his fall, and not because there was a ripple in the rug or because any portion of the rug was raised off of the ground (*see Jacobsohn*, 250 AD2d at 554).

Although we agree with the dissent that defendant failed to establish as a matter of law that plaintiff's inattention was the sole proximate cause of his fall, we conclude that defendant established as a matter of law that the alleged defect created by the placement of a rug in the vestibule and any apparent height differential between the rug and the floor "is too trivial to be actionable" (*Sharpe v Ulrich Dev. Co., LLC*, 52 AD3d 1319, 1320). "[T]he test established by the case law in New York is not whether a defect is *capable* of catching a pedestrian's shoe. Instead, the relevant questions are whether the defect was difficult for a pedestrian to see or to identify as a hazard or difficult to pass over safely on foot in light of the surrounding circumstances" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 80; *see Stein v Sarkisian Bros., Inc.*, 144 AD3d 1571, 1572). Defendant's submissions established that the accident occurred between approximately 10:00 and 10:30 a.m., when it was "bright enough to see." Plaintiff was entering defendant's restaurant behind his son, and there were no other customers in the vicinity. The photograph submitted by defendant depicting the rug does not reveal any defect or irregularity with the rug, and the videotape of the incident shows that the area where plaintiff fell was unobstructed, no other patrons had an issue traversing through the doors and over the rug, and there was no appreciable ripple or other height differential present in the rug to cause a tripping hazard. Thus, after examining the photograph and the video depicting the placement of the rug in the vestibule, and " 'in view of the time, place, and circumstances of plaintiff's injury,' " we conclude that defendant established as a matter of law that any defect in the rug was too trivial to be actionable (*Germain v Kohl's Corp.*, 96 AD3d 1474, 1475), and plaintiff in opposition failed to raise a triable issue of fact.

All concur except WHALEN, P.J., who dissents and votes to affirm in the following memorandum: I respectfully dissent. Contrary to the conclusion of the majority, I conclude that Carrols, LLC (defendant) failed to meet its initial burden of establishing as a matter of law that the rug on which plaintiff allegedly tripped was not in an unreasonably dangerous condition (*see Grefrath v DeFelice*, 144 AD3d 1652, 1653; *Muto v Roman Catholic Church of St. John the Evangelist*, 68 AD3d 1789, 1789; *cf. O'Rourk v Menorah Campus, Inc.*, 13 AD3d 1154, 1154). " '[W]hether a dangerous or defective condition exists on the property of another so as to create liability . . . is generally a question of fact for the jury' " (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 77, quoting *Trincere v County of Suffolk*, 90 NY2d 976, 977). In support of its motion, defendant submitted plaintiff's

deposition testimony in which he testified that he fell when his right foot went "underneath something," and that he saw the rug "kind of flapped over" after he fell. Affording plaintiff the benefit of every reasonable inference (*see Williams v Jones*, 139 AD3d 1346, 1348; *see generally Vega v Restani Constr. Corp.*, 18 NY3d 499, 503), I conclude that his testimony raised a question of fact whether the rug was partially elevated off the floor and thus created an unreasonably dangerous condition (*see Camizzi v Tops, Inc.*, 244 AD2d 1002, 1002; *cf. Jacobsohn v New York Hosp.*, 250 AD2d 553, 554; *see generally Luciano v Niagara Frontier Vocational Rehabilitation Ctr.*, 255 AD2d 974, 974).

I cannot agree with the majority's conclusions that "plaintiff tripped over the rug because his foot picked up the edge of the rug and caused his fall, and not because there was a ripple in the rug or because any portion of the rug was raised off the ground," and that "there was no appreciable ripple or other height differential present in the rug to cause a tripping hazard." Adopting those conclusions "requires the resolution of factual inferences in favor of defendant[], which is improper on a motion for summary judgment" (*Morris v Lenox Hill Hosp.*, 232 AD2d 184, 185, *affd* 90 NY2d 953). In my view, the photograph of the rug and the videotape of the accident submitted in support of defendant's motion did not conclusively demonstrate either the absence of any dangerous condition (*see Brothers v 574 9th Ave. Rest. Corp.*, 140 AD3d 512, 513; *Jordan v Juncalito Abajo Meat Corp.*, 131 AD3d 1012, 1012; *Deviva v Bourbon St. Fine Foods & Spirit*, 116 AD3d 654, 655), or that the alleged dangerous condition was too trivial to be actionable (*see Greco v City of Buffalo*, 128 AD3d 1461, 1462-1463; *McFadden v New Castle Hotel, LLC*, 101 AD3d 1767, 1768; *cf. Germain v Kohl's Corp.*, 96 AD3d 1474, 1474-1475; *see generally Hutchinson*, 26 NY3d at 77-79). Finally, I conclude that defendant failed to establish as a matter of law that plaintiff's inattention was the sole proximate cause of his fall (*see Grefrath*, 144 AD3d at 1654). I would therefore affirm the order denying defendant's motion for summary judgment dismissing the complaint against it.

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

214

CA 16-00989

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

RYAN NICASTRO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY,
DEFENDANT-RESPONDENT.

MARCUS & CINELLI, LLP, WILLIAMSVILLE (DAVID P. MARCUS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (ANTHONY G. MARECKI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered December 16, 2015 in a breach of contract action. The order denied the motion of plaintiff for partial summary judgment and granted the cross motion of defendant for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing defendant's seventh affirmative defense, and by denying the cross motion, and reinstating plaintiff's claim for full replacement cost, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this breach of contract action seeking, inter alia, a determination that he is entitled to full replacement cost coverage under the liability policy issued to him by defendant for the loss sustained when a property that he owned was destroyed by a fire. Three days after the fire, plaintiff, through his agent, advised defendant that he "elect[ed] to exercise any replacement cost options, which are or may become available." Plaintiff moved for partial summary judgment seeking, inter alia, dismissal of defendant's seventh affirmative defense, that plaintiff is not entitled to replacement cost value because he did not make a claim for replacement costs within 180 days of the loss and thus that any claim would be untimely, and that the terms of the policy do not entitle plaintiff to full replacement cost value. Defendant cross-moved for partial summary judgment dismissing the complaint to the extent that plaintiff alleges that he is entitled to full replacement cost value of the property. Supreme Court denied plaintiff's motion in its entirety and granted defendant's cross motion. We conclude that the court erred in denying that part of plaintiff's motion seeking dismissal of defendant's seventh affirmative defense and in

granting defendant's cross motion, and we therefore modify the order accordingly.

We agree with plaintiff that the provision requiring that a claim for indemnification of costs of repair or replacement be made within 180 days is ambiguous and therefore must be construed against defendant (*see White v Continental Cas. Co.*, 9 NY3d 264, 267; *Harrington v Amica Ins. Co.*, 223 AD2d 222, 228, *lv denied* 89 NY2d 808). "If an ambiguity exists, the insurer bears the burden of establishing that the construction it advances is not only reasonable, but also that it is the only fair construction . . . , viewed through the eyes of the average [person] on the street" (*Harrington*, 223 AD2d at 228 [internal quotation marks omitted]; *see Lachs v Fidelity & Cas. Co. of N.Y.*, 306 NY 357, 364, *rearg denied* 306 NY 941). Section five of the replacement cost provision of the policy provides: "**You** may make a claim for the actual cash value amount of the loss before repairs are made. A claim for any additional amount payable under this provision must be made within 180 days after the loss." The term "claim" is not defined in the policy. Plaintiff contends that he made a claim in compliance with the replacement cost provision by advising defendant three days after the loss that he would seek replacement costs for the premises. Defendant contends that plaintiff did not comply with that provision because it required that plaintiff make a "bona-fide" claim by "actually replacing and actually spending money in excess of the actual cash value within 180 days of the loss." We conclude that defendant failed to establish as a matter of law that its interpretation of the replacement cost provision of the policy is the "only fair construction" of the provision (*Harrington*, 223 AD2d at 228).

We further agree with plaintiff that, because he sustained a total loss rather than a partial loss, the coinsurance provisions in the policy providing for full replacement cost value only in the event that "the limit of liability on the damaged building is at least 80 percent of its replacement cost at the time of loss" do not apply. Instead, we agree with our colleagues in the Third Department in *Magie v Preferred Mut. Ins. Co.* (91 AD3d 1232, 1235, quoting *New York Life Ins. Co. v Glens Falls Ins. Co.*, 184 Misc 846, 849, *affd* 274 App Div 1045, *affd* 301 NY 506), that, "in New York, a coinsurance clause 'results in reducing the recovery in case of a partial loss, though in case of a total loss, the insurer is liable for the amount named in the policy.' " As the Court of Appeals explained with respect to a coinsurance clause, "[w]here either the loss or the insurance equals or exceeds 80 per cent of value, the clause has no effect, but when both are less, the insured and the insurer bear the loss in certain proportions. The amount of the insurance is not the variable factor, but the amount of loss. The amount of insurance is at all times the same, but when the loss is partial the insurer stands only a part, unless the insurance is for the full percentage, whereas if the loss is total, the insurer stands all, not exceeding the limit stated in the policy" (*Farmers' Feed Co. of N.J. v Scottish Union & Natl. Ins. Co.*, 173 NY 241, 247).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

227

KA 15-00665

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TWAN CONWAY, DEFENDANT-APPELLANT.

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

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), dated March 24, 2015. The order denied the motion of defendant to vacate the judgment of conviction pursuant to CPL 440.10.

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

Memorandum: On defendant's direct appeal from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), we held that, to the extent that defendant's contention in his pro se supplemental brief that he was denied effective assistance of counsel survived his guilty plea and valid waiver of the right to appeal, his contention lacked merit (*People v Conway*, 43 AD3d 635, 636, *lv denied* 9 NY3d 990). After Supreme Court summarily denied defendant's subsequent motion pursuant to CPL 440.10 seeking to vacate the judgment, we granted defendant leave to appeal and held on appeal that, as relevant here, defendant was entitled to a hearing pursuant to CPL 440.30 (5) on his claim of ineffective assistance because defendant's submissions, which involved matters outside the record on direct appeal, raised a factual issue whether trial counsel unreasonably refused to investigate potential alibi witnesses and a third party's admission to the crime, made to defendant's prior attorney (*People v Conway*, 118 AD3d 1290, 1291). The court denied the motion to vacate following a hearing, we granted defendant leave to appeal from that order, and we now affirm.

The submissions and hearing testimony established that, following indictment and suppression proceedings, defendant's criminal prosecution was adjourned so that the prior attorney, who was then representing defendant, could locate the third party who had

purportedly contacted him and confessed to committing the burglary. In his subsequent application for a material witness warrant, the prior attorney alleged that he had met with the third party at his office and tape-recorded the confession, which purportedly had been made "with convincing detail." The prior attorney further explained in the application that he attempted to have counsel appointed for the third party but the third party did not timely report to court and, thereafter, the prior attorney was unable to locate the third party despite attempting to serve him with a subpoena at his last known address and employing the services of a private investigator. The court issued the warrant.

After further proceedings and the replacement of attorneys, defendant was assigned trial counsel and the matter proceeded to trial. It is undisputed that the material witness warrant remained active and the investigator continued to look for the third party, even during the trial, but the third party was never located. Trial counsel had the prior attorney added to the witness list, but did not otherwise seek to introduce the third party's confession in evidence. Trial counsel explained at the hearing that she did not seek to introduce the confession due to evidentiary issues with authentication and admissibility, and that she had no good faith basis to seek a pretrial ruling because there were no rules of evidence under which the confession could be admitted. Trial counsel also testified that she had multiple conversations with defendant about the admissibility of the tape. In his testimony at the hearing, defendant confirmed that trial counsel spoke with him about the admissibility of the tape, and he claimed that trial counsel had stated that she was not going to use that evidence because it was hearsay.

After the People called two witnesses at trial, the court granted trial counsel's request to reopen the suppression hearing, thereby allowing defendant to raise an issue regarding the adequacy of the People's CPL 710.30 notice, but the court ultimately denied defendant's motion. After an off-the-record discussion that followed the adverse ruling, defendant indicated his desire to plead guilty, the People agreed to renew a previous offer, and defendant pleaded guilty in accordance with the offer.

Defendant contends that the court erred in denying his motion to vacate the judgment because the record establishes that he was denied effective assistance based on trial counsel's failure to seek admission of the tape recording purportedly containing the confession of the third party, or to present testimony of the prior attorney about that confession, and based on trial counsel's failure to seek a pretrial ruling on the admissibility of such evidence. Defendant also contends that he was denied effective assistance of counsel based on trial counsel's failure to pursue an alibi defense. We reject those contentions.

Where, as here, a defendant contends that he or she was denied the right to effective assistance of counsel guaranteed by both the Federal and New York State Constitutions, we evaluate the claim using

the state standard, which affords greater protection than its federal counterpart (*see People v Stultz*, 2 NY3d 277, 282, *rearg denied* 3 NY3d 702; *Conway*, 118 AD3d at 1291; *People v Ross*, 118 AD3d 1413, 1415-1416, *lv denied* 24 NY3d 964). Under the state standard, "[s]o long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met" (*People v Baldi*, 54 NY2d 137, 147; *see People v Benevento*, 91 NY2d 708, 712). A "defendant must demonstrate the absence of strategic or other legitimate explanations for counsel's alleged failure" (*People v Pavone*, 26 NY3d 629, 646; *see People v Barboni*, 21 NY3d 393, 406; *People v Caban*, 5 NY3d 143, 152). "However, a reviewing court must be careful not to 'second-guess' counsel, or assess counsel's performance 'with the clarity of hindsight,' effectively substituting its own judgment of the best approach to a given case" (*Pavone*, 26 NY3d at 647, quoting *Benevento*, 91 NY2d at 712; *see People v Parson*, 27 NY3d 1107, 1108). "The test is 'reasonable competence, not perfect representation' " (*Pavone*, 26 NY3d at 647). "In the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404; *see People v Hoyer*, 119 AD3d 1457, 1458).

Here, we conclude that the court did not err in determining that trial counsel's analysis regarding the admissibility of the tape recording was correct and defendant offered no plausible legal theory to support its admissibility. The court therefore properly concluded that the fact that trial counsel did not argue for admission of the confession did not constitute ineffective assistance because there was little or no chance of success with respect to such an argument. Contrary to defendant's contention, neither the tape recording of the confession nor the prior attorney's testimony about that confession was admissible under the declaration against penal interest exception to the hearsay rule.

"The declaration against penal interest exception to the hearsay rule 'recognizes the general reliability of such statements . . . because normally people do not make statements damaging to themselves unless they are true' " (*People v Shabazz*, 22 NY3d 896, 898, quoting *People v Brensic*, 70 NY2d 9, 14, *remittitur amended* 70 NY2d 722). "The exception has four components: (1) the declarant must be unavailable to testify by reason of death, absence from the jurisdiction or refusal to testify on constitutional grounds; (2) the declarant must be aware at the time the statement is made that it is contrary to penal interest; (3) the declarant must have competent knowledge of the underlying facts; and (4) there must be sufficient proof independent of the utterance to assure its reliability" (*id.*; *see Brensic*, 70 NY2d at 15; *People v Settles*, 46 NY2d 154, 167). "The fourth factor is the 'most important' aspect of the exception" (*Shabazz*, 22 NY3d at 898), and "[t]he crucial inquiry focuses on the intrinsic trustworthiness of the statement as confirmed by competent evidence independent of the declaration itself" (*Settles*, 46 NY2d at

169). Where, as here, the declaration exculpates the defendant, "[s]upportive evidence is sufficient if it establishes a reasonable possibility that the [declaration] might be true" (*id.* at 169-170; *see Shabazz*, 22 NY3d at 898; *People v McFarland*, 108 AD3d 1121, 1122, *lv denied* 24 NY3d 1220). This is a more lenient admissibility standard than that applied to a declaration against the defendant offered by the prosecution because "[d]epriving a defendant of the opportunity to offer into evidence [at trial] another person's admission to the crime with which he or she has been charged, even though that admission may . . . be offered [only] as a hearsay statement, may deny a defendant his or her fundamental right to present a defense" (*McFarland*, 108 AD3d at 1122 [internal quotation marks omitted]*; see Chambers v Mississippi*, 410 US 284, 302; *People v McArthur*, 113 AD3d 1088, 1089-1090).

Even assuming, arguendo, the existence of the first three components of the exception, we conclude that there was insufficient proof independent of the third party's confession to assure its reliability. Trial counsel testified that the prior attorney informed her that the tape recording contained the statement of someone who had come into his office and confessed to the burglary. Trial counsel explained that, although the prior attorney was given the name of the third party, "it wasn't even really clear who that person was." In support of her conclusion that the confession was inadmissible, trial counsel testified that all she had was a voice on a tape recording and, based on her discussions with the prior attorney, "there was some question as to whether [the third party] was even voluntarily in [the prior attorney's] office" when he made the confession. Defendant testified that the third party was a friend of one of his sisters, and that the third party and defendant's sister smoked crack cocaine together. As previously indicated, the prior attorney made arrangements for the third party to be appointed counsel, but the third party disappeared shortly thereafter and, despite diligent efforts, including maintaining the investigator's search, trial counsel was unable to locate him even up through defendant's trial.

Contrary to defendant's contention, under the circumstances here, the third party's disappearance is not necessarily indicative of consciousness of guilt, thereby demonstrating the truthfulness of his alleged confession. Rather, particularly in light of the evidence adduced at the hearing, the third party's actions could quite reasonably be consistent with a false or coerced statement given in an attempt to secure an acquittal for defendant (*see generally Chambers*, 410 US at 301 n 21). We conclude that the surrounding circumstances—i.e., a potentially involuntary confession to defendant's prior attorney from a third party who was associated with defendant through his drug use with defendant's sister and disappeared shortly after the alleged confession—do not attest to the trustworthiness or reliability of the declaration (*see People v Jones*, 129 AD3d 477, 477-478, *lv denied* 26 NY3d 931; *see generally McArthur*, 113 AD3d at 1090; *People v Maynard*, 108 AD3d 781, 781, *lv denied* 22 NY3d 1042). The court therefore properly concluded that trial counsel had accurately deemed the evidence to be inadmissible and that her

failure to argue for its admission was not ineffective because there was " 'little or no chance of success' " (*Caban*, 5 NY3d at 152; *see People v Patterson*, 115 AD3d 1174, 1176, *lv denied* 23 NY3d 1066).

Defendant nonetheless contends that trial counsel's explanations for her decision to forgo use of the potentially exculpatory evidence were not credible. We reject that contention. Even if some of the underlying rationale provided by trial counsel in support of her strategic decisions was unconvincing, nothing in her testimony undermined her legitimate explanation that she had no good faith basis for seeking admission of the confession (*see generally People v Curry*, 294 AD2d 608, 612, *lv denied* 98 NY2d 674). To the extent that defendant characterizes trial counsel's testimony as incredible as a matter of law, we conclude that his contention is without merit inasmuch as it cannot be said that trial counsel's testimony was " 'manifestly untrue, physically impossible, contrary to experience, or self-contradictory' " (*People v Smith*, 73 AD3d 1469, 1470, *lv denied* 15 NY3d 778). The court's determination to credit trial counsel's testimony is supported by the record and entitled to great weight (*see People v Smith*, 16 AD3d 1081, 1082, *lv denied* 4 NY3d 891), and we perceive no basis for reversal on this record (*see People v Campbell*, 106 AD3d 1507, 1508, *lv denied* 21 NY3d 1002).

Finally, contrary to defendant's further contention, the record establishes that trial counsel made a strategic decision not to pursue a weak and potentially harmful alibi defense that the prosecution was prepared to rebut with contradictory statements made by defendant to the police (*see People v VanDeusen*, 129 AD3d 1325, 1327, *lv denied* 26 NY3d 972; *People v Atkins*, 107 AD3d 1465, 1465, *lv denied* 21 NY3d 1040; *People v Washington*, 184 AD2d 451, 452, *lv denied* 80 NY2d 911; *see also Baldi*, 54 NY2d at 147-148). That decision " 'cannot be characterized as ineffective assistance of counsel' " (*Atkins*, 107 AD3d at 1465).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

246

KA 14-00479

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRENCE D. BEARD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered February 24, 2014. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of two counts of robbery in the second degree (Penal Law § 160.10 [1], [2] [b]). We reject defendant's contention that the verdict is against the weight of the evidence. A person is guilty of robbery in the second degree when he forcibly steals property and he either "is aided by another person actually present, or . . . [i]n the course or commission of the crime . . . , he or another participant in the crime . . . [d]isplays what appears to be a pistol, revolver, rifle, shotgun, machine gun, or other firearm" (*id.*). Here, the victim testified that defendant forcibly stole property from him and handed it to an accomplice who fled (*see generally People v Leggett*, 101 AD3d 1694, 1694, *lv denied* 20 NY3d 1101). The victim also testified that defendant offered to sell him a gun that was "cocked and loaded," that defendant's hand was in a pocket that appeared to contain a firearm, and that he believed that defendant in fact had a firearm (*see People v Williams* [appeal No. 2], 100 AD3d 1444, 1445, *lv denied* 20 NY3d 1015; *People v Williams*, 286 AD2d 918, 918, *lv denied* 97 NY2d 763). Viewing the evidence in light of the elements of the two counts of robbery in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant's contention that the victim's testimony was motivated

by the victim's desire to be released from prison is based on matters outside the record and therefore must be raised by way of a motion pursuant to CPL 440.10 (*see generally People v Broomfield*, 134 AD3d 1443, 1445, *lv denied* 27 NY3d 1129).

