SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MARCH 16, 2018

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. JOANNE M. WINSLOW, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

394/17

CA 16-00096

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

MICHAEL A. SERRANO, PLAINTIFF-APPELLANT,

V ORDER

THOMAS A. GILRAY, JR., ET AL., DEFENDANTS,
AND CORPUS CHRISTI CHURCH, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

AUGELLO & MATTELIANO, LLP, BUFFALO (JOSEPH A. MATTELIANO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (NICHOLAS M. HRICZKO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

GOLDBERG SEGALLA LLP, BUFFALO (MICHAEL APPELBAUM OF COUNSEL), FOR DEFENDANT CENTRAL TERMINAL RESTORATION CORPORATION.

LAW OFFICE OF DANIEL ARCHILLA, BUFFALO (JEFFREY SENDZIAK OF COUNSEL), FOR DEFENDANT THOMAS A. GILRAY, JR.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered October 8, 2015. The order granted the motion of defendant Corpus Christi Church for summary judgment and dismissed the complaint and all cross claims against said defendant.

Now, upon the partial stipulation of discontinuance with respect to defendant Corpus Christi Church signed by the attorneys for the above listed parties on August 1, 11, 24 and 28, 2017, and filed in the Erie County Clerk's Office on August 30, 2017,

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

All concur except SCUDDER, J., who is not participating.

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

949

CA 16-02192

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

ANN VANYO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BUFFALO POLICE BENEVOLENT ASSOCIATION, INC., AND CITY OF BUFFALO, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.)

JAMES OSTROWSKI, BUFFALO, FOR PLAINTIFF-APPELLANT.

CREIGHTON, JOHNSEN & GIROUX, BUFFALO (IAN HAYES OF COUNSEL), FOR DEFENDANT-RESPONDENT BUFFALO POLICE BENEVOLENT ASSOCIATION, INC.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (DAVID M. LEE OF COUNSEL), FOR DEFENDANT-RESPONDENT CITY OF BUFFALO.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered February 5, 2016. The order and judgment denied the motion of plaintiff pursuant to CPLR 306-b seeking an order extending the time within which to serve the complaint and sua sponte dismissed the complaint.

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

Same memorandum as in *Vanyo v Buffalo Police Benevolent Association, Inc.* ([appeal No. 2] — AD3d — [Mar. 16, 2018] [4th Dept 2018]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

950

CA 17-00249

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

ANN VANYO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BUFFALO POLICE BENEVOLENT ASSOCIATION, INC., AND CITY OF BUFFALO, DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.)

JAMES OSTROWSKI, BUFFALO, FOR PLAINTIFF-APPELLANT.

CREIGHTON, JOHNSEN & GIROUX, BUFFALO (IAN HAYES OF COUNSEL), FOR DEFENDANT-RESPONDENT BUFFALO POLICE BENEVOLENT ASSOCIATION, INC.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (DAVID M. LEE OF COUNSEL), FOR DEFENDANT-RESPONDENT CITY OF BUFFALO.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered February 5, 2016. The order and judgment, inter alia, granted the motions of defendants to dismiss the complaint and amended complaint against them.

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

Memorandum: This case arises from the termination of plaintiff's employment as a police officer with defendant City of Buffalo (City) following arbitration conducted pursuant to a collective bargaining agreement (CBA) between the City and defendant Buffalo Police Benevolent Association, Inc. (PBA). After a hearing, the arbitrator found plaintiff guilty of the disciplinary charges pending against her and that termination was the appropriate penalty, and the City subsequently terminated plaintiff's employment on October 16, 2014. Plaintiff commenced an action against the City and the PBA by filing a summons and complaint (original complaint) on February 10, 2015. Plaintiff, however, never served defendants with the original complaint. Instead, on May 21, 2015, plaintiff filed an "amended" summons and amended complaint (amended complaint), which was served upon defendants on May 26, 2015. In the amended complaint, which included four causes of action that had been alleged in the original complaint, plaintiff alleged that: (1) the PBA breached its duty of fair representation; (2) the City breached the CBA in terminating her employment; (3) defendants conspired to breach the duty of fair representation and the CBA in order to unlawfully terminate her; and

(4) the City violated her constitutional right to procedural due process. The amended complaint added a fifth cause of action, alleging gender discrimination by the City.

Defendants each moved to dismiss the amended complaint against them pursuant to CPLR 3211 (a) (5) and (7) and, before Supreme Court ruled on those motions, plaintiff moved pursuant to CPLR 306-b seeking an order extending the time within which to serve the original complaint and deeming the original complaint timely served nunc pro tunc. In appeal No. 1, plaintiff appeals from an order and judgment that, as relevant here, denied her motion pursuant to CPLR 306-b. In appeal No. 2, plaintiff appeals from an order and judgment that, inter alia, granted defendants' motions and dismissed the original complaint and amended complaint. Because the appeal from the order and judgment in appeal No. 2 brings up for review the propriety of the order and judgment in appeal No. 1, the appeal from the order and judgment in appeal No. 1 must be dismissed (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435, 435 [2d Dept 1989]; *see also* CPLR 5501 [a] [1]).

Plaintiff contends that the court erred in denying her motion pursuant to CPLR 306-b seeking an order extending the time within which to serve the original complaint and deeming the original complaint timely served nunc pro tunc, such that the first and second causes of action would be timely. We reject that contention. "If service is not made upon a defendant within the time provided in [CPLR 306-b], the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service" (*id.*). It is well settled that the determination to grant "[a]n extension of time for service is a matter within the court's discretion" (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 101 [2001]). "[A]lthough law office failure and the lack of reasonable diligence in effectuating service generally do not constitute good cause, the interest of justice standard of the statute [is] a separate, broader and more flexible provision [that may] encompass a mistake or oversight as long as there was no prejudice to the defendant" (*id.* at 102; *see Moss v Bathurst*, 87 AD3d 1373, 1374 [4th Dept 2011]). Upon weighing the relevant factors with respect to the interest of justice standard, including the expiration of the statute of limitations with respect to the first and second causes of action and plaintiff's failure to move for an extension of time for over seven months after the service period expired, we conclude that the court did not abuse its discretion in denying plaintiff's motion pursuant to CPLR 306-b (*see Leader*, 97 NY2d at 106-107; *Moss*, 87 AD3d at 1374; *see also Matter of Druyan v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 128 AD3d 617, 618 [1st Dept 2015]; *Matter of Parrino v New York City Bd. of Stds. & Appeals*, 90 AD3d 931, 932 [2d Dept 2011]).

Contrary to plaintiff's contention, we conclude that the court properly dismissed the first and second causes of action alleged in the amended complaint inasmuch as they are untimely. With respect to the first cause of action against the PBA, an action against a union for breach of its duty of fair representation "shall be commenced

within four months of the date the . . . former employee knew or should have known that the breach has occurred, or within four months of the date the . . . former employee suffers actual harm, whichever is later" (CPLR 217 [2] [a]; *see Mercone v Monroe County Deputy Sheriffs' Assn., Inc.*, 90 AD3d 1698, 1699 [4th Dept 2011]). Inasmuch as "the second cause of action against [the City] is inextricably intertwined with the breach of the duty of fair representation cause of action against the [PBA], it is similarly governed by the four-month period of limitations" (*Obot v New York State Dept. of Corr. Servs.*, 256 AD2d 1089, 1090 [4th Dept 1998]; *see Yoonessi v State of New York*, 289 AD2d 998, 999 [4th Dept 2001], *lv denied* 98 NY2d 609 [2002], *cert denied* 537 US 1047 [2002]). Here, plaintiff suffered actual harm on October 16, 2014 when she was terminated, but the amended complaint, i.e., the only pleading with which defendants were served, was filed well beyond the applicable four-month limitations period (*see* CPLR 217 [2] [a], [b]). By arguing that the amended complaint filed on May 21, 2015 was untimely, defendants clearly were taking the position that May 21, 2015 was the date on which plaintiff's claims were interposed.

Plaintiff nonetheless contends that the first and second causes of action are timely because her claims relate back to the original complaint, which was timely filed before the expiration of the four-month limitations period (*see* CPLR 203 [f]). We reject that contention. Pursuant to CPLR 203 (f), "[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." It is well established that "the 'linchpin' of the relation back doctrine [is] notice to the defendant within the applicable limitations period" (*Buran v Coupal*, 87 NY2d 173, 180 [1995]; *see Cole v Tat-Sum Lee*, 309 AD2d 1165, 1167 [4th Dept 2003]). Here, it is undisputed that the original complaint was never served on defendants. The original complaint thus did not give defendants notice of the transactions or occurrences to be proved pursuant to the amended complaint. The claims in the amended complaint, therefore, are measured for timeliness by service (or filing in this case) of the amended complaint (*see* Siegel, NY Prac § 49 at 69 [5th ed 2011]). "Because no one was served until [after the statute of limitations expired], there is no basis to conclude that defendant[s] had any idea that a lawsuit was pending, much less that [they] would be . . . named [as] defendants," within the applicable limitations period (*Cole*, 309 AD2d at 1167-1168; *see Cracolici v Shah*, 127 AD3d 413, 414 [1st Dept 2015]; *see generally Hirsh v Perlmutter*, 53 AD3d 597, 599 [2d Dept 2008]).

While the dissent notes that a party may amend a pleading as of right "at any time before the period for responding to it expires" (CPLR 3025 [a]), plaintiff did not do so here (*cf. Cracolici*, 127 AD3d at 414; *Schroeder v Good Samaritan Hosp.*, 80 AD3d 744, 746 [2d Dept 2011]; *O'Keefe v Baiettie*, 72 AD3d 916, 917 [2d Dept 2010]; *see also* CPLR 320 [a]). Plaintiff's amended complaint was filed and served without leave of court and outside the timeframes of CPLR 3025 (a)

that permit amendment without leave. Plaintiff's amendment thus was one for which leave of court was required and, absent the establishment of the relation-back doctrine, the claims are deemed interposed on the date the motion for leave is served, assuming that the motion is granted (*see Vastola v Maer*, 48 AD2d 561, 565 [2d Dept 1975], *affd* 39 NY2d 1019 [1976]; *Calamari v Panos*, 131 AD3d 1088, 1090 [2d Dept 2015]). Here, even if plaintiff had moved for leave on May 21, 2015, the date on which she filed the amended complaint, absent the relation-back doctrine, that would be the date on which the claims in the amended pleading would have been deemed to have been interposed. Furthermore, defendants did not waive their right to dispute the propriety of the amended complaint because they did not accept the amended complaint without objection; rather, they moved to dismiss it in lieu of answering (*cf. Jordan v Aviles*, 289 AD2d 532, 533 [2d Dept 2001]).

We further conclude that the court properly dismissed the third cause of action. It is well settled that no independent tort for civil conspiracy exists in New York; "[r]ather, '[a]llegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort' " (*Brenner v American Cyanamid Co.*, 288 AD2d 869, 869 [4th Dept 2001]). Thus, although plaintiff claims that defendants conspired to breach the duty of fair representation and the CBA in order to terminate her unlawfully, "conspiracy to commit a tort is not, of itself, a cause of action . . . , and such [a claim] is time-barred [where, as here,] the substantive tort[s] underlying it [are] time-barred" (*Loren v Church St. Apt. Corp.*, 148 AD3d 516, 517 [1st Dept 2017]; *see generally Arvanitakis v Lester*, 145 AD3d 650, 652-653 [2d Dept 2016]).

We agree with the alternative grounds for affirmance properly raised by the City with respect to the fourth and fifth causes of action (*see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 544-546 [1983]; *Cleary v Walden Galleria LLC*, 145 AD3d 1524, 1526 [4th Dept 2016]). The fourth cause of action fails to state a cause of action (*see* CPLR 3211 [a] [7]; *see generally Mermer v Constantine*, 131 AD2d 28, 29-30 [3d Dept 1987]), and the fifth cause of action is barred by the doctrine of collateral estoppel (*see* CPLR 3211 [a] [5]; *see generally Scipio v Wal-Mart Stores E., L.P.*, 100 AD3d 1452, 1453 [4th Dept 2012]).

Finally, we agree with the dissent that the court was not authorized to dismiss the complaint sua sponte (*see* CPLR 306-b), but that issue is academic in view of our determination that the court properly dismissed the original complaint and amended complaint in the order and judgment in appeal No. 2.

All concur except CENTRA, and CARNI, JJ., who dissent in part and vote to modify in the following memorandum: We agree with the majority that Supreme Court did not abuse its discretion under CPLR 306-b in denying plaintiff's motion for an extension of time to serve the original summons and complaint. However, we part ways with the majority in a number of procedural respects, and we therefore dissent in part.

We respectfully submit that the court's sua sponte dismissal of the action pursuant to CPLR 306-b "with prejudice" in the absence of any motion by defendants seeking such relief was done in excess of the court's authority. Contrary to the majority's conclusion, this issue is a linchpin of the analysis at hand, and we respectfully submit that it cannot simply be dismissed with the superficial conclusion that it is "academic."

There is no dispute that the original summons and complaint, filed on February 10, 2015, was never served. There is also no dispute that plaintiff filed an amended summons and amended complaint on May 21, 2015 and that defendants were served with those amended pleadings on May 26, 2015. On June 15, 2015, defendants moved to dismiss the amended complaint against them on CPLR 3211 (a) (5) and (7) grounds. The amended pleadings are clearly denominated "Amended Summons" and "Amended Complaint." The amended summons and amended complaint was electronically filed and is stamped "NYSCEF Doc. No. 2." The original summons and complaint is "NYSCEF Doc. No. 1." Defendants utilized the electronic filing system in moving to dismiss. Thus, defendants' contention that they were not, or should not have been, on notice of the existence of the filed original complaint is unavailing.

CPLR 306-b provides that, "[i]f service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service." Here, defendants moved, pre-answer, to dismiss based upon CPLR 3211 (a) (5) and (7), not CPLR 306-b. Plaintiff moved pursuant to CPLR 306-b for an extension of time to serve the complaint and contended that defendants had waived any claim to dismissal of the complaint based upon lack of personal service. Defendants opposed plaintiff's motion for an extension of time for service under CPLR 306-b but did not move to dismiss the original complaint pursuant to CPLR 306-b, although defendant City of Buffalo asked for such relief in its papers opposing plaintiff's motion. The opposition papers of defendant Buffalo Police Benevolent Association, Inc. (PBA) are not contained in the record. We conclude that, in the absence of a notice of motion seeking that affirmative relief, the court was without authority to grant such relief to defendants (*see* CPLR 2215; *Varlaro v Varlaro*, 107 AD3d 1596, 1596 [4th Dept 2013]; *Daniels v King & Chicken Stuff, Inc*., 35 AD3d 345, 345 [2d Dept 2006]; *Torre v Torre* [appeal No. 1], 142 AD2d 942, 942 [4th Dept 1988]). "There is no statutory authority to permit a moving party to amend a motion that is comparable to the right to amend an answer afforded by CPLR 3025 (a)" (*Iacovangelo v Shepherd*, 5 NY3d 184, 187 [2005]). CPLR 306-b contains no authority for the court to dismiss a complaint on its own motion (*see Rotering v Satz*, 71 AD3d 861, 862 [2d Dept 2010]; *cf.* 22 NYCRR 202.21 [e]). Thus, we conclude that the court clearly exceeded its authority in dismissing the complaint without a motion by defendants (*see Matter of Fry v Village of Tarrytown*, 89 NY2d 714, 722 [1997] [In absence of motion to dismiss, and in view of waiver of defect by respondents' failure to raise objection, Supreme Court lacked the authority to dismiss the proceeding sua sponte on the ground that petitioner did not comply with CPLR 304]; *VSL Corp. v*

Dunes Hotels & Casinos, 70 NY2d 948, 949 [1998] ["The Appellate Division acted outside of its authority in *sua sponte* dismissing the complaint on forum non conveniens grounds. Under CPLR 327 (a) a court may stay or dismiss an action in whole or in part on forum non conveniens grounds only upon the motion of a party; a court does not have the authority to invoke the doctrine on its own motion"]; *Matter of Travelers Indem. Co. of Ill. v Nnamani*, 286 AD2d 769, 770 [2d Dept 2001] [Reversing order dismissing petition where court had no authority in absence of motion to change venue required by statute]).

There is another simple but important reason why a request for relief in reply or opposition papers is improper. A request for relief made in the absence of a notice of cross motion is not a "motion . . . made upon notice" (CPLR 5701 [a] [2]), so an order granting or denying the request is not appealable as of right, and permission to appeal is necessary (*see* CPLR 5701 [c]; *Blam v Netcher*, 17 AD3d 495, 496 [2d Dept 2005]). By contrast, generally, a party may appeal as of right to challenge the disposition of a motion or cross motion made on notice (*see* CPLR 5701 [a]). Thus, by failing to move on notice, a defendant not only prejudices a plaintiff by failing to provide the required notice, but a plaintiff is then placed in the unenviable position of attempting to appeal from an order that, from a technical point of view, is not appealable as of right. Although this issue is not presented in this appeal, it nonetheless illustrates the impropriety of the procedural missteps taken here. Thus, we conclude that the court erred in sua sponte dismissing the complaint "with prejudice."

Defendants also did not move to dismiss on the ground that plaintiff failed to obtain personal jurisdiction (*see* CPLR 3211 [a] [8]). It is axiomatic that, if a defendant moves to dismiss pre-answer without raising the defense of lack of personal jurisdiction, the defense is waived (*see* CPLR 3211 [e]; *Addesso v Shemtob*, 70 NY2d 689, 690 [1987]). The majority does not address plaintiff's waiver of personal jurisdiction contention, although it was directly raised in Supreme Court and briefed by plaintiff on appeal. In any event, we fail to see how by moving only on CPLR 3211 (a) (5) and (7) grounds, defendants did not waive any objection based on a lack of personal jurisdiction with respect to the lack of service of the original complaint. Thus, we conclude that defendants waived any objection or defense with respect to lack of personal jurisdiction and, to the extent the court dismissed the complaint on this ground, the court also erred.

We also disagree with the majority that plaintiff's first and second causes of action are time-barred. There is no dispute that plaintiff was terminated from her employment on October 16, 2014. Thus, with respect to the first and second causes of action, plaintiff was required to commence her action within four months of such termination (*see* CPLR 217 [2] [a]). Here, it is undisputed that plaintiff filed the original summons and complaint on February 10, 2015, within the four-month period. This filing commenced the action and tolled the statute of limitations (*see* CPLR 203 [c]).

A party may amend a pleading without leave of court at any time before the period for responding to it has expired (*see* CPLR 3025 [a]). On May 21, 2015, plaintiff filed an amended summons and complaint. This amendment did not add a new party or otherwise change the names or identities of the defendants named in the original pleadings. Instead, the amendment added a fifth cause of action against the PBA based upon an alleged violation of 42 USC § 1981. Using the date of the filing of the amended complaint as the commencement date for statute of limitations purposes with respect to the first and second causes of action, the majority concludes that the new cause of action in the amended complaint does not relate back to the original. We respectfully disagree and therefore further dissent in part.

As a result of the Legislature's decision in 1992 to convert New York to a commencement-by-filing system (*see* CPLR 304), as compared to a commencement-by-service system, under CPLR 203 (c) the moment of commencement by filing "constitutes the crucial date for determining whether the [s]tatute of [l]imitations is satisfied" (*Matter of Spodek v New York State Commr. of Taxation & Fin.*, 85 NY2d 760, 763 [1995]). "As a result, service of process on the defendant no longer marks interposition of a claim for [s]tatute of [l]imitations purposes" (*id.*).