Defendant's further contention that the evidence presented at trial materially changed the theory of the prosecution, as charged in the indictment and narrowed by the bill of particulars, is unpreserved for our review. In any event, we conclude that the contention is without merit. Although the bill of particulars stated that one man removed property from the victim while the other man displayed the gun, the evidence presented at trial established that defendant performed both of those actions. In our view, the discrepancy does not amount to a material change in the theory of the prosecution but constitutes merely an alteration in a " 'factual incident' " that is still consistent with the theory presented in the bill of particulars (*People v Harris*, 129 AD3d 1522, 1524, *lv denied* 27 NY3d 998; *see People v McCallar*, 53 AD3d 1063, 1065, *lv denied* 11 NY3d 833; *see also People v Grega*, 72 NY2d 489, 495).

We reject defendant's contention that he was denied effective assistance of counsel because his attorney failed to request a jury instruction on the lesser included offense of robbery in the third degree (Penal Law § 160.05). "A lesser [included] offense must be submitted to the jury if (1) it is actually a lesser included offense of the greater charge, and (2) the jury is 'warranted in finding that the defendant committed the lesser but not the greater crime' . . . , i.e., there is a 'reasonable view of the evidence' to support such a finding" (*People v Cabassa*, 79 NY2d 722, 728-729, *cert denied sub nom. Lind v New York*, 506 US 1011; *see* CPL 300.50). Here, there is no reasonable view of the evidence to support a finding that defendant was not aided by another individual, and thus, it would have been fruitless for counsel to request that the jury be charged with the lesser included offense of robbery in the third degree (*see generally People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702). Viewing the evidence, the law, and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Defendant's contentions that the indictment is facially duplicitous and that he was denied a fair trial owing to the prosecutor's elicitation of a prejudicial nickname are unpreserved for our review, and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Finally, the sentence is not unduly harsh or severe.

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

251

KAH 14-00819

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
ERICK M. CAMPBELL, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

SUPERINTENDENT, J. COLVIN, MID-STATE CORRECTIONAL
FACILITY, RESPONDENT-RESPONDENT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (BRIAN D. GINSBERG OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered January 16, 2014 in a habeas corpus proceeding. The judgment, inter alia, dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment that, inter alia, dismissed without a hearing his petition pursuant to CPLR article 70. Petitioner's contention that respondent failed to file a proper return under CPLR 7008 is unpreserved for our review (*see People ex rel. Mitchell v Cully*, 63 AD3d 1679, 1679, *lv denied* 13 NY3d 708), and we decline to exercise our power to review it as a matter of discretion in the interest of justice.

Contrary to petitioner's further contention, the motion to dismiss, which Supreme Court converted to a return, established that petitioner was lawfully detained pursuant to an undischarged sentence of incarceration, and the petition was therefore properly dismissed (*see People ex rel. Allen v Hammock*, 128 AD2d 657, 657).

Lastly, we reject petitioner's contention that it was an abuse of discretion for the court to deny his request for assigned counsel. Petitioner failed to make that request until briefs had been filed with the court, and we therefore conclude that petitioner suffered no prejudice from a lack of assigned counsel (*see People ex rel. Eaddy v Wilkins*, 27 AD2d 984, 984).

Entered: March 31, 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 16-00835

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

DAVID J. PACY, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF KIMBERLY M. PACY, AN INFANT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COWEN HOLDINGS, INC., ET AL., DEFENDANTS, RAYTHEON COMMERCIAL LAUNDRY LLC, INDIVIDUALLY AND DOING BUSINESS AS ALLIANCE LAUNDRY HOLDINGS LLC AND AS SUCCESSOR IN INTEREST TO RAYTHEON COMPANY, ALLIANCE LAUNDRY HOLDINGS LLC, FORMERLY KNOWN AS RAYTHEON COMMERCIAL LAUNDRY LLC, AND ALLIANCE LAUNDRY SYSTEMS LLC, DEFENDANTS-RESPONDENTS.

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

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (THOMAS J. SPEYER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Chautauqua County (Paul Wojtaszek, J.), entered February 2, 2016. The order granted the motion of defendants-respondents for summary judgment dismissing plaintiff's complaint and all cross claims against them.

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

Memorandum: On July 24, 2011, Kimberly M. Pacy, plaintiff's daughter, was working at Webb's Year-Round Resort as a summer part-time housekeeper. One of the duties of plaintiff's daughter involved laundering linens and towels for the resort. When attempting to take a load of towels out of the washer, plaintiff's daughter's right arm became entangled and twisted. As a result, plaintiff's daughter sustained multiple injuries.

On February 14, 2012, this personal injury action was commenced against defendants Raytheon Commercial Laundry, LLC, individually and doing business as Alliance Laundry Holdings LLC and as successor in interest to Raytheon Company, Alliance Laundry Holdings LLC, formerly known as Raytheon Commercial Laundry LLC, and Alliance Laundry Systems LLC (collectively, Alliance) as manufacturers of the washing machine. Following discovery, Alliance moved for summary judgment dismissing the complaint and any cross claims against it, contending that the

defects alleged by plaintiff were not the proximate cause of the accident and that the washing machine was not defectively designed. Supreme Court granted the motion, and we affirm.

On a motion for summary judgment, a defendant manufacturer meets its burden by establishing that its product was safe and complied with applicable industry standards (*see Ross v Alexander Mitchell & Son, Inc.*, 138 AD3d 1425, 1426; *Wesp v Carl Zeiss, Inc.*, 11 AD3d 965, 967*; see generally Romano v Stanley*, 90 NY2d 444, 452). Here, Alliance met its burden by establishing as a matter of law that the washing machine was a safe product because it was equipped with two devices, i.e., a door interlock and microswitch. Those devices automatically de-activate the spinning of the drum when the door is open, and the spinning concludes within a few seconds thereafter. Alliance also submitted proof establishing that the washing machine complied with industrial and safety standards and that it was reviewed and certified by several national safety organizations (*see Ross*, 138 AD3d at 1426; *Wesp*, 11 AD3d at 967*; see generally Romano*, 90 NY2d at 452). Plaintiff failed to meet his burden in opposition "by establishing that the product 'was not reasonably safe and that it was feasible to design the product in a safer manner' " (*Wesp*, 11 AD3d at 967; *see Voss v Black & Decker Mfg. Co*., 59 NY2d 102, 108; *see also Hoover v New Holland N. Am., Inc.*, 23 NY3d 41, 53-54; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Although plaintiff's expert averred that there should have been a braking mechanism present to "immediately slow and stop" the drum upon the door being opened, he failed to identify a suitable available modification that could have been made to *stop* the drum instantaneously, in contrast to the design at issue herein, which immediately *slows* the drum. Plaintiff's expert also failed to identify any regulations or industry standards requiring such a mechanism in a washing machine (*see Rabon-Willimack v Robert Mondavi Corp.*, 73 AD3d 1007, 1009), and he did not indicate whether any other manufacturers were using such modifications in their washing machines during the relevant time period (*see Reis v Volvo Cars of N. Am.*, 24 NY3d 35, 39; *see also Cwiklinski v Sears, Roebuck & Co., Inc.*, 70 AD3d 1477, 1480).

Further, although a manufacturer has a duty to warn against "latent dangers resulting from foreseeable uses of its product of which it knew or should have known" (*Liriano v Hobart Corp.*, 92 NY2d 232, 237), it is not required to warn against dangers that are "readily apparent as a matter of common sense" (*id.* at 242). Users who are aware of an inherent danger as a result of their experience also need not be warned of that danger (*see Lamb v Kysor Indus. Corp.*, 305 AD2d 1083, 1084; *see also Liriano*, 92 NY2d at 241-242). Here, Alliance established in its motion submissions that sufficient warnings were placed on the washing machine, and plaintiff failed to raise a triable issue of fact (*see Zuckerman*, 49 NY2d at 562). Moreover, the testimony of plaintiff's daughter established that the daughter was aware of the danger of the moving drum, inasmuch as she usually checked to see if the drum was moving before reaching into the washing machine. Thus, even assuming, arguendo, that the warning label was insufficient as opined by plaintiff's expert, plaintiff

presented no proof that had an additional label existed to warn of the danger of the moving drum, his daughter would have heeded it.

Entered: March 31, 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 16-01739

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

TIME CAP DEVELOPMENT CORP.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COLONY INSURANCE COMPANY,
DEFENDANT-APPELLANT-RESPONDENT,
ET AL., DEFENDANT.

COLONY INSURANCE COMPANY, THIRD-PARTY
PLAINTIFF-APPELLANT-RESPONDENT,

V

CINCINNATI INSURANCE COMPANY, THIRD-PARTY
DEFENDANT-RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

MELITO & ADOLFSEN P.C., NEW YORK CITY (S. DWIGHT STEPHENS OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT AND THIRD-PARTY PLAINTIFF-APPELLANT-RESPONDENT.

RIVKIN RADLER LLP, UNIONDALE (FRANK MISITI OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (KEVIN R. VANDUSER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal and cross appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered September 9, 2016. The order and judgment denied the motion of defendant-third-party plaintiff for renewal of its prior cross motion for summary judgment and denied the cross motion of third-party defendant for summary judgment.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by granting the cross motion of third-party defendant, and judgment is entered in its favor as follows:

> It is ADJUDGED and DECLARED that defendant-third-party plaintiff has the sole obligation to indemnify plaintiff in the underlying litigation,

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

Memorandum: Time Cap Development Corp. (Time Cap) commenced this action seeking a declaration that defendant-third-party plaintiff Colony Insurance Company (Colony) is required to defend and indemnify Time Cap in the underlying personal injury action. Thereafter, Colony impleaded third-party defendant Cincinnati Insurance Company (Cincinnati) seeking a declaration that Colony's coverage of Time Cap in the underlying action was excess to Cincinnati's coverage or, alternatively, that Colony and Cincinnati were coinsurers of Time Cap on a 50/50 basis.

In the underlying action, a laborer sought to recover damages from Time Cap and other parties for personal injuries that he sustained when he fell from a ladder at a construction site. Time Cap, which was insured by Cincinnati, was the general contractor on that construction project, and the injured laborer was an employee of a subcontractor. The subcontract required the subcontractor to add Time Cap as an additional insured on the subcontractor's insurance policy with Colony. Shortly after the laborer's accident, Cincinnati sent Colony a letter on Time Cap's behalf giving notice of the laborer's injuries and requesting that Colony defend and indemnify Time Cap. Colony disclaimed coverage approximately 20 months later. There is no dispute that Colony failed to disclaim coverage of Time Cap in a timely fashion (*see* Insurance Law § 3420 [d] [2]; *RLI Ins. Co. v Smiedala*, 96 AD3d 1409, 1411-1412). Time Cap eventually entered into a settlement agreement with the injured laborer, and the underlying action was discontinued.

In appeal No. 1, Colony contends that Supreme Court erred in denying its cross motion for summary judgment insofar as Colony sought a declaration that Cincinnati owes Colony coinsurance on a 50/50 basis. We reject that contention. An insurance policy is "to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous the terms are to be taken and understood in their plain, ordinary and proper sense" (*Matter of Covert*, 97 NY2d 68, 76 [internal quotation marks omitted]). According to the plain terms of the respective insurance policies, the Colony policy is Time Cap's primary insurance, the Cincinnati policy is excess insurance, and Colony may not seek contribution from Cincinnati. Even assuming, arguendo, that we agree with Colony that its disclaimer was effective against Cincinnati because Cincinnati, unlike Time Cap, was not entitled to a prompt disclaimer under Insurance Law § 3420 (*see generally J.T. Magen v Hartford Fire Ins. Co.*, 64 AD3d 266, 272-273, *lv dismissed* 13 NY3d 889), we nonetheless perceive no basis for altering the priority of coverage set forth in the plain language of the insurance contracts.

In appeal No. 2, Colony contends that the court erred in denying its motion for leave to renew its cross motion for summary judgment. We also reject that contention. A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR

2221 [e] [2]; *see Garland v RLI Ins. Co.*, 79 AD3d 1576, 1576-1577, *lv dismissed* 17 NY3d 774, 18 NY3d 877). "While a court, in its discretion, may grant renewal upon facts known to the moving party at the time of the original motion . . . , renewal should not be available where a party has proceeded on one legal theory on the assumption that what has been submitted is sufficient, and thereafter sought to move again on a different legal argument merely because he was unsuccessful upon the original application" (*Marino v Brown*, 225 AD2d 529, 529 [internal quotation marks omitted]; *see generally Sodano v Faithway Deliverance Ctr., Inc.*, 18 AD3d 534, 535-536). In moving for leave to renew, Colony proceeded on a completely different legal theory, i.e., that Cincinnati had the sole obligation to defend and indemnify Time Cap, not that Cincinnati owed Colony coinsurance on a 50/50 basis, and we therefore conclude that the court properly denied the motion.

On cross appeal in appeal No. 2, Cincinnati contends that the court erred in denying its cross motion for summary judgment insofar as it sought a declaration that Colony has the sole obligation to indemnify Time Cap. We agree, and we therefore modify the order and judgment accordingly. Cincinnati met its burden of establishing that it is entitled to judgment as a matter of law by submitting evidence in admissible form sufficient to eliminate any issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). The Colony insurance policy under which Time Cap was an additional insured provided coverage "with respect to liability for 'bodily injury' . . . caused, in whole or in part, by . . . acts or omissions of those acting on [the subcontractor's] behalf[] in the performance of [the subcontractor's] ongoing operations for the additional insured(s) . . . " In support of its motion, Cincinnati submitted deposition testimony of witnesses to the accident establishing that the injured laborer's underlying claims arose from bodily injury that he allegedly suffered when he fell off a ladder while employed by the subcontractor on the construction project. Although Colony contends that Cincinnati was required to establish negligence, we conclude that the deposition testimony established that the bodily injuries at issue were caused at least in part by the "acts or omissions" of one acting on the subcontractor's behalf, i.e., the injured laborer himself, regardless whether the subcontractor was negligent (*see Kel-Mar Designs, Inc. v Harleysville Ins. Co. of New York*, 127 AD3d 662, 663).

Entered: March 31, 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 15-01920

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

TIME CAP DEVELOPMENT CORP., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COLONY INSURANCE COMPANY, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

COLONY INSURANCE COMPANY, THIRD-PARTY
PLAINTIFF-APPELLANT,

V

CINCINNATI INSURANCE COMPANY, THIRD-PARTY
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

MELITO & ADOLFSEN P.C., NEW YORK CITY (S. DWIGHT STEPHENS OF COUNSEL), FOR DEFENDANT-APPELLANT AND THIRD-PARTY PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (KEVIN R. VANDUSER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

RIVKIN RADLER LLP, UNIONDALE (FRANK MISITI OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered July 21, 2015. The order and judgment, among other things, denied the cross motion of defendant-third-party plaintiff seeking a declaration that third-party defendant is a coinsurer for plaintiff on a 50/50 basis in the underlying action.

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

Same memorandum as in *Time Cap Dev. Corp. v Colony Ins. Co.* ([appeal No. 2] ___ AD3d ___ [Mar. 31, 2017]).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

267

KA 14-00575

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN,

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN V. BYNG, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

KEVIN V. BYNG, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered September 2, 2011. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

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

Memorandum: Defendant appeals from two judgments convicting him, upon his pleas of guilty, of robbery in the second degree (Penal Law § 160.10 [2] [b]) and attempted robbery in the third degree (§§ 110.00, 160.05), respectively. In appeal No. 1, we conclude that defendant validly waived his right to appeal and that his "general unrestricted waiver" encompasses his challenge to the severity of his bargained-for sentence (*People v Hidalgo*, 91 NY2d 733, 737; *see People v Lopez*, 6 NY3d 248, 255-256; *cf. People v Maracle*, 19 NY3d 925, 928). In appeal No. 2, we conclude that defendant did not validly waive his right to appeal inasmuch as County Court failed to " 'engage[] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Brown*, 296 AD2d 860, 860, *lv denied* 98 NY2d 767). Nevertheless, we conclude that the sentence in appeal No. 2 is not unduly harsh or severe.

The remaining contentions in defendant's pro se supplemental brief are based upon matters dehors the record, and are thus not properly before us on defendant's direct appeals from the judgments (*see People v Wilson*, 108 AD3d 1011, 1013).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

268

KA 14-00574

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN,

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN V. BYNG, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

KEVIN V. BYNG, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered September 8, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the third degree.

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

Same memorandum as in *People v Byng* ([appeal No. 1] ___ AD3d ___ [Mar. 31, 2017]).

Entered: March 31, 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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KA 15-01099

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN,

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JACOB MELVIN, 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 (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered March 18, 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: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty under an indictment of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). In appeal No. 2, defendant appeals from a judgment convicting him upon his pleas of guilty under a superior court information (SCI) of two counts of assault in the second degree (§ 120.05 [7]).

Preliminarily, the People correctly concede that defendant did not validly waive his right to appeal in a written waiver of the right to appeal, given the total absence of an oral colloquy on that subject (*see People v Banks*, 125 AD3d 1276, 1277, *lv denied* 25 NY3d 1159). Nevertheless, we reject defendant's challenge to the severity of the sentence in appeal No. 1.

Defendant contends that the SCI in appeal No. 2 is jurisdictionally defective because it charged him with committing two assaults on December 3, 2014, even though he waived indictment only with respect to two assaults committed on December 23, 2014. Initially, we note that "[d]efendant's challenges to the jurisdictional requirements of the waiver of indictment and the superior court information need not be preserved for [appellate] review" and are not forfeited by the guilty plea (*People v Lugg*, 108 AD3d 1074, 1074; *see People v Boston*, 75 NY2d 585, 589 n; *People v*

Jackson, 128 AD3d 1279, 1279, *lv denied* 26 NY3d 930). Here, defendant was initially charged by felony complaint with two counts of assault in the second degree committed on December 23, 2014, and defendant subsequently waived his right to indictment on those particular charges. The SCI, however, charged defendant with committing two acts of assault in the second degree on December 3, 2014, rather than December 23, 2014, and the special information attached to the SCI provided that the assaults occurred on December 23, 2014. During the plea colloquy, Supreme Court referenced both dates.

In our view, defendant never waived his constitutional right to indictment for any offenses taking place on December 3, 2014; rather, he waived his constitutional right to indictment for two assaults committed on December 23, 2014. Under these circumstances, as we recently explained in *People v Walker* ([appeal No. 2] ___ AD3d ___, ___ [Mar. 24, 2017]), the SCI is jurisdictionally defective and must be dismissed. We disagree with the People that the date-of-crime discrepancy here may be excused or overlooked as a ministerial typographical error. In our view, it is not "obvious" (*People v June*, 30 AD3d 1016, 1017, *lv denied* 7 NY3d 813, *reconsideration denied* 7 NY3d 868), nor is it "clear" (*Jackson*, 128 AD3d at 1279-1280), that the date-of-crime discrepancy at issue here is in fact a mere typographical error (*see e.g. People v Siminions*, 112 AD3d 974, 975, *lv denied* 24 NY3d 1088). We therefore reverse the judgment in appeal No. 2, vacate the guilty pleas, dismiss the SCI, and remit the matter to Supreme Court for proceedings pursuant to CPL 470.45 (*see People v Mano*, 121 AD3d 1593, 1593, *lv dismissed* 24 NY3d 1121; *People v Tun Aung*, 117 AD3d 1492, 1492).

In view of the foregoing, defendant's remaining contentions in appeal No. 2 are academic.

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

274

KA 15-01098

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN,

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JACOB MELVIN, 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 (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered March 18, 2015. The judgment convicted defendant, upon his pleas of guilty, of assault in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the guilty pleas are vacated, the superior court information is dismissed and the matter is remitted to Supreme Court, Erie County, for proceedings pursuant to CPL 470.45.

Same memorandum as in *People v Melvin* ([appeal No. 1] ___ AD3d ___ [Mar. 31, 2017]).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

278

CA 16-01325

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN,

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EUGENE MARGERUM, JOSEPH FAHEY, TIMOTHY HAZELET, PETER KERTZIE, PETER LOTOCKI, SCOTT SKINNER, THOMAS REDDINGTON, TIMOTHY CASSEL, MATTHEW S. OSINSKI, MARK ABAD, BRAD ARNONE, DAVID DENZ, PLAINTIFFS-RESPONDENTS, ET AL., PLAINTIFF,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, CITY OF BUFFALO DEPARTMENT OF FIRE, DEFENDANTS-APPELLANTS, AND LEONARD MATARESE, INDIVIDUALLY AND AS COMMISSIONER OF HUMAN RESOURCES FOR CITY OF BUFFALO, DEFENDANT.

HODGSON RUSS LLP, BUFFALO (JOSHUA FEINSTEIN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CHIACCHIA & FLEMING, LLP, HAMBURG (ANDREW P. FLEMING OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered October 23, 2015. The order denied the motion of defendants for a protective order.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of defendants' motion seeking a protective order limiting the disclosure of any privileged or confidential material generated after February 3, 2006 and as modified the order is affirmed without costs.

Memorandum: Plaintiffs, firefighters employed by defendant City of Buffalo Department of Fire (Fire Department), commenced this action alleging that defendants discriminated against them by allowing promotional eligibility lists created pursuant to the Civil Service Law to expire solely on the ground that plaintiffs, who were next in line for promotion, were Caucasian. The eligibility lists were generated following civil service examinations in 1998 and 2002. Because minorities fared poorly on those examinations, there were few, if any, minority applicants on the eligibility lists. Men of Color Helping All Society, Inc. (MOCHA), an organization of African-American firefighters employed by the Fire Department, commenced two actions in federal court alleging that the 1998 and 2002 examinations for the position of lieutenant were discriminatory.

In 2005 and 2006, while the federal actions were pending, defendant Leonard Matarese, then Commissioner of Human Resources for defendant City of Buffalo (City), decided to allow the eligibility lists for all supervisory positions that were generated from the 2002 examinations to expire without granting a typical one-year extension. In addition to prompting plaintiffs to commence this action, that decision spawned related CPLR article 78 proceedings (*see Matter of Hynes v City of Buffalo,* 52 AD3d 1216; *Matter of Hynes v City of Buffalo*, 52 AD3d 1217) and arbitration proceedings (*see Matter of Buffalo Professional Firefighters Assn., Inc., IAFF Local 282 [City of Buffalo]*, 79 AD3d 1737, *lv dismissed* 17 NY3d 854, *rearg denied* 18 NY3d 836).

In the context of this action, we initially affirmed that part of an order denying defendants' CPLR 3211 motion to dismiss the complaint but concluded that Supreme Court erred in granting plaintiffs' cross motion for partial summary judgment on liability (*Margerum v City of Buffalo*, 63 AD3d 1574 [*Margerum I*]). Fourteen days after our decision in *Margerum I*, the United States Supreme Court issued its decision in *Ricci v DeStefano* (557 US 557), establishing a new test for liability in discrimination cases such as this one. The Court held that, "before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action" (*id.* at 585).

Relying on *Ricci's* "strong basis in evidence" test, plaintiffs again moved for partial summary judgment on liability. We affirmed the order granting that motion (*Margerum v City of Buffalo*, 83 AD3d 1575 [*Margerum II*]), and the matter proceeded to trial on damages. On the appeal from the subsequent judgment, we modified the damages award (*Margerum v City of Buffalo*, 108 AD3d 1021, *mod* 24 NY3d 721 [*Margerum III*]). Both parties appealed to the Court of Appeals, which concluded that "whether the City had 'a strong basis in evidence to believe it [would] be subject to disparate-impact liability' at the time that it terminated the promotion eligibility lists while the *MOCHA* litigation was still pending raises issues of fact that cannot be determined on motions for summary judgment" (*Margerum III*, 24 NY3d at 732). The Court found that "[t]here must be a credibility assessment of the City's position as to the validity of the examinations, the prospects in the federal litigation, and the reasons for its decision to expire the promotion eligibility lists. We know that Matarese decided to let the promotion eligibility lists expire in 2005 and 2006. What we do not know is why" (*id.*). The Court remitted the matter to Supreme Court for further proceedings.

Following the Court of Appeals' remittitur, plaintiffs submitted a request for the production of documents in which they sought disclosure of "[a]ny and all documents Leonard Matarese reviewed and/or relied upon *prior to* making the decisions to terminate the [applicable] Civil Service promotion lists . . . in 2005 and 2006" (emphasis added). Defendants thereafter moved for a protective order

in which they sought eight forms of relief. In the first two requests, defendants requested that the court "declin[e] to follow the direction of the Court of Appeals" in *Margerum III* (24 NY3d 721) and to stay further proceedings until various issues, including the privilege issues, could be resolved. The court denied those two requests in their entirety.

In the third request, defendants sought to maintain privileges over materials during the discovery process, while allowing them to use the materials at trial under appropriate confidentiality restrictions. In the fourth request, defendants sought to limit the disclosure of privileged or confidential material to three specific subject areas and "to the period prior to February 3, 2006." The court denied those two requests without prejudice to renew.

The court likewise denied the fifth through eighth requests without prejudice to renew, but the parties subsequently entered into an agreement concerning those requests. We thus do not address them on this appeal.

Defendants initially contend that we should conduct a de novo review of the order denying their motion on the ground that their contentions involve questions of law for which we need not defer to the trial court. The cases cited by defendants in support of their contention, however, do not involve discovery disputes (*see Andrea v Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C. [Habiterra Assoc.]*, 5 NY3d 514, 521; *Bush v Delaware, Lackawanna & W. R.R. Co.*, 166 NY 210, 227). We reject defendants' contention and see no need to depart from our traditional standard of reviewing the order for either an abuse of discretion (*see Imanverdi v Popovici*, 109 AD3d 1179, 1179), or an improvident exercise of discretion (*see Kimmel v State of New York*, 302 AD2d 908, 908).

Contrary to defendants' contention, the court did not abuse its discretion in denying the first and second requests, which essentially asked the court to ignore or disregard the Court of Appeals' decision in *Margerum III* based on defendants' belief that the Court of Appeals improperly expanded the holding of *Ricci*. We decline to do so as well. It is axiomatic that the Appellate Division and the trial courts are "court[s] of precedent and [are] bound to follow the holding of the Court of Appeals" (*Jiannaras v Alfant,* 124 AD3d 582, 586, *affd* 27 NY3d 349). We thus reject defendants' challenges to the decision of the Court of Appeals. Contrary to defendants' further contention, the court did not improvidently exercise its discretion in denying their request for a stay of further proceedings until the privilege issues could be resolved (*see* CPLR 2201).

With respect to defendants' third and fourth requests, in which defendants raised issues of privilege, we agree with defendants that the court erred in denying that part of their motion that sought to limit disclosure to documents that were reviewed and/or relied upon by Matarese before he made the decision to allow the applicable Civil Service promotion lists to expire. First, those were the only

documents sought in plaintiffs' demand for documents and, second, only those documents generated before February 3, 2006, the date on which Matarese let the last list expire, are relevant to the determination whether defendants had " 'a strong basis in evidence to believe it [the City] [would] be subject to disparate-impact liability' *at the time that it terminated the promotion eligibility lists*" (*Margerum III*, 24 NY3d at 732 [emphasis added]). We therefore modify the order accordingly.

Contrary to defendants' further contentions, the court properly denied, without prejudice, that part of their fourth request for a protective order for documents generated before February 3, 2006. Although defendants correctly contend that the holding of the Court of Appeals in *Margerum III* seemingly requires them to disclose privileged material, there are times when even privileged material must be disclosed. For example, a client may be deemed to have waived the attorney-client and work product privileges by making selective disclosures of the advice, or in instances "where invasion of the privilege is required to determine the validity of the client's claim or defense and application of the privilege would deprive the adversary of vital information" (*Jakobleff v Cerrato, Sweeney & Cohn*, 97 AD2d 834, 835; *see Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust*, 43 AD3d 56, 63-64; *cf. Heckl v Walsh*, 130 AD3d 1447, 1448). Moreover, materials covered by a "conditional privilege," such as the privilege for materials prepared in anticipation of litigation (*Matter of Grand Jury Proceedings [Doe]*, 56 NY2d 348, 354), may be disclosed but "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means" (CPLR 3101 [d] [2]). It cannot be gainsaid that privileges are "meant to operate as a shield or a sword, but not both at once" (*Levy v Arbor Commercial Funding, LLC*, 138 AD3d 561, 562).

Ultimately, "resolution of the issue 'whether a particular document is . . . protected is necessarily a fact-specific determination . . . , most often requiring in camera review' " (*Optic Plus Enters., Ltd. v Bausch & Lomb Inc.*, 37 AD3d 1185, 1186, quoting *Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 378). We thus conclude that, inasmuch as there may be a valid basis for disclosure of privileged materials, the court properly denied that part of defendants' fourth request seeking a blanket protective order encompassing the period before February 3, 2006.

We have reviewed defendants' remaining contentions and conclude that they lack merit.

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

292

KA 16-01381

PRESENT: WHALEN, P.J., CENTRA, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

CHARLES J. TAN, DEFENDANT-RESPONDENT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (KELLY CHRISTINE WOLFORD OF COUNSEL), FOR APPELLANT.

BRIAN DECAROLIS, ROCHESTER, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Monroe County Court (James J. Piampiano, J.), rendered November 5, 2015. The order granted defendant's motion for a trial order of dismissal.

It is hereby ORDERED that said appeal is unanimously dismissed.

Memorandum: The People appeal from an order granting defendant's motion for a trial order of dismissal with respect to the sole charge in the indictment, i.e., murder in the second degree (Penal Law § 125.25 [1]). County Court had reserved decision on the motion at the conclusion of the People's case and at the conclusion of the evidence. After the jury deliberated for eight days without reaching a verdict, the People and defendant consented to the jury's discharge, and defendant asserted that he was aware that double jeopardy would not bar a retrial. The court declared a mistrial and advised that it continued to reserve decision on the motion for a trial order of dismissal. The court granted the motion at the next court appearance.

The People's appeal must be dismissed because there is no statutory authority for an appeal by the People from an order granting a motion for a trial order of dismissal in these circumstances. "It is fundamental that in the absence of a statute expressly authorizing a criminal appeal, there is no right to appeal" (*People v Laing*, 79 NY2d 166, 170). CPL 450.20, the "exclusive route for a People's appeal" (*Laing*, 79 NY2d at 168), does not authorize this appeal. Contrary to the People's contention, CPL 450.20 (2) does not provide the statutory basis for this appeal, inasmuch as the order they seek to appeal did not set aside a guilty verdict and dismiss the indictment pursuant to CPL 290.10 (1) (b). Rather, there was no guilty verdict to set aside, and the order was issued pursuant to CPL 290.10 (1) (a). Thus, the order is not appealable (*see People v Ainsworth*, 145 AD2d 74, 76-77; *People v Brummel*, 136 AD2d 322, 324-325, *lv denied* 73 NY2d 853). We may not "create a right to appeal out

of thin air" in order to address the merits "without trespassing on the Legislature's domain and undermining the structure of article 450 of the CPL–the definite and particular enumeration of all appealable orders" (*Laing*, 79 NY2d at 172). Were we able to review the merits, however, we would agree with the People that the court erred in dismissing the indictment. A "review [of] the legal sufficiency of the evidence as defined by CPL 70.10 (1), [while] accepting the competent evidence as true, in the light most favorable to the People," compels the conclusion that the evidence was legally sufficient to support the charge (*People v Lazaro*, 125 AD3d 1008, 1009).

Finally, we reject the People's contention that permitting their appeal would not be contrary to principles of double jeopardy. The court's "dismissal of a count due to insufficient evidence is tantamount to an acquittal for purposes of double jeopardy" (*People v Biggs*, 1 NY3d 225, 229; *see People v Brown*, 40 NY2d 381, 386, *rearg denied* 45 NY2d 839, *cert denied* 433 US 913). Defendant did not waive his double jeopardy protections when, prior to the court's ruling on his motion for a trial order of dismissal, he consented to the mistrial and acknowledged that he could be retried on the murder charge (*cf. People v Smith*, 12 AD3d 219, 220, *lv denied* 4 NY3d 836).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

299

CA 16-01520

PRESENT: WHALEN, P.J., SMITH, CENTRA, CURRAN, AND SCUDDER, JJ.

DAVID H. PEELLE AND BAIBA PEELLE,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF IRONDEQUOIT, DEFENDANT-RESPONDENT.

THE ZOGHLIN GROUP, PLLC, ROCHESTER (BRIDGET A. O'TOOLE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LAW OFFICES OF JOHN WALLACE, ROCHESTER (DAVID F. BOWEN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an amended order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered December 1, 2015. The amended order, inter alia, denied in part the motion of plaintiffs for leave to serve an amended complaint.

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

Memorandum: Plaintiffs commenced this action seeking injunctive relief and monetary damages based upon flooding damage to their property allegedly caused by acts or omissions of defendant, Town of Irondequoit (Town). Plaintiffs alleged causes of action for, inter alia, negligence, trespass, nuisance, inverse condemnation, and constitutional takings. Plaintiffs moved for leave to serve an amended complaint, and the Town cross-moved to dismiss certain causes of action for failure to state a cause of action, and to dismiss all claims related to alleged flooding events that occurred in 2000, 2004, and 2005 on the ground that such claims were time-barred. Supreme Court granted in part and denied in part both the motion and cross motion, and we now affirm.

We agree with plaintiffs that the inverse condemnation and constitutional takings causes of action have a single accrual date, contrary to the implication of the court in its decision. "[A] de facto taking is a permanent ouster of the owner or permanent interference with his physical use, possession and enjoyment of the property by one having condemnation powers" (*Carr v Town of Fleming*, 122 AD2d 540, 541; *see O'Brien v City of Syracuse*, 54 NY2d 353, 357; *Stewart v State of New York*, 248 AD2d 761, 762), and thus a de facto taking cause of action accrues when that occurs, if at all. Indeed, once the taking occurs, there is no longer a trespass inasmuch as the

de facto taking is permanent and "a trespass is temporary in nature" (*Carr*, 122 AD2d at 541; *see Smith v Town of Long Lake*, 40 AD3d 1381, 1383). Here, plaintiffs alleged theories of both trespass and a taking, and "the issue of whether the entry was a trespass or a taking must be resolved at trial" (*Carr*, 122 AD2d at 541; *see Stewart*, 248 AD2d at 763).

We reject plaintiffs' contention that, with respect to their takings causes of action, the court improperly rejected application of the stabilization doctrine as set forth in *United States v Dickinson* (331 US 745, 749). That doctrine is used to determine the accrual date of certain takings claims that occur from a gradual process (*see Boling v United States*, 220 F3d 1365, 1370-1371). Inasmuch as the court did not determine if a taking occurred and, if so, when the takings causes of action accrued or dismiss those causes of action in their entirety as untimely, however, there is no need to address whether the doctrine applies in this case.

Contrary to plaintiffs' further contention, the court did not fail to apply the continuous wrong doctrine to their causes of action for trespass and nuisance. "[I]njuries to property caused by a continuing nuisance involve a 'continuous wrong,' and, therefore, generally give rise to successive causes of action that accrue each time a wrong is committed" (*Town of Oyster Bay v Lizza Indus., Inc.*, 22 NY3d 1024, 1031, *rearg denied* 23 NY3d 934; *see Sova v Glasier*, 192 AD2d 1069, 1070). In applying that doctrine, the court properly limited plaintiffs' recovery of monetary damages for trespass and nuisance to those incurred within one year and 90 days prior to the commencement of the action (*see Greco v Incorporated Vil. of Freeport*, 66 AD3d 836, 837; *Baumler v Town of Newstead*, 198 AD2d 777, 777).

We have considered plaintiffs' remaining contentions and conclude that none requires reversal or modification of the amended order.

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

304

CA 16-01557

PRESENT: WHALEN, P.J., SMITH, CENTRA, CURRAN, AND SCUDDER, JJ.

ANNA-MARIE H. RUSSO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DENNIS B. PEARSON AND NIAGARA MOHAWK POWER CORP.,
DEFENDANTS-RESPONDENTS.

STANLEY LAW OFFICES, LLP, SYRACUSE (STEPHANIE VISCELLI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARCLAY DAMON, LLP, SYRACUSE (MATTHEW J. LARKIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered May 27, 2016. The order denied plaintiff's motion for partial summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when the vehicle she was driving collided with a vehicle driven by Dennis B. Pearson (defendant) and owned by defendant Niagara Mohawk Power Corp. Supreme Court properly denied plaintiff's motion for summary judgment on the issues of serious injury and "negligence." Plaintiff's motion and supporting papers show that plaintiff was actually seeking a determination that defendant's negligence was the sole proximate cause of the accident and that she was not comparatively negligent. We conclude that plaintiff failed to meet her initial burden of establishing as a matter of law that defendant's negligence was the sole proximate cause of the accident and that there are no issues of fact concerning her comparative negligence (*see Jackson v City of Buffalo*, 144 AD3d 1555, 1556; *Bush v Kovacevic*, 140 AD3d 1651, 1653). " '[W]hether a plaintiff is comparatively negligent is almost invariably a question of fact and is for the jury to determine in all but the clearest cases' " (*Yondt v Boulevard Mall Co.*, 306 AD2d 884, 884). In support of the motion, plaintiff submitted her own deposition testimony, which raised a question of fact regarding her attentiveness as she drove her vehicle (*see Spicola v Piracci*, 2 AD3d 1368, 1369). Thus, we conclude that plaintiff "failed to establish that there was nothing she could do to avoid the accident and therefore failed to establish that she was free of comparative fault" (*Jackson*, 144 AD3d at 1556). We have considered plaintiff's remaining contention and conclude that it is

without merit.

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

307

CA 16-00939

PRESENT: WHALEN, P.J., SMITH, CENTRA, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF THE ESTATE OF ANTHONY J. THOMAS, DECEASED

IN THE MATTER OF THE ESTATE OF DOROTHY THOMAS, DECEASED.

JOSEPH M. THOMAS AND GLORIA M. BORRELLI, PETITIONERS-APPELLANTS,

V ORDER

TOM J. THOMAS, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

BOND, SCHOENECK & KING, PLLC, ROCHESTER (JONATHAN B. FELLOWS OF COUNSEL), FOR PETITIONERS-APPELLANTS.

ADAMS BELL ADAMS, P.C., ROCHESTER (ANTHONY J. ADAMS, JR., OF COUNSEL), AND LACY KATZEN (RACHELLE H. NUHFER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Surrogate's Court, Monroe County (John M. Owens, S.), entered March 4, 2016. The order, among other things, directed that petitioners have the burden of proof at the hearing to establish that New York State Fence Company stock should be included in the estates.

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: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

308

CA 16-00940

PRESENT: WHALEN, P.J., SMITH, CENTRA, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF THE ESTATE OF ANTHONY J. THOMAS, DECEASED.

IN THE MATTER OF THE ESTATE OF DOROTHY THOMAS, DECEASED.

JOSEPH M. THOMAS AND GLORIA M. BORELLI, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

TOM J. THOMAS, RESPONDENT-RESPONDENT. (APPEAL NO. 2.)

BOND, SCHOENECK & KING, PLLC, ROCHESTER (JONATHAN B. FELLOWS OF COUNSEL), FOR PETITIONERS-APPELLANTS.

ADAMS BELL ADAMS, P.C., ROCHESTER (ANTHONY J. ADAMS, JR., OF COUNSEL), AND LACY KATZEN (RACHELLE H. NUHFER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a decree of the Surrogate's Court, Monroe County (John M. Owens, S.), entered March 25, 2016. The decree, among other things, denied and dismissed the petition and the supplemental petition.

It is hereby ORDERED that said appeal from the decree insofar as it reserved decision is unanimously dismissed, and the decree is otherwise reversed on the law without costs, the motion for a directed verdict is denied, the petition and supplemental petition are reinstated, and the matter is remitted to Surrogate's Court, Monroe County, for further proceedings in accordance with the following memorandum: As we explained in a prior appeal, petitioners, respondent, and a nonparty are the four children of Anthony J. Thomas and Dorothy Thomas (collectively, decedents), who died in April 2012 and August 2012, respectively (*Matter of Thomas*, 124 AD3d 1235, 1235-1236). Respondent was the named executor under decedents' respective wills, and was appointed trustee to numerous trusts created by the wills (*id.* at 1236). In the prior appeal, petitioners "challenged respondent's failure to identify any shares of New York State Fence Company (NYSFC) as being included within the assets of decedents' estates. According to respondent, he was the sole shareholder of NYSFC, a company founded by Anthony J. Thomas in 1958 and incorporated in 1977" (*id.*). We concluded that Surrogate's Court erred in granting

that part of respondent's motion seeking to dismiss the claim for the imposition of a constructive trust with respect to the NYSFC stock, and we reinstated that claim.