The amendment of a complaint to assert a new cause of action may be allowed, even where it would be time-barred standing alone, if the new cause of action relates back to the facts, circumstances and proof underlying the original complaint (*see Caffaro v Trayna*, 35 NY2d 245, 249 [1974]; *Pinchback v City of New York*, 51 AD2d 733, 733-734 [2d Dept 1976]). The CPLR 203 (f) "relation-back doctrine" permits a plaintiff "to interpose a claim or cause of action which would ordinarily be time-barred, where the allegations of the original complaint gave notice of the transactions or occurrences to be proven and the cause of action would have been timely interposed if asserted in the original complaint" (*Pendleton v City of New York*, 44 AD3d 733, 736 [2d Dept 2007]). We note that the majority incorrectly relies upon cases that involve attempts to invoke the CPLR 203 (b) relation-back doctrine to *add a new party* in an amended pleading (*see Buran v Coupal*, 87 NY2d 173, 177-178 [1995]; *Cole v Tat-Sum Lee*, 309 AD2d 1165, 1167 [4th Dept 2003]). The multi-pronged analysis of the relation-back doctrine with respect to adding a new defendant is a creature of the common law (*see Mondello v New York Blood Ctr.--Greater N.Y. Blood Program*, 80 NY2d 219, 226 [1992]). All three prongs must be met for the CPLR 203 (b) relation-back remedy to be operative with respect to adding a new defendant (*see id.*). The relation back of amendments adding new defendants implicates more serious policy concerns than simply the relation back of new causes of action under CPLR 203 (f) (*see Buran*, 87 NY2d at 178). Here, however, plaintiff made no attempt to add a new party, and thus the majority's multi-pronged common-law analysis is inappropriate.

"A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the

transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading" (CPLR 203 [f]). It is a long-established and "well-settled rule of pleading that where an amended pleading is served, it takes the place of the original pleading, and the action proceeds *as though the original pleading had never been served*" (*New York Insulated Wire Co. v Westinghouse Elec. & Mfg. Co.*, 85 Hun 269 [1st Dept 1895] [emphasis added]). Although the majority offers the superficial conclusion that plaintiff's amended complaint was filed and served "outside the timeframes" of CPLR 3025 (a), it offers no analysis or specifics as to what time frame applied to the amended complaint, when that time frame expired, and what the triggering event was that started any such time frame. The applicable triggering events for amendment of a pleading without leave of the court are service of the amended pleading within 20 days after service of the pleading; at any time before expiration of the period for responding; or within 20 days of a pleading responding to the original pleading (*see* CPLR 3025 [a]). None of those events occurred here with respect to the original complaint. The majority also concludes that defendants did not waive any objection to the "propriety" of the amended complaint because they moved pursuant to CPLR 3211 (a) (5) and (7). However, neither of those grounds challenged the procedural "propriety" of the filing or service of an amended complaint. Defendants' moving papers failed to so much as mention CPLR 3025 or any impropriety with the amendment of the complaint.

Here, defendants simply assume that the *commencement* of the action by the original filing disappeared or was somehow purged by the failure to serve the original summons and complaint and the filing and service of the amended complaint. While the complaint may have been superseded by the amended complaint, the *commencement* of the action was not and clearly could not have been superseded by the amended complaint. Defendants and the majority conflate the concepts of commencement by filing with obtaining personal jurisdiction by service of process. The Legislative change from a commencement-by-service system to a commencement-by-filing system segregated these concepts and made them mutually exclusive. Under the new system, problems with service no longer prevent timely *commencement* of an action.

In summary, we conclude that defendants waived any objection based upon lack of service of the original complaint; the court exceeded its authority in sua sponte dismissing the original complaint; pursuant to CPLR 203 (f) the amended complaint, which only added a new cause of action and not a new party, relates back to the timely commencement of the action by the filing of the original complaint; and the first and second causes of action are not time-barred. We would therefore modify the order and judgment in appeal No. 2 accordingly.

We concur with the majority with respect to the dismissal of the

third through fifth causes of action.

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

1071

CA 17-00316

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

CURTIS L. MILLER AND CHRISTINE CURTIS-MILLER,
PLAINTIFFS-APPELLANTS,

V ORDER

SNORAC, LLC, DOING BUSINESS AS ENTERPRISE
RENT-A-CAR, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

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

BOUVIER PARTNERSHIP, LLP, BUFFALO (PAUL F. HAMMOND OF COUNSEL), FOR DEFENDANT-RESPONDENT.

GOLDBERG SEGALLA LLP, ROCHESTER (RAUL MARTINEZ OF COUNSEL), FOR DEFENDANT.

Appeal from a judgment and order (one paper) of the Supreme Court, Monroe County (John J. Ark, J.), entered April 19, 2016. The judgment and order dismissed the complaint against defendant SNORAC, LLC, doing business as Enterprise Rent-A-Car.

Now, upon the partial stipulation of discontinuance with respect to SNORAC, LLC, doing business as Enterprise Rent-A-Car signed by the attorneys for the parties on January 11, 2018, and filed in the Monroe County Clerk’s Office on February 20, 2018,

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

1098

CA 15-02155

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

PATRICIA A. RICKICKI, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF DAVID P. RICKICKI, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BORDEN CHEMICAL, DIVISION OF BORDEN, INC., ET AL., DEFENDANTS, UNIMIN CORPORATION AND U.S. SILICA COMPANY, DEFENDANTS-RESPONDENTS.
(ACTION NO. 1.)

MICHAEL C. CROWLEY AND SHARON M. CROWLEY, PLAINTIFFS-APPELLANTS,

V

C-E MINERALS, INC., ET AL., DEFENDANTS, UNIMIN CORPORATION, UNIMIN SPECIALTY MINERALS, INC., MEYERS CHEMICALS, U.S. SILICA COMPANY, MALVERN MINERALS COMPANY, FERRO CORPORATION, NYCO MINERALS COMPANY AND CHARLES B. CHRYSTAL CO., INC., DEFENDANTS-RESPONDENTS.
(ACTION NO. 2.)
(APPEAL NO. 1.)

PAUL WILLIAM BELTZ, P.C., BUFFALO (WILLIAM A. QUINLAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

NATHAN A. SCHACHTMAN, ESQ., P.C., NEW YORK CITY (NATHAN A. SCHACHTMAN OF COUNSEL), BOND SCHOENECK & KING, PLLC, BUFFALO, AND SMITH, MURPHY & SCHOEPPERLE, LLP, FOR DEFENDANTS-RESPONDENTS UNIMIN CORPORATION, UNIMIN SPECIALTY MINERALS, INC., MEYERS CHEMICALS, AND U.S. SILICA COMPANY.

ANSPACH MEEKS ELLENBERGER LLP, BUFFALO (DAVID M. STILLWELL OF COUNSEL), FOR DEFENDANT-RESPONDENT MALVERN MINERALS COMPANY.

BARCLAY DAMON LLP, BUFFALO (VINCENT G. SACCOMANDO OF COUNSEL), FOR DEFENDANT-RESPONDENT FERRO CORPORATION.

GOLDBERG SEGALLA LLP, ROCHESTER (RAUL E. MARTINEZ OF COUNSEL), FOR DEFENDANTS-RESPONDENTS NYCO MINERALS COMPANY AND CHARLES B. CHRYSTAL CO., INC.

THE TARANTINO LAW FIRM, LLP, BUFFALO (ANN M. CAMPBELL OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT DEXTER HYSOL, INC.

Appeal from an order of the Supreme Court, Cattaraugus County (Patrick H. NeMoyer, J.), entered March 26, 2015. The order granted the motions and cross motions of defendants-respondents for summary judgment dismissing the complaints against them.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs, the motions and cross motions are denied, and the negligence and products liability causes of action insofar as those causes of action are based on failure to warn, as well as the loss of consortium claims, are reinstated against the respective defendants-respondents in action Nos. 1 and 2.

Memorandum: Patricia A. Rickicki and David P. Rickicki commenced action No. 1 and Michael C. Crowley and Sharon M. Crowley commenced action No. 2 against various silica manufacturers, including defendants-respondents (defendants), seeking damages for injuries allegedly sustained by David Rickicki and Michael Crowley (hereafter, injured workers) as a result of their exposure to silica dust while they were working for Dexter Corporation, Hysol Division (Dexter) (*Rickicki v Borden Chem.*, 60 AD3d 1276, 1277 [4th Dept 2009]). The Rickickis and the Crowleys alleged, inter alia, that defendants were negligent because they did not adequately warn the injured workers of the latent dangers of silica dust inhalation. In 2006, defendants moved for summary judgment dismissing the complaints against them and contended, as relevant here, that they could not be held liable on a failure to warn theory inasmuch as Dexter was a "sophisticated user" that was fully aware of the dangers of silica inhalation. Supreme Court granted the motions and dismissed the complaints against defendants, but we modified that order on a prior appeal by reinstating the negligence and products liability causes of action against defendants insofar as they were based on the failure to warn, as well as the loss of consortium claims against defendants (*id.* at 1276). We assumed, arguendo, that the theory underlying the motions, which "has been termed the 'sophisticated intermediary' or 'responsible intermediary' theory" (hereafter, sophisticated intermediary doctrine), was "viable in New York under the facts of this case," but nonetheless concluded that issues of fact existed with respect to whether Dexter was knowledgeable about "the differences between amorphous silica and crystalline silica, the effect that those two categories of silica have on lung health, and the additional measures needed to prevent inhalation of crystalline silica" (*id.* at 1277-1278).

David Rickicki died in 2013, and Patricia Rickicki was substituted as a plaintiff in her capacity as executrix of his estate. Defendants again moved and cross-moved in 2014 for summary judgment dismissing the complaints against them and submitted evidence purporting to establish Dexter's knowledge of the matters discussed in our prior decision. The court again granted the motions and cross motions, determining that the record established Dexter's

sophistication as a matter of law, that "the sophisticated intermediary doctrine was tailor-made for the situation at bar," and that defendants thus had no duty to convey warnings directly to the injured workers. The court further determined that any failure to warn was not a proximate cause of the injuries sustained by the injured workers. Plaintiffs appeal.

We now resolve the issue left open on the prior appeal by declining to recognize the sophisticated intermediary doctrine under the facts of this case (*cf. Bergfeld v Unimin Corp.*, 319 F3d 350, 353-355 [8th Cir 2003]; *Goodbar v Whitehead Bros.*, 591 F Supp 552, 566-567 [WD Va 1984], *affd sub nom. Beale v Hardy*, 769 F2d 213 [4th Cir 1985]). In other words, contrary to the court's conclusion, it is not a complete defense to a failure to warn claim against a product manufacturer under New York law that an injured worker's *employer* was adequately warned or otherwise knowledgeable of the dangers of the product (*see Cohen v St. Regis Paper Co.*, 109 AD2d 1048, 1049 [4th Dept 1985], *affd* 65 NY2d 752, 754 [1985]), or that the employer may have been in the best position to give the warning at issue (*see Johnson v UniFirst Corp.*, 90 AD3d 1539, 1540 [4th Dept 2011]). Instead, evidence that an employer had knowledge of a hazard or was better able than the manufacturer to provide a warning to the injured worker is relevant to whether a manufacturer *satisfied* its duty to provide adequate warnings, which is typically a question of fact (*see generally Liriano v Hobart Corp.*, 92 NY2d 232, 243 [1998]; *Houston v McNeilus Truck & Mfg., Inc.*, 115 AD3d 1185, 1187 [4th Dept 2014]).

As a procedural matter, we reject the dissent's suggestion that our consideration of the viability of the sophisticated intermediary doctrine as applied to the facts of this case represents an unjustified "change in approach" from our decision on the prior appeal. In that decision, we expressly declined to determine the viability of the doctrine, and instead concluded that defendants were not entitled to summary judgment *even if* the doctrine was viable (*see Rickicki*, 60 AD3d at 1277-1278). Thus, we did not make a legal determination necessarily resolving the merits of the viability of the doctrine, and our prior decision is not the law of the case with respect to that issue (*see Matter of Doman*, 150 AD3d 994, 995 [2d Dept 2017]; *Howard v BioWorks, Inc.*, 103 AD3d 1112, 1113 [4th Dept 2013]; *Sharrow v Dick Corp.*, 233 AD2d 858, 859-860 [4th Dept 1996], *lv denied* 89 NY2d 810 [1997], *rearg denied* 89 NY2d 1087 [1997]).

In contending that the sophisticated intermediary doctrine should apply to preclude liability here as a matter of law, defendants and the dissent rely, inter alia, on the Restatement (Second) of Torts, and on New York case law establishing that a manufacturer of prescription drugs or medical devices satisfies its duty to warn by providing a proper warning to a physician, with no need for a direct warning to a plaintiff patient (*see Martin v Hacker*, 83 NY2d 1, 8-9 [1993]; *see also Bukowski v CooperVision Inc.*, 185 AD2d 31, 34-35 [3d Dept 1993]). We conclude that their reliance is misplaced.

The Restatement (Second) recognizes that providing a warning to a

third party such as a product user's employer "is not in all cases sufficient to relieve [a] supplier from liability," particularly where the danger posed by the product is significant and "means of [direct] disclosure are practicable and not unduly burdensome" (Restatement [Second] of Torts § 388, Comment *n*). In addition, the analogous provision of the later Restatement (Third) states that "[t]here is no general rule as to whether one supplying a product for the use of others through an intermediary has a duty to warn the ultimate product user directly or may rely on the intermediary to relay warnings. The standard is one of reasonableness in the circumstances" involving, among other things, "the feasibility and effectiveness of giving a warning directly to the user" (Restatement [Third] of Torts: Products Liability § 2, Comment *i*). Here, there is evidence that the injured workers directly handled bags of silica in an era before the bags had any warnings on them, and we conclude that it would have been a minimal burden for defendants to place warnings on the bags at that time (*see Humble Sand & Gravel, Inc. v Gomez*, 146 SW3d 170, 193 [Tex Sup Ct 2004]; *cf. Polimeni v Minolta Corp.*, 227 AD2d 64, 66 [3d Dept 1997]). We therefore conclude that the Restatement does not support the recognition of the sophisticated intermediary doctrine on these facts. The dissent's observation that the silica "became a bulk product" once removed from the bags is irrelevant for purposes of defendants' motions and cross motions in view of the evidence that the injured workers handled the bags themselves.

We further conclude that the " 'informed intermediary' " doctrine, which is applicable in cases involving prescription drugs and medical devices (*Martin*, 83 NY2d at 9), is premised on features of the physician-patient relationship that are not present in the relationship between an industrial employer and its employees (*see Polimeni*, 227 AD2d at 66-67; *Billsborrow v Dow Chem.*, 139 Misc 2d 488, 492 [Sup Ct, Suffolk County 1988]; *see also Hall v Ashland Oil Co.*, 625 F Supp 1515, 1519-1520 [D Conn 1986]), and thus provides no support for recognition of the sophisticated intermediary doctrine here. Moreover, although the dissent is correct that there is "no duty to warn a knowledgeable *user* who is aware of the risks inherent in [a] product" (*Steinbarth v Otis El. Co.*, 269 AD2d 751, 752 [4th Dept 2000] [emphasis added]), and that a warning may be unnecessary as a matter of law in view of "an *injured party's* actual knowledge of the specific hazard that caused the injury" (*Liriano*, 92 NY2d at 241 [emphasis added]), those principles are inapposite here because the party alleged to be fully knowledgeable of the dangers of silica dust inhalation, Dexter, is not the relevant "user" or "injured party." In sum, we decline to recognize the sophisticated intermediary doctrine on the facts of this case, and we conclude that there is a triable issue of fact whether defendants provided adequate warnings to the injured workers (*see generally Ramirez Gabriel v Johnston's L.P. Gas Serv., Inc.*, 143 AD3d 1228, 1231 [4th Dept 2016]).

Finally, we conclude that the court erred in determining as a matter of law that any failure to warn was not a proximate cause of the injuries sustained by the injured workers. While defendants submitted evidence that the injured workers occasionally disregarded

Dexter's safety policies, that evidence is insufficient to establish as a matter of law that an earlier or more specific warning about the dangers of silica dust "would have been superfluous" (*Montufar v Shiva Automation Serv.*, 256 AD2d 607, 607 [2d Dept 1998]; *cf. Terwilliger v Max Co., Ltd.*, 137 AD3d 1699, 1701 [4th Dept 2016]; *see generally Houston*, 115 AD3d at 1187). We therefore reverse the order, deny defendants' motions and cross motions, and reinstate the complaint against them in relevant part in each action.

All concur except CARNI, and CURRAN, JJ., who dissent and vote to affirm in the following memorandum: We respectfully disagree with our colleagues that the sophisticated intermediary doctrine does not apply to the facts in this case and would affirm the order dismissing the complaints.

David P. Rickicki and plaintiff Michael C. Crowley (hereafter, injured workers) were employees in the plant operated by Dexter Corporation, Hysol Division (Dexter) in Olean, New York. Dexter manufactured a wide variety of equipment and materials, including electronic components and circuit boards. Dexter purchased and used silica in its manufacturing process. The injured workers were each diagnosed with silicosis, a respiratory disease, and commenced actions against many of Dexter's suppliers, including defendants, alleging their exposure to airborne crystalline silica dust caused their silicosis. Supreme Court dismissed the complaints against the defendants who did not supply Dexter with silica. The remaining defendants manufactured silica-containing products sold to Dexter for use in their manufacturing processes (hereafter, supplier defendants).

In 2007, the court dismissed the complaints and cross claims against the supplier defendants on the ground, among others, that the supplier defendants had no duty to warn the injured workers of the dangers of silica because Dexter's status as a sophisticated intermediary—an entity that was already fully knowledgeable of the dangers of silica dust inhalation—discharged that duty. This Court modified that order by reinstating the negligence and products liability causes of action solely on the ground that there was an issue of fact regarding Dexter's knowledge that crystalline silica—the type of silica the injured workers were exposed to—was more dangerous than amorphous silica (*Rickicki v Borden Chem.*, 60 AD3d 1276 [4th Dept 2009]). The supplier defendants thereafter made further discovery efforts to identify evidence that Dexter knew the difference between the two types of silica. On a second set of summary judgment motions/cross motions, the court granted summary judgment to the supplier defendants and again dismissed the complaints against them holding that Dexter, as the sophisticated intermediary, had knowledge of the dangers of crystalline silica equal to the knowledge of the supplier defendants.

Our colleagues now conclude that the sophisticated intermediary defense is not a viable defense "under the facts of the case." As an initial matter, the only new fact on the second set of motions/cross motions as compared to the supplier defendants' original motions for summary judgment is that Dexter knew about the dangerousness of

crystalline silica, as opposed to amorphous silica. Thus, in our view, and as Justice NeMoyer stated in his decision granting summary judgment for the second time, the triable issue of fact identified by this Court on the prior appeal—Dexter's supposed lack of appreciation of the differences between crystalline and amorphous silica—has been proven after further discovery to be a non-issue after all.