Upon remittal, the Surrogate determined that he was "basically . . . dealing with a miscellaneous proceeding to determine the ownership of" the NYSFC stock. We agree with petitioners that the Surrogate erred in denying that part of petitioners' cross motion in limine seeking a determination that respondent had the burden of proof at the hearing to establish his ownership of the NYSFC stock, and in determining that petitioners had the burden of proof to establish that the stock had not been transferred to respondent by decedents. Where, as here, an asset is not included in the inventory of the estate based upon respondent fiduciary's assertion that he is the owner of the asset, it is respondent's burden to "show a legal and sufficient reason for withholding" the asset from the estate (*Matter of Taber*, 30 Misc 172, 181, *affd* 54 App Div 629). Such an assertion is "in essence, the assertion of a personal claim by the fiduciary . . . , the burden of demonstration of which is upon the fiduciary who claims adversely to the estate. Such fiduciary will not be permitted to jeopardize the interests of [the beneficiaries] by . . . forc[ing] them to demonstrate the substantially impossible," i.e., that the stock was not transferred to the fiduciary by decedents (*Matter of Greenberg*, 158 Misc 446, 448; *see Matter of Zuckerman*, 8 Misc 2d 57, 59; *see generally Matter of Camarda*, 63 AD2d 837, 839). We therefore further conclude that the Surrogate erred in directing a verdict in favor of respondent at the close of petitioners' proof, and we remit the matter to Surrogate's Court for further proceedings on the issue of ownership of the NYSFC stock.

We agree with respondent, however, that petitioners' contention that the Surrogate erred in dismissing their petition seeking an order that attorneys' fees related to litigation over the ownership of the NYSFC stock should not be paid from the estate is not properly before us, inasmuch as the Surrogate specifically reserved decision on that issue until the estate is settled. We therefore dismiss the appeal from the decree insofar as it reserved decision (*see Kuhlman v Westfield Mem. Hosp.* [appeal No. 2], 204 AD2d 1065, 1065).

Finally, we reject petitioners' contention that the matter should to be heard on remittal by a different surrogate (*see Matter of Michel*, 12 AD3d 1189, 1191).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

310

TP 16-01391

PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, TROUTMAN, AND SCUDDER, JJ.

IN THE MATTER OF AMG MANAGING PARTNERS, LLC, MICHAEL ARONICA AND MICHAEL GIANGRECO, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS, BRITTANY FRAGALE, RESPONDENTS-PETITIONERS, AND JOHN SUPPA, RESPONDENT.

JUSTIN S. WHITE, WILLIAMSVILLE, FOR PETITIONERS-RESPONDENTS.

CAROLINE J. DOWNEY, GENERAL COUNSEL, BRONX (TONI ANN HOLLIFIELD OF COUNSEL), FOR RESPONDENT-PETITIONER NEW YORK STATE DIVISION OF HUMAN RIGHTS.

CHRISTOPHER D. GALASSO, WILLIAMSVILLE, FOR RESPONDENT-PETITIONER BRITTANY FRAGALE.

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 26, 2016) to review a determination of respondent-petitioner New York State Division of Human Rights. The determination, among other things, ordered petitioners-respondents Michael Aronica and Michael Giangreco and respondent John Suppa to pay respondent-petitioner Brittany Fragale the sum of $65,000 for compensatory damages incurred as a result of discriminatory actions.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by reducing the award of compensatory damages for mental anguish and humiliation to $25,000, and as modified the determination is confirmed without costs, and the cross petitions are granted in part and petitioners-respondents and respondent John Suppa are directed to pay respondent-petitioner Brittany Fragale the sum of $25,000 with interest at the rate of 9% per annum, commencing February 5, 2016, to pay respondent-petitioner Brittany Fragale $5,720 in lost wages with interest at the rate of 9% per annum, commencing February 5, 2016, and to pay the State of New York a civil penalty in the amount of $15,000 with interest at the rate of 9% per annum, commencing February 5, 2016, and petitioners-respondents and Suppa are directed to attend a training session in the prevention of unlawful discrimination.

Memorandum: Respondent-petitioner Brittany Fragale (complainant) filed a complaint in March 2014 with respondent-petitioner New York State Division of Human Rights (Division), alleging unlawful discriminatory practices against her employer, petitioner-respondent AMG Managing Partners, LLC (AMG) and its two principals, petitioner-respondent Michael Aronica and petitioner-respondent Michael Giangreco (collectively, petitioners), as well as against respondent John Suppa. Following the Division's determination that it had jurisdiction over the complaint and that probable cause existed to believe that petitioners and Suppa had engaged in unlawful discriminatory practices, the matter was referred to a public hearing pursuant to Executive Law § 297. At the conclusion of the hearing, the Commissioner of the Division (Commissioner) adopted in large part the recommended findings of fact, opinion and decision, and order of the Administrative Law Judge (ALJ) and ordered petitioners and Suppa to pay complainant $5,720 in lost wages and $65,000 for mental anguish and humiliation. The Commissioner also ordered petitioners and Suppa to pay a $15,000 civil penalty and to attend an unlawful discrimination training seminar. Petitioners seek to vacate, annul, and set aside the Commissioner's order. The Division and complainant have each cross-petitioned for enforcement of the Commissioner's order. We deny the petition in part and grant the cross petitions in part.

Contrary to petitioners' contentions, the determinations that complainant was subjected to a hostile work environment (*see Matter of Father Belle Community Ctr. v New York State Div. of Human Rights*, 221 AD2d 44, 50-51, *lv denied* 89 NY2d 809), that petitioners Aronica and Giangreco were informed of the sexually inappropriate conduct directed toward complainant and condoned that conduct (*see Matter of State Div. of Human Rights v St. Elizabeth's Hosp.*, 66 NY2d 684, 687; *Father Belle Community Ctr.*, 221 AD2d at 53), and that complainant was constructively discharged from employment (*see Morris v Schroder Capital Mgt. Intl.*, 7 NY3d 616, 621-622; *Bielby v Middaugh,* 120 AD3d 896, 899) are supported by substantial evidence (*see generally Matter of State Div. of Human Rights [Granelle]*, 70 NY2d 100, 106; *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-182). That complainant may have used sexually inappropriate language or engaged in sexually inappropriate conduct with a longtime personal friend who worked in the same office does not preclude a finding of hostile work environment inasmuch as the relevant inquiry is "whether [complainant] welcomed the particular conduct in question from the alleged harasser[s]" (*Swentek v USAir, Inc.*, 830 F2d 552, 557). As the Court in *Swentek* held, complainant's "use of foul language or sexual innuendo in a consensual setting does not waive 'her legal protections against unwelcome harassment' " (*id.*; *see Danna v New York Tel. Co.*, 752 F Supp 594, 612).

The ALJ, "after a full consideration of many factors, including [complainant's] character and possible self-interest, decided to credit [her] testimony and reject that of [an opposing witness]. In our view, those credibility determinations are unassailable and the testimony thus credited provided substantial evidence for the

determinations under review" (*Matter of Berenhaus v Ward*, 70 NY2d 436, 443).

Contrary to petitioners' further contention, "the award of damages for lost wages is reasonably related to the discriminatory conduct . . . and thus there is no reason to disturb the determination of the Commissioner with respect thereto" (*Matter of New York State Div. of Human Rights v Independent Auto Appraisers, Inc.*, 78 AD3d 1541, 1542; *see Matter of Beame v DeLeon*, 87 NY2d 289, 297). Moreover, petitioners, who had the burden of proof on the issue of mitigation of damages (*see Matter of Walter Motor Truck Co. v New York State Human Rights Appeal Bd.*, 72 AD2d 635, 636), "failed to prove that complainant did not exercise diligent efforts to mitigate her damages" (*Matter of New York State Div. of Human Rights v Wackenhut Corp.*, 248 AD2d 926, 926, *lv denied* 92 NY2d 812). Moreover, we conclude that petitioners have failed to establish that the civil penalty assessed against them was " 'an abuse of discretion as a matter of law' " (*Matter of County of Erie v New York State Div. of Human Rights*, 121 AD3d 1564, 1566, quoting *Matter of Kelly v Safir*, 96 NY2d 32, 38, *rearg denied* 96 NY2d 854).

In challenging the award for mental anguish and humiliation, petitioners rely heavily on the fact that complainant failed to submit documentary evidence to corroborate her testimony that she sought counseling 33 times in the four months following her constructive discharge. Contrary to petitioners' contention, such testimony does not require corroboration inasmuch as proof of mental anguish "may be established through the testimony of the complainant alone" (*Cullen v Nassau County Civ. Serv. Commn.*, 53 NY2d 492, 497; *see Matter of New York City Tr. Auth. v State Div. of Human Rights*, 78 NY2d 207, 216).

We agree with petitioners, however, that the award for mental anguish and humiliation is excessive. "In reviewing an award for mental anguish and humiliation, the court should 'determine whether the relief was reasonably related to the wrongdoing, whether the award was supported by evidence before the Commissioner, and how it compared with other awards for similar injuries' " (*Father Belle Community Ctr.*, 221 AD2d at 57). We conclude that, although the relief granted herein was reasonably related to the wrongdoing, the amount of the award is inappropriate when compared to other awards for similar injuries. While petitioners' conduct was "unquestionably reprehensible[,] . . . 'care must be taken to insure that the award is compensatory and not punitive in nature' " (*Matter of New York State Div. of Human Rights v Young Legends, LLC*, 90 AD3d 1265, 1269-1270). Based on the evidence in this case, including evidence of complainant's own sexually inappropriate conduct at the workplace, the short duration of the conduct, and the severity of the conduct, we conclude that the Commissioner's award is excessive and must be reduced to $25,000 (*see id.* at 1270; *Matter of State of New York v New York State Div. of Human Rights*, 284 AD2d 882, 884; *cf. Father Belle Community Ctr.*, 221 AD2d at 57-58).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

316

KA 15-00977

PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KURT A. MCCALL, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (James J. Piampiano, J.), entered April 27, 2015. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court erred in failing to grant a downward departure from his presumptive risk level. "Defendant failed to request a downward departure to a level two risk, and thus he failed to preserve for our review his contention that the court erred in failing to afford him that downward departure from his presumptive level three risk" (*People v Quinones*, 91 AD3d 1302, 1303, *lv denied* 19 NY3d 802; *see People v Havens*, 144 AD3d 1632, 1632; *People v Montanez*, 88 AD3d 1278, 1280; *cf. People v George*, 141 AD3d 1177, 1178).

In any event, we conclude that the facts herein do not warrant a downward departure. "A departure from the presumptive risk level is warranted if there is 'an aggravating or mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines' " (*People v Smith*, 122 AD3d 1325, 1325, quoting Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006]; *see People v Carlberg*, 145 AD3d 1646, 1646-1647). Defendant failed to identify or establish the existence of any such mitigating factor (*see People v Scone*, 145 AD3d 1327, 1328; *Montanez*, 88 AD3d at 1280; *see also People v Finocchiaro*, 140 AD3d 1676, 1676-

1677, *lv denied* 28 NY3d 906).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

321

KA 13-00434

PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONELL L. MCFADDEN, DEFENDANT-APPELLANT.

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

RONELL L. MCFADDEN, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered March 7, 2013. The judgment convicted defendant, upon a jury verdict, of rape in the first degree and criminal sexual act in the first degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by directing that the sentences imposed on counts two and three shall run concurrently with each other and consecutively to the sentence imposed on count one and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of rape in the first degree (Penal Law § 130.35 [1]) and two counts of criminal sexual act in the first degree (§ 130.50 [1]). Defendant contends that the evidence is not legally sufficient to support the conviction because the only evidence connecting him to the crimes is DNA evidence taken from a vaginal swab and there is no physical evidence supporting the counts for criminal sexual act. Defendant failed to preserve that contention for our review inasmuch as his motion for a trial order of dismissal was not " 'specifically directed' at the error[s] being urged" here (*People v Hawkins*, 11 NY3d 484, 492; *see People v Gray*, 86 NY2d 10, 19). In any event, the contention is without merit. "Although the victim was unable to identify her attacker at trial . . . , the DNA evidence alone 'established defendant's identity beyond a reasonable doubt' " (*People v Burroughs*, 108 AD3d 1103, 1106, *lv denied* 22 NY3d 995). Viewing the evidence in the light most favorable to the People, including the DNA evidence and the victim's testimony, and giving the People "all reasonable evidentiary inferences" (*People v Delamota*, 18 NY3d 107, 113), we conclude, "as a matter of law, [that] a jury could

logically conclude that the People sustained [their] burden of proof" with respect to each count (*id.*; *see People v Danielson*, 9 NY3d 342, 349; *see generally People v Bleakley*, 69 NY2d 490, 495). Upon our independent assessment of all of the proof (*see Delamota*, 18 NY3d at 116), and viewing the evidence in light of the elements of the crimes as charged to the jury (*see Danielson*, 9 NY3d at 349), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We reject the contention of defendant in his main and pro se supplemental briefs that he was denied his constitutional right to due process based upon the nearly six-year preindictment delay. We conclude that County Court properly determined that the People met their burden of establishing good cause for the delay (*see generally People v Decker*, 13 NY3d 12, 14; *People v Singer*, 44 NY2d 241, 254). We note that the original indictment with respect to these crimes was dismissed after DNA evidence excluded as the perpetrator the person who had been accused of the crimes. Thereafter, the District Attorney's office was notified that the DNA results generated a "hit" for defendant in the Combined DNA Index System database; defendant, however, was not charged until nearly six years later when he voluntarily provided a DNA sample. The evidence at the *Singer* hearing established that much of the delay was caused by the fact that indicted cases were given priority over unindicted cases requiring additional investigation; that a DNA sample from defendant was required to prosecute this matter; that requests were made to the police in 2006 and 2007 to locate defendant; and, from June 2011 to April 2012, the assistant district attorney assigned to the case was unable to locate the victim. In determining that the People met their burden, the court properly applied the factors set forth in *People v Taranovich* (37 NY2d 442; *see Decker*, 13 NY3d at 15), i.e., "(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay" (*Taranovich*, 37 NY2d at 445). It is undisputed that the underlying charges, class B violent felony offenses (*see* Penal Law § 70.02 [1] [a]), are very serious offenses and that defendant was not incarcerated. At issue here are the extent and reason for the delay and whether defendant was prejudiced by the delay. Although the six-year delay is a factor that weighs in defendant's favor, it is well established that the extent of the delay, standing alone, is not sufficient to warrant a reversal (*see Decker*, 13 NY3d at 15; *see also People v Vernace*, 96 NY2d 886, 888; *People v Chatt*, 77 AD3d 1285, 1285, *lv denied* 17 NY3d 793), and defendant asserted no impairment of the defense as a result of the delay. We conclude that the People's explanations constitute "acceptable excuse or justification" for the delay (*People v Staley*, 41 NY2d 789, 793; *cf. People v Wheeler*, 289 AD2d 959, 959-960).

We reject defendant's contention that the court abused its discretion in permitting the People to cross-examine him with respect to four prior convictions, none of which are similar to the charges herein, inasmuch as those convictions were probative of defendant's

willingness to place his interests " 'ahead of principle or of the interests of society' and thus 'may be relevant to suggest his readiness to do so again on the witness stand' " (*People v Bennette*, 56 NY2d 142, 148, quoting *People v Sandoval*, 34 NY2d 371, 377).

Defendant contends in his pro se supplemental brief that counts one and three were rendered duplicitous by the victim's testimony. Although defendant failed to preserve that contention for our review (*see People v Allen*, 24 NY3d 441, 449-450; *People v Symonds*, 140 AD3d 1685, 1686, *lv denied* 28 NY3d 937), we note that at the time this case was tried, preservation was not required (*see People v Snyder*, 100 AD3d 1367, 1367, *lv denied* 21 NY3d 1010). We therefore exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.05 [2]). We nevertheless conclude that the contention is without merit. With respect to the rape count, "the briefly interrupted act of sexual intercourse . . . was 'part and parcel of the continuous conduct' that constituted one act of rape" (*People v Watkins*, 300 AD2d 1070, 1071, *lv denied* 99 NY2d 659; *cf. People v Cox*, 145 AD3d 1507, 1507-1508). We reject defendant's contention that our decision in *People v Black* (38 AD3d 1283, 1284, *lv denied* 8 NY3d 982) compels a different result. In *Black*, our conclusion that there were "two separate acts of sexual intercourse," which "were separated by only a brief period of time" (*id.*; *cf. Cox*, 145 AD3d at 1507-1508), is based upon the record facts in that case. Those record facts established that each act concluded with defendant's ejaculation, thereby distinguishing the facts in the instant case and in *Watkins*. We reject defendant's further contention that the victim's testimony with respect to count three related to two acts of criminal sexual act and conclude that her testimony described acts that were " 'part and parcel of the continuous conduct' that constituted one act of [criminal sexual act]" (*Watkins*, 300 AD2d at 1071).

We reject defendant's contention in his pro se supplemental brief that he was denied effective assistance of counsel based upon counsel's alleged failure to object when the court stated it would accept the verdict before providing a readback of testimony requested by the jury in its prior note. Defendant failed to allege the absence of a strategic or other legitimate explanation for counsel's allegedly deficient conduct in acceding to the court's intention to accept the verdict (*see People v Caban*, 5 NY3d 143, 154; *Symonds*, 140 AD3d at 1686; *see generally People v Mack*, 27 NY3d 534, 543). We reject defendant's further contention he was denied effective assistance of counsel by defense counsel's alleged failure to object to the testimony of the victim with respect to the duplicitous counts issue (*see generally Caban*, 5 NY3d at 154). Indeed, "had defense counsel objected during the trial '[a]ny uncertainty could have easily been remedied' through a jury charge" (*People v Smith*, 145 AD3d 1628, 1630).

Finally, we agree with defendant's contention in his main brief that the aggregate sentence of 60 years, which is statutorily reduced to 50 years (*see* Penal Law § 70.30 [1] [c], [e] [vi]), is unduly harsh

and severe, particularly in light of the court's commitment days before the trial to a 10-year term of incarceration for a plea to the rape count. We therefore modify the sentence as a matter of discretion in the interest of justice by directing that the sentences imposed on counts two and three shall run concurrently with each other and consecutively to the sentence imposed on count one (*see* CPL 470.15 [6] [b]).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

325

CA 16-00689

PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, TROUTMAN, AND SCUDDER, JJ.

ANITA A. VITULLO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (MARCO CERCONE OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILKOFSKY, FRIEDMAN, KAREL & CUMMINS, NEW YORK CITY (HARRY A. CUMMINS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Norman I. Siegel, J.), entered July 7, 2015. The order denied defendant's motion to enforce the settlement agreement entered between the parties and to dismiss the complaint.

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

Memorandum: Plaintiff commenced this action against defendant, her insurer, to recover for property damage that she sustained in a fire on her premises. After the fire, plaintiff submitted claims covering damages to the main house, pavers, landscaping, a carriage house, and other items on the premises, which defendant refused to pay. After plaintiff commenced this action, the parties entered into a stipulated settlement agreement (agreement) under which defendant compensated plaintiff for certain enumerated items, and the parties otherwise agreed to abide by an appraisal "only with respect to the actual cash value of [p]laintiff[']s dwelling as it stood immediately before the fire loss." The parties agreed that, once the appraisal was complete and plaintiff was paid, they would execute any documents necessary to effect a discontinuance of the action. The appraisers proceeded to calculate the value of the main house, as well as each outstanding item for which plaintiff had submitted a claim. Defendant paid plaintiff the appraised value of the main house only, on the understanding that plaintiff had agreed to forego additional compensation. Plaintiff disagreed with defendant's construction of the agreement and refused to stipulate to a discontinuance of the action.

In appeal No. 1, we conclude that Supreme Court erred in denying defendant's motion seeking to enforce the agreement and to dismiss the complaint. Generally, a stipulated settlement is binding upon a party if "it is in a writing subscribed by him or his attorney" (CPLR 2104). "Stipulations of settlement are favored by the courts and not lightly cast aside" (*Hallock v State of New York*, 64 NY2d 224, 230; *see Matter of Ecogen Wind LLC v Town of Prattsburgh Town Bd.*, 112 AD3d 1282, 1284), "and a party will be relieved from the consequences of a stipulation made during litigation only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident" (*Ecogen Wind LLC*, 112 AD3d at 1284; *see Hallock*, 64 NY2d at 230). Inasmuch as both parties executed the agreement and neither party has asserted that there is cause to invalidate it, we conclude that the agreement constitutes an enforceable contract.

A contract may be enforced summarily where its terms are unambiguous (*see Baumis v General Motors Corp.*, 102 AD2d 961, 962). "Whether a contract is ambiguous is a question of law[,] and extrinsic evidence may not be considered unless the document itself is ambiguous" (*South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 278; *see Non-Instruction Adm'rs & Supervisors Retirees Assn. v School Dist. of City of Niagara Falls*, 118 AD3d 1280, 1281). Furthermore, " 'extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face' " (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 163; *see Non-Instruction Adm'rs & Supervisors Retirees Assn.*, 118 AD3d at 1281). We agree with defendant that the term *dwelling* unambiguously refers only to the main house on the premises. A *dwelling* is defined as "a building or construction used for residence" (Webster's Third New International Dictionary 706 [2002]). Moreover, the recitals contained in the agreement note that the fire "resulted in a total loss to the dwelling," and the main house indisputably was the only building on the premises that sustained a total loss. Defendant fulfilled its remaining obligations under the agreement by paying plaintiff the appraised value of the main house, and thus is entitled to a discontinuance of the action. We therefore conclude that the court erred in denying defendant's motion seeking to enforce the settlement agreement and to dismiss the complaint.

For the foregoing reasons we conclude that, in appeal No. 2, the court properly denied plaintiff's motion for summary judgment inasmuch as plaintiff failed to demonstrate that her construction of the agreement is " 'the only construction [that] can fairly be placed thereon' " (*DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp.*, 120 AD3d 905, 906).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

330

CA 16-01568

PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, TROUTMAN, AND SCUDDER, JJ.

ANITA A. VITULLO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

WILKOFSKY, FRIEDMAN, KAREL & CUMMINS, NEW YORK CITY (HARRY A. CUMMINS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (MARCO CERCONE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Norman I. Siegel, J.), entered November 16, 2015. The order, among other things, denied plaintiff's motion for summary judgment.

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

Same memorandum as in *Vitullo v New York Cent. Mut. Fire Ins. Co.* ([appeal No. 1] ___ AD3d ___ [Mar. 31, 2017]).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

339

CAF 15-02177

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

IN THE MATTER OF CHRISTIAN C.-B. AND
KNOAH L. C.-B.

LIVINGSTON COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

CHRISTOPHER V.B., AND RENEE E.C.,
RESPONDENTS-APPELLANTS.

MEMORANDUM AND ORDER

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

BRIDGET L. FIELD, ROCHESTER, FOR RESPONDENT-APPELLANT RENEE E.C.

JOHN T. SYLVESTER, MT. MORRIS, FOR PETITIONER-RESPONDENT.

FARES A. RUMI, ATTORNEY FOR THE CHILDREN, ROCHESTER.

Appeals from an order of the Family Court, Livingston County (Robert B. Wiggins, J.), entered November 24, 2015 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondents' parental rights.

It is hereby ORDERED that said appeal by respondent Christopher V.B. is unanimously dismissed and the order is affirmed without costs.

Memorandum: In this permanent neglect proceeding pursuant to Family Court Act article 6 and Social Services Law § 384-b, respondent parents appeal from an order terminating their parental rights. Initially, we note that the father's sole contention on appeal is that Family Court erred in denying the mother's request for a suspended judgment. With respect "to the determination of the mother's parental rights . . . [the father] cannot be considered an aggrieved party, and [thus] his appeal must be dismissed" (*Matter of Vivian OO.*, 33 AD3d 1096, 1096; *see Matter of Charle C.E. [Chiedu E.]*, 129 AD3d 721, 721-722; *see also Matter of Terrance M. [Terrance M., Sr.]*, 75 AD3d 1147, 1147).

On her appeal, the mother initially contends that petitioner failed to establish that it had exercised diligent efforts to encourage and strengthen the parent-child relationship while she was incarcerated, as required by Social Services Law § 384-b (7) (a). We reject that contention. "Diligent efforts include reasonable attempts at providing counseling, scheduling regular visitation with the

child[ren], providing services to the parent[] to overcome problems that prevent the discharge of the child[ren] into [his or her] care, and informing the parent[] of [the children's] progress" (*Matter of Jessica Lynn W.*, 244 AD2d 900, 900-901; *see* § 384-b [7] [f]). Petitioner is not required, however, to "guarantee that the parent succeed in overcoming his or her predicaments" (*Matter of Sheila G.*, 61 NY2d 368, 385; *see Matter of Jamie M.*, 63 NY2d 388, 393). Rather, the parent must "assume a measure of initiative and responsibility" (*Jamie M.*, 63 NY2d at 393). Here, petitioner established, by the requisite clear and convincing evidence (*see* § 384-b [3] [g] [i]), that it fulfilled its duty to exercise diligent efforts to encourage and strengthen the mother's relationships with her children (*see generally Matter of Star Leslie W.*, 63 NY2d 136, 142). For instance, petitioner established that it arranged visitation between the mother and the subject children, transported the children to those visits, "explored the planning resources suggested by [the mother,] and kept [her] apprised of the child[ren]'s progress" (*Matter of "Male C."*, 22 AD3d 250, 250; *see Matter of Davianna L. [David R.]*, 128 AD3d 1365, 1365, *lv denied* 25 NY3d 914; *Matter of Mya B. [William B.]*, 84 AD3d 1727, 1727-1728, *lv denied* 17 NY3d 707). Thus, "given the circumstances, [petitioner] provided what services it could" (*Matter of Curtis N.*, 290 AD2d 755, 758, *lv dismissed* 97 NY2d 749).

Contrary to the further contention of the mother, the court properly concluded that she permanently neglected the subject children inasmuch as she "failed substantially and continuously or repeatedly to . . . plan for the future of the child[ren] although . . . able to do so" (*Star Leslie W.*, 63 NY2d at 142; *see Matter of Justin Henry B.*, 21 AD3d 369, 370). " '[T]o plan for the future of the child' shall mean to take such steps as may be necessary to provide an adequate, stable home and parental care for the child" (Social Services Law § 384-b [7] [c]). "At a minimum, parents must 'take steps to correct the conditions that led to the removal of the child[ren] from their home' " (*Matter of Nathaniel T.*, 67 NY2d 838, 840; *see Matter of Crystal Q.*, 173 AD2d 912, 913, *lv denied* 78 NY2d 855). Here, "there is no evidence that [the mother] had a realistic plan to provide an adequate and stable home for the child[ren]" (*Matter of Saiah Isaiah C. [Tanisha C.]*, 144 AD3d 585, 586; *see Matter of Micah Zyair F.W. [Tiffany L.]*, 110 AD3d 579, 579).

Finally, we reject the mother's contention that the court erred in denying her request for a suspended judgment. The court concluded, inter alia, that there was little chance that the mother could continue to control her addictions or gain insight into how her choices were impacting the children, and " '[t]he court's assessment that [the mother] was not likely to change [her] behavior is entitled to great deference' " (*Matter of Tiara B. [Torrance B.]*, 70 AD3d 1307, 1308, *lv denied* 14 NY3d 709; *see Matter of Jane H. [Susan H.]*, 85 AD3d 1586, 1587, *lv denied* 17 NY3d 709; *Matter of Philip D.*, 266 AD2d 909, 909). Consequently, the court properly determined that " '[f]reeing the child[ren] for adoption provided [them] with prospects for permanency and some sense of the stability [they] deserved, rather than the perpetual limbo caused by unfulfilled hopes of returning to

[the mother's] care' " (*Matter of Roystar T. [Samarian B.]*, 72 AD3d 1569, 1570, *lv denied* 15 NY3d 707).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

351

CA 16-01342

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

JOHN C. BLASE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH C. BLASE, DEFENDANT-APPELLANT.

MARK A. WOLBER, UTICA, FOR DEFENDANT-APPELLANT.

MICHAEL J. LAUCELLO, CLINTON, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Louis P. Gigliotti, A.J.), entered October 30, 2015. The order denied the motion of defendant for summary judgment.

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

Memorandum: Prior to his death in 2012, Joseph V. Blase (decedent) owned several accounts at a credit union. For each of those accounts, decedent named two of his sons, plaintiff and defendant, as equal beneficiaries. Defendant, acting pursuant to a power of attorney that decedent signed while he was in a nursing home, directed the credit union to remove plaintiff as a beneficiary on those accounts, and defendant withdrew the funds from the accounts after decedent passed away. Plaintiff commenced a proceeding in Surrogate's Court to transfer those funds to decedent's estate, but discovered that the accounts were not part of that estate. Plaintiff then commenced this action seeking to recover half of the funds that had been removed from the credit union accounts, alleging, inter alia, that defendant misused the power of attorney. Defendant appeals from an order denying his motion for summary judgment dismissing the complaint. We affirm.

Defendant contends that Supreme Court erred in denying that part of the motion for summary judgment dismissing the cause of action alleging that he exercised undue influence over decedent because plaintiff failed to establish that defendant exercised such influence. We reject that contention. It is well settled that, "where there was a confidential or fiduciary relationship between the beneficiary and the decedent, [a]n inference of undue influence arises which requires the beneficiary to come forward with an explanation of the circumstances of the transaction" (*Bazigos v Krukar*, 140 AD3d 811, 813 [internal quotation marks omitted]). Here, the allegations in the complaint and the evidence submitted by defendant in support of his

motion, including his own affirmation, establish that he had a confidential relationship with decedent (*see Allen v La Vaud*, 213 NY 322, 327-328; *Peters v Nicotera*, 248 AD2d 969, 970; *Matter of Connelly*, 193 AD2d 602, 603, *lv denied* 82 NY2d 656). Thus, in order to meet his burden on the motion of establishing his entitlement to judgment as a matter of law (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324), defendant was required " 'to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood' " (*Matter of Gordon v Bialystoker Ctr. & Bikur Cholim*, 45 NY2d 692, 699). We agree with the court that defendant failed to meet that burden, and thus that part of the motion was properly denied "regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). Similarly, contrary to defendant's contention, he failed to meet his burden on that part of the motion seeking summary judgment dismissing the remaining causes of action, alleging that he breached his duty under the power of attorney, inasmuch as he failed to establish that, in removing plaintiff as a beneficiary on the accounts, he " 'act[ed] in the utmost good faith and undivided loyalty toward the principal, and . . . in accordance with the highest principles of morality, fidelity, loyalty and fair dealing' " (*Matter of Ferrara*, 7 NY3d 244, 254). Consequently, the court also properly denied that part of the motion.

We have considered defendant's remaining contentions, and we conclude that they do not require reversal or modification of the order.

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

352

CA 15-01953

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

IN THE MATTER OF KIAMBU PORTER,
PETITIONER-APPELLANT,

V MEMORANDUM AND 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 (FRANK BRADY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered October 27, 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.

Memorandum: Petitioner appeals from a judgment dismissing his petition seeking to annul the Parole Board's determination denying him parole release. We conclude that "[t]his appeal must be dismissed as moot because the determination expired during the pendency of this appeal, and the Parole Board denied petitioner's subsequent request for parole release" (*Matter of Patterson v Berbary*, 1 AD3d 943, 943, *appeal dismissed and lv denied* 2 NY3d 731; *see Matter of Robles v Evans*, 100 AD3d 1455, 1455). Contrary to petitioner's contention, the exception to the mootness doctrine does not apply here (*see Matter of Sanchez v Evans*, 111 AD3d 1315, 1315; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

355

KA 12-02153

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY T. HENDERSON, JR., ALSO KNOWN AS BUTTER,
DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (SCOTT MYLES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered September 26, 2012. The appeal was held by this Court by order entered March 25, 2016, decision was reserved and the matter was remitted to Monroe County Court for further proceedings (137 AD3d 1670). The proceedings were held and completed (Douglas A. Randall, J.).

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: We previously held this case, reserved decision, and remitted the matter for a hearing upon determining that County Court (Geraci, J.) had erred in summarily denying defendant's motion to withdraw his guilty plea (*People v Henderson*, 137 AD3d 1670, 1670-1671). In support of the motion, defendant had alleged that his attorney erroneously advised him before he pleaded guilty that his plea could be withdrawn at any time prior to sentencing (*id.* at 1670). Upon remittal, defendant was represented by new counsel, and County Court (Randall, J.) heard the testimony of defendant's former attorney. Defense counsel then sought to call defendant as a witness, and the court precluded defendant's testimony and closed the hearing without rendering a decision on defendant's motion to withdraw his plea.

The court erred in failing to rule on defendant's motion. The intent of our prior decision was for the court to conduct a hearing *and* decide the motion by resolving any issues of credibility that arose at the hearing (*see id.* at 1671; *see generally People v Stephens*, 6 AD3d 1123, 1124, *lv denied* 3 NY3d 663, *reconsideration denied* 3 NY3d 682). The court further erred in precluding defendant from testifying at the hearing, inasmuch as "defendant's testimony must be considered important proof bearing directly on" whether his

guilty plea was voluntarily and intelligently entered (*People v Plevy*, 52 NY2d 58, 65). The testimony of defendant's former attorney contradicted some of the assertions made by defendant in support of the motion, and thus defendant's testimony was necessary for the court's resolution of the resulting credibility issue (*see generally People v Prochilo*, 41 NY2d 759, 761; *People v Fitzgerald*, 56 AD3d 811, 813). Under the circumstances of this case, the preclusion of defendant's testimony deprived him of " 'a reasonable opportunity to advance his claims [such that] an informed and prudent determination [could] be rendered' " on his motion (*People v Days*, 125 AD3d 1508, 1509, quoting *People v Frederick*, 45 NY2d 520, 525). We therefore hold the case, reserve decision, and remit the matter to County Court to reopen the hearing and rule on defendant's motion after affording him an opportunity to testify (*see generally id.*; *People v Mack*, 122 AD3d 1444, 1445).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

358

KA 15-00534

PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK J. MALTESE, ALSO KNOWN AS MARK JOSEPH MALTESE, ALSO KNOWN AS MARK MALTESE, DEFENDANT-APPELLANT.

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

MARK J. MALTESE, DEFENDANT-APPELLANT PRO SE.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (MELISSA L. CIANFRINI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered March 4, 2015. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree (three counts), burglary in the third degree, criminal mischief in the second degree and grand larceny in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of three counts of robbery in the second degree (Penal Law § 160.10 [2] [b]), and one count each of burglary in the third degree (§ 140.20), criminal mischief in the second degree (§ 145.10), and grand larceny in the third degree (§ 155.35 [1]). By making only a general motion for a trial order of dismissal, defendant failed to preserve for our review his contention in his main and pro se supplemental briefs that the evidence is legally insufficient to support the conviction (*see People v Hawkins*, 11 NY3d 484, 492). 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 reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant also contends in his main and pro se supplemental briefs that his statements to the police were not knowing and voluntary and that County Court therefore erred in refusing to suppress them because he was not given water the first time he requested it; "it was possible" that he was "complaining" from opiate withdrawal symptoms and may have appeared intoxicated; he was in custody for six hours before he was interrogated, and was questioned for 2½ hours; and he

was never given any medication while in custody. We reject that contention. Here, the officer who questioned defendant testified at the suppression hearing that defendant never requested any form of medication or food, and did not complain that he was suffering from withdrawal. Furthermore, although defendant's first request for water was denied, he was thereafter provided with water and was allowed to take several cigarette breaks. Thus, we conclude that "the totality of the circumstances here does not 'bespeak such a serious disregard of defendant's rights, and [was not] so conducive to unreliable and involuntary statements, that the prosecutor has not demonstrated beyond a reasonable doubt that the defendant's will was not overborne' " (*People v Jin Cheng Lin*, 26 NY3d 701, 725). Contrary to defendant's related contention, the fact that defendant and the officer conducting the questioning were acquaintances does not warrant a different conclusion (*see generally People v Gates*, 101 AD2d 635, 635-636).

We reject defendant's further contention in his main and pro se supplemental briefs that the police lacked probable cause to arrest him. " 'Probable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely [requires] information sufficient to support a reasonable belief that an offense has been or is being committed or that evidence of a crime may be found in a certain place' " (*People v Myhand*, 120 AD3d 970, 970, *lv denied* 25 NY3d 952). Here, a witness followed defendant's car directly from the store that was burglarized to a house, and a police officer was allowed to enter the house where defendant was seen walking up the stairs holding the stolen television. In addition, an occupant of the house provided a statement that defendant left the house with another man and came back with a television. We thus conclude that the police had probable cause to arrest defendant (*see id*.).

Defendant contends in his main brief that the court erred in admitting his written statement in evidence because the People failed to comply with the CPL 710.30 notice requirements, i.e., they indicated in their CPL 710.30 notice that defendant's written statement was made on September 13, 2013, when it was actually made on November 27, 2013. We reject that contention. " '[T]he purpose of the statute will be served when the defendant is provided an opportunity to challenge the admissibility of the statement[]' " (*People v Simpson*, 35 AD3d 1182, 1183, *lv denied* 8 NY3d 990). While the statement displays the date September 13, 2013 on the top lefthand corner of the first page, the dates underneath defendant's signature at the bottom of both pages of the statement indicate that it was made on November 27, 2013. We conclude that this mere clerical error did not hinder defendant from challenging the admissibility of the statement during the suppression hearing (*see id.*). We reject defendant's final contention in his main brief that the sentence is unduly harsh and severe.

By failing to object to the jury charge as given, defendant failed to preserve for our review his contention in his pro se supplemental brief that the jury charge was improper with respect to the issue of voluntary statements (*see generally People v Robinson*, 88

NY2d 1001, 1001-1002). In any event, we conclude that the court's charge, viewed in its entirety, "fairly instructed the jury on the correct principles of law to be applied to the case and does not require reversal" (*People v Ladd*, 89 NY2d 893, 896). We similarly reject defendant's contention in his pro se supplemental brief that the court erred in denying his request for an adverse inference charge concerning the failure of the police to record his interrogation electronically (*see People v Durant*, 26 NY3d 341, 352-353). Defendant's contentions in his pro se supplemental brief that the prosecutor should have been disqualified and that defense counsel was ineffective based on a conflict of interest concern matters outside of the record and must be raised by way of a motion pursuant to CPL article 440 (*see e.g. People v Sanford*, 138 AD3d 1435, 1436).

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

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

359

KA 14-01882

PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EBONY S. MACK, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered July 22, 2014. The judgment convicted defendant, upon her plea of guilty, of aggravated driving while intoxicated with a child passenger (two counts), aggravated driving while intoxicated, driving while intoxicated (two counts) and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of, inter alia, aggravated driving while intoxicated (Vehicle and Traffic Law § 1192 [2-a] [a]). We agree with defendant that the certificate of conviction incorrectly reflects that her sentence included a fine, and it therefore must be amended to correct that error (*see generally People v Meza*, 141 AD3d 1110, 1110, *lv denied* 28 NY3d 928; *People v Kemp*, 112 AD3d 1376, 1377).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

363

CAF 16-00399

PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF RYAN J. FISHER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LESLIE A. FISHER, RESPONDENT-APPELLANT.

IN THE MATTER OF LESLIE A. FISHER,
PETITIONER-APPELLANT,

V

RYAN J. FISHER, RESPONDENT-RESPONDENT.

MICHAEL STEINBERG, ROCHESTER, FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (ADAM W. KOCH OF COUNSEL), FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Wyoming County (Terrence M. Parker, A.J.), entered February 22, 2016 in proceedings pursuant to Family Court Act article 6. The order granted the parties joint custody and directed that the residence of the parties' child shall be in New York.

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

Memorandum: On appeal from an order that, inter alia, awarded the parties joint custody of their child and ordered that the child's residence remain in New York, respondent-petitioner mother contends that Family Court erred in failing to award her primary physical residence with permission to relocate to Texas. We affirm.

"Inasmuch as this case involves an initial custody determination, 'it cannot properly be characterized as a relocation case to which the application of the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741 [1996]) need be strictly applied' " (*Forrestel v Forrestel*, 125 AD3d 1299, 1299, *lv denied* 25 NY3d 904). " 'Although a court may consider the effect of a parent's [proposed] relocation as part of a best interests analysis, relocation is but one factor among

many in its custody determination' " (*id.* at 1299-1300). We reject the mother's contention that Family Court required her to establish by a preponderance of the evidence that her proposed relocation to Texas was in the best interests of the child, thereby imposing an improper burden of proof (*cf. Matter of Saperston v Holdaway*, 93 AD3d 1271, 1272, *appeal dismissed* 19 NY3d 887, 20 NY3d 1052). Rather, we conclude that the court, in evaluating the mother's proposed relocation as part of the best interests analysis, properly weighed that factor against the mother upon determining that the child's relationship with petitioner-respondent father would be adversely affected by the proposed relocation because of the distance between western New York and Texas (*see Forrestel*, 125 AD3d at 1300). Contrary to the mother's further contention, upon weighing the other relevant factors (*see Fox v Fox*, 177 AD2d 209, 210), we conclude that the court's determination that the child's best interests would be served by awarding joint custody to the parties with continued residence in New York is supported by a sound and substantial basis in the record and should not be disturbed (*see Forrestel*, 125 AD3d at 1299).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

364

CAF 15-01702

PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF MADELYNN T.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

REBECCA M., RESPONDENT-APPELLANT.