Rather than addressing this factual issue undertaken by the parties per this Court's prior direction, our colleagues appear to hold that the sophisticated intermediary doctrine is not a viable doctrine in New York in an employee/employer scenario. While our Court is certainly at liberty to alter its prior approaches to issues, we are compelled to lament the change in approach here for the sake of the parties in this case.[1] Additionally, while our colleagues state that the doctrine is inapplicable to the facts of this case, they fail to identify a single disputed material fact impacting Dexter's clear knowledge of the difference between the types of silica or even as to its demonstrated awareness of and protection against the dangers of crystalline silica. We respectfully disagree with the majority, and instead agree with Supreme Court that the sophisticated intermediary doctrine should be a viable one and that, as Supreme Court observed, it was "tailor-made for the situation at bar."

Under strict products liability law, "[a] product may be defective when it contains a manufacturing flaw, is defectively designed or *is not accompanied by adequate warnings for the use of the product*" (*Liriano v Hobart Corp.*, 92 NY2d 232, 237 [1998] [emphasis added]; *see Sage v Fairchild-Swearingen Corp.*, 70 NY2d 579, 586 [1987]). Here, plaintiffs allege that the silica-containing substances produced or distributed by the supplier defendants were defective because of inadequate or absent warnings. A strict liability cause of action predicated on a failure to warn of dangers of which the manufacturers knew or should have known is indistinguishable from a negligence cause of action (*see Enright v Eli Lilly & Co.*, 77 NY2d 377, 387 [1991], *rearg denied* 77 NY2d 990 [1991], *cert denied* 502 US 868 [1991]). The adequacy of a warning generally is a question of fact, unless the court decides as a matter of law that there is no duty to warn or that the duty has been discharged as a matter of law (*see Passante v Agway Consumer Prods.*, 294 AD2d 831, 833 [4th Dept 2002], *appeal dismissed* 98 NY2d 728 [2002]). For example, "where the injured party was fully aware of the hazard through general knowledge, observation or common sense, . . . lack of a warning about that danger may well obviate the failure to warn as a legal cause of an injury resulting from that danger" (*Liriano*, 92 NY2d at 241). Thus, in appropriate cases, courts may "as a matter of law decide that a manufacturer's warning would have been superfluous given an injured party's actual knowledge of the specific hazard that caused

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[1] Contrary to the majority's suggestion, we recognize that our prior decision was not the "law of the case" on the application of the doctrine. However, by the language in the prior decision, the court clearly steered the parties to a particular course of further action.

the injury" (*id.*).

New York courts have applied the "knowledgeable user" doctrine to relieve a manufacturer "of liability on a failure to warn theory where the purchaser or user knows or has reason to know of the dangerous propensities of the product independent of the information supplied to him by the manufacturer or distributor" (*Billsborrow v Dow Chem.*, 177 AD2d 7, 15 n [2d Dept 1992]; *see Steuhl v Home Therapy Equip., Inc.*, 51 AD3d 1101, 1103 [3d Dept 2008]; *Steinbarth v Otis El. Co.*, 269 AD2d 751, 752 [4th Dept 2000]). In other words, "the duty to warn of a product's danger does not arise when the injured [party] is already aware of the specific hazard . . . , or the product-connected danger is obvious" (*Lonigro v TDC Elecs.*, 215 AD2d 534, 535-536 [2d Dept 1995]).

Akin to the "knowledgeable user" doctrine is the "sophisticated intermediary" defense (*see e.g. Billsborrow v Dow Chem.*, 139 Misc 2d 488, 495 [Sup Ct, Suffolk County 1988]). The sophisticated intermediary doctrine, which as the majority recognizes, has been said to be rooted in section 388 (b) of the Restatement (Second) of Torts, provides that there is " 'no duty to warn if the user knows or should know of the potential danger, especially when the user is a professional who should be aware of the characteristics of the product' " (*Bergfeld v Unimin Corp.*, 319 F3d 350, 353 [8th Cir 2003]). The Restatement has served to form the bedrock principles in New York law for strict products liability (*see generally Matter of New York City Asbestos Litig.*, 27 NY3d 765, 786-787, 790-791 [2016]; *Codling v Paglia*, 32 NY2d 330, 342 [1973]).

The "sophisticated user" doctrine is premised on the theory that the immediate distributee of the product (here, the employer) is in a better position to warn the ultimate user (the employee) of the dangers associated with the use of the product. As other state courts have recognized, "sound policy reasons support the adoption of the sophisticated user defense. First, it places the duty to warn on the party arguably in the best position to ensure workplace safety, the purchaser-employer. Second, the burden falls upon the party in the best position to know of the product's potential uses-thereby enabling that party to communicate safety information to the ultimate user based upon the specific use to which the product will be put" (*Haase v Badger Mining Corp.*, 266 Wis 2d 970, 984, 669 NW2d 737, 743-744 [Ct App 2003], *affd* 274 Wis 2d 143, 682 NW2d 389 [Sup Ct 2004]). For all of these practical and policy reasons, "[i]t would appear, then, that some version of a 'sophisticated purchaser' defense is the norm in most jurisdictions" (*In re Asbestos Litigation [Mergenthaler]*, 542 A2d 1205, 1211 [Del Super Ct 1986]).

For the doctrine to apply, the user's "sophistication" must consist of a special expertise or knowledge of the dangerous properties of the product and not a mere general idea of the danger (*see Mason v Texaco, Inc.*, 741 F Supp 1472, 1486 [D Kan 1990], *affd* 948 F2d 1546 [10th Cir 1991], *cert denied* 504 US 910 [1992]), "the intermediary must have knowledge or sophistication equal to that of the manufacturer or supplier, and the manufacturer must be able to

rely reasonably on the intermediary to warn the ultimate [user]" (*Natural Gas Odorizing, Inc. v Downs*, 685 NE2d 155, 164 [Ind Ct App 1997], citing 63A Am Jur 2d, Products Liability § 1195). "Reliance is only reasonable if the intermediary knows or should know of the product's dangers . . . Actual or constructive knowledge may arise where either the supplier has provided an adequate explicit warning of such dangers or information of the product's dangers is available in the public domain" (*Natural Gas Odorizing, Inc.*, 685 NE2d at 164). Additionally, a supplier of a dangerous product has a duty to warn the purchaser's employees if it knows or has reason to know that either the purchaser is unaware of the full extent of the danger or the purchaser will not transmit the warnings to its employees (*see* Dan B. Dobbs et al., Torts § 467, at 964-965 [2d ed 2011]). Thus, where an employer purchases raw materials from a supplier, under the sophisticated intermediary doctrine, the supplier's duty to warn ends if the sophisticated employer independently knows or should know of the dangerous propensities of the product and the supplier lacks actual or constructive knowledge that the employer will not warn its employees of those dangers. Rather, under those circumstances, it is the employer that has a duty to warn and protect its employees because it is impractical for the supplier to issue warnings directly to the employees.

While the majority relies on this Court's prior decisions in both *Johnson v UniFirst Corp.* (90 AD3d 1539, 1540 [4th Dept 2011]) and *Cohen v St. Regis Paper Co.* (109 AD2d 1048, 1049 [4th Dept 1985], *affd* 65 NY2d 752, 754 [1985]), we find that reliance misplaced. Initially, we note that, if *Cohen* stood for the broad proposition with which the majority now burdens it, that holding would have formed the basis for our Court's prior decision in this case and obviated the discovery foisted upon the parties in the interim. We do not read *Cohen* so expansively. Rather, our view is that the Court in neither *Cohen* nor *Johnson* considered the "sophisticated intermediary doctrine." Moreover, both cases stand for the general rule that suppliers of dangerous products have a duty to warn those who are expected to use them, including employees, a proposition with which we do not disagree. We submit, however, that a defendant supplier may raise, and perhaps be successful in raising, the "sophisticated intermediary" defense where the defendant can show that the employer has knowledge or sophistication equal to that of the supplier, and the supplier is able to rely reasonably on that employer to warn the employee.

Turning to the merits of this case, we conclude that, under the circumstances of this case, the supplier defendants' duty to warn ended as a matter of law under the sophisticated intermediary doctrine. The supplier defendants proffered evidence revealing that the injured workers' employer, Dexter, both before and throughout the period of employment, knew about the dangers associated with crystalline silica dust. Starting in the 1940s, the courts have recognized the hazards of silica exposure (*see Urie v Thompson*, 337 US 163, 165-166 [1949]; *Sadowski v Long Is. R.R. Co.*, 292 NY 448, 456 [1944]) and, at least as early as the 1970s, the dangers of silica dust were known in both society and at the Dexter plant. The supplier defendants submitted evidence that within the plant Dexter had

specific expertise with and knowledge about silica, and in particular crystalline silica. Dexter had used silica for many years before the injured workers were hired and was aware that silicosis was caused by the inhalation of crystalline silica dust. To be sure, Dexter took protective measures, including the use of a ventilation or exhaust system and a dust extraction hose situated next to the openings of the mixing machines in which bags of silica were poured. In 1970, workers were required to wear masks or respirators while working with silica. This evidence, taken together, establishes that Dexter knew or should have known that exposure to the airborne crystalline silica dust was a health hazard and that Dexter took steps throughout the injured workers' employment to limit its workers' exposure to the dust.

Moreover, it was reasonable for the supplier defendants to rely on Dexter to warn and protect the ultimate end users because Dexter was the employer of the end users and, indeed, had a duty under both federal and state law to protect its employees from the dangers of silica dust. The facts of this case show that it was highly impractical for the supplier defendants to issue warnings directly to Dexter employees. As Justice NeMoyer noted, the suppliers of a raw material are rarely well-equipped to warn eventual end users of the material, and employers in industrial settings are generally best equipped to warn their employees. Given the nature of the product, Dexter was in the best position to warn its workers and to institute protective measures to safeguard the health and safety of its workers. Once the silica was removed from the bags, it became a bulk product and any warning on the bags could not have followed the movement of the product thereafter. Imposing such a duty would be unduly burdensome for the suppliers, and employers are unlikely to allow third parties to interfere in the employer-employee relationship or the employer's business operations. While it is almost certainly true that many employers have been known to place profit over safety, the solution to that problem should not be to shift an employer's duty to its suppliers, thereby lessening an employer's primary duty to protect its employees from well-known dangers.

In short, we conclude that the supplier defendants had no duty to warn the injured workers of the hazards of crystalline silica under the facts of this case and thus, the complaints were properly dismissed.

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

1099

CA 15-02156

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

PATRICIA A. RICKICKI, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF DAVID P. RICKICKI, DECEASED, PLAINTIFF-APPELLANT,

V ORDER

BORDEN CHEMICAL, DIVISION OF BORDEN, INC., ET AL., DEFENDANTS, UNIMIN CORPORATION AND U.S. SILICA COMPANY, DEFENDANTS-RESPONDENTS.
(ACTION NO. 1.)

MICHAEL C. CROWLEY AND SHARON M. CROWLEY, PLAINTIFFS-APPELLANTS,

V

C-E MINERALS, INC., ET AL., DEFENDANTS, UNIMIN CORPORATION, UNIMIN SPECIALTY MINERALS, INC., MEYERS CHEMICALS, U.S. SILICA COMPANY, MALVERN MINERALS COMPANY, FERRO CORPORATION, NYCO MINERALS COMPANY AND CHARLES B. CHRYSTAL CO., INC., DEFENDANTS-RESPONDENTS.
(ACTION NO. 2.)
(APPEAL NO. 2.)

PAUL WILLIAM BELTZ, P.C., BUFFALO (WILLIAM A. QUINLAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

NATHAN A. SCHACHTMAN, ESQ., P.C., NEW YORK CITY (NATHAN A. SCHACHTMAN OF COUNSEL), BOND SCHOENECK & KING, PLLC, BUFFALO, AND SMITH, MURPHY & SCHOEPPERLE, LLP, FOR DEFENDANTS-RESPONDENTS UNIMIN CORPORATION, UNIMIN SPECIALTY MINERALS, INC., MEYERS CHEMICALS, AND U.S. SILICA COMPANY.

ANSPACH MEEKS ELLENBERGER LLP, BUFFALO (DAVID M. STILLWELL OF COUNSEL), FOR DEFENDANT-RESPONDENT MALVERN MINERALS COMPANY.

BARCLAY DAMON LLP, BUFFALO (VINCENT G. SACCOMANDO OF COUNSEL), FOR DEFENDANT-RESPONDENT FERRO CORPORATION.

GOLDBERG SEGALLA LLP, ROCHESTER (RAUL E. MARTINEZ OF COUNSEL), FOR DEFENDANTS-RESPONDENTS NYCO MINERALS COMPANY AND CHARLES B. CHRYSTAL CO., INC.

Appeal from a corrected order of the Supreme Court, Cattaraugus County (Patrick H. NeMoyer, J.), entered October 14, 2015. The corrected order granted the motions and cross motions of defendants-respondents for summary judgment dismissing the complaints against them.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Kolasz v Levitt*, 63 AD2d 777, 779 [3d Dept 1978]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

1286

CA 17-00175

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

CITY OF BUFFALO CITY SCHOOL DISTRICT,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LPCIMINELLI, INC., DEFENDANT-RESPONDENT.
(ACTION NO. 1.)

LPCIMINELLI, INC.,
PETITIONER-PLAINTIFF-RESPONDENT,

V

CITY OF BUFFALO JOINT SCHOOLS CONSTRUCTION
BOARD AND CITY OF BUFFALO CITY SCHOOL DISTRICT,
RESPONDENTS-DEFENDANTS-APPELLANTS.
(ACTION NO. 2.)
(APPEAL NO. 1.)

HARTER SECREST & EMERY LLP, BUFFALO (JOHN G. HORN OF COUNSEL), FOR PLAINTIFF-APPELLANT AND RESPONDENTS-DEFENDANTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (BENJAMIN M. ZUFFRANIERI, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT AND PETITIONER-PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered September 9, 2016. The order, among other things, granted in part the motion of defendant-petitioner-plaintiff to dismiss the complaint in action No. 1.

It is hereby ORDERED that the order so appealed from is modified on the law by vacating the third ordering paragraph 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 same memorandum as in *City of Buffalo City School District v LPCiminelli, Inc.* ([appeal No. 2] — AD3d — [Mar. 16, 2018] [4th Dept 2018]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

1287

CA 17-00176

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

CITY OF BUFFALO CITY SCHOOL DISTRICT,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LPCIMINELLI, INC., DEFENDANT-RESPONDENT.
(ACTION NO. 1.)

LPCIMINELLI, INC.,
PETITIONER-PLAINTIFF-RESPONDENT,

V

CITY OF BUFFALO JOINT SCHOOLS CONSTRUCTION
BOARD AND CITY OF BUFFALO CITY SCHOOL DISTRICT,
RESPONDENTS-DEFENDANTS-APPELLANTS.

(ACTION NO. 2.)
(APPEAL NO. 2.)

HARTER SECREST & EMERY, LLP, BUFFALO (JOHN G. HORN OF COUNSEL), FOR PLAINTIFF-APPELLANT AND RESPONDENTS-DEFENDANTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (BENJAMIN M. ZUFFRANIERI, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT AND PETITIONER-PLAINTIFF-RESPONDENT.

Appeal from a judgment and order (denominated order) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered December 8, 2016. The judgment and order, among other things, granted those parts of defendant-petitioner-plaintiff's motion in action No. 1 to dismiss the second, third, sixth and seventh causes of action and granted defendant-petitioner-plaintiff judgment on its CPLR article 78 cause of action in action No. 2.

It is hereby ORDERED that the judgment and order so appealed from is modified on the law by denying those parts of the motion of defendant-petitioner-plaintiff seeking dismissal of the third, sixth and seventh causes of action in action No. 1 and reinstating those causes of action, vacating the award of judgment to defendant-petitioner-plaintiff on the second cause of action in action No. 2, and granting that part of the motion of plaintiff-respondent-defendant and respondent-defendant seeking dismissal of the second cause of action in action No. 2 and as modified the judgment and order is affirmed without costs.

Memorandum: Pursuant to the City of Buffalo and the Board of Education of the City School District of the City of Buffalo Cooperative School Construction Act (L 2000, ch 605), plaintiff-respondent-defendant, City of Buffalo City School District (District), and the City of Buffalo (City) were authorized to construct and renovate numerous schools throughout the City, and respondent-defendant, City of Buffalo Joint Schools Construction Board (Board), was authorized to "enter into contracts on behalf of the [C]ity or the [District], or both, for the design, construction, financing, and management of the new educational facilities" (L 2000, ch 605, § 4 [b]). In furtherance of the Buffalo Schools Development Program (Program), defendant-petitioner-plaintiff, LPCiminelli, Inc., formerly known as Louis P. Ciminelli Management Co., Inc. (LPC), was selected to be the "Program manager" (L 2000, ch 605, § 3 [k]). LPC thereafter entered into a Comprehensive Program Packaging and Development Services Provider Agreement (PPDS) with the Board, which acted "for itself and as agent and on behalf of the [City] and the [District]." The terms of the PPDS incorporated yet-to-be-written "addenda."

The addenda, which would also incorporate by reference the provisions of the PPDS, were known as the Master Design and Construction Agreements (MDCAs), and there was one for each of the five phases of the Program. The MDCAs relevant to these appeals concern only phases three and five, and the relevant portions of those MDCAs are identical. It is undisputed that the PPDS and incorporated MDCAs resulted in a stipulated-sum construction contract, i.e., a contract with one total price for all of the construction work, regardless of the actual costs of construction.

In 2014 and 2015, after operating under the PPDS and MDCAs for over 12 years, the Board and the District refused to process or pay the last four payment requisitions until LPC provided them with documentation concerning LPC's actual construction and administrative costs, information that LPC contended was confidential, proprietary and not subject to disclosure under the PPDS and MDCAs. Following negotiations and an attempt at mediation, the District commenced action No. 1, asserting causes of action for, inter alia, breach of fiduciary duty and breach of contract and seeking, inter alia, declaratory and injunctive relief as well as punitive damages.

LPC thereafter commenced a hybrid CPLR article 78 proceeding and declaratory judgment action (action No. 2), alleging that the District and the Board (collectively, appellants) had breached the contract and seeking, pursuant to CPLR 7803, either "an order compelling the District and/or [the Board] to process *and approve* the requisitions" (emphasis added) or an order "compelling the District and, if required, [the Board], to process the requisitions." In the declaratory judgment causes of action, LPC sought, inter alia, a declaration that "the District and/or [the Board] [were] required under law to process *and approve* the requisitions" (emphasis added), as well as declarations that the District and/or the Board were not entitled to the information they sought, had no right to refuse to process the requisitions and owed LPC payments for the work approved by the architects.

LPC filed a pre-answer motion to dismiss the complaint in action No. 1 and, shortly thereafter, appellants moved to dismiss the petition/complaint in action No. 2. The District also cross-moved in action No. 1 to order LPC to preserve all of its documentation, and LPC moved in action No. 1 to permit it to file Exhibit I under seal on the ground that the exhibit contained confidential and proprietary company information.

By the order in appeal No. 1, Supreme Court, inter alia, granted in part LPC's motion to dismiss in action No. 1 and dismissed the first cause of action and the request for punitive damages, and granted LPC's motion in action No. 1 to seal Exhibit I. The court otherwise reserved decision on LPC's remaining requests for relief. By the judgment and order (denominated order) in appeal No. 2, the court, inter alia, further granted those parts of LPC's motion in action No. 1 that sought dismissal of the second, third, sixth and seventh causes of action; denied those parts of appellants' motion in action No. 2 that sought dismissal of the petition/complaint as time-barred, dismissal of the petition/complaint against the Board, and dismissal of the CPLR article 78 cause of action; and granted LPC judgment on the CPLR article 78 cause of action in action No. 2, directing the District to "act on the Disputed Payment Requisitions by either definitively approving or rejecting them."

We conclude in appeal No. 1 that the court erred in directing that a portion of the record in action No. 1 be sealed without first making a determination of good cause. We further conclude in appeal No. 2 that the court erred in granting those parts of LPC's motion seeking dismissal of the third, sixth and seventh causes of action in action No. 1, in granting LPC judgment on the CPLR article 78 cause of action, and in denying that part of appellants' motion seeking dismissal of that cause of action in action No. 2.

Addressing first the issues raised in appeal No. 1, we reject appellants' contention that the court did not apply the appropriate standards when ruling on LPC's CPLR 3211 pre-answer motion to dismiss. Where, as here, a court is considering a pre-answer motion to dismiss made pursuant to CPLR 3211 (a) (1) and (7), the court may look to the contract documents (*see EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19-20 [2005]), and "affidavits may . . . be used under certain circumstances, even without converting the motion to one for summary judgment under CPLR 3212" (*Albert v Solimon*, 252 AD2d 139, 140 [4th Dept 1998], *affd* 94 NY2d 771 [1999]).

Contrary to appellants' further contention, we conclude that the court properly granted that part of LPC's motion seeking to dismiss the District's first cause of action, for breach of fiduciary duty, in action No. 1. Although that cause of action was pleaded with sufficient particularity under CPLR 3016 (b) (*see Faith Assembly v Titledge of N.Y. Abstract, LLC*, 106 AD3d 47, 62 [2d Dept 2013]), we agree with LPC that it "fails to allege conduct by [LPC] in breach of a duty other than, and independent of, that contractually established between the parties and is thus duplicative" of the District's breach of contract causes of action (*Kaminsky v FSP Inc.*, 5 AD3d 251, 252

[1st Dept 2004]; *see NYAHSA Servs., Inc., Self-Ins. Trust v Recco Home Care Servs., Inc.*, 141 AD3d 792, 795 [3d Dept 2016]; *cf. EBC I, Inc.*, 5 NY3d at 20). As a result, we further conclude that the court properly dismissed the request for punitive damages related to the first cause of action.

Contrary to appellants' contention, the court also properly dismissed the request for punitive damages in action No. 1 insofar as it related to the breach of contract causes of action, thereby dismissing the request for punitive damages in its entirety. As a general rule, "[p]unitive damages are not recoverable in a breach of contract action in which no public rights are alleged to be involved" (*2470 Cadillac Resources, Inc. v DHL Express [USA], Inc.*, 84 AD3d 697, 699 [1st Dept 2011], *lv dismissed* 18 NY3d 921 [2012]), because the purpose of punitive damages "is not to remedy private wrongs but to vindicate public rights" (*Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613 [1994]). Here, the breach of contract causes of action do not seek to vindicate public rights but, rather, they involve allegations of an ordinary breach of contract between a private contractor and municipal entities.

With respect to appellants' final contention concerning appeal No. 1, we agree with appellants that the court erred in granting LPC's motion to file Exhibit I under seal in the absence of "a written finding of good cause, . . . specify[ing] the grounds thereof," as required by 22 NYCRR 216.1 (a) (*see Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.V.*, 28 AD3d 322, 324 [1st Dept 2006]; *see also Maxim Inc. v Feifer*, 145 AD3d 516, 517 [1st Dept 2016]). We therefore modify the order in appeal No. 1 accordingly, and we remit the matter to Supreme Court to determine whether good cause exists to seal the record with respect to Exhibit I.

Addressing next the issues raised in appeal No. 2, we reject appellants' contention that the court erred in dismissing the second cause of action in action No. 1. That cause of action is based on allegations that LPC breached PPDS section 11.05 (k), which required LPC to "[p]rovide regular comparisons of the approved construction cost estimates with actual costs and submit monthly reports to the [Board] that identify variances between actual and estimated costs." According to appellants, the "actual costs" referenced in PPDS section 11.05 (k) are *LPC's* actual costs. LPC, however, contends that section 11.05 (k) applies only to the *District's* actual costs because, in a stipulated-sum contract such as the one at issue here, the contractor's actual costs are irrelevant. Moreover, LPC contends that, if PPDS section 11.05 (k) applied to LPC's actual costs, that section would then be in conflict with or render meaningless section 6.8 of the relevant MDCAs.

Section 6.8 of those MDCAs provides the District with audit and examination rights to any and all records related to the " 'construction contingency' " portion of the stipulated sum. Nevertheless, that section further provides that, "[n]otwithstanding anything to the contrary contained herein, the foregoing audit and examination rights do no[t] apply to any records maintained by [LPC]

(or . . . on behalf of [LPC]) with respect to any Project Administration Costs or Construction Costs other than records directly related to the expenditure of the 'construction contingency.' " We agree with LPC that we must read the PPDS and MDCAs as a whole and construe them in such a manner "as to give full meaning and effect to the material provisions" and "not render any portion meaningless" (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007] [internal quotation marks omitted]).

The contract is a stipulated-sum construction contract. In such contracts, "[t]he owner is obligated to pay the contractor the fixed amount no matter what it costs to finish the work" and, generally, "the owner is not entitled to review the costs that the contractor incurs during the project" (L. Franklin Elmore et al., Fundamentals of Construction Law at 14-15 [2d ed 2013]). Considering the general purpose of the contract and the fact that the MDCAs specifically provide that the audit rights for construction contingency funds did not apply to records concerning LPC's "Project Administration Costs or Construction Costs" unrelated to the construction contingency, we conclude that the only reasonable way to interpret PPDS section 11.05 (k) is to determine that it applies to the *District's* actual costs only. To hold otherwise would render the MDCAs' limitation of the District's access to LPC's actual administration and construction costs meaningless. Indeed, if PPDS section 11.05 (k) applied to LPC's actual costs, then there would be no need for section 6.8 of the relevant MDCAs to grant specific access to actual costs related to the construction contingency portion of the stipulated sum contract. Inasmuch as section 11.05 (k) did not entitle the District access to LPC's actual construction costs, LPC did not breach the contract by refusing to provide that information to the District.

Based on our determination, we do not address appellants' additional contention that the court erred in considering parol evidence of the parties' course of conduct in dismissing the second cause of action.

Appellants further contend that the court erred in dismissing the third cause of action in action No. 1, and we agree. In that cause of action, the District alleged that LPC breached PPDS section 15.01 (c), which provides that LPC is required to provide the Board or its authorized representatives "access to all documentation and information concerning any Project relating to the bidding, letting, and payment of contracts, as well as any other information that would be available to the NYSED [New York State Education Department] in the course of its customary auditing and reimbursement approval function concerning any Project." As with the second cause of action, LPC contends that PPDS section 15.01 (c) cannot be read to require LPC to provide information on its administration and construction costs because that would conflict with or render meaningless section 6.8 of the relevant MDCAs. While we agree with LPC's premise that such a reading would render a portion of section 6.8 meaningless, we cannot reconcile the two provisions as we did with section 6.8 and PPDS section 11.05 (k). The PPDS requires LPC to disclose to the Board all information that would be available to the NYSED in an audit, which

presumably includes LPC's administration and construction costs, while the MDCAs provide access to those records only insofar as they concern the construction contingency portion of the stipulated sum. Inasmuch as we cannot interpret the contract in such a manner as to render either provision meaningless, the contract, insofar as it concerns the interplay between PPDS section 15.01 (c) and section 6.8 of the relevant MDCAs, is ambiguous. We thus conclude that the "documentary evidence submitted [by LPC does not] conclusively establish[ ] a defense to the asserted claim[] as a matter of law" (*Beal Sav. Bank*, 8 NY3d at 324 [internal quotation marks omitted]), and dismissal of the third cause of action pursuant to CPLR 3211 (a) (1) or (7) is not appropriate. We therefore modify the judgment and order in appeal No. 2 accordingly.

Relying on the "well-established principle of contract interpretation that specific provisions concerning an issue are controlling over general provisions" (*Huen N.Y., Inc. v Board of Educ. Clinton Cent. Sch. Dist.*, 67 AD3d 1337, 1338 [4th Dept 2009]; *see generally Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 46 [1956]), our dissenting colleagues conclude that the specific provisions of section 6.8 of the relevant MDCAs control over the general provisions of PPDS section 15.01 (c). As a preliminary matter, we respectfully disagree with the position that MDCA section 6.8 is a specific provision *denying* access to the requested records. There is no doubt that PPDS section 15.01 (c), which is contained in the article dealing with "General Covenants of [LPC]," is a general provision providing that the Board has access to any information that would be available to NYSED in the event of an audit. Although section 6.8 of the relevant MDCAs is a specific provision providing access to records related to the construction contingency, its disclaimer that it does not apply to "Project Administration Costs or Construction Costs" unrelated to the construction contingency is not a specific provision *prohibiting* access to such documents. Rather, it merely states that the District cannot rely on section 6.8 as a basis for seeking access to those records. Moreover, were we to adopt the dissent's position, it would render the language in PPDS section 15.01 (c) meaningless if, in fact, information concerning administration and construction costs would be available to NYSED in the event of an audit. Inasmuch as we may not interpret the contract in such a manner as to render any provision meaningless, we are left with two possible interpretations of the contract based on competing rules of contract interpretation. Under such circumstances, we conclude that it would be inappropriate to grant a pre-answer CPLR 3211 motion to dismiss.

To the extent that the sixth and seventh causes of action in action No. 1 seek declaratory and injunctive relief based on the claims made in the third cause of action, we conclude that the court erred in dismissing those two causes of action, and we further modify the judgment and order in appeal No. 2 accordingly.

With respect to the petition/complaint in action No. 2, appellants contend that the court erred in denying their motion to dismiss the petition/complaint because the notice of claim was untimely (*see* Education Law § 3813 [1]), and the CPLR article 78 cause

of action was barred by the statute of limitations set forth in CPLR 217 (1). We reject that contention. There was no rejection of payment or final and binding determination until December 2015, and we therefore conclude that the amended notice of claim filed on January 5, 2016 and the petition/complaint filed on February 17, 2016 were timely. Contrary to appellants' contention, their refusal to make the payments upon receipt of the demands for payments and their conditioning of payment upon receipt of records that LPC refused to provide were not final and binding determinations. During that time, the Board voted to reconsider the requisitions and the District contended that the requisitions were improperly submitted to the Board instead of the District. Those actions " 'created an ambiguity . . . whether . . . the determination [not to approve the requisitions] was intended to be final' " (*A.C. Transp. v Board of Educ. of City of N.Y.*, 253 AD2d 330, 337 [1st Dept 1999], *lv denied* 93 NY2d 808 [1999], quoting *Matter of Biondo v New York State Bd. of Parole*, 60 NY2d 832, 834 [1983]), and whether the claims for payment were explicitly or constructively rejected (*see Greece Cent. Sch. Dist. v Garden Grove Landscape*, 90 AD3d 1568, 1568 [4th Dept 2011]).

We further reject appellants' contention that the petition/complaint against the Board should be dismissed because the Board was a mere agent of the District. Inasmuch as we are to construe the allegations of the petition/complaint liberally and accord LPC the benefit of every favorable inference (*see* CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), we conclude that LPC has set forth causes of action against both the Board and the District.

We agree with appellants, however, that the court erred in awarding LPC judgment on the second cause of action, seeking mandamus relief under CPLR article 78. LPC did not seek such relief in its motion and, moreover, failed to establish that it had a " 'clear legal right' " to that relief (*Matter of Brusco v Braun*, 84 NY2d 674, 679 [1994]). We further agree with appellants that the court erred in denying that part of their motion seeking dismissal of that cause of action. Where "damages allegedly have been sustained due to a breach of contract by a public official or governmental body, the claim 'must be resolved through the application of traditional rules of contract law' " (*Matter of Steve's Star Serv. v County of Rockland*, 278 AD2d 498, 499 [2d Dept 2000], quoting *Abiele Contr. v New York City Sch. Constr. Auth.*, 91 NY2d 1, 8 [1997]; *see Kerlikowske v City of Buffalo*, 305 AD2d 997, 997 [4th Dept 2003]). "Here, since the essence of [LPC's] claim against the appellants is predicated upon their alleged breach of contract, and since the remedy sought relates to enforcement of the contract, mandamus to compel payment of the outstanding [requisitions] does not lie" (*Steve's Star Serv.*, 278 AD2d at 500). We therefore further modify the judgment and order in appeal No. 2 accordingly. We need not convert the proceeding under CPLR 103 (c) into an action to recover damages inasmuch as LPC's remaining causes of action for breach of contract and declaratory judgment remain intact (*cf. Steve's Star Serv.*, 278 AD2d at 500).

All concur except NEMOYER, and CURRAN, JJ., who dissent in part and vote to modify in the following memorandum: We respectfully dissent

in part in appeal No. 2. We disagree with our colleagues only to the extent that we conclude that Supreme Court properly granted that part of the motion of defendant-petitioner-plaintiff, LPCiminelli, Inc. (LPC), seeking dismissal of the third cause of action in action No. 1. We would therefore affirm the judgment and order in appeal No. 2 to that extent. That cause of action is premised on allegations that LPC breached section 15.01 (c) of the Comprehensive Program Packaging and Development Services Provider Agreement (PPDS). That section of the PPDS, like section 11.05 (k) of the PPDS upon which plaintiff-respondent-defendant, City of Buffalo City School District (District), premises its second cause of action in action No. 1, is a general provision without defined terms. Thus, as the majority concluded with respect to PPDS section 11.05 (k), we conclude that PPDS section 15.01 (c) must yield to the more specific language in the Master Design and Construction Agreements (MDCAs). In other words, for the same reasons that the majority concluded that the court properly granted LPC's motion with respect to the second cause of action, we conclude that the court properly granted LPC's motion with respect to the third cause of action, i.e., LPC's compliance with the specific provisions of the MDCAs cannot be considered a breach of the general provisions of PPDS section 15.01 (c).

The majority distinguishes PPDS section 11.05 (k) from PPDS section 15.01 (c) on the ground that the latter section provides that the District is entitled to "any other information that would be available to the NYSED [New York State Education Department] in the course of its customary auditing and *reimbursement* approval function concerning any Project" (emphasis added), and no similar language is found in section 11.05 (k). In our view, however, that is a distinction without a difference. That portion of PPDS section 15.01 (c) is just as general as the rest of the section, and thus that general language must yield to the specific language of section 6.8 of the MDCAs (*see Huen N.Y. Inc. v Board of Educ. Clinton Cent. Sch. Dist.*, 67 AD3d 1337, 1338 [4th Dept 2009]). Indeed, the vague language in PPDS section 15.01 (c) describing something that the NYSED might someday be permitted to access should not be construed as contract language more specific than that contained in the MDCAs. Finally, even if further discovery revealed that the NYSED would be entitled to LPC's construction and administrative costs in an audit, that would not entitle the District to LPC's construction and administrative costs because such disclosure would be in conflict with the specific language found in section 6.8 of the MDCAs, which prevails over the more general language in PPDS section 15.01 (c) (*see generally id.*).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

1364

KA 14-00530

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERRELL B. HENRY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered January 14, 2014. The judgment convicted defendant, upon a jury verdict, of murder in the first degree.

It is hereby ORDERED that the judgment so appealed from is modified on the law by reducing the conviction of murder in the first degree under the first count of the indictment to murder in the second degree (Penal Law § 125.25 [1]) and vacating the sentence imposed on that count and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Monroe County, for sentencing on that conviction.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of murder in the first degree (Penal Law § 125.27 [1] [a] [vii]; [b]). The charges arose from the shooting death of the victim during a home invasion robbery. Defendant contends that the evidence is legally insufficient to support his conviction because there is no evidence from which the jury could have concluded that he fired the shots that killed the victim. We agree. To support a conviction of murder in the first degree under Penal Law § 125.27 (1) (a) (vii), the People were required to establish beyond a reasonable doubt that defendant intentionally caused the victim's death during the commission of a crime enumerated in the statute, such as a robbery or burglary in the first degree. A conviction under subparagraph (vii) cannot be based on accomplice liability under section 20.00, "unless the defendant's criminal liability . . . is based upon the defendant having commanded another person to cause the death of the victim or intended victim" (§ 125.27 [1] [a] [vii]). Here, the jury was never presented with the command theory of liability, but was instead expressly instructed in response to a jury note that, to convict defendant of murder in the first degree, it would have to

determine that defendant "pulled the trigger himself."

Viewing the evidence in the light most favorable to the People, we conclude that no rational trier of fact could have found beyond a reasonable doubt that defendant shot the victim (*see People v Grassi*, 92 NY2d 695, 697 [1999]; *see also People v Reed*, 22 NY3d 530, 534 [2014]). Here, the evidence established that defendant's girlfriend was also inside the victim's house with defendant at the time when the victim is believed to have been shot, but the People presented no evidence whatsoever with respect to the series of events inside the home or with respect to who ultimately "pulled the trigger" against the victim. The People's evidence against defendant with respect to the act of the shooting itself consisted of scant and weak circumstantial evidence (*see generally People v Benzinger*, 36 NY2d 29, 32 [1974]), i.e., that defendant stated that he did not want any "loose ends" and so "everybody . . . involved would have to be eliminated," that defendant subsequently threatened his cousin with the rifle used in the killing, and that the same rifle was found in defendant's possession at the time of defendant's arrest, three days after the crime. Although we agree with our dissenting colleagues that "the fact that no one saw [defendant] fire the shot[s] that killed the victim does not render the evidence legally insufficient" (*People v Moore* [appeal No. 2], 78 AD3d 1658, 1659 [4th Dept 2010]), we are compelled to conclude that the People's evidence is legally insufficient to establish that defendant was the shooter, and thus the People failed to prove beyond a reasonable doubt that defendant is guilty of murder in the first degree (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant correctly concedes, however, that the People presented legally sufficient evidence to establish his guilt beyond a reasonable doubt of either form of murder in the second degree charged to the jury as lesser included offenses of murder in the first degree (*see* Penal Law § 125.25 [1], [3]). We therefore modify the judgment by reducing the conviction of murder in the first degree under count one of the indictment to murder in the second degree (§ 125.25 [1]) and vacating the sentence imposed on that count (*see* CPL 470.15 [2] [a]), and we remit the matter to Supreme Court for sentencing on that conviction (*see* CPL 470.20 [4]).

Contrary to defendant's further contention, the record as a whole demonstrates that the court did not unjustifiably deny his request to waive counsel so that he could represent himself at trial (*see People v Providence*, 2 NY3d 579, 580-581 [2004]; *see also People v Malone*, 119 AD3d 1352, 1353 [4th Dept 2014], *lv denied* 24 NY3d 1003 [2014]). "[A] trial court must be satisfied that a defendant's waiver [of the right to counsel] is unequivocal, voluntary and intelligent; otherwise the waiver will not be recognized as effective" (*People v Smith*, 92 NY2d 516, 520 [1998]; *see generally People v Arroyo*, 98 NY2d 101, 103 [2002]; *People v McIntyre*, 36 NY2d 10, 16-17 [1974]). Here, the court conducted a "sufficiently searching inquiry" to determine whether defendant "appreciate[d] the dangers and disadvantages of giving up the fundamental right to counsel," and we conclude that the court properly determined that defendant's waiver did not satisfy the

rigorous requirements (*Smith*, 92 NY2d at 520 [internal quotation marks omitted]).