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

AMBER R. POULOS, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered September 4, 2015 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, adjudged that respondent had abandoned the subject child.

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

Memorandum: Respondent mother appeals from an order that terminated her parental rights with respect to her daughter on the ground of abandonment. We affirm.

Social Services Law § 384-b (5) (a) provides that "a child is 'abandoned' by his [or her] parent if such parent evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency." A child is deemed abandoned when the parent engages in such behavior "for the period of six months immediately prior to the date on which the petition [for abandonment] is filed" (§ 384-b [4] [b]). "In the absence of evidence to the contrary, such ability to visit and communicate shall be presumed" (§ 384-b [5] [a]). Here, the mother does not dispute that she failed to maintain contact for the statutory period, but she contends that her period of hospitalization and her repeated drug abuse constitute valid defenses to the claim of abandonment. We reject that contention.

"In the abandonment context, '[a] court shall not require a showing of diligent efforts, if any, by an authorized agency to encourage the parent to perform the acts specified in paragraph (a) of

this subdivision' " (*Matter of Gabrielle HH.*, 1 NY3d 549, 550, quoting Social Services Law § 384-b [5] [b]; *see Matter of Lundyn S. [Al-Rahim S.]*, 128 AD3d 1406, 1407; *Matter of Angela N.S. [Joshua S.]*, 100 AD3d 1381, 1382). "Rather, it was [the mother's] burden, which [she] failed to meet, to show that there were circumstances rendering contact with the child or agency infeasible, or that [she] was discouraged from doing so by the agency" (*Matter of Regina A.*, 43 AD3d 725, 725; *see Matter of Miranda J. [Jeromy J.]*, 118 AD3d 1469, 1470). "Hospitalization . . . does not automatically excuse a parent from maintaining the contacts required under the Social Services Law" (*Matter of Crystal C.*, 219 AD2d 601, 602), and the mother failed to submit any supporting documentary evidence to substantiate the length, severity, or extent of her purported illness and hospitalization (*see Matter of Ruth R. [Diana P.]*, 115 AD3d 531, 531-532; *see generally Matter of I.R.*, 153 AD2d 559, 560). In our view, the mother "failed to show that . . . her hospitalization . . . 'so permeated [her] life that contact was not feasible' " (*Matter of Andre W.*, 298 AD2d 206, 206; *see Matter of Christina S.*, 251 AD2d 982, 982-983).

After the mother was released from her hospitalization, her only attempt at establishing any contact with the child or petitioner was a vague request for the child's grandmother to obtain the relevant contact information for her. Even assuming, arguendo, that the grandmother obtained the relevant contact information from petitioner on behalf of the mother, "we conclude that such 'insubstantial contact [was] insufficient to defeat the claim of abandonment' " (*Lundyn S.*, 128 AD3d at 1407; *see Matter of Nadine Nicky McD. [Vernice H.]*, 138 AD3d 495, 495; *Miranda J.*, 118 AD3d at 1470). The mother further contends that she never followed up on that request because she was "actively using" drugs, which had the effect of "disturb[ing her] mind," and that the intensity of her addiction demonstrates that her drug use "permeate[d] her life." We reject that contention and conclude that the mother's vague and conclusory testimony "failed to establish that her alleged health problems and other hardships 'permeated [her] life to such an extent that contact was not feasible' " (*Matter of Dahata R.*, 278 AD2d 894, 894; *see Ruth R.*, 115 AD3d at 531-532).

Finally, the mother's period of incarceration does not excuse her failure to contact the child or petitioner (*see Matter of Lindsey B.*, 16 AD3d 1078, 1078; *Matter of Ashton*, 254 AD2d 773, 773, *lv denied* 92 NY2d 817) and, insofar as there appears to have been a week prior to the filing of the petition when the mother was not incarcerated, there is no evidence in the record of any attempt by the mother to contact or communicate with petitioner, the child, or the child's foster parents during that time (*see generally Matter of Stephen UU. [Stephen VV.]*, 81 AD3d 1127, 1129, *lv denied* 17 NY3d 702).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

365

CAF 15-01084

PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF BABY B.W., ALSO KNOWN AS
RALEAK H.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; MEMORANDUM AND ORDER

TRACY B.H., RESPONDENT-APPELLANT.

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

DENISE J. MORGAN, UTICA, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered July 13, 2015 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject child.

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

Memorandum: Respondent father appeals from an order adjudicating his child to be neglected based upon the father's illegal drug use simultaneously with the mother's illegal drug use during the pregnancy. Contrary to the father's contention, petitioner met its burden of establishing by a preponderance of the evidence that the child was neglected (*see generally* Family Ct Act § 1046 [b] [i]). "It is well established that 'a finding of neglect may be appropriate even when a child has not been actually impaired, in order to protect that child and prevent impairment' " (*Matter of Lavountae A.*, 57 AD3d 1382, 1382, *affd* 12 NY3d 832; *see Matter of Serenity P. [Shameka P.]*, 74 AD3d 1855, 1855-1856), and that "[a] single incident where the parent's judgment was strongly impaired and the child exposed to a risk of substantial harm can sustain a finding of neglect" (*Serenity P.*, 74 AD3d at 1856 [internal quotation marks omitted]). Here, the child was born with a positive toxicology for crack cocaine and marihuana and, based upon the testimony adduced at the hearing, Family Court properly found that the father's drug use simultaneously with the mother's use contributed to the mother's use of illegal drugs, which was harmful to the child. The positive toxicology, together with the father's substance abuse history, his failure to submit to drug screening as requested, and his mental health issues, for which he fails to take his prescribed medication and fails to attend mental

health appointments, supports the finding of neglect on the ground that the child was placed in imminent danger (*see Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79). To the extent that the positive toxicology may not have been the basis for the court's finding of neglect, we conclude that we are not precluded from affirming the order based in part on that finding inasmuch as "the authority of this Court to review the facts is as broad as that of Family Court" (*Matter of David R.*, 39 AD3d 1187, 1188; *see Matter of Anthony L. [Lisa P.]*, 144 AD3d 1690, 1692, *lv denied* 28 NY3d 914). Contrary to the father's further contention, the court was entitled to draw " 'the strongest inference [against him] that the opposing evidence permits' based on [his] failure to testify at the fact-finding hearing" (*Serenity P.*, 74 AD3d at 1855; *see Denise J.*, 87 NY2d at 79; *Lavountae A.*, 57 AD3d at 1382).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

368

CA 16-00415

PRESENT: PERADOTTO, J.P., DEJOSEPH, CURRAN, AND SCUDDER, JJ.

RONALD L. HAWE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TODD DELMAR, INDIVIDUALLY AND AS AN EMPLOYEE OF OSWEGO COUNTY, I.E. OSWEGO COUNTY SHERIFF'S DEPARTMENT, OSWEGO COUNTY SHERIFF'S DEPARTMENT AND COUNTY OF OSWEGO, DEFENDANTS-RESPONDENTS.

SHANLEY LAW OFFICES, OSWEGO (P. MICHAEL SHANLEY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (CHRISTOPHER M. MILITELLO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered December 18, 2015. The order granted the motion of defendants to dismiss the complaint pursuant to CPLR 3216.

It is hereby ORDERED that the order so appealed from is unanimously reversed in the exercise of discretion without costs, defendants' motion is denied, the complaint is reinstated, and the matter is remitted to Supreme Court, Oswego County, for further proceedings in accordance with the following memorandum: Plaintiff commenced this negligence action seeking damages for injuries that he sustained when defendant Todd Delmar, a deputy sheriff, allegedly subjected plaintiff to an unlawful arrest and employed excessive force. Plaintiff further alleged that defendants Oswego County Sheriff's Department and County of Oswego were negligent because they did not properly instruct, supervise and control Delmar. Plaintiff appeals from an order granting defendants' motion to dismiss the complaint pursuant to CPLR 3216 for failure to prosecute. We reverse.

Plaintiff established a justifiable excuse for his failure to comply with defendants' 90-day demand in the form of law office failure, i.e., the postponement of depositions during the 90-day period due to a necessary medical procedure for plaintiff's attorney, the assigned paralegal's failure to reschedule before resigning from the firm, and the subsequent misplacement of the client file without the case being reassigned (*see Restaino v Capicotto*, 26 AD3d 771, 771-772; *Charnock v Preferred Mut. Ins. Co.*, 281 AD2d 981, 982). Contrary to plaintiff's contention, however, the affirmation of his attorney, "who lacks personal knowledge of the facts, is insufficient to establish a meritorious cause of action" (*Wasielewski v Town of*

Cheektowaga, 281 AD2d 944, 945), and even assuming, arguendo, that his further contention is properly before us (*cf. Nardozzi v Piotrowski*, 298 AD2d 970, 970), we conclude that "[t]he 'generalized details' set forth in plaintiff['s] verified complaint are likewise insufficient" (*Wasielewski*, 281 AD2d at 945).

Nonetheless, " '[a] court retains discretion to deny a motion to dismiss pursuant to CPLR 3216 even when a plaintiff fails to comply with the 90-day requirement and fails to demonstrate a justifiable excuse and a meritorious cause of action' " (*Restaino*, 26 AD3d at 771; *see generally Baczkowski v Collins Constr. Co.*, 89 NY2d 499, 503-505). "[W]here discretionary determinations concerning discovery and CPLR article 31 are at issue, [we are] vested with the same power and discretion as [Supreme Court, and thus we] may also substitute [our] own discretion *even in the absence of abuse*" (*Daniels v Rumsey*, 111 AD3d 1408, 1409 [internal quotation marks omitted]; *see generally Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 11 NY3d 843, 845).

Under the circumstances here, we substitute our discretion for that of the court, and we conclude that dismissal of the complaint is not warranted. Plaintiff's participation in ongoing disclosure that occurred within the 90-day period—namely, the efforts of his attorney to schedule the depositions of defendant Todd Delmar and a sheriff, and his correspondence indicating his desire to reschedule those depositions after his medical procedure—" 'negated any inference that [plaintiff] intended to abandon [the] action' " (*Restaino*, 26 AD3d at 772). Plaintiff thus took steps to resume prosecution of the action (*cf. Baczkowski*, 89 NY2d at 503-504), and the parties demonstrated an intent to proceed with discovery, i.e., by corresponding about rescheduling the depositions, after the 90-day demand was served (*see Altman v Donnenfeld*, 119 AD3d 828, 828). Although there were some delays attributable to plaintiff's attorney and his law office both before and after the 90-day demand, we conclude that "[t]here is no parallel between the circumstances of the instant case and those where CPLR 3216 dismissals have been justified based on patterns of persistent neglect, a history of extensive delay, evidence of an intent to abandon prosecution, and lack of any tenable excuse for such delay" (*Amanda C.S. v Stearns* [appeal No. 1], 49 AD3d 1227, 1228 [internal quotation marks omitted]). Moreover, there is no indication that defendants have been prejudiced by the delay (*see Altman*, 119 AD3d at 828-829; *Loschiavo v DeBruyn*, 6 AD3d 1113, 1114), and we note that defendants also sought relief short of dismissal inasmuch as they requested, in the alternative, that the court establish a deadline for the completion of discovery and the filing of a note of issue.

Thus, in the exercise of our discretion, we reverse the order and remit the matter to Supreme Court for further proceedings, including establishing a date certain for plaintiff to complete discovery and file a note of issue and certificate of readiness for trial, and imposing a monetary sanction if deemed appropriate (*see generally*

Baczkowski, 89 NY2d at 505; *Amanda C.S.*, 49 AD3d at 1228).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

373

CA 16-01466

PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

WALTER KENNEDY, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

OSWEGO CITY SCHOOL DISTRICT,
RESPONDENT-RESPONDENT.

KENNY & KENNY, PLLC, SYRACUSE (MICHAEL P. KENNY OF COUNSEL), FOR CLAIMANT-APPELLANT.

THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (CHRISTOPHER M. MILITELLO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered February 24, 2016. The order, inter alia, denied the application of claimant for leave to serve a late notice of claim on respondent.

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

Memorandum: Claimant appeals from an order that, inter alia, denied his application for leave to serve a late notice of claim against respondent pursuant to General Municipal Law § 50-e (5) for violations of the Labor Law. We reject claimant's contention that Supreme Court erred in denying the application.

"In determining whether to grant such leave, the court must consider, inter alia, whether the claimant has shown a reasonable excuse for the delay, whether the municipality 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 municipality" (*Matter of Friend v Town of W. Seneca*, 71 AD3d 1406, 1407; *see generally* General Municipal Law § 50-e [5]; Education Law § 3813 [2-a]). "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" (*Dalton v Akron Cent. Schs.*, 107 AD3d 1517, 1518, *affd* 22 NY3d 1000 [internal quotation marks omitted]).

Here, claimant failed to establish that respondent had actual knowledge of the essential facts constituting the claim within the requisite time period (*see Folmar v Lewiston-Porter Cent. Sch. Dist.*, 85 AD3d 1644, 1645), which is a factor "that should be accorded great weight in determining whether leave to serve a late notice of claim

should be granted" (*Santana v Western Regional Off-Track Betting Corp.*, 2 AD3d 1304, 1304, *lv denied* 2 NY3d 704; *see Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 535; *Matter of Turlington v Brockport Cent. Sch. Dist.*, 143 AD3d 1247, 1248). Contrary to claimant's contention, the accident report prepared by claimant's employer and purportedly received by the construction manager for the school project on which claimant was injured did not impute to respondent the requisite actual knowledge inasmuch as the evidence in the record failed to establish that the construction manager was an agent of respondent (*see Matter of Casale v City of New York*, 95 AD3d 744, 745; *see also Mehra v City of New York*, 112 AD3d 417, 418). In any event, even assuming, arguendo, that the construction manager was respondent's agent and timely received the accident report, we conclude that the report was insufficient to provide respondent with actual knowledge of the essential facts constituting the claim inasmuch as it described the underlying occurrence and claimant's injuries in general terms and made no connection between the accident and any liability on the part of respondent (*see Matter of Jin Gak Kim v Dormitory Auth. of the State of N.Y.*, 140 AD3d 1459, 1460-1461; *Matter of Fernandez v City of New York*, 131 AD3d 532, 533; *Mehra*, 112 AD3d at 418; *Matter of Kliment v City of Syracuse*, 294 AD2d 944, 945). "Respondent's knowledge of the accident and the injury, without more, does not constitute actual knowledge of the essential facts constituting the claim" (*Folmar*, 85 AD3d at 1645 [internal quotation marks omitted]). Moreover, "[w]hile the record reveals that certain of respondent's employees had been generally alerted [at a project meeting] that a [worker] injured himself on the job, no details or specifics of the accident or the extent of injuries were given or known such that it could be fairly stated that respondent 'acquired actual knowledge of the essential facts constituting the claim' . . . within a reasonable time of the accident" (*Matter of Smith v Otselic Val. Cent. Sch. Dist.*, 302 AD2d 665, 666).

With respect to claimant's excuse for the delay, we conclude that, even if he was "initially unaware of the severity of his injuries, he did not seek leave to serve a late notice of claim until [nearly seven] months after he underwent surgery, and he failed to offer a reasonable excuse for the postsurgery delay" (*Friend*, 71 AD3d at 1407; *see Mehra*, 112 AD3d at 418). Claimant's further excuse that his ability to ascertain that respondent could be liable was impaired by respondent's allegedly inadequate initial responses to his Freedom of Information Law (FOIL) requests is unavailing here, inasmuch as claimant failed to explain how any FOIL responses were necessary to discover that respondent, the known owner of the school, was potentially liable for violations of the Labor Law (*cf. Matter of Rivera v City of New York*, 127 AD3d 445, 445-446; *see generally Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499-503).

We further conclude that claimant failed to meet his initial burden of showing that the late notice will not substantially prejudice respondent's ability to investigate and defend against the claim (*see Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 466; *Matter of D'Agostino v City of New York*, 146 AD3d 880,

882). Thus, under the circumstances of this case, we cannot conclude that there was a clear abuse of the court's broad discretion in denying claimant's application.

Finally, we reject claimant's contention that respondent should be equitably estopped from relying on General Municipal Law § 50-e based upon its allegedly inadequate initial FOIL responses. Here, "there is no evidence that [respondent] engaged in any improper conduct dissuading [claimant] from serving a timely notice of claim" (*Putrelo Constr. Co. v Town of Marcy*, 105 AD3d 1406, 1408; *see Glasheen v Valera*, 116 AD3d 505, 505-506) and, in any event, claimant's purported reliance upon the FOIL responses in delaying the notice of claim was not justifiable under the circumstances (*see Mohl v Town of Riverhead*, 62 AD3d 969, 970-971; *Dowdell v Greene County*, 14 AD3d 750, 750-751; *Wilson v City of Buffalo*, 298 AD2d 994, 995-996, *lv denied* 99 NY2d 505).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

374

CA 16-01573

PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

VINCENT BREGE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF TONAWANDA, DEFENDANT-RESPONDENT.

LAW OFFICE OF ERIC B. GROSSMAN, WILLIAMSVILLE (ERIC B. GROSSMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COLUCCI & GALLAHER, P.C., BUFFALO (RYAN L. GELLMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered June 23, 2016. The order denied the application of plaintiff to deem his proposed notice of claim timely served nunc pro tunc, or in the alternative, for leave to serve a late notice of claim.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting plaintiff's application in part and that part of the notice of claim alleging false arrest, false imprisonment and malicious prosecution is deemed timely served nunc pro tunc, and as modified the order is affirmed without costs.

Memorandum: Plaintiff appeals from an order denying his application to deem his proposed notice of claim timely served nunc pro tunc, or in the alternative, for leave to serve a late notice of claim pursuant to General Municipal Law § 50-e (5) for his claims for, inter alia, false arrest, false imprisonment and malicious prosecution. We conclude that Supreme Court abused its discretion in denying the application with respect to those three claims based solely on plaintiff's failure to provide a reasonable excuse for the delay. It is well established that "a [plaintiff's] failure to tender a reasonable excuse is not fatal where . . . actual notice was had and there is no compelling showing of prejudice to [defendant]" (*Casale v Liverpool Cent. Sch. Dist.*, 99 AD3d 1246, 1246 [internal quotation marks omitted]). Here, defendant had actual knowledge of the essential facts underlying those claims within the 90-day period (*see Lawton v Town of Orchard Park*, 138 AD3d 1428, 1428, *lv denied* 27 NY3d 912). Moreover, plaintiff met his initial burden of showing that the late notice would not substantially prejudice defendant and, in opposition, defendant failed to make a "particularized showing" of substantial prejudice caused by the late notice (*Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 468; *see Lawton*, 138

AD3d at 1428).

We further conclude, however, that the court properly denied that part of the application with respect to the claim for defamation (*see generally Grullon v City of New York*, 222 AD2d 257, 258). Plaintiff made no showing that defendant had actual knowledge of the essential facts underlying that claim (*cf. Lawton*, 138 AD3d at 1428), and plaintiff failed to meet his initial burden of presenting "some evidence or plausible argument that supports a finding of no substantial prejudice" regarding that claim (*Newcomb*, 28 NY3d at 466).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

379

KA 16-00437

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY D. BONES, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

THEODORE A. BRENNER, DEPUTY DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara Sheldon, J.), rendered January 13, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the fifth 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 sale of a controlled substance in the fifth degree (Penal Law § 220.31). 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). That valid waiver constitutes a "general unrestricted waiver" that encompasses his contention that the sentence imposed is unduly harsh and severe (*People v Hidalgo*, 91 NY2d 733, 737; *see Lopez*, 6 NY3d at 255-256; *cf. People v Maracle*, 19 NY3d 925, 928).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

380

KA 15-00971

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN ARCHIBALD, 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 (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered October 29, 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]). Supreme Court sentenced defendant as a persistent felony offender to an indeterminate term of incarceration of 15 years to life. Defendant contends that the evidence is legally insufficient to establish that he possessed a dangerous instrument, i.e., a knife, and that he used it intentionally to cause physical injury to the victim. We reject that contention. The victim testified that he saw defendant with a knife in his hand, and observed and felt defendant use the knife to cut him across the face. We note that the victim's testimony is buttressed by videotape and photographic evidence depicting defendant holding an elongated shiny object and also depicting blood at various locations inside the store where the assault had occurred. That evidence is legally sufficient to establish defendant's identity as the assailant and his use of a dangerous instrument to intentionally inflict physical injury upon the victim (*see People v Butler*, 140 AD3d 1610, 1610-1611, *lv denied* 28 NY3d 969; *see also People v Bleakley*, 69 NY2d 490, 495). 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 Butler*, 140 AD3d at 1611; *see generally Bleakley*, 69 NY2d at 495).

We reject defendant's further contention that the court erred in refusing to charge third-degree assault as a lesser included offense of second-degree assault. Although " 'it is theoretically impossible to commit assault in the second degree under [Penal Law § 120.05 (2)] without at the same time committing assault in the third degree under [Penal Law § 120.00 (1)]' " (*People v Smith*, 121 AD3d 1568, 1569, *lv denied* 26 NY3d 1150; *see People v Fasano*, 107 AD2d 1052, 1052; *see generally* CPL 1.20 [37]; *People v Glover*, 57 NY2d 61, 63-64), here there is no reasonable view of the evidence that would support a finding that defendant committed the lesser offense but not the greater (*see Smith*, 121 AD3d at 1569; *People v Samuels*, 113 AD3d 1117, 1117, *lv denied* 24 NY3d 964).

Defendant's contention that the sentence imposed by the court violated his right to be free from cruel and unusual punishment pursuant to the Eighth Amendment of the United States Constitution and article I, § 5 of the New York Constitution is not preserved for our review inasmuch as defendant did not raise it before the sentencing court (*see People v Ludwig*, 104 AD3d 1162, 1164, *affd* 24 NY3d 221; *People v Kirk*, 96 AD3d 1354, 1359, *lv denied* 20 NY3d 1012). In any event, it is without merit (*see Kirk*, 96 AD3d at 1359; *People v Verbitsky*, 90 AD3d 1516, 1516, *lv denied* 19 NY3d 868). We reject defendant's further contention that the sentence is unduly harsh and severe.

Finally, we note that the record does not support defendant's contention that he was deprived of effective assistance of counsel and due process because defense counsel and the court allegedly misled him about the advisability of going to trial. We note that the record does not demonstrate that defendant was offered the opportunity to plead guilty in exchange for a sentence less than that ultimately imposed. Moreover, the record does not conclusively reveal what defendant and his counsel knew about the strengths and weaknesses of the People's case prior to trial, particularly with reference to the contents of the videotape, and what impact that knowledge may have had on defendant's decision to go to trial. Because defendant's contentions involve matters outside the record on appeal, they must be raised by way of a motion pursuant to CPL article 440 (*see People v Smith*, 145 AD3d 1628, 1630; *People v Riley*, 117 AD3d 1495, 1496, *lv denied* 24 NY3d 1088; *see also People v Thomas*, 144 AD3d 1596, 1597). We conclude on the record before us that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

383

KA 15-00636

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD T. SPOOR, DEFENDANT-APPELLANT.

CHARLES J. GREENBERG, AMHERST, FOR DEFENDANT-APPELLANT.

BARRY L. PORSCH, DISTRICT ATTORNEY, WATERLOO, FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Seneca County (Daniel J. Doyle, J.), rendered February 6, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal sexual act in the first degree (Penal Law § 130.50 [3]), defendant contends that Supreme Court erred in refusing to suppress his statement to the police. We reject that contention. The court properly determined that defendant was not in custody when he made his admission to a police investigator. The evidence at the suppression hearing established that defendant voluntarily accompanied the investigator to a police station while seated in the front passenger seat of an unmarked vehicle, was cooperative, and was never restrained in any way, and the police conducted only investigatory rather than accusatory questioning (*see People v Murphy*, 43 AD3d 1276, 1277, *lv denied* 9 NY3d 1008; *People v Williams*, 283 AD2d 998, 999, *lv denied* 96 NY2d 926). Defendant then agreed to undergo a polygraph examination, and he voluntarily accompanied the investigator to another police station in the front seat of the vehicle and was offered food along the way (*see People v Serrano*, 14 AD3d 874, 875, *lv denied* 4 NY3d 803). Another police investigator provided *Miranda* warnings prior to administering the polygraph examination, which produced an inconclusive result, but defendant subsequently made his admission to the investigator during a further interview after acknowledging that he was voluntarily present and remained willing to speak. Under those circumstances, we conclude that "a reasonable person, innocent of any crime, would not have thought he or she was in custody if placed in defendant's position" (*People v Smielecki*, 77 AD3d 1420, 1421, *lv denied* 15 NY3d 956; *see generally People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US 851).

In any event, defendant validly waived his *Miranda* rights prior to making his admission to the investigator. Contrary to defendant's contention, the *Miranda* warnings he was provided were not deficient. "In determining whether police officers adequately conveyed the [*Miranda*] warnings, . . . [t]he inquiry is simply whether the warnings reasonably conve[y] to [a suspect] his [or her] rights as required by *Miranda*" (*Florida v Powell*, 559 US 50, 60 [internal quotation marks omitted]; *see People v Dunbar*, 24 NY3d 304, 315, *cert denied* ___ US ___, 135 S Ct 2052). Here, we conclude that "the warnings given to defendant reasonably apprised him of his rights" (*People v Bakerx*, 114 AD3d 1244, 1247, *lv denied* 22 NY3d 1196). Contrary to defendant's further contention, despite his purported literacy deficiencies, the record of the suppression hearing supports the court's determination that defendant knowingly and intelligently waived his *Miranda* rights before making the admission (*see People v Williams*, 62 NY2d 285, 288-289; *People v Bray*, 295 AD2d 996, 997, *lv denied* 98 NY2d 694).

Contrary to defendant's further contention, under the circumstances of this case, the fact that he was transported to a second police station and spent several hours with the police, and that the police conducted a polygraph examination, did not render his admission involuntary (*see Serrano*, 14 AD3d at 875; *see also People v Ellis*, 73 AD3d 1433, 1434, *lv denied* 15 NY3d 851; *see generally People v Tarsia*, 50 NY2d 1, 11).

Defendant's contention that he was denied effective assistance of counsel survives his guilty plea "only insofar as he demonstrates that 'the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [his] attorney['s] allegedly poor performance' " (*People v Rausch*, 126 AD3d 1535, 1535, *lv denied* 26 NY3d 1149 [internal quotation marks omitted]). Here, to the extent that defendant contends that he entered the plea because of his attorney's allegedly poor performance, i.e., defense counsel's failure to investigate the crimes properly and to obtain material from defendant's federal prosecution for potentially impeaching a police witness, that contention is not properly before us because it involves matters outside the record on appeal and thus 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; *Rausch*, 126 AD3d at 1535-1536).

Defendant failed to preserve for our review his further contention that his guilty plea was not knowingly and voluntarily entered inasmuch as he did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Alexander*, 132 AD3d 1412, 1413, *lv denied* 27 NY3d 1148). Moreover, "[t]his case does not fall within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666), inasmuch as nothing in the plea colloquy casts significant doubt on defendant's guilt or the voluntariness of the plea" (*Alexander*, 132 AD3d at 1413 [internal quotation marks omitted]). In any event, we conclude that defendant's

contention is without merit.

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

388

CA 16-01150

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

JACQUELINE FLEMING, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

EARNSTEIN SANGSTER, DEFENDANT-RESPONDENT.

LOUIS ROSADO, BUFFALO, FOR PLAINTIFF-APPELLANT.

RAMOS & RAMOS, BUFFALO (JOSHUA I. RAMOS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered October 1, 2015. The order, among other things, granted defendant's motion for summary judgment dismissing the third amended complaint.

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

Memorandum: In this litigation arising from a longstanding acrimonious relationship between neighbors, plaintiff appeals from an order that, inter alia, granted defendant's motion for summary judgment dismissing the third amended complaint. Contrary to plaintiff's contention, Supreme Court properly granted defendant's motion insofar as it sought dismissal of the cause of action for malicious prosecution. The record establishes that no judicial proceedings were commenced as a result of defendant's complaints to various agencies in July 2010 (*see generally Broughton v State of New York*, 37 NY2d 451, 457, *cert denied* 423 US 929). With respect to defendant's complaint to the police in August 2011, which accused plaintiff of violating a previously-issued order of protection and which resulted in a criminal proceeding, defendant established that she merely reported the purported violations to the police and did not "play[ ] an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act" (*Viza v Town of Greece*, 94 AD2d 965, 966, *appeal dismissed* 64 NY2d 776; *see Moorhouse v Standard, N.Y.*, 124 AD3d 1, 7; *Quigley v City of Auburn*, 267 AD2d 978, 979), and that there was probable cause to believe that plaintiff had committed criminal contempt (*see Shapiro v County of Nassau*, 202 AD2d 358, 358, *lv denied* 83 NY2d 760; *see generally Colon v City of New York*, 60 NY2d 78, 82, *rearg denied* 61 NY2d 670). Plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We agree with defendant that the court properly granted that part of her motion seeking dismissal of the cause of action alleging false arrest and imprisonment inasmuch as plaintiff first alleged that cause of action in an amended complaint after expiration of the one-year statute of limitations (*see* CPLR 215 [3]; *Coleman v Worster*, 140 AD3d 1002, 1004).

We have considered plaintiff's remaining contentions, including those concerning the dismissal of the remaining causes of action and the denial of her cross motion for partial summary judgment, and we conclude that they are without merit.

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

389

CA 16-00977

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

MARIA S. DALMAU, PLAINTIFF,

V MEMORANDUM AND ORDER

VERTIS, INC., CATCH THE WIND LLC, LIGHT BULB LLC, ON THE RIVER LLC, 1230 UNIVERSITY AVENUE LLC, DEFENDANTS-APPELLANTS, PRICE RITE, ALSO KNOWN AS SHOP RITE, ALSO KNOWN AS WAKEFERN FOOD CORPORATION, DEFENDANT-RESPONDENT, ET AL., DEFENDANT.

LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (LISA DIAZ-ORDAZ OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BENNETT SCHECHTER ARCURI & WILL LLP, BUFFALO (ASHLEY M. EMERY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Debra A. Martin, A.J.), entered March 3, 2016. The order, inter alia, granted the motion of defendant Price Rite, also known as Shop Rite, also known as Wakefern Food Corporation for summary judgment dismissing the cross claims of defendants Vertis, Inc., Catch the Wind LLC, Light Bulb LLC, On the River LLC, and 1230 University Avenue LLC.

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

Memorandum: Plaintiff commenced this action against Vertis, Inc., Catch the Wind LLC, Light Bulb LLC, On the River LLC, and 1230 University Avenue LLC (owner defendants), and defendants Commercial Property Maintenance Services, Inc. (CPMS) and Price Rite, also known as Shop Rite, also known as Wakefern Food Corporation (Price Rite), for injuries allegedly sustained when she slipped and fell in a parking lot in front of a Price Rite store. Price Rite thereafter moved for summary judgment seeking dismissal of plaintiff's amended complaint and dismissal of the owner defendants' and CPMS's cross claims against it, arguing that it did not own or possess the lot at the time of the accident and that it was simply a lessee with a right to use the lot for purposes of customer and employee parking. Supreme Court granted Price Rite's motion, and the owner defendants appeal. We affirm.

The owner defendants do not dispute that Price Rite had no duty of care toward plaintiff pursuant to its lease but instead argue that

Price Rite assumed a duty to inspect the parking lot for snow and ice conditions. We reject that contention. Any personal decision of the assistant manager to monitor the lot and contact the responsible entity to remove any snow or ice as a courtesy to customers did not amount to an assumption of control over the parking lot giving rise to a duty of care on the part of Price Rite (*see Hamelin v Town of Chateaugay*, 100 AD3d 1330, 1331; *Mesler v Podd LLC*, 89 AD3d 1533, 1536; *Figueroa v Tso*, 251 AD2d 959, 959). Furthermore, "[i]n order for a party to be negligent in the performance of an assumed duty . . . the plaintiff must have known of and detrimentally relied upon the defendant's performance, or the defendant's actions must have increased the risk of harm to the plaintiff" (*Arroyo v We Transp., Inc.*, 118 AD3d 648, 649; *see Crough v BJ's Wholesale Club, Inc.*, 87 AD3d 1372, 1373; *Falu v 233 Assoc.*, 258 AD2d 342, 342-343; *Figueroa*, 251 AD2d at 959). Here, "there is not a hint of any reliance by plaintiff on [Price Rite's] 'assumed duty' " to call CPMS for additional plowing and/or salting (*Falu*, 258 AD2d at 343). In addition, the record does not establish that Price Rite's actions " 'enhanced the risk [plaintiff] faced . . . , created a new risk []or induced [plaintiff] to forgo some opportunity to avoid risk' " (*Crough*, 87 AD3d at 1373; *see Carpenter v Penn Traffic Co.*, 296 AD2d 842, 843).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

396

CA 16-00666

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

AMY REID, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CARRIE LEVY AND ROCK CITY CHRYSLER,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

BROWN CHIARI LLP, BUFFALO (MICHAEL DRUMM OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (TODD C. BUSHWAY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Chautauqua County (Paul Wojtaszek, J.), entered November 20, 2015. The order denied the posttrial motion of plaintiff to set aside a jury verdict.

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

Same memorandum as in *Reid v Levy* ([appeal No. 2] ___ AD3d ___ [Mar. 31, 2017]).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

397

CA 16-00667

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

AMY REID, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CARRIE LEVY AND ROCK CITY CHRYSLER,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

BROWN CHIARI LLP, BUFFALO (MICHAEL DRUMM OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (TODD C. BUSHWAY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Chautauqua County (Paul Wojtaszek, J.), entered December 29, 2015. The judgment dismissed the complaint upon a jury verdict of no cause of action.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the posttrial motion is granted, the verdict is set aside, and a new trial is granted on the issue of liability.

Memorandum: Plaintiff commenced this action to recover damages for personal injuries that she sustained when she was struck by a vehicle owned by defendant Rock City Chrysler and operated by Carrie Levy (defendant). Following a jury trial on the issue of liability only, the jury found that defendant was negligent but that such negligence was not a substantial factor in causing the accident. Plaintiff sought to set aside the verdict on the grounds that it was irreconcilably inconsistent and that the finding that defendant's negligence was not a substantial factor in causing the accident is against the weight of the evidence. In appeal No. 1, plaintiff appeals from an order denying her posttrial motion to set aside the verdict and, in appeal No. 2, she appeals from the judgment subsequently entered on the basis of that verdict.

At the outset, we note that the order in appeal No. 1 is subsumed in the judgment in appeal No. 2 and that the appeal from the order must be dismissed on that basis (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435, 435; *see also* CPLR 5501 [a] [1]). We further note that plaintiff's challenge to the verdict on the ground of its purported inconsistency is not preserved for our review inasmuch as plaintiff did not raise that issue until after the jury

had been discharged (*see Berner v Little*, 137 AD3d 1675, 1676; *Schley v Steffans*, 79 AD3d 1753, 1753).

We agree with plaintiff, however, that Supreme Court erred in denying her posttrial motion. Although a jury's "finding that a party was at fault but that such fault was not a proximate cause of the accident is inconsistent and against the weight of the evidence only when the issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding probable cause" (*Berner*, 137 AD3d at 1676 [internal quotation marks omitted]; *see Szymanski v Holenstein*, 15 AD3d 941, 942), we "conclude under the facts of this case that the jury's 'finding of negligence cannot be reconciled with the jury's finding of no proximate cause' " (*Szymanski*, 15 AD3d at 942; *see Martinez v Wascom*, 57 AD3d 1415, 1416; *Murphy v Holzinger*, 6 AD3d 1072, 1072-1073). We thus conclude that the finding that defendant's negligence was not a substantial factor in causing the accident could not have been reached upon any fair interpretation of the evidence and is against the weight of the evidence (*see Johnson v Schrader* [appeal No. 2], 299 AD2d 815, 816; *see also Martinez*, 57 AD3d at 1416).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

402

KA 15-02073

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARSHAWN T. JOHNSON, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Christopher S. Ciaccio, J.), entered October 28, 2015. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). To the extent that defendant contends that County Court erred in calculating his risk level by improperly assessing points for his history of substance abuse and his failure to accept responsibility for his crime, we reject that contention (*see generally People v Cathy*, 134 AD3d 1579, 1579; *People v Noriega*, 26 AD3d 767, *lv denied* 6 NY3d 713). Furthermore, the court properly determined that defendant is a presumptive level three risk based upon his prior felony conviction of a sex crime (*see People v Walker*, 146 AD3d 569, 569*; People v Judd*, 29 AD3d 431, 431, *lv denied* 7 NY3d 709).

We have considered defendant's further contention and conclude that it is without merit.

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

404

KA 15-00426

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KAHLID A. KABIR, DEFENDANT-APPELLANT.

LAW OFFICES OF MATTHEW J. RICH, P.C., ROCHESTER (MATTHEW J. RICH OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (KELLY CHRISTINE WOLFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered January 13, 2015. 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 contends that Supreme Court erred in refusing to suppress the weapon because the police recovered it during the search of a home without a warrant. We agree with the court that, even assuming, arguendo, that defendant had standing to contest the warrantless search, the People established that the resident of the home voluntarily consented to the search (*see People v Nance*, 132 AD3d 1389, 1389, *lv denied* 26 NY3d 1091; *People v McCray*, 96 AD3d 1480, 1481, *lv denied* 19 NY3d 1104). In contending that the resident did not give consent, defendant improperly relies on testimony of the resident of the home at the first trial, which ended in a hung jury. " '[T]estimony subsequently elicited at trial may not be considered in connection with a challenge to a pretrial suppression determination' " (*People v McCurty* [appeal No. 2], 60 AD3d 1406, 1407, *lv denied* 12 NY3d 856; *see People v Cooper*, 59 AD3d 1052, 1054, *lv denied* 12 NY3d 852).

We reject defendant's further contention that the evidence is legally insufficient to establish that defendant was in possession of the firearm, inasmuch as the evidence "established a particular set of circumstances from which a jury could infer possession" (*People v Boyd*, 145 AD3d 1481, 1482 [internal quotation marks omitted]). An officer testified that, upon entering the home, he observed defendant

standing upstairs, holding a handgun. Defendant retreated to a bedroom for a minute, and then came back out of the room without the gun. When officers searched the room, they found a gun concealed under clothing in a dresser drawer. Contrary to defendant's further 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).

Defendant contends that he was deprived of effective assistance of counsel based on defense counsel's failure to call a witness, i.e., the resident of the house, who testified at the first trial that ended in a hung jury. That contention is based on matters outside the record on appeal and must be raised by a motion pursuant to CPL 440.10 (*see People v Streeter*, 118 AD3d 1287, 1289, *lv denied* 23 NY3d 1068, *reconsideration denied* 24 NY3d 1047; *People v Kaminski*, 109 AD3d 1186, 1186, *lv denied* 22 NY3d 1088).

Defendant failed to preserve for our review his contention that the sentence was a vindictive punishment for proceeding to trial (*see People v Pope*, 141 AD3d 1111, 1112), and that contention is without merit in any event (*see People v Garner*, 136 AD3d 1374, 1374-1375, *lv denied* 27 NY3d 997). The sentence is not unduly harsh or severe.

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

410

CA 16-01611

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

LINZY FANCETT, AN INFANT UNDER THE AGE OF 14 YEARS, BY AND THROUGH HER MOTHER AND NATURAL GUARDIAN SUSAN KUHN AND SUSAN KUHN, INDIVIDUALLY, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, DEFENDANT-APPELLANT.

JOSEPH FAHEY, INTERIM CORPORATION COUNSEL, SYRACUSE (JOHN A. SICKINGER OF COUNSEL), FOR DEFENDANT-APPELLANT.

LYNN LAW FIRM, LLP, SYRACUSE (PATRICIA A. LYNN-FORD OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered April 22, 2016. The order denied the motion of defendant for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking to recover damages for injuries allegedly sustained by the infant plaintiff when her foot went through a gap between two sections of a steel grate covering a debris basin. Defendant moved for summary judgment dismissing the complaint on the ground that the grate and debris basin were part of a culvert on a City street, and the prior written notice of the defect required by Syracuse City Charter § 8-115 (1) was not provided with respect thereto. We conclude that Supreme Court properly denied the motion, but our reasoning differs from that of the court.

To meet its initial burden on the motion, defendant was required to establish as a matter of law that the debris basin was indeed a culvert or part of a City street for purposes of the prior written notice requirement (*see generally Staudinger v Village of Granville*, 304 AD2d 929, 929). We conclude that defendant failed to meet that burden (*cf. Duffel v City of Syracuse*, 103 AD3d 1235, 1235; *Hall v City of Syracuse*, 275 AD2d 1022, 1023). Here, the debris basin is not a culvert (*see Sobotka v Zimmerman*, 48 AD3d 1260, 1261). With respect to whether the debris basin was situated in a street for the purposes of the prior written notice requirement, we conclude that defendant failed to submit evidence establishing the precise location of the

debris basin. Thus, in the absence of a metes and bounds description of the nearby streets, a survey map, or any instruments of conveyance establishing the boundaries of the City streets, defendant failed to establish that the debris basin was situated in a City street for the purposes of the prior written notice requirement (*see Staudinger*, 304 AD2d at 929).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

413

CA 16-01566

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

O'BRIEN & GERE, INC. OF NORTH AMERICA,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

G.M. MCCROSSIN, INC., DEFENDANT-RESPONDENT.