Finally, we reject defendant's contention that the court abused its discretion in denying his pro se supplemental motion to suppress evidence. Contrary to defendant's contention, his attorney had previously made a request for the same relief several months earlier, and the court denied that earlier application. Inasmuch as the record does not support a finding "that additional pertinent facts ha[d] been discovered by the defendant which he could not have discovered with reasonable diligence before the determination of the motion," we conclude that the court properly denied the supplemental motion (CPL 710.40 [4]; *see People v Fuentes*, 53 NY2d 892, 894 [1981]).

All concur except WHALEN, P.J., and WINSLOW, J., who dissent and vote to affirm in the following memorandum: We respectfully dissent. We disagree with the determination of our colleagues that there is no evidence from which the jury could have concluded that defendant shot the victim. We conclude that the conviction is supported by legally sufficient evidence and that the verdict is not against the weight of the evidence, and we would therefore affirm the judgment.

The evidence established, inter alia, that the victim, who lived next door to defendant's family members, was found in a public park with two gunshot wounds to her head approximately one week after defendant intimated to his cousin that he was going to kill the victim. Defendant was observed leaving the victim's home with a box of items shortly after the time when the victim is believed to have been shot, and historical location information from a global positioning system tracking device that was on defendant's body as a condition of his parole supervision established that defendant had been at both the victim's residence and the park where her body was discarded. Further, defendant was found to be in possession of the suspected murder weapon, a rifle, when he was arrested three days after the victim was killed.

Although, as the majority notes, there is evidence that defendant's girlfriend was also inside the victim's house with defendant at the time when the victim is believed to have been killed, there is no evidence to suggest that defendant's girlfriend, in contrast to defendant, had a plan to "eliminate" the victim or even touched the murder weapon, let alone used it to threaten or intimidate anyone. Defendant, on the other hand, used the rifle to threaten his cousin and continued to possess it until he jumped out of the vehicle that had belonged to the victim while fleeing from the police, and we conclude that such conduct is "relevant in establishing . . . the identity of the [shooter] in this circumstantial evidence case" (*People v Gamble*, 18 NY3d 386, 398 [2012], *rearg denied* 19 NY3d 833 [2012]; *see People v Perez*, 173 AD2d 162, 163 [1st Dept 1991], *lv denied* 78 NY2d 925 [1991]).

Viewing the evidence in the light most favorable to the People, as we must, we conclude that there is sufficient circumstantial evidence from which the jury could have rationally excluded

alternative explanations and determined that defendant was the person who shot the victim (*see People v Reed*, 22 NY3d 530, 534-535 [2014], *rearg denied* 23 NY3d 1009 [2014]; *People v Moore* [appeal No. 2], 78 AD3d 1658, 1659 [4th Dept 2010]). Although the majority recognizes that "the fact that no one saw defendant fire the shots that killed the victim does not render the evidence legally insufficient," the majority nevertheless seems to conclude that the evidence is legally insufficient because no one saw defendant pull the trigger. In our view, defendant's inculpatory statements and his continuing possession and use of the rifle in the days after the murder and immediately prior to his apprehension by police provided probative circumstantial evidence of his identity as the shooter, and we disagree with the majority's characterization of such evidence as "scant and weak." We further conclude that, when viewed in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

1417

CA 16-01639

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

JEFFREY'S AUTO BODY, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ALLSTATE INSURANCE COMPANY AND ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

BOUSQUET HOLSTEIN PLLC, SYRACUSE (CECELIA R.S. CANNON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered December 10, 2015. The order and judgment granted the motion of defendants for summary judgment dismissing the amended complaint.

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

Memorandum: Plaintiffs in these consolidated appeals operate automobile repair shops, and they commenced these actions to recover payment for repairs performed on behalf of defendants' insureds, i.e., first-party assignors, and persons involved in accidents with defendants' insureds, i.e., third-party assignors. Plaintiffs also commenced actions, later consolidated, in Supreme Court, Onondaga County, making similar allegations and seeking similar relief against Liberty Mutual Fire Insurance Company (*Liberty Mutual* action). In addition, plaintiff Nick's Garage, Inc. (Nick's) commenced actions in the Federal District Court for the Northern District of New York making similar allegations and seeking similar relief against, inter alia, Nationwide Mutual Insurance Company (*Nationwide* action) and, inter alia, Progressive Casualty Insurance Company (*Progressive* action). On prior appeals by defendant Allstate Insurance Company (Allstate), this Court modified an order by granting those parts of Allstate's motions seeking dismissal of the second cause of action, alleging quantum meruit, pursuant to CPLR 3211 (*Jeffrey's Auto Body, Inc. v Allstate Ins. Co.*, 125 AD3d 1342 [4th Dept 2015]; *Nick's Garage, Inc. v Allstate Ins. Co.*, 125 AD3d 1343 [4th Dept 2015]). Defendants thereafter moved for summary judgment dismissing the

remaining causes of action, i.e., the first cause of action, alleging breach of contract, and the third cause of action, alleging violation of General Business Law § 349.

While those motions were pending, the defendant insurers in the *Nationwide* and *Progressive* actions successfully moved for summary judgment dismissing the respective complaints in those actions (*Nick's Garage, Inc. v Nationwide Mut. Ins. Co.*, 101 F Supp 3d 185 [ND NY 2015]; *Nick's Garage, Inc. v Progressive Cas. Ins. Co.*, 2015 WL 1481683 [ND NY, March 31, 2015]). In addition, Supreme Court granted the defendant's motion for summary judgment dismissing the complaints in the *Liberty Mutual* action (*Nick's Garage, Inc. v Liberty Mut. Fire Ins. Co.*, Sup Ct, Onondaga County, Aug. 4, 2015, Murphy, J., index No. 2012EF2278).

Based upon the orders in the federal actions, defendants supplemented their motions and took the position that, inasmuch as the substance of Nick's allegations and legal theories in the federal actions are identical to those in the instant action, and plaintiffs had a full and fair opportunity to litigate them in Federal District Court, plaintiffs are barred from relitigating those issues in the instant action. The court agreed with defendants, concluding that, by virtue of the orders in the *Nationwide* and *Progressive* actions, and also the judgment in the *Liberty Mutual* action, Nick's is barred by collateral estoppel from litigating the claims in its second amended complaint, and plaintiff Jeffrey's Auto Body, Inc. (Jeffrey's) is barred from litigating the claims in its amended complaint. We reverse.

While these appeals were pending, the Second Circuit reversed and vacated in substantial part the District Court orders in the *Nationwide* and *Progressive* actions (*Nick's Garage, Inc. v Progressive Cas. Ins. Co.*, 875 F3d 107 [2d Cir 2017]; *Nick's Garage, Inc. v Nationwide Mut. Ins. Co.*, 2017 WL 5171217 [2d Cir, Nov. 8, 2017]), and Supreme Court vacated the judgment in the *Liberty Mutual* action pursuant to CPLR 5015 (*Nick's Garage, Inc. v Liberty Mut. Ins. Co.*, Sup Ct, Onondaga County, Sept. 1, 2016, Murphy, J., index No. 2012EF2278). In light of the orders of the Second Circuit in the *Nationwide* and *Progressive* actions, the orders of the Federal District Court, at least to the extent that they were reversed and vacated, may not be used to bar these actions (*see Church v New York State Thruway Auth.*, 16 AD3d 808, 810 [3d Dept 2005]; *Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35, 39 [1st Dept 1998]). Similarly, the vacated judgment in *Liberty Mutual* may not be used to bar these actions (*see Church*, 16 AD3d at 810). Contrary to defendants' contention, we conclude that the court's decision in *Liberty Mutual* " 'is ineffective as a bar to subsequent proceedings' " inasmuch as the court vacated the judgment that was based on that decision (*Ruben v American & Foreign Ins. Co.*, 185 AD2d 63, 65 [4th Dept 1992]).

We further conclude that defendants are not otherwise entitled to summary judgment dismissing the amended complaint and second amended complaint. Even assuming, arguendo, that defendants met their initial

burden, we agree with plaintiffs that their submissions in opposition to the motions raise triable issues of fact with respect to both the breach of contract and General Business Law § 349 causes of action (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). We therefore deny the motions and reinstate Jeffrey's amended complaint and Nick's second amended complaint.

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

1418

CA 16-01640

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

NICK'S GARAGE, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ALLSTATE INSURANCE COMPANY, ALLSTATE INDEMNITY COMPANY, AND ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

BOUSQUET HOLSTEIN PLLC, SYRACUSE (CECELIA R.S. CANNON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered December 10, 2015. The order and judgment granted the motion of defendants for summary judgment dismissing the second amended complaint.

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

Same memorandum as in *Jeffrey's Auto Body, Inc. v Allstate Ins. Co.* ([appeal No. 1] — AD3d — [Mar. 16, 2018] [4th Dept 2018]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

1421

CA 17-01123

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

MD3 HOLDINGS, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

AUGUST BUERKLE, DEFENDANT-APPELLANT.

MICHAEL J. KAWA, SYRACUSE, FOR DEFENDANT-APPELLANT.

HARRIS BEACH PLLC, SYRACUSE (DAVID M. CAPRIOTTI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered February 7, 2017. The order, insofar as appealed from, granted the motion of plaintiff for summary judgment on the complaint and entered judgment in plaintiff's favor.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied and the third and fourth ordering paragraphs are vacated.

Memorandum: Defendant contracted to purchase plaintiff's commercial building in the Town of DeWitt, Onondaga County. The contract included a standard mortgage contingency provision, and a bank subsequently issued defendant a conditional mortgage commitment letter. After receiving the mortgage commitment letter, however, defendant provided the bank with additional projections from his accountant that cast doubt upon the financial viability of the planned use of the building. Upon reviewing the accountant's analysis, the bank determined that "[defendant's] project will be reliant upon the speculative acquisition of an acceptable tenant," and it revoked the mortgage commitment. Without financing, the sale could not close.

Plaintiff then commenced this breach of contract action, alleging that defendant wrongfully induced the bank to revoke the mortgage commitment. Supreme Court, inter alia, granted plaintiff's ensuing motion for summary judgment on the complaint. Defendant now contends that the court erred in granting plaintiff's motion. We agree.

"When a mortgage commitment letter is revoked by the lender after the contingency period, in contrast to the failure to obtain a commitment letter in the first instance, the contractual provision relating to failure to obtain an initial commitment is inoperable, and the question becomes whether the revocation was attributable to any bad faith on the part of the purchaser" (*Anderson v Meador*, 56 AD3d

1030, 1038 [3d Dept 2008]; *see Blair v O'Donnell*, 85 AD3d 954, 955 [2d Dept 2011]). Thus, where a mortgage commitment is revoked in the absence of bad faith on the part of the purchaser, performance of the contract is excused and the purchaser avoids the "unenviable position of either having to proceed to closing [without financing], or to risk forfeiture of the down payment" (*Kapur v Stiefel*, 264 AD2d 602, 603 [1st Dept 1999]). Notably, the fact that a mortgage commitment was revoked based on new information supplied by the purchaser does not, by itself, establish that he or she acted in bad faith (*see Anderson*, 56 AD3d at 1038; *Kapur*, 264 AD2d at 603; *Creighton v Milbauer*, 191 AD2d 162, 163-167 [1st Dept 1993]). Here, plaintiff failed to establish as a matter of law that "the lender's revocation of the mortgage commitment was attributable to bad faith on the part of [defendant]" (*Blair*, 85 AD3d at 955), rather than to defendant's efforts to honor his duty of fair dealing to the bank by providing it with further information regarding the proposed transaction (*see Anderson*, 56 AD3d at 1038; *Kapur*, 264 AD2d at 603; *see also Garber v Giordano*, 16 AD3d 454, 455 [2d Dept 2005]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

1437

KA 15-00890

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

J.W. HARDY, ALSO KNOWN AS J.W. HARDY, JR.,
DEFENDANT-APPELLANT.

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

J.W. HARDY, JR., DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered February 23, 2015. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree (five counts), criminal possession of a controlled substance in the third degree (five counts) and criminal possession of a controlled substance in the fifth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted on counts 3 through 12 and count 14 of the indictment.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of five counts each of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]), and one count of criminal possession of a controlled substance in the fifth degree (§ 220.06 [5]). Defendant contends that County Court erred in denying his request to substitute his second assigned attorney and, at a minimum, should have conducted a more detailed inquiry with respect to his complaints about counsel's performance.

" '[A]lthough there is no rule requiring that a defendant who has filed a grievance against his attorney be assigned new counsel, [a] court [is] required to make an inquiry to determine whether defense counsel [can] continue to represent defendant in light of the grievance' " (*People v Tucker*, 139 AD3d 1399, 1400 [4th Dept 2016]). Here, we agree with defendant that the court should have "made at least some minimal inquiry in light of defense counsel's statement

that the defendant had filed a grievance against him," in order to determine whether defense counsel was properly able to continue to represent defendant (*People v Middleton*, 153 AD3d 937, 939 [2d Dept 2017]; *see People v Dodson*, 30 NY3d 1041, 1042 [2017]; *People v Smith*, 30 NY3d 1043, 1043-1044 [2017]). We thus conclude that the court thereby violated defendant's right to counsel and that defendant is entitled to a new trial (*see Tucker*, 139 AD3d at 1399-1400), prior to which he should be given the opportunity to retain counsel or be assigned new counsel if appropriate.

We have considered the remaining contentions in defendant's main brief and the contentions in his pro se supplemental brief and conclude that none warrants dismissal of the indictment.

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

1462

CA 17-00985

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

EULA C. DOZIER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

VERIZON, DEFENDANT-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (RYAN A. LEMA OF COUNSEL), AND LEIGH R. SCHACHTER, BASKING RIDGE, NEW JERSEY, FOR DEFENDANT-APPELLANT.

EULA C. DOZIER, PLAINTIFF-RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Monroe County (Renee F. Minarik, A.J.), entered August 18, 2016. The order denied defendant's motion to compel arbitration.

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

Memorandum: Defendant appeals from an order denying its motion to compel arbitration. Contrary to defendant's contention, there are "substantial question[s] whether a valid [arbitration] agreement was made" between the parties (CPLR 7503 [a]), specifically, whether plaintiff knowingly signed the alleged arbitration agreement and whether, if he did, the agreement is unconscionable (*see Matter of Frankel v Citicorp Ins. Servs., Inc.*, 80 AD3d 280, 284-287 [2d Dept 2010]; *Matter of Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 382-383 [1st Dept 2006]; *Oberlander v Fine Care*, 108 AD2d 798, 799 [2d Dept 1985]). Supreme Court therefore properly denied the motion, and we note that the statute requires that the above "substantial question[s] . . . be tried forthwith in said court" (CPLR 7503 [a]; *see generally Matter of County of Rockland [Primiano Constr. Co.]*, 51 NY2d 1, 7 [1980]). At the hearing, defendant will have the burden of proving that plaintiff knowingly signed the alleged arbitration agreement, and plaintiff will have the burden of proving that the agreement, if any, is unconscionable (*see Frankel*, 80 AD3d at 291; *see generally Matter of Waldron [Goddess]*, 61 NY2d 181, 183-184 [1984]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

1463

TP 17-00481

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

IN THE MATTER OF RYAN WEST, PETITIONER,

V MEMORANDUM AND ORDER

STATE UNIVERSITY OF NEW YORK AT BUFFALO,
OFFICE OF VICE PRESIDENT FOR STUDENT AFFAIRS,
RESPONDENT.

RICHARD L. SULLIVAN, BUFFALO, FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [John L. Michalski, A.J.], entered March 9, 2017) to annul a determination of respondent. The determination, inter alia, found that petitioner had nonconsensual sex with another student and placed him on persona non grata status.

It is hereby ORDERED that the determination is unanimously annulled without costs, the petition is granted, and respondent is directed to expunge all references to this matter from petitioner's school record.

Memorandum: In this CPLR article 78 proceeding transferred to this Court pursuant to CPLR 7804 (g), petitioner seeks to annul a determination of respondent that petitioner had nonconsensual sex with another student (complainant) based on complainant's alleged incapacitation. Respondent sanctioned petitioner by placing him on persona non grata status, barring him from the college campus, and making a notation of a disciplinary violation on petitioner's academic transcript. This Court may review whether "the determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence" (CPLR 7803 [4]; *see Matter of Haug v State Univ. of N.Y. at Potsdam*, 149 AD3d 1200, 1201 [3d Dept 2017]). "Substantial evidence" is defined as "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011]). We conclude that respondent's determination that the complainant lacked the ability to consent because of her incapacitation is not supported by substantial evidence. The complainant's testimony at the disciplinary hearing

contradicted her version with respect to the sequence of events made in her statement to the Buffalo Police Department, which statement was the most contemporaneous to the incident. Moreover, the affidavit and testimony of the witness who was with the complainant the morning following the incident was consistent with the complainant's earlier version of the sequence of events, which establishes that she could not have been incapacitated at the time of the incident. Thus, considering the record as a whole, respondent's determination is not supported by substantial evidence and must be annulled (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181 [1978]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

1484

CAF 17-01146

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

IN THE MATTER OF RUTH H. AND MATTHEW H.

STACY ALVORD, COMMISSIONER, OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-APPELLANT;

MARIE H. AND WILLIAM H., JR., RESPONDENTS-RESPONDENTS.

MEMORANDUM AND ORDER

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

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

ROBERT J. GALLAMORE, OSWEGO, FOR RESPONDENT-RESPONDENT WILLIAM H., JR.

Appeal from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered March 30, 2017 in a proceeding pursuant to Family Court Act article 10. The order, among other things, determined that the temporary removal of the children while the neglect petition was pending was in the children's best interests.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating that part of the order determining that petitioner failed to make reasonable efforts to prevent or eliminate the need for removal of the children from respondents' home and substituting therefor a determination that petitioner made such reasonable efforts, and vacating that part of the order requiring that petitioner arrange for a foster home for respondents' cat and as modified the order is affirmed without costs.

Memorandum: Petitioner commenced this neglect proceeding seeking, inter alia, the temporary removal of respondents' two children from their custody. Respondents consented to the temporary removal of the children and, after a hearing pursuant to Family Court Act § 1027, Family Court determined, inter alia, that the temporary removal of the children while the neglect petition was pending was in the children's best interests based upon respondents' failure to provide adequate nutrition for the children and the uninhabitable condition of respondents' home. The court also determined that petitioner failed to make reasonable efforts to prevent the removal of the children from respondents' custody, and ordered petitioner to find a foster home for respondents' cat.

We agree with petitioner that the court erred in determining that it failed to make reasonable efforts to prevent or eliminate the need for removal of the children from respondents' custody. We therefore modify the order accordingly. Although respondents consented to the temporary removal of the children, Family Court Act § 1021 requires that, under such circumstances, a petition shall be filed within three days of the removal, and "a hearing shall be held [on the petition] . . . and findings shall be made as required pursuant to [Family Court Act § 1027]." Family Court Act § 1027 (b) (ii) provides in relevant part that, "[i]n determining whether removal or continuing the removal of a child is necessary to avoid imminent risk to the child's life or health, the court shall consider and determine in its order . . . whether reasonable efforts were made . . . to prevent or eliminate the need for removal of the child from the home." Inasmuch as the record establishes that respondents were receiving considerable support and assistance during the months prior to the filing of the neglect petition, we conclude that the court's determination lacks a sound and substantial basis in the record (*see id.*; *see generally Nicholson v Scoppetta*, 3 NY3d 357, 379-380 [2004]; *Matter of Austin M. [Dale M.]*, 97 AD3d 1168, 1170-1171 [4th Dept 2012]).