RIVETTE & RIVETTE, P.C., SYRACUSE (FRANCIS R. RIVETTE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered December 17, 2015. The order granted defendant's motion for partial summary judgment on the issue of liability.

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

Memorandum: Plaintiff appeals from an order that granted defendant's motion for partial summary judgment with respect to liability on defendant's first counterclaim, for breach of contract. As a preliminary matter, we conclude that plaintiff waived its right to compel arbitration by its acceptance of the judicial forum, i.e., by commencing a declaratory judgment action, participating in discovery throughout the four years of this litigation, and filing the note of issue (*see Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 371-372, *rearg denied* 5 NY3d 746; *Cunningham v Horning Constr.*, 309 AD2d 1187, 1188).

We further conclude that Supreme Court properly granted defendant's motion. Plaintiff contends that, under section 10 of the contract, it was permitted to terminate the contract without following the notice provisions set forth in section 19 of the contract. We reject that contention. "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" (*Maven Tech., LLC v Vasile*, 147 AD3d 1377, ___ [internal quotation marks omitted]; *see DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp.*, 120 AD3d 905, 906). " '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' " (*Maven Tech., LLC*, 147 AD3d at ___; *see DiPizio Constr. Co., Inc.*, 120 AD3d at 906). Here, section 10 of the contract expressly incorporates the terms of section 19, under which plaintiff was required to give defendant 10 days' written notice before terminating the contract for cause. Section 19 further provided that, if plaintiff improperly terminated the contract for cause, "the termination shall be deemed to be a termination for the convenience" of plaintiff, and would entitle defendant to damages.

We also reject plaintiff's contention that it satisfied the notice requirements contained in section 19 by giving defendant oral notice that it intended to terminate the contract. " 'Where a contract provides that a party must fulfill specific conditions precedent before it can terminate the agreement, those conditions are enforced as written and the party must comply with them' " (*Summit Dev. Corp. v Fownes*, 74 AD3d 563, 563). The contract specifically required plaintiff to give defendant 10 days' written notice in order to terminate the contract for cause. Because it is undisputed that plaintiff did not strictly comply with the written notice requirement before it terminated the contract, the court properly determined that the termination must "be deemed to be a termination for the convenience" of plaintiff.

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

418

CA 16-01496

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

ALISON M. CARBONE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JON W. BRENIZER AND MACHT, BRENIZER & GINGOLD, P.C., DEFENDANTS-RESPONDENTS.

BRINDISI, MURAD, BRINDISI & PEARLMAN, LLP, UTICA (EVA BRINDISI PEARLMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (NICOLE MARLOW-JONES OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Deborah H. Karalunas, J.), entered December 3, 2015. The order granted the motion of defendants to dismiss the complaint.

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

Memorandum: Plaintiff commenced this legal malpractice action alleging that defendants did not advise her properly during settlement negotiations in the underlying matrimonial action. In her complaint, plaintiff alleged that defendants conducted no investigation into her ex-husband's financial assets and instead advised her to settle the action, assuring her that the initial settlement offer was the best offer she would receive. She further alleged that defendants' representation fell below the ordinary and reasonable skill and knowledge commonly possessed by members of the legal profession and that, but for defendants' negligent representation, she would have obtained a more equitable distribution of the marital assets.

We agree with plaintiff that Supreme Court erred in granting defendants' motion to dismiss to the extent they relied on CPLR 3211 (a) (1). A court may grant such a motion "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co. of N.Y.*, 98 NY2d 314, 326; *see Vassenelli v City of Syracuse*, 138 AD3d 1471, 1473). In an action alleging legal malpractice during the course of an underlying action that resulted in a settlement, "the focus becomes whether 'settlement of the action was effectively compelled by the mistakes of counsel' " (*Chamberlain, D'Amanda, Oppenheimer & Greenfield, LLP v Wilson*, 136 AD3d 1326, 1328, *lv*

dismissed 28 NY3d 942). In her affidavit in opposition to the motion, plaintiff stated that defendants advised her that an investigation into her ex-husband's financial assets would be a costly and lengthy process, but did not explain that she could apply to the court for her ex-husband to bear the costs of the investigation. As a result, plaintiff was convinced that she could not afford to conduct an investigation and settled the matter without knowing what she was giving up. Thus, although the settlement agreement in the underlying action contained a comprehensive waiver of plaintiff's rights, we conclude that the language of that waiver does not conclusively establish that plaintiff was not effectively compelled to settle by defendants' allegedly deficient representation (*see Schiller v Bender, Burrows & Rosenthal, LLP*, 116 AD3d 756, 757; *see generally* CPLR 3211 [a] [1]).

To the extent that defendants moved in the alternative to dismiss the action as barred by the three-year statute of limitations for legal malpractice actions (*see* CPLR 214 [6]; 3211 [a] [5]), we agree with plaintiff that defendants are not entitled to that alternative relief. " 'The continuous representation doctrine tolls the statute of limitations . . . where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim' " (*Zorn v Gilbert*, 8 NY3d 933, 934; *see R. Brooks Assoc., Inc. v Harter Secrest & Emery LLP*, 91 AD3d 1330, 1331). Regardless of when plaintiff's claim accrued, defendants' representation of plaintiff in the underlying action ended, at the earliest, upon entry of the judgment of divorce in June 2014 (*see Zorn*, 8 NY3d at 934; *Gaslow v Phillips Nizer Benjamin Krim & Ballon*, 286 AD2d 703, 706, *lv dismissed* 97 NY2d 700).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

419

KA 15-00648

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES C. JONES, DEFENDANT-APPELLANT.

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

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (KELLY M. BALCOM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered January 12, 2015. 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 imposed upon his conviction of driving while intoxicated as a class E felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i] [A]), and sentencing him to an indeterminate term of imprisonment of one to three years. We note at the outset that, contrary to the People's contention, defendant's waiver of the right to appeal at the underlying plea proceeding does not preclude our review of his contentions on this appeal following the revocation of his probation (*see generally People v Williams*, 140 AD3d 1749, 1750, *lv denied* 28 NY3d 975; *People v Rodriguez*, 259 AD2d 1040, 1040).

Defendant failed to preserve for our review his contention that County Court erred in failing to order an updated presentence report before sentencing defendant upon his admission to violating probation (*see People v Stachnik*, 101 AD3d 1590, 1592, *lv denied* 20 NY3d 1104). In any event, the court was sufficiently familiar with defendant's status and his conduct while on probation that an updated report was not required to enable it to perform its sentencing function, inasmuch as the court was informed that defendant had pleaded guilty in another county to a new charge of driving while intoxicated committed while he was on probation (*see id.* at 1592; *People v Perry*, 278 AD2d 933, 933, *lv denied* 96 NY2d 866; *cf. People v Klinkowski*, 281 AD2d 972, 973, *lv denied* 96 NY2d 831). We further conclude that defendant was not denied effective assistance of counsel by his attorney's failure to

request an updated presentence report (*see People v Williams*, 114 AD3d 993, 994, *lv denied* 23 NY3d 969; *see generally People v Ward*, 25 AD3d 727, 727, *lv denied* 7 NY3d 764). Finally, the sentence is not unduly harsh or severe.

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

421

KA 15-01685

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA M. FURBECK, DEFENDANT-APPELLANT.

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (COURTNEY S. RADICK 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 (Walter W. Hafner, Jr., J.), rendered August 24, 2012. 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: Defendant appeals from a judgment convicting him, upon his plea of guilty, of grand larceny in the fourth degree (Penal Law § 155.30 [4]). We reject defendant's contention that he did not knowingly, voluntarily, and intelligently waive his right to appeal. County Court engaged defendant "in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Ripley*, 94 AD3d 1554, 1554, *lv denied* 19 NY3d 976 [internal quotation marks omitted]; *see People v Marshall*, 144 AD3d 1544, 1545), and " '[d]efendant's responses to County Court's questions unequivocally establish that defendant understood the proceedings and was voluntarily waiving the right to appeal' " (*People v Buryta*, 85 AD3d 1621, 1622). Defendant's valid waiver of the right to appeal encompasses his contention that the court abused its discretion in denying his request for youthful offender status (*see People v Jones*, 96 AD3d 1637, 1637, *lv denied* 19 NY3d 1103; *People v Rush*, 94 AD3d 1449, 1449-1450, *lv denied* 19 NY3d 967; *cf. People v Matsulavage*, 121 AD3d 1581, *lv denied* 24 NY3d 1045).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

425

CAF 15-00832

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

IN THE MATTER OF ICEIES B.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, ORDER
PETITIONER-RESPONDENT;

SHACOYA L., RESPONDENT-APPELLANT.

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

JOHN A. HERBOWY, UTICA, FOR PETITIONER-RESPONDENT.

PAUL A. NORTON, ATTORNEY FOR THE CHILD, CLINTON.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered December 23, 2014 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject child.

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

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

426

CAF 15-01709

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

IN THE MATTER OF FRANK L. STANTON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NINA M. KELSO, RESPONDENT-APPELLANT.

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

BRIAN P. DEGNAN, ATTORNEY FOR THE CHILD, BATAVIA.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered June 4, 2015 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner primary physical custody of the parties' child.

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

Memorandum: Respondent mother appeals from an order that continued joint custody of the parties' son but transferred primary physical custody of the child to petitioner father, with visitation to the mother. Where, as here, the parties' existing custody arrangement is based on a consent order, which is "entitled to less weight than a disposition after a plenary trial" (*Matter of Alexandra H. v Raymond B.—H.*, 37 AD3d 1125, 1126 [internal quotation marks omitted]), Family Court "cannot modify that order unless a sufficient change in circumstances--since the time of the stipulation--has been established, and then only where a modification would be in the best interests of the child[ ]" (*Matter of Hight v Hight*, 19 AD3d 1159, 1160 [internal quotation marks omitted]; *see Matter of Stevenson v Smith*, 145 AD3d 1598, 1599). The court's determination in a custody matter " 'is entitled to great deference and will not be disturbed where' . . . it is based on a careful weighing of appropriate factors" (*Stevenson*, 145 AD3d at 1598; *see Matter of Pinkerton v Pensyl*, 305 AD2d 1113, 1113-1114).

Contrary to the mother's contention, we conclude that the father established the requisite change in circumstances since the entry of the consent order, namely, the child's repeated changes of schools, his recent attendance at a school in the district where the father resides, and the parents' inability to agree on where their child should attend school (*see Sequeira v Sequeira*, 105 AD3d 504, 505, *lv denied* 21 NY3d 1052; *see generally Pecore v Blodgett*, 111 AD3d 1405,

1406, *lv denied* 22 NY3d 864). We further conclude that there is a sound and substantial basis in the record for the determination that it is in the child's best interests to change his primary physical residence from the mother's house to the father's house in connection with the child's school enrollment (*see Stevenson*, 145 AD3d at 1599; *see generally Matter of Tuttle v Tuttle*, 137 AD3d 1725, 1726).

We note that the mother at oral argument withdrew her contentions that the court erred in failing to conduct, and that her counsel was ineffective in failing to seek, a *Lincoln* hearing (*see Matter of Lincoln v Lincoln*, 24 NY2d 270, 271-274). We have considered the mother's remaining claim of ineffective assistance of counsel, and we conclude that it is without merit (*see Matter of Bennett v Abbey*, 141 AD3d 882, 884; *Matter of Thompson v Gibeault*, 305 AD2d 873, 875).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

430

CA 15-02042

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

IN THE MATTER OF HERBERT FARRINGTON,
PETITIONER-APPELLANT,

V MEMORANDUM AND 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 (FRANK BRADY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered October 27, 2015 in a CPLR article 78 proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III hearing, that he violated various inmate rules. We reject petitioner's contention that he was denied his right to effective employee assistance. Specifically, petitioner faults his employee assistant for failing to provide him with a "recreation go around" list that could have helped to identify some of the other inmates in the recreation yard at the time of the incident. The record establishes, however, that such lists are maintained for only two weeks, and petitioner did not request the list until long after it was destroyed. Thus, "[t]he employee assistant 'cannot be faulted for . . . failing to provide petitioner with documentary evidence that did not exist' " (*Matter of Green v Sticht*, 124 AD3d 1338, 1338, *lv denied* 26 NY3d 906; *see Matter of Russell v Selsky*, 50 AD3d 1412, 1413). Moreover, the record establishes that "petitioner received all the relevant and available documents to which he was entitled" (*Matter of McGowan v Goord*, 282 AD2d 848, 849). With respect to petitioner's contention that the employee assistant failed to investigate potential witnesses, we conclude that petitioner failed to provide the assistant with any "information to help identify specific witnesses" (*Matter of Davila v Selsky*, 48 AD3d 846, 847), and the assistant otherwise contacted the six witnesses who were identified by petitioner. Thus, because the

documents sought by petitioner no longer existed, the assistant contacted all the witnesses actually identified by petitioner, and the record fails to establish any other deficiencies of the assistant, we conclude that the record does not establish that petitioner was denied his right to effective employee assistance (*see generally Matter of Hazel v Coombe*, 239 AD2d 736, 737).

Contrary to petitioner's further contention, his " 'conditional right to call witnesses was not violated because the witnesses who were not called would have provided redundant testimony' " (*Matter of Hogan v Fischer*, 90 AD3d 1544, 1545, *lv denied* 19 NY3d 801).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

436

CA 16-01266

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

MIA KADAH, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KEITH N. BYRD AND ALPHONSO BRADSHAW,
DEFENDANTS-RESPONDENTS.

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

GOLDBERG SEGALLA, LLP, SYRACUSE (HEATHER K. ZIMMERMAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Walter W. Hafner, Jr., A.J.), entered January 8, 2016. The order denied the motion of plaintiff to vacate the order dismissing the complaints.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, plaintiff's motion is granted, the order entered September 22, 2015 is vacated, and the complaints against defendants-respondents are reinstated.

Memorandum: Plaintiff commenced this consolidated personal injury action in May 2013 seeking damages for injuries that she sustained in a motor vehicle accident, while she was a passenger in a rental vehicle operated by defendant Keith N. Byrd and leased by defendant Alphonso Bradshaw. Supreme Court granted defendants' unopposed motion to dismiss the complaints on the ground that plaintiff failed to comply with an order directing her to submit to a medical examination conducted by defendants' expert, and plaintiff appeals from an order denying her motion to vacate the order of dismissal.

Plaintiff was deposed in March 2014, and, upon her failure to appear for an independent medical examination (IME) in July 2014, defendants moved to compel her to submit to an IME. In December 2014, the parties tentatively agreed to settle the action, which would render an IME unnecessary, and defendants withdrew their motion. Thereafter, plaintiff's counsel attempted to obtain consent from plaintiff's supplemental uninsured motorist (SUM) carrier to resolve the claim. The SUM carrier, however, mistakenly asserted that its consent was not required because plaintiff was not entitled to seek SUM coverage for the accident inasmuch as the full amounts of the

underlying policies had not been tendered. As a result, progress toward a settlement was temporarily halted.

On May 14, 2015, defendants brought another motion seeking to compel plaintiff to submit to an IME. In response, plaintiff's counsel sought an adjournment so that the SUM coverage dispute could be resolved and the case could be settled. In June 2015, the parties met with Supreme Court to discuss the SUM coverage issue, and once again the parties tentatively agreed to settle the case.

Shortly thereafter, at defendants' request, the court placed the motion to compel plaintiff to submit to an IME back on its calendar for July 16, 2015. By letter, the court advised the parties that, "[i]f no appearance is made, the Court will order the IME for August 10, 2015," and that "[n]o requests for adjournments will be considered." On July 16, 2015, the court granted defendants' motion without opposition from plaintiff, and the IME was ordered to take place at 12:30 p.m. on August 10, 2015. Although plaintiff appeared on that date for her IME, she was 15 minutes late and was turned away by the IME physician's receptionist.

On August 19, 2015, defendants moved to dismiss the complaints on the ground that plaintiff failed to comply with the order directing plaintiff to appear for the IME. Later that same afternoon, plaintiff's counsel contacted defendants' counsel and left a voicemail message requesting that the IME be rescheduled and the motion withdrawn, but that phone call went unreturned. After he called defendants' counsel, plaintiff's counsel mistakenly believed that defendants' motion would be withdrawn or adjourned, and so plaintiff's counsel failed to enter defendants' motion into his calendar, did not submit any responding papers, and did not appear for argument on the motion. The court granted defendants' unopposed motion and, on September 22, 2015, the court entered an order dismissing the complaint.

Plaintiff subsequently filed the present motion seeking, inter alia, to vacate the September 22, 2015 order pursuant to CPLR 5015 (a)(1). The court denied the motion, stating that plaintiff failed to "establish her default was excusable," and that defendants "established [plaintiff's] persistent neglect in the prosecution of this matter." The court further found that plaintiff "misrepresented the status of the SUM issue, causing further delays," and that plaintiff's "repeated failures to appear for an IME and the misrepresentations regarding the SUM issue constitute[] a pattern of willful default or neglect that should not be excused by the court."

We agree with plaintiff that the court erred in denying her motion to vacate the order of dismissal. "In determining whether to vacate an order entered on default, 'the court should consider relevant factors, such as the extent of the delay, prejudice or lack of prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits' " (*Calaci v Allied Interstate, Inc.*, 108 AD3d 1127, 1128). "It is well established that law office failure may be

excused, in the court's discretion, when deciding a motion to vacate a default order" (*id.*).

Here, plaintiff's default in responding to the motion to dismiss was due to law office failure. Upon learning of the default, plaintiff immediately sought to vacate the order, thereby establishing both a minimal delay and her continued intent to pursue the action. Further, the record establishes that plaintiff did in fact appear for an IME pursuant to the July 16, 2015 order, albeit late, thereby undermining any claim that plaintiff's conduct could be construed as "repeated failures to appear for an IME." Likewise, in light of the SUM carrier's ultimate concession that its assessment of the law was incorrect and that plaintiff was entitled to seek SUM coverage, plaintiff made no misrepresentations regarding the issues related to SUM coverage that could constitute a pattern of willful default or neglect. Moreover, on this record, we can discern no prejudice to defendants from plaintiff's failure to appear for the scheduled IME, inasmuch as the IME likely was unnecessary because of the pending settlement. Thus, in light of the " 'strong public policy in favor of resolving cases on the merits' " (*Lauer v City of Buffalo*, 53 AD3d 213, 217; *see Matter of County of Livingston [Mort]*, 101 AD3d 1755, 1756, *lv denied* 20 NY3d 862), we conclude that dismissal of the complaints was not warranted (*see generally Calaci*, 108 AD3d at 1128-1129; *Gokey v DeCicco*, 24 AD3d 860, 861-862).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court

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

437

CA 15-01584

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

SHMUEL SHMUELI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WHITESTAR DEVELOPMENT CORP.,
DEFENDANT-RESPONDENT.

OFECK & HEINZE, LLP, HACKENSACK (MARK F. HEINZE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (FRANK JACOBSON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Timothy J. Walker, A.J.), entered June 12, 2015. The order granted the motion of defendant for a directed verdict.

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

Memorandum: Plaintiff appeals from an order granting defendant's motion for a directed verdict at the close of plaintiff's proof pursuant to CPLR 4401 and dismissing plaintiff's sole cause of action alleging a breach of the implied covenant of good faith and fair dealing. We affirm. A plaintiff seeking to prevail on a cause of action for breach of the implied covenant of good faith and fair dealing must prove that he or she sustained actual damages as a natural and probable consequence of the breach (*see RXR WWP Owner LLC v WWP Sponsor, LLC*, 132 AD3d 467, 468; *see generally Kenford Co. v County of Erie*, 73 NY2d 312, 319; *Village of Kiryas Joel v County of Orange*, 144 AD3d 895, 896). Contrary to plaintiff's contention, he failed at trial to present nonspeculative evidence of his alleged damages (*see Friedman v Miale*, 69 AD3d 789, 791, *lv denied* 16 NY3d 706; *see generally Lloyd v Town of Wheatfield*, 67 NY2d 809, 810). We thus conclude that the court properly granted defendant's motion for a directed verdict because, upon the evidence presented, there was no rational process by which the trier of fact could find in plaintiff's favor (*cf. Family Operating Corp. v Young Cab Corp.*, 129 AD3d 1016, 1017-1018; *see generally Szczerbiak v Pilat*, 90 NY2d 553, 556).

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court