Although the court found that petitioner failed to tailor its services to the particular problems that were facing respondents by failing to provide respondents with, inter alia, mental health services, anger management counseling, psychological evaluations, assistance with understanding the nutritional needs of their children, transportation to medical appointments and the pharmacy, and assistance locating safe and affordable housing, the evidence at the fact-finding hearing established that respondents were indeed receiving such services. Respondents were receiving public assistance for their rent, medical care and treatment of the father's mental health issues, as well as assistance buying groceries through the food stamp and WIC programs. In addition, petitioner provided respondents with a preventive caseworker who met with respondents up to four times per month. The caseworker scheduled and attended doctor's appointments with the mother and children, picked up a prescription at the pharmacy, brought food and cleaning products to the home, brought holiday food baskets for the family and toys for the children, and provided transportation assistance. The caseworker provided nutrition and hygiene information and helped respondents address the dangers and choking hazards in the home, such as the cigarette butts that were littered throughout their toddler's bedroom. The caseworker also helped respondents search for new housing and initiated the HUD application process for them, helped the father restart his social security income payments, and referred respondents to several other programs. On this record, we conclude that petitioner "made reasonable efforts to prevent or eliminate the need for removal of the children from [respondents'] home" (*Austin M.*, 97 AD3d at 1171).

We also agree with petitioner that the court lacked the authority to order it to find a foster home for respondents' cat, and we therefore further modify the order accordingly. "Family Court is a court of limited jurisdiction that cannot exercise powers beyond those

granted to it by statute" (*Matter of Johna M.S. v Russell E.S.*, 10 NY3d 364, 366 [2008]; Family Ct Act §§ 115, 1013), or by the New York Constitution (*see* NY Const, art VI, § 13). Inasmuch as animals are property (*see generally Mullaly v People*, 86 NY 365, 368 [1881]), and Family Court does not have jurisdiction over matters concerning personal property, we conclude that the court exceeded its authority in directing petitioner to find foster care for respondents' cat.

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

1494

CA 17-00883

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

CHRISTOPHER CALVERT,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

DUGGAN & DUGGAN GENERAL CONTRACTOR, INC.,
DEFENDANT-APPELLANT-RESPONDENT,
ET AL., DEFENDANT.

MURA & STORM, PLLC, BUFFALO (KRIS E. LAWRENCE OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

COLLINS & COLLINS ATTORNEYS, LLC, BUFFALO (MICHAEL SZCZYGIEL OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Cattaraugus County (Jeremiah J. Moriarty, III, J.), entered December 20, 2016. The order granted the motion of defendant Duggan & Duggan General Contractor, Inc., for summary judgment to the extent of dismissing plaintiff's third, fourth and fifth causes of action and otherwise denied the motion.

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

Memorandum: Duggan & Duggan General Contractor, Inc. (defendant) appeals from an order denying in part its motion for summary judgment seeking dismissal of the amended complaint against it. Specifically, Supreme Court denied the motion with respect to the first and second causes of action, which assert common-law negligence and the violation of Labor Law § 200 against defendant, respectively. Plaintiff cross-appeals from the order insofar as it granted those parts of defendant's motion with respect to the fourth and fifth causes of action, which assert violations of Labor Law § 241 (6) and the Vehicle and Traffic Law against defendant, respectively. Plaintiff raises no issues on his cross appeal with respect to Labor Law § 240 (1) and thus is deemed to have abandoned any issues with respect to the court's dismissal of the third cause of action (*see Hale v Odd Fellow & Rebekah Health Care Facility*, 302 AD2d 948, 949 [4th Dept 2003]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

Plaintiff commenced this action seeking damages for injuries he sustained when a coworker ran over him with a skid steer while they were performing landscaping work in preparation for the opening of an entertainment complex, Good Times of Olean (GTO). Defendant was the general contractor for the GTO construction project, which included the destruction of existing structures and the construction of restaurants, batting cages, and volleyball courts. Plaintiff and his coworker were employed by GTO and did not work for defendant. On the day of the accident, the coworker was using a skid steer that was owned by defendant to transport topsoil and mulch, and plaintiff was spreading topsoil on an island bed in the parking lot.

We agree with defendant that the court erred in denying those parts of its motion seeking summary judgment dismissing the causes of action against it based on common-law negligence and the violation of Labor Law § 200, and we therefore modify the order accordingly. Those causes of action should have been dismissed insofar as they allege that defendant failed to provide a safe place to work, inasmuch as the record establishes that plaintiff's accident resulted from the manner in which the work was performed by the coworker, and not from a defective condition on the premises (*see Poole v Ogiejko*, 62 AD3d 977, 977-978 [2d Dept 2009]).

Those causes of action also should have been dismissed insofar as they allege that defendant is liable because it had supervisory control over the work that was being performed by the coworker (*see Hargrave v LeChase Constr. Servs., LLC*, 115 AD3d 1270, 1271-1272 [4th Dept 2014]). Here, the evidence submitted by defendant established that plaintiff and the coworker were both employed by GTO, not by defendant. They were performing landscaping work in the parking lot of the complex, and were not involved in the construction work that was being performed by defendant. Defendant did not give any instructions to plaintiff and the coworker about what work to perform or how to perform their work, and no one from GTO was required to use the skid steer to perform his or her duties. The coworker chose to use the skid steer to move topsoil, and defendant permitted him to do so for such use. Although we are mindful that there might be circumstances in which a party may be said to exercise control over the manner of work based on the provision of the equipment to be used, we conclude that defendant did not exercise such control in this case (*see Hutchins v Finch, Pruyn & Co.*, 267 AD2d 809, 810 [3d Dept 1999]). The fact that defendant allowed a GTO employee to use its equipment to perform work on the grounds did not give defendant supervisory control over the manner in which the landscaping work was being performed by the GTO employees. To the contrary, the record establishes that defendant exercised no supervisory control over the landscaping work that was being performed by plaintiff and the coworker and, thus, defendant cannot be held liable for any injuries that were caused by the manner in which that work was being performed.

We further agree with defendant that the common-law negligence cause of action should have been dismissed insofar as it alleges that defendant was negligent in entrusting the skid steer to the coworker and permitting him to use it without adequate training. Defendant met

its initial burden by establishing that it did not "possess[ ] any special knowledge concerning a characteristic or condition peculiar to [the coworker] that rendered his use of [the skid steer] unreasonably dangerous" (*Monette v Trummer*, 105 AD3d 1328, 1330 [4th Dept 2013], *affd* 22 NY3d 944 [2013]), and plaintiff failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Although plaintiff's expert opined that, "without adequate training," a skid steer is "an unreasonably dangerous machine," he did not define what constitutes "adequate training," and he did not state that the coworker's past training in operating heavy machinery was inadequate.

Turning to plaintiff's cross appeal, we reject plaintiff's contention that the court erred in granting that part of defendant's motion for summary judgment dismissing the fourth cause of action, asserting the violation of Labor Law § 241 (6). Although it is undisputed that construction work was being performed by defendant at the complex where plaintiff was injured, plaintiff and the coworker, both employees of GTO and not of defendant, were performing landscaping work in the parking lot that was unrelated to the construction work (*see Spadola v 260/261 Madison Equities Corp.*, 19 AD3d 321, 323 [1st Dept 2005], *lv denied* 6 NY3d 770 [2006]; *see also Crossett v Wing Farm, Inc.*, 79 AD3d 1334, 1336-1337 [3d Dept 2010]), and the landscaping work being performed by plaintiff and the coworker was not itself "[c]onstruction work" or "[e]xcavation work" as those terms are defined by 12 NYCRR 23-1.4 (b) (13) and (19) (*see Moll v Brandwood, LLC*, 67 AD3d 1364, 1365-1366 [4th Dept 2009]). Moreover, defendant was not an owner, contractor, or an agent with respect to the landscaping work that was being performed (*see generally* Labor Law § 241 [6]).

Plaintiff further contends that the court erred in granting that part of defendant's motion for summary judgment dismissing the fifth cause of action. As amplified by the bill of particulars, that cause of action alleges that defendant is vicariously liable for the coworker's negligent acts under Vehicle and Traffic Law § 388. We reject that contention. Heavy equipment such as a skid steer may constitute a "[m]otor vehicle[]" (§ 125) for purposes of the statute if, at the time of the accident, the motor is running and the operator is moving the machine on a "[p]ublic highway" (§ 134; *Couture v Miskovitz*, 102 AD3d 723, 723-724 [2d Dept 2013]; *Matter of County of Westchester v Winstead*, 231 AD2d 630, 630 [2d Dept 1996]). Here, defendant met its initial burden by establishing that it was not liable to plaintiff under Vehicle and Traffic Law § 388 because, at the time of the accident, the skid steer was being operated in a parking lot that was not open to the public, rather than on a "[p]ublic highway" as that term is defined in Vehicle and Traffic Law § 134. Thus, the machine was not a "[m]otor vehicle[]" for purposes of liability under section 388 (§§ 125, 388 [2]; *see People v Thew*, 44 NY2d 681, 682 [1978]), and plaintiff failed to raise an issue of fact

(*see Zuckerman*, 49 NY2d at 562).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

1507

CA 17-01188

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

FARMERS NEW CENTURY INSURANCE COMPANY, AS SUBROGEE OF DIANE ANDERSON, AND DIANE ANDERSON, PLAINTIFFS-RESPONDENTS,

V ORDER

FEDEX FREIGHT, INC., DEFENDANT-APPELLANT, NIAGARA MOHAWK POWER CORPORATION, DOING BUSINESS AS NATIONAL GRID, DEFENDANT-RESPONDENT, ET AL., DEFENDANTS.

BURDEN, HAFNER & HANSEN, LLC, BUFFALO (DONNA L. BURDEN OF COUNSEL), FOR DEFENDANT-APPELLANT.

WHITE & WILLIAMS, LLP, PHILADELPHIA, PENNSYLVANIA (WILLIAM J. SCHMIDT OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered September 26, 2016. The order denied the motion of defendant FedEx Freight, Inc., for summary judgment.

Now, upon the stipulation of discontinuance as to defendant FedEx Freight, Inc. signed by the attorneys for plaintiffs and defendant FedEx Freight, Inc., and filed in the Erie County Clerk’s Office on February 16, 2018,

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

1512

CA 16-02212

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

IN THE MATTER OF DR. VIRGINIA M. FICHERA, PH.D., ROBIN ALLINGER, ALVIN G. HAMMOND, JEFFREY A. COUPERUS, TIA M. COUPERUS, DALE RITCHIE AND LORRAINE RITCHIE, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, ZONING BOARD OF APPEALS OF TOWN OF STERLING, PLANNING BOARD OF TOWN OF STERLING, TOWN OF STERLING, CHRISTOPHER J. CONSTRUCTION, LLC, AND CHRISTOPHER FERLITO, RESPONDENTS-RESPONDENTS.

LIPPES & LIPPES, BUFFALO (RICHARD J. LIPPES OF COUNSEL), FOR PETITIONERS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARIE CHERY-SEKHOBO OF COUNSEL), FOR RESPONDENT-RESPONDENT NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION.

CAMARDO LAW FIRM, P.C., AUBURN (KEVIN M. COX OF COUNSEL), FOR RESPONDENT-RESPONDENT ZONING BOARD OF APPEALS OF TOWN OF STERLING, PLANNING BOARD OF TOWN OF STERLING, AND TOWN OF STERLING.

THE STEELE LAW FIRM, P.C., OSWEGO (KIMBERLY A. STEELE OF COUNSEL), FOR RESPONDENTS-RESPONDENTS CHRISTOPHER J. CONSTRUCTION, LLC, AND CHRISTOPHER FERLITO.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered May 17, 2016 in a proceeding pursuant to CPLR article 78. The judgment denied the amended petition, and granted the motion of respondents Zoning Board of Appeals of Town of Sterling, Planning Board of Town of Sterling, and Town of Sterling and the cross motion of respondents Christopher J. Construction, LLC and Christopher Ferlito to dismiss the amended petition.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying those parts of the motion and cross motion seeking dismissal of the third cause of action and reinstating that cause of action, and by granting the relief sought in the third cause of action, thus vacating the determinations of respondent Zoning Board of Appeals of Town of Sterling granting the area variance and amended area variance, and as modified the judgment

is affirmed without costs, and the matter is remitted to respondent Zoning Board of Appeals of Town of Sterling for a new determination on petitioners' application.

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking, inter alia, to void certain actions of respondents New York State Department of Environmental Conservation (DEC) and Zoning Board of Appeals of Town of Sterling (ZBA) and to enjoin "the advancement" of a mine project on land owned by respondent Christopher J. Construction LLC, improperly sued as Christopher J. Construction, LLC (CJC). The ZBA, and respondents Planning Board of Town of Sterling, and Town of Sterling (collectively, Town respondents) moved and CJC and respondent Christopher Ferlito (collectively, Owners) cross-moved to dismiss the amended petition against them. Supreme Court denied the amended petition, and granted the motion and cross motion, but it did not issue a decision explaining its reasoning. We agree with petitioners that the court erred in dismissing the third cause of action, for the violation of General Municipal Law § 239-m, and in failing to grant the amended petition with respect to that cause of action.

We note at the outset that petitioners correctly contend that they have standing to challenge the administrative agency actions (*see generally Matter of Sierra Club v Village of Painted Post*, 26 NY3d 301, 310-311 [2015]; *Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 687 [1996]; *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 774-775 [1991]) and, despite their assertion to the contrary in support of their cross motion, the Owners have not attempted to refute petitioners' contention on appeal.

Petitioners contend that the ZBA violated General Municipal Law § 239-m when it granted the Owners' original application for an area variance without referring the matter to the appropriate "county planning agency or regional planning council" (§ 239-m [2]) and, as a result, the ZBA's action in granting that initial application should be deemed null and void. Inasmuch as the ZBA's sua sponte determination to grant an amended area variance was based on its previous determination to grant the original area variance, petitioners contend that the ZBA's action in granting the amended area variance should likewise be deemed null and void. Respondents contend that petitioners' challenge to the determination granting the initial area variance is time-barred because petitioners failed to challenge that determination within 30 days, as required by Town Law § 267-c (1). Respondents further contend that the determination granting the amended area variance, which was based on the findings underlying the initial area variance and was made after the appropriate referral under General Municipal Law § 239-m, is thus valid. On the record before us, we agree with petitioners.

"General Municipal Law § 239-m requires that a municipal agency, before taking final action on an application for [land use] approval, refer that application to a county or regional planning board for its recommendation" (*Matter of Ferrari v Town of Penfield Planning Bd.*, 181 AD2d 149, 152 [4th Dept 1992]; *see* § 239-m [2]). It is undisputed

that the ZBA did not refer the initial application for an area variance to the Cayuga County Planning Board (County Planning Board) before taking final action on that application. Contrary to the contention of the Town respondents, area variances are proposed actions for which referral is required under the statute (*see* § 239-m [3] [a] [v]). "The alleged failure to comply with the referral provisions of the statute is not a mere procedural irregularity but is rather a jurisdictional defect involving the validity of a legislative act" (*Matter of Ernalex Constr. Realty Corp. v City of Glen Cove*, 256 AD2d 336, 338 [2d Dept 1998]; *see Matter of 24 Franklin Ave. R.E. Corp. v Heaship*, 139 AD3d 742, 744 [2d Dept 2016]; *Matter of Smith v Town of Plattekill*, 13 AD3d 695, 697 [3d Dept 2004]; *see also Ferrari*, 181 AD2d at 152). Thus, the ZBA's failure to refer the initial application for an area variance to the County Planning Board renders the subsequent approval by the ZBA "null and void" (*Ferrari*, 181 AD2d at 152; *see 24 Franklin Ave. R.E. Corp.*, 139 AD3d at 744). We note that we have not considered arguments and documents submitted to this Court for the first time in a postargument submission on this appeal (*see Lake v Cowper Co.*, 249 AD2d 934, 935 [4th Dept 1998]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [1994]), and we decline to take judicial notice of the document submitted by the Town respondents inasmuch as it is outside the record on appeal (*see Matter of Warren v Miller*, 132 AD3d 1352, 1354 [4th Dept 2015]).

Contrary to the contentions of the Town respondents and the Owners, where, as here, there is a jurisdictional defect, "the statute of limitations does not begin to run upon the filing of [the] jurisdictionally defective document" (*Matter of Sullivan v Dunn*, 298 AD2d 975, 976 [4th Dept 2002]; *see Matter of Hampshire Mgt. Co., No. 20, LLC v Feiner*, 52 AD3d 714, 715 [2d Dept 2008]*; Matter of South Shore Audubon Socy. v Board of Zoning Appeals of Town of Hempstead,* 185 AD2d 984, 985 [2d Dept 1992]; *cf. Smith*, 13 AD3d at 697; *Matter of Stankavich v Town of Duanesburg Planning Bd.*, 246 AD2d 891, 892 [3d Dept 1998]; *see generally Matter of Foy v Schechter*, 1 NY2d 604, 615 [1956]). We thus conclude that the court erred in granting the motion and cross motion insofar as they sought dismissal of the third cause of action and that the ZBA's determination approving the initial application for an area variance is null and void. Inasmuch as the determination granting an amended area variance was based on the initial, void determination, we further conclude that the ZBA's approval of the amended area variance is likewise null and void. Although the Owners contend that the ZBA's determinations need not be voided because the ZBA's unanimous approval to grant the amended area variance was sufficient to override the recommendation of the "Cayuga County GML 239-l, m & n Review Committee" to disapprove the area variance (*see* General Municipal Law § 239-m [5]), we conclude that the subsequent vote cannot retroactively cure the jurisdictional defect in granting the original area variance upon which the ZBA relied in granting the amended area variance.

We therefore modify the judgment by denying those parts of the motion and cross motion seeking dismissal of the third cause of action and reinstating that cause of action, and by granting the relief

sought in the third cause of action, thus vacating the determinations of the ZBA granting the area variance and amended area variance. Because the ZBA's approvals of the area variance and amended area variance are null and void, we remit the matter to the ZBA for a new determination on petitioners' application (*see Matter of Eastport Alliance v Lofaro*, 13 AD3d 527, 529 [2d Dept 2004], *lv dismissed* 5 NY3d 846, 847 [2005]). In light of our determination, we do not address petitioners' contentions related to the second cause of action, which alleges that the ZBA violated Town Law § 267-b in granting the area variance and amended area variance.

Petitioners further contend that the court erred in granting those parts of the motion and cross motion seeking to dismiss the first cause of action, alleging the improper issuance of a negative declaration by the DEC under the State Environmental Quality Review Act ([SEQRA] ECL art 8) with respect to the proposed mining facility. In support of that contention, petitioners impermissibly rely on documents and reports that were generated well after the DEC made its determination (*see Matter of Raritan Baykeeper, Inc. v Martens*, 142 AD3d 1083, 1086 [2d Dept 2016]; *Matter of City of Saratoga Springs v Zoning Bd. of Appeals of Town of Wilton*, 279 AD2d 756, 760 [3d Dept 2001]; *see generally Matter of Kelly v Safir*, 96 NY2d 32, 39 [2001], *rearg denied* 96 NY2d 854 [2001]; *Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]). Considering only the "facts and record adduced before" the DEC at the time of its determination (*Kelly*, 96 NY2d at 39 [internal quotation marks omitted]), we conclude that the record establishes that the DEC took the requisite hard look and provided a reasoned elaboration of the basis for its determination regarding the potential impacts of the project on traffic, noise, water, agricultural land requirements, and wildlife (*see generally Matter of Chinese Staff & Workers' Assn. v Burden*, 19 NY3d 922, 924 [2012]; *Matter of Marilla v Travis*, 151 AD3d 1588, 1591 [4th Dept 2017]). We thus further conclude that the DEC "complied with the requirements of SEQRA in issuing the negative declaration . . . , [that] the 'designation as a type I action does not, per se, necessitate the filing of an environmental impact statement . . . , [and that no such statement] was . . . required here' " (*Matter of Wooster v Queen City Landing LLC*, 150 AD3d 1689, 1692 [4th Dept 2017]).

Contrary to petitioners' remaining contentions with respect to their fourth cause of action, there are no identifiable violations of the Freedom of Information Law ([FOIL] Public Officers Law art 6) or the Open Meetings Law (art 7) that would warrant relief, and thus the court properly granted those parts of the motion and cross motion seeking dismissal of that cause of action. With respect to petitioners' FOIL challenges for which administrative remedies have been exhausted (*see* Public Officers Law § 89 [4] [a]; *Matter of Bradhurst Site Constr. Corp. v Zoning Bd. of Appeals, Town of Mount Pleasant*, 128 AD3d 817, 818 [2d Dept 2015]), there is no evidence that any documents were wrongfully withheld (*cf. Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67, 79 [2017]; *Matter of Bottom v Fischer*, 129 AD3d 1604, 1605 [4th Dept 2015]). Moreover, petitioners have failed to establish that the Town respondents released any

documents or records "because of the commencement of litigation[, and have] failed to produce any evidence that respondents did not act in good faith" (*Matter of Friedland v Maloney*, 148 AD2d 814, 816 [3d Dept 1989]; *see Matter of Cook v Nassau County Police Dept.*, 140 AD3d 1059, 1060-1061 [2d Dept 2016]). We thus conclude that any technical violations in the mode or manner of the Town's responses to the FOIL requests would not warrant the imposition of costs or counsel fees (*see generally Matter of Beechwood Restorative Care Ctr. v Signor*, 11 AD3d 987, 988 [4th Dept 2004], *affd* 5 NY3d 435 [2005]).

With respect to the challenges based on the Open Meetings Law, it is well settled that " '[a]n unintentional failure to fully comply with the notice provisions required by [the Open Meetings Law] shall not alone be grounds for invalidating any action taken at a meeting of a public body' . . . Thus, not every violation of the Open Meetings Law automatically triggers its enforcement sanctions" (*Matter of Britt v Niagara County*, 82 AD2d 65, 69-70 [4th Dept 1981]; *see Matter of New York Univ. v Whalen*, 46 NY2d 734, 735 [1978]). Even assuming, arguendo, that petitioners established technical violations of the Open Meetings Law, we conclude that they have failed to establish that they were aggrieved by any unintentional failures to comply fully with the notice provisions or by any lack of information on the Town's website (*see Matter of Thorne v Village of Millbrook Planning Bd.*, 83 AD3d 723, 726 [2d Dept 2011], *lv denied* 17 NY3d 711 [2011]), and thus they failed to establish the requisite good cause to void any action taken by the Town respondents (*see Britt*, 82 AD2d at 69-70; *cf. Matter of Rampello v East Irondequoit Cent. Sch. Dist.*, 236 AD2d 797, 798 [4th Dept 1997]; *see also Matter of Edwards v Incorporated Vil. of Hempstead*, 122 AD3d 627, 628 [2d Dept 2014]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

1514

CA 17-00915

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

LORI E. ULLMAN, M.D., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MEDICAL LIABILITY MUTUAL INSURANCE COMPANY,
DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

BOND SCHOENECK & KING, PLLC, BUFFALO (SHARON M. PORCELLIO OF COUNSEL), FOR DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (MICHAEL E. APPELBAUM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered October 20, 2016. The order, insofar as appealed from, denied the motion of defendant Medical Liability Mutual Insurance Company to dismiss the complaint against it.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion of defendant Medical Liability Mutual Insurance Company is granted, and the complaint against it is dismissed.

Memorandum: Plaintiff, a licensed physician, commenced this action against Medical Liability Mutual Insurance Company (defendant), her medical malpractice insurer, seeking to recover damages that allegedly resulted when defendant settled a malpractice claim on her behalf. In her complaint, plaintiff asserted, inter alia, two causes of action seeking declarations voiding her written consent to settle and vacating the settlement, respectively. Plaintiff alleged, inter alia, that defendant's employees fraudulently misrepresented the effect of her refusal to consent to settle, thereby inducing her to consent. We agree with defendant that Supreme Court erred in denying its motion pursuant to CPLR 3211 (a) (1), (5) and (7) to dismiss the complaint against it.

We agree with defendant that the court erred in denying that part of its motion seeking to dismiss the cause of action for a violation of General Business Law § 349. The allegations in the complaint demonstrate that this "is merely a private contract dispute over [insurance] policy coverage, which does not affect[] the consuming public at large, and therefore falls outside the purview of General

Business Law § 349" (*Carlson v American Intl. Group, Inc.*, 30 NY3d 288, 309 [2017] [internal quotation marks omitted]; *see Shou Fong Tam v Metropolitan Life Ins. Co.*, 79 AD3d 484, 486 [1st Dept 2010]).

We also agree with defendant that the court erred in denying that part of its motion seeking to dismiss the cause of action for breach of contract. Plaintiff did not identify the provisions that defendant allegedly breached, and thus she has failed to state a cause of action for breach of contract (*see Reznick v Bluegreen Resorts Mgt., Inc.*, 154 AD3d 891, 893 [2d Dept 2017]; *Sutton v Hafner Valuation Group, Inc.*, 115 AD3d 1039, 1042 [3d Dept 2014]). We nevertheless acknowledge that every contract contains an implied covenant of good faith and fair dealing encompassing any promise that a reasonable party would understand to be included (*see Rowe v Great Atl. & Pac. Tea Co., Inc.*, 46 NY2d 62, 68-69 [1978]*; Waterways at Bay Pointe Homeowners Assn., Inc. v Waterways Dev. Corp.*, 132 AD3d 975, 977 [2d Dept 2015]), but we conclude that plaintiff likewise failed to state a cause of action for breach of the implied covenant of good faith and fair dealing (*see Aventine Inv. Mgt. v Canadian Imperial Bank of Commerce*, 265 AD2d 513, 514 [2d Dept 1999]). In the context of an insurance contract, "a reasonable insured would understand that the insurer promises to investigate in good faith and pay covered claims" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]; *see Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187, 194 [2008]; *Gutierrez v Government Empls. Ins. Co.*, 136 AD3d 975, 976 [2d Dept 2016]). "An insured may also bargain for the peace of mind, or comfort, of knowing that it will be protected in the event of a catastrophe" (*Bi-Economy Mkt., Inc.*, 10 NY3d at 194). Here, it is undisputed that plaintiff received the benefit of defendant investigating the claim, negotiating the settlement, paying the settlement in full, and securing a general release.

We further agree with defendant that the court erred in denying that part of its motion seeking to dismiss the causes of action for fraudulent misrepresentation, negligent misrepresentation, and fraudulent inducement. Actual pecuniary damage is an element of any cause of action asserting fraud (*see Connaughton v Chipotle Mexican Grill, Inc.*, 135 AD3d 535, 539 [1st Dept 2016], *affd* 29 NY3d 137 [2017]), or negligent misrepresentation (*see White v Guarente*, 43 NY2d 356, 362-363 [1977]; *Mega Group, Inc. v Pechenik & Curro, P.C.*, 32 AD3d 584, 587 [3d Dept 2006]; *see generally Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]). Here, the medical malpractice claim was settled with no admission of wrongdoing by plaintiff, no monetary payment by her, and no liability attributed to her. Moreover, to the extent that plaintiff alleges that she lost staff privileges at a hospital, we conclude that the loss of those privileges did not result from the settlement itself, but from plaintiff's own actions in failing to disclose it. Plaintiff thus failed to allege that she suffered any actual pecuniary damage as a result of defendant's conduct, and she therefore failed to state a cause of action for fraud (*see Connaughton*, 135 AD3d at 539-540) or negligent misrepresentation (*see generally White*, 43 NY2d at 362-363).

With respect to the two causes of action seeking declarations, defendant contends that plaintiff cannot obtain that relief based on the absence of necessary parties (*see* CPLR 3211 [10]; *see also* CPLR 1001), and we agree. As a preliminary matter, we note that, contrary to plaintiff's assertion, defendant's contention is properly before us inasmuch as "[t]he absence of a necessary party may be raised at any stage of the proceedings, by any party or by the court on its own motion" (*Matter of Hudson Riv. Sloop Clearwater, Inc. v Town Bd. of the Town of Coeymans*, 144 AD3d 1274, 1275 [3d Dept 2016] [internal quotation marks omitted]; *see Matter of Jim Ludtka Sporting Goods, Inc. v City of Buffalo Sch. Dist.*, 48 AD3d 1103, 1103-1104 [4th Dept 2008]). Although the medical malpractice claimants were initially joined as defendants in this action, the court in the order on appeal dismissed the complaint against them, and plaintiff has not cross-appealed. Here, the medical malpractice claimants were parties to the settlement agreement and received a monetary payment pursuant to it, and thus they are necessary parties to any declaration as to its validity. In the absence of those necessary parties, we will not issue a declaration in favor of any party (*see Wood v City of Salamanca*, 289 NY 279, 283 [1942]; *White v Nationwide Mut. Ins. Co.*, 228 AD2d 940, 941 [3d Dept 1996]). We therefore dismiss the two causes of action seeking a declaration.

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

1536

CA 17-00619

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

JOHN HOKENSON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SEARS, ROEBUCK AND CO., DEFENDANT-RESPONDENT.

ELLIOTT STERN CALABRESE, LLP, ROCHESTER (DAVID S. STERN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARCLAY DAMON, LLP, ROCHESTER (SANJEEV DEVABHAKTHUNI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (William K. Taylor, J.), entered December 12, 2016. The order granted the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that he sustained when he fell from a ladder that was manufactured in 1972 and sold by defendant. Plaintiff asserted causes of action for negligence and strict products liability predicated on design defect, manufacturing defect, and failure to warn. Defendant moved for summary judgment dismissing the complaint, and Supreme Court granted the motion. We affirm.

Initially, we note that, on appeal, plaintiff has not challenged the dismissal of his failure to warn claim, and plaintiff has therefore abandoned any contentions with respect thereto (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). Furthermore, to the extent that plaintiff relies on the doctrine of res ipsa loquitur, that issue is not properly before us inasmuch as plaintiff has raised it for the first time on appeal (*see id.* at 985).

We conclude that the court properly granted the motion with respect to the remainder of the complaint, i.e., the negligence cause of action and the strict products liability cause of action to the extent that it is predicated on design and manufacturing defects in the ladder (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Defendant met its initial burden by establishing through the affidavit of its expert that the ladder was not defective, met all applicable industry standards for safety, and was reasonably safe for its intended use when it was manufactured (*see Preston v Peter Luger*

Enters., Inc., 51 AD3d 1322, 1323-1326 [3d Dept 2008]; *McArdle v Navistar Intl. Corp*, 293 AD2d 931, 932 [3d Dept 2002]; *Steinbarth v Otis El. Co.*, 269 AD2d 751, 752 [4th Dept 2000]). As noted by the court, the expert affidavit submitted by plaintiff in opposition failed to establish that the expert was qualified to render an opinion with respect to the alleged manufacturing and/or design defects of the ladder. "An expert is qualified to proffer an opinion if he or she is 'possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable' " (*O'Boy v Motor Coach Indus., Inc.*, 39 AD3d 512, 513-514 [2d Dept 2007]). Here, plaintiff's expert established that he was an occupational safety and health consultant, but he " 'failed to present evidence that he had any practical experience with, or personal knowledge of, [ladders] such as [the one] at issue here, nor did [he] demonstrate such personal knowledge or experience with [ladder manufacture or design] in general' " (*Stever v HSBC Bank USA, N.A.*, 82 AD3d 1680, 1681 [4th Dept 2011], *lv denied* 17 NY3d 705 [2011]). Consequently, we conclude that the affidavit of plaintiff's expert was insufficient to raise a triable issue of fact (*see id.*).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

1546

CAF 16-00298

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

IN THE MATTER OF MICHAEL S.

ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

BRITTANY R., RESPONDENT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (ELIZABETH deV. MOELLER OF COUNSEL), FOR RESPONDENT-APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (CATHERINE Z. GILMORE OF COUNSEL), FOR PETITIONER-RESPONDENT.

SUSAN B. MARRIS, MANLIUS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered December 17, 2015 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.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order that, among other things, adjudged that she neglected the subject child. We reject the contention of the mother, who did not appear at the fact-finding hearing, that Family Court abused its discretion in denying her attorney's request for a mid-hearing adjournment. Here, the evidence adduced by petitioner, including medical records, established that the mother and her boyfriend brought the child to the hospital with significant bruising on the left side of his face, a dark bruise on his right cheek, a missing upper left tooth, and lacerations and bruising on his lips. Among other things, the medical records also established that the evaluating physicians determined that the child's injuries, which included bruising at different stages of healing, were the result of non-accidental trauma and were not consistent with the mother's explanation that such injuries resulted from the child's sleep disturbances. With respect to the mother's contention that the court erred in denying her attorney's request to adjourn the hearing to obtain an unidentified medical witness to support her explanation of the child's injuries, "the mother's attorney failed to demonstrate that the need for the adjournment to subpoena [a] witness was not based on a lack of due diligence on the part of the mother or her

attorney" (*Matter of Sophia M.G.-K. [Tracy G.-K.]*, 84 AD3d 1746, 1747 [4th Dept 2011]; *see Matter of Steven B.*, 6 NY3d 888, 889 [2006]; *Matter of Latonia W. [Anthony W.]*, 144 AD3d 1692, 1693 [4th Dept 2016], *lv denied* 28 NY3d 914 [2017]). Moreover, in light of the evaluating physicians' rejection of the mother's explanation and a follow-up medical record indicating that the child exhibited no new injuries while in foster care despite his continuing sleep disturbances at that time, the mother's unsubstantiated speculation that her attorney would have been able to obtain some unidentified medical witness to rebut petitioner's evidence is insufficient to constitute good cause for an adjournment (*see* § 1048 [a]; *see generally Matter of Evelyn R. [Franklin R.]*, 117 AD3d 957, 957-958 [2d Dept 2014]; *Matter of Westchester County Dept. of Social Servs. v Felicia R.*, 215 AD2d 671, 672-673 [2d Dept 1995], *lv denied* 86 NY2d 708 [1995]).

Contrary to the mother's further contention, we conclude upon our review of the record that petitioner established by a preponderance of the evidence that the mother knew or should have known that the child either was being beaten by her boyfriend or was in imminent danger of such harm (*see* Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [i]; *Matter of Eddie E.*, 219 AD2d 719, 719-720 [2d Dept 1995]). The mother's failure to protect the child from that harm supports the court's finding of neglect against her (*see Eddie E.*, 219 AD2d at 719-720).

Finally, contrary to the mother's contention, " 'the record establishes that, viewed in the totality of the proceedings, [the mother] received meaningful representation' " (*Matter of Bentleigh O. [Jacqueline O.]*, 125 AD3d 1402, 1404 [4th Dept 2015], *lv denied* 25 NY3d 907 [2015]). The mother's contention that she was denied meaningful representation by her attorney's failure to retain and call a medical witness in a timely manner to rebut the evidence establishing the cause of the child's injuries "is 'impermissibly based on speculation, i.e., that favorable evidence could and should have been offered on [her] behalf' " (*Matter of Amodea D. [Jason D.]*, 112 AD3d 1367, 1368 [4th Dept 2013]). In particular, the mother failed to "demonstrate[] that there were 'relevant experts who would have been willing to testify in a manner helpful [and favorable] to [her] case[]' . . . , and her speculation that [her attorney] could have found an expert with a contrary, exculpatory medical opinion is insufficient to establish deficient representation" (*Matter of Julian P. [Colleen Q.]*, 129 AD3d 1222, 1224-1225 [3d Dept 2015]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

1548

CAF 16-02234

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

IN THE MATTER OF WAYNE COUNTY DEPARTMENT OF SOCIAL SERVICES, ON BEHALF OF MARGUERITE JACKSON, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LISA LOREN, RESPONDENT-APPELLANT.

ROBERT A. DINIERI, CLYDE, FOR RESPONDENT-APPELLANT.

ELIZA HEATON, LYONS, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Wayne County (Dennis M. Kehoe, J.), entered October 12, 2016 in a proceeding pursuant to Family Court Act article 4. The order denied the objections of respondent to the order of the Support Magistrate.

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

Memorandum: Respondent mother appeals from an order denying her objections to the order of the Support Magistrate, which, inter alia, determined that the mother willfully violated a prior order of child support and denied her motion to cap her unpaid child support arrears at $500 pursuant to Family Court Act § 413 (1) (g).

We reject the mother's contention that petitioner failed to establish that she willfully violated the order of support. There is a statutory presumption that a respondent has sufficient means to support his or her minor children (*see* Family Ct Act § 437; *Matter of Powers v Powers*, 86 NY2d 63, 68-69 [1995]), and petitioner presented evidence that the mother failed to pay child support as ordered, which constitutes " 'prima facie evidence of a willful violation' " (*Matter of Roshia v Thiel*, 110 AD3d 1490, 1492 [4th Dept 2013], *lv dismissed in part and denied in part* 22 NY3d 1037 [2013], quoting § 454 [3] [a]). The burden then shifted to the mother to present "some competent, credible evidence of [her] inability to make the required payments" (*Powers*, 86 NY2d at 70). The mother failed to meet that burden because she "failed to present evidence that [she] made 'reasonable efforts to obtain gainful employment' " (*Matter of Christine L.M. v Wlodek K.*, 45 AD3d 1452, 1452 [4th Dept 2007]). The mother testified that her only sources of income were food stamps and Medicaid benefits, and that she could not work as a result of a medical disability. The Support Magistrate, however, found that the

mother's explanation was "totally lacking in credibility." The Support Magistrate was in the best position to evaluate the mother's credibility, and her determination is entitled to great deference (*see Matter of Kasprowicz v Osgood*, 101 AD3d 1760, 1761 [4th Dept 2012], *lv denied* 20 NY3d 864 [2013]). Furthermore, the record establishes that the mother failed to submit competent medical evidence to substantiate her claim that she was unable to work because of a disability (*see Matter of Yamonaco v Fey*, 91 AD3d 1322, 1323 [4th Dept 2012], *lv denied* 19 NY3d 803 [2012]; *Matter of Wilson v LaMountain*, 83 AD3d 1154, 1156 [3d Dept 2011]; *Matter of Gray v Gray*, 52 AD3d 1287, 1288 [4th Dept 2008], *lv denied* 11 NY3d 706 [2008]).

Contrary to the mother's further contention, Family Court properly denied her objections to the Support Magistrate's order insofar as it denied her motion to cap her unpaid child support arrears at $500 pursuant to Family Court Act § 413 (1) (g) (*see Roshia*, 110 AD3d at 1492; *Matter of Sutkowy v J.B.*, 196 Misc 2d 1005, 1008-1009 [Fam Ct, Onondaga County 2003]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

1555

CAF 17-01310

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

IN THE MATTER OF LYNNSEY SORRENTINO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEAL B. KEATING, RESPONDENT-RESPONDENT.

TANYA J. CONLEY, ESQ., ATTORNEY FOR THE CHILD,
APPELLANT.

THE SAGE LAW FIRM GROUP, PLLC, BUFFALO (KATHRYN FRIEDMAN OF COUNSEL), FOR PETITIONER-APPELLANT.

TANYA J. CONLEY, ROCHESTER, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

LISA A. SADINSKY, ROCHESTER, FOR RESPONDENT-RESPONDENT.

Appeals from an order of the Family Court, Monroe County (Thomas W. Polito, R.), entered March 23, 2017 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded the parties joint legal custody and shared physical custody of their child.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by awarding petitioner primary physical custody of the child and vacating that part of the order requiring that petitioner relocate her residence and as modified the order is affirmed without costs and the matter is remitted to Family Court, Monroe County, to fashion an appropriate visitation schedule.

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner mother and the Attorney for the Child (AFC) appeal from an order that, inter alia, awarded the mother and respondent father joint legal custody and shared physical custody of their child, and required the mother to relocate and maintain a residence "within 35 minutes[']travel of the [f]ather's current residence at Brockport College." Contrary to the contention of the mother and the AFC, we conclude that Family Court's determination that joint legal custody is in the best interests of the child "is supported by the requisite 'sound and substantial basis in the record' and thus will not be disturbed" (*Matter of Stilson v Stilson*, 93 AD3d 1222, 1223 [4th Dept 2012]).

We agree with the mother and the AFC, however, that the court's

determination that shared physical custody without designation of a primary physical residential parent is in the best interests of the child lacks a sound and substantial basis in the record. Here, the mother and the father were never married. They met when the mother, then an undergraduate student, took a class taught by the father, a college professor. The parties did not live together while the mother attended the college where the father is employed, and they moved to the Buffalo area several months before the child was born. The parties then moved to Holley, where they resided together with the child for less than two years before the mother moved to Marcellus. The father then moved to Brockport.

Although the father has made accommodations for the child at his apartment in the dormitory on the college campus where he works and now resides, the father has considerable travel obligations associated with his professorship. By the father's own testimony, he is "under a lot of professional pressure" to travel extensively for work, resulting in his periodic absence from the Brockport area for as long as five to six weeks at a time. We note that the court expressed concern that the father "downplay[ed] the amount of necessary travel for his professional obligations." The mother's home is about 90 miles away from the residence hall in which the father lives. She has a job with no travel obligations, an apartment where the child has his own room, and a support system close to where she lives and works. The mother has been the child's primary caregiver since he was born. She manages the child's day-to-day care, and takes him to appointments with his pediatrician, speech pathologist, and dentist. Thus, although both parties appear to be fit and loving parents, the evidence at the hearing establishes that the mother is better able to provide for the child's care and is better suited to serve as the primary residential parent (*see Hendrickson v Hendrickson*, 147 AD3d 1522, 1523 [4th Dept 2017]). We therefore conclude that the best interests of the child are served by awarding the mother primary physical custody, and we modify the order accordingly.

Finally, relocation is but "one factor among many" to be considered by a court making an initial custody determination (*Matter of Jacobson v Wilkinson*, 128 AD3d 1335, 1336 [4th Dept 2015]; *see Matter of Quistorf v Levesque*, 117 AD3d 1456, 1457 [4th Dept 2014]). "[T]he relevant issue is whether it is in the best interests of the child to reside primarily with the mother or the father" (*Matter of Saperston v Holdaway*, 93 AD3d 1271, 1272 [4th Dept 2012], *appeal dismissed* 19 NY3d 887 [2012], 20 NY3d 1052 [2013]). Inasmuch as it is in the best interests of the child to reside with the mother in her current residence where the child has stability and support, we agree with the mother and the AFC that the court erred in ordering the mother to relocate to be closer to the father's residence. We therefore further modify the order accordingly, and we remit the matter to Family Court to fashion an appropriate visitation schedule.

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

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KA 15-00251

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARCUS C. FREEMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (TIMOTHY DAVIS 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 (Victoria M. Argento, J.), rendered December 4, 2014. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, attempted murder in the second degree, assault in the first degree, criminal use of a firearm in the first degree (two counts) and criminal sexual act in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of attempted murder in the second degree, assault in the first degree and criminal use of a firearm in the first degree under counts two, three and six of the indictment, and vacating the sentences imposed thereon, and as modified the judgment is affirmed and a new trial is granted on those counts.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1] [count one]), attempted murder in the second degree (§§ 110.00, 125.25 [1] [count two]), assault in the first degree (§ 120.10 [1] [count three]), criminal use of a firearm in the first degree (§ 265.09 [1] [a] [count six]), criminal sexual act in the first degree (§ 130.50 [1] [count seven]), and a second count of criminal use of a firearm in the first degree (§ 265.09 [1] [b] [count eight]). Counts one, two, three and six relate to the shooting of two people, one of whom died, while counts seven and eight are related to defendant’s sexual assault of his then girlfriend at gunpoint the night before the shooting.

We agree with defendant that County Court erred in refusing to charge the jury on the defense of justification insofar as it related to counts two, three and six. The evidence at trial established that

defendant was arrested in the spring of 2013 for sexually abusing a 12-year-old girl. Shortly thereafter, defendant was shot in broad daylight outside of his home, and the girl's father and uncle were arrested for that shooting. Several months later, defendant came home from work for an early lunch and observed a small group of people outside assisting defendant's girlfriend by packing a moving truck with her belongings. Included in that group was the brother of defendant's girlfriend, Martin Moore, and Walesy Alvarez, the mother of the sexual abuse victim and Moore's girlfriend at the time.

Defendant testified at trial that, as he stopped his vehicle on the street in front of his apartment, Moore approached him in an aggressive manner while holding something in his hand. Fearing that he was about to be shot again, defendant pulled out a gun that he carried with him for protection and opened fire on Moore. One of the bullets struck Moore, who ran into the house. Another bullet struck Alvarez in the head and killed her as she was sitting in the driver's seat of Moore's vehicle. Defendant fired additional shots at Moore as he chased him into the house. Moore ran into the attic, and defendant left the house after running out of ammunition. The police found and arrested defendant the next day.

According to defendant, he intentionally shot at Moore in self-defense, but he did not see Alvarez in the vehicle and did not intend to shoot her. In fact, defendant testified at trial that he did not even realize that Alvarez had been shot. However, Moore testified that, after defendant shot him, Alvarez yelled something, whereupon defendant fired another shot, the one that evidently struck Alvarez.

In considering whether the trial court's charge to the jury was adequate, we must consider the record in the light most favorable to defendant (*see People v Padgett*, 60 NY2d 142, 144 [1983]). "[I]f on any reasonable view of the evidence, the fact finder might have decided that defendant's actions were justified, the failure to charge the defense constitutes reversible error" (*id.* at 145; *see* Penal Law § 35.15 [2] [a], [c]; *People v Maher*, 79 NY2d 978, 982 [1992]).

Here, viewing the evidence in the light most favorable to defendant, we conclude that "it would not have been irrational for the jury to credit . . . defendant's account of the incident" (*People v Irving*, 130 AD3d 844, 845 [2d Dept 2015]; *cf. People v Gentile*, 23 AD3d 1075, 1075 [4th Dept 2005], *lv denied* 6 NY3d 813 [2006]). Although defendant's claim that he shot Moore in self-defense is dubious, a trial court is required to give the justification charge even where the defendant's version of events is "extraordinarily unlikely" (*People v Smith*, 62 AD3d 411, 411 [1st Dept 2009], *lv denied* 12 NY3d 929 [2009]). We note that the jury evidently struggled with its verdict inasmuch as it deliberated for more than two days before reaching a verdict, and it requested readbacks of large portions of testimony.

We reject the People's contention that defendant was not entitled to the justification charge because he had a duty to retreat. Under

the circumstances of this case, the questions whether defendant could have retreated or was under a duty to retreat are questions of fact to be determined by the jury (*see e.g. People v Berk*, 88 NY2d 257, 267 [1996], *cert denied* 519 US 819 [1996]; *People v Daniel*, 35 AD3d 877, 878 [2d Dept 2006], *lv denied* 8 NY3d 945 [2007]; *cf. People v Alston*, 104 AD2d 653, 654 [2d Dept 1984]). We thus conclude that the court should have granted defendant's request to charge the jury on the defense of justification with respect to counts two, three and six.

We reject defendant's contention, however, that the court should have charged the jury on the defense of justification with respect to count one, charging murder in the second degree. The justification defense does not apply to the intentional murder of Alvarez, who was shot while sitting in Moore's vehicle and posed no conceivable threat to defendant. The court did not instruct the jury on transferred intent, and the People's theory, as set forth in the indictment and argued at trial, was that defendant intentionally shot and killed Alvarez. As noted, defendant testified that he shot at Moore in self-defense and that he did not even know that Alvarez had been shot. If the jury had believed defendant's testimony, it would have acquitted him of intentional murder inasmuch as he testified that he did not intend to kill Alvarez. Because the jury convicted defendant of murder in the second degree, we must presume that it followed the court's instructions and concluded that defendant intended to kill Alvarez. Of course, if defendant intended to kill Alvarez, then he was not justified in doing so inasmuch as she posed no threat to him.

Defendant further contends that the verdict with respect to counts seven and eight is against the weight of the evidence. We reject that contention. The testimony of defendant's girlfriend concerning the sexual assault perpetrated against her by defendant was not incredible as a matter of law, and defendant's denial of the assault presented the jury with a credibility determination. The jury credited the victim's testimony, which was corroborated by the fact that the morning after the assault she secreted her children away and attempted to move out of the residence she had shared with defendant. It was during that attempt to move that defendant shot two of the people at the residence. Viewing the evidence in light of the elements of the crimes in counts seven and eight as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence with respect to those counts (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

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KA 15-00250

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARCUS C. FREEMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (TIMOTHY DAVIS 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 (Victoria M. Argento, J.), rendered December 4, 2014. The judgment convicted defendant, upon his plea of guilty, of rape in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of rape in the second degree (Penal Law § 130.30 [1]). We reject defendant's contention that his plea must be vacated pursuant to *People v Fuggazzatto* (62 NY2d 862 [1984]), which provides that where a defendant pleads guilty to a second indictment "on the understanding that the sentence imposed would run concurrently with and not exceed" the sentence imposed on the first indictment (*id.* at 863), the plea to the second indictment must be vacated where the sentence imposed on the first indictment has been set aside.

Here, we are modifying the judgment in *People v Freeman* (— AD3d — [Mar. 16, 2018] [4th Dept 2018]) by reversing those parts convicting defendant of counts two, three and six, vacating the sentences imposed thereon, and granting a new trial on those counts. Nevertheless, we are affirming the judgment with respect to count one, for which County Court imposed an indeterminate sentence of 25 years to life. We are also affirming the judgment with respect to counts seven and eight, for which the court imposed concurrent determinate sentences of 25 years. Inasmuch as the five-year sentence imposed on the conviction of rape herein will still run "concurrently with and not exceed" the sentence imposed on counts one, seven and eight in defendant's other appeal (*Fuggazzatto*, 62 NY2d at 863), we need not reverse the judgment.

Defendant further contends that his plea was not knowingly, voluntarily or intelligently entered because he was denied an adjournment to consider the plea offer and initially stated that he had not had enough time to talk with his attorney about the offer. Although such a contention survives a valid waiver of the right to appeal, we note that "defendant did not move to withdraw the plea or to vacate the judgment of conviction and thus failed to preserve that contention for our review" (*People v Russell*, 55 AD3d 1314, 1314-1315 [4th Dept 2008], *lv denied* 11 NY3d 930 [2009]). In any event, defendant's contention lacks merit. "[T]he fact that defendant was required to accept or reject the plea offer within a short time period does not amount to coercion" (*id.* [internal quotation marks omitted]; *see People v Grimes*, 53 AD3d 1055, 1056 [4th Dept 2008], *lv denied* 11 NY3d 789 [2008]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

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CA 17-01077

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

IN THE MATTER OF RANDOLPH BARTZ, JANE BICKETT, CANDACE BOWER, DAVID BOYCE, ROBERT BOYCE, ELIZABETH BOYCE, JOSEPH CONDIDORIO, JOHN GREEN, JOSEPH MCKAY, STEPHEN MOULTON AND RONALD PAGANIN, PETITIONERS-PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

VILLAGE OF LEROY, ZONING BOARD OF APPEALS OF LEROY, JEFFREY STEINBRENNER, CODE ENFORCEMENT OFFICER, DANIEL LANG, CODE ENFORCEMENT OFFICER, DUZMOR PAINTING, INC., CIRCULAR HILL, INC., PETER MCQUILLEN, JUDITH MCQUILLEN, RESPONDENTS-DEFENDANTS-RESPONDENTS, ET AL., RESPONDENT-DEFENDANT.

KNAUF SHAW LLP, ROCHESTER (AMY K. KENDALL OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-APPELLANTS.

DADD, NELSON, WILKINSON & WUJCIK, ATTICA (JAMES M. WUJCIK OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS VILLAGE OF LEROY, ZONING BOARD OF APPEALS OF LEROY, JEFFREY STEINBRENNER, CODE ENFORCEMENT OFFICER, AND DANIEL LANG, CODE ENFORCEMENT OFFICER.

BONARIGO & MCCUTCHEON, BATAVIA (KRISTIE L. DEFREZE OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS DUZMOR PAINTING, INC., CIRCULAR HILL, INC., PETER MCQUILLEN, AND JUDITH MCQUILLEN.

Appeal from a judgment (denominated order) of the Supreme Court, Genesee County (Emilio L. Colaiacovo, J.), entered March 16, 2017 in a hybrid CPLR article 78 proceeding and declaratory judgment action. The judgment denied the “request” of petitioners-plaintiffs to annul the determinations of respondent-defendant Zoning Board of Appeals of LeRoy dated June 3, 2014 and July 9, 2014.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting that part of the amended petition/complaint that sought to annul the determination of respondent-defendant Zoning Board of Appeals of LeRoy affirming the issuance of a building permit for a duplex on Lot 18, Fillmore Street, tax map No. 14.-1-116 and granting judgment in favor of petitioners-plaintiffs as follows:

It is ADJUDGED and DECLARED that new duplexes may not

be permitted or constructed in the Presidential Acres Subdivision, Part V without a use variance,

and as modified the judgment is affirmed without costs.

Memorandum: In January 1989, the owner of certain property in respondent-defendant Village of LeRoy (Village) sought permission to develop a subdivision. The Village Planning Board approved the application "contingent upon all engineering being accepted by the Village Board and the Village Engineer" and numerous other conditions being met. One of those conditions was that only "25% of new structures to be built may be duplexes (10 homes)." The property was located in an R-1 zoning district and, at that time, the zoning laws of the Village permitted multifamily dwellings in R-1 districts. The site plan was filed on April 16, 1990 and, on August 17, 1990, the Village Board of Trustees passed Local Law No. 4 of 1990, which revised the Village's zoning laws. Insofar as relevant to this appeal, multifamily residences were no longer permitted in R-1 districts either as a regular use or by special permit. A final site plan, which was different from the initial site plan, was filed on March 8, 1991, and it does not depict any duplexes in the subdivision.

It is undisputed that construction was halted for the better part of a decade and that, once it resumed, the only structures built in the subdivision were single-family homes. Petitioners-plaintiffs (petitioners) are some of the residents who purchased single-family homes in that subdivision, and their contracts provided that the seller warranted that the property was located in an R-1 district. In 2010, the original owner of the property sold the remaining undeveloped lots to respondent-defendant Duzmor Painting, Inc. Respondents-defendants Peter McQuillen and Judith McQuillen are the owners and/or officers of Duzmor Painting, Inc. and admit that they are the record owners of the property. In October and December 2012, Peter McQuillen applied for and obtained two building permits for duplexes in the subdivision. Those duplexes were constructed without incident. Thereafter, in April 2014, respondent-defendant John Gillard as applicant, and Peter McQuillen as owner, applied for and received a building permit for a duplex on Lot 18. Petitioner David Boyce appealed the issuance of the building permit for Lot 18 to respondent-defendant Zoning Board of Appeals of LeRoy (ZBA). By decision dated June 3, 2014, the ZBA affirmed the issuance of the building permit for a duplex on Lot 18, finding that the subdivision, as approved "in 1990," was "vested [inasmuch] as multiple structures [had] been erected since 1990 pursuant to the guidelines of the filed Subdivision."

Petitioners commenced this hybrid CPLR article 78 proceeding and declaratory judgment action, seeking, inter alia, to annul the ZBA's determination concerning the building permit for Lot 18 and challenging the building permits issued in October and December 2012. Petitioners additionally sought a declaration "that new duplexes may not be permitted or constructed in the Subdivision without a use variance."

In 2015, petitioners moved for, inter alia, summary judgment on the petition/complaint (petition), and Duzmor Painting, Inc., Peter McQuillen, Judith McQuillen, and respondent-defendant Circular Hill, Inc. (collectively, private respondents) cross-moved for summary judgment dismissing the petition against them. Supreme Court (Noonan, A.J.) denied petitioners' motion, but granted that part of the private respondents' cross motion seeking dismissal of all claims related to the 2012 building permits on the ground that those claims were time-barred. In addressing whether the ZBA's determination related to the permit for Lot 18 was arbitrary, capricious or otherwise illegal, the court noted that the question "depend[ed] on support for the ZBA's explicit finding that the . . . subdivision, including the ten duplexes approved on January 25, 1989, had vested based upon multiple structures erected in conformity therewith since 1990." The court concluded that "the existing record [did] not eliminate all material factual issues with regard to vesting" and ordered a trial on that issue. Following the trial, the court (Colaiacovo, J.) determined that the ZBA's determination affirming the issuance of the building permit for Lot 18 was not arbitrary and capricious and denied petitioners' "request" to annul that determination.

Petitioners contend that the 2015 order constitutes the law of the case and precluded the trial court from considering any issue other than whether the subdivision had vested because of the erection of multiple structures within the subdivision. We reject that contention. "The doctrine of law of the case provides that, once an issue is judicially determined, it is not to be reconsidered by Judges or courts of coordinate jurisdiction in the course of the same litigation" (*Welch Foods v Wilson*, 262 AD2d 949, 950 [4th Dept 1999]), and it " 'applies only to legal determinations that were necessarily resolved on the merits in a prior decision' " (*Pettit v County of Lewis*, 145 AD3d 1650, 1651 [4th Dept 2016]). Here, the 2015 order denying the motion " 'established only that . . . there were triable issues of fact' " precluding judgment to either party (*Strouse v United Parcel Serv.*, 277 AD2d 993, 994 [4th Dept 2000]). It did not limit the court's ability to consider other evidence when deciding the ultimate issue whether the ZBA's determination was arbitrary and capricious or irrational (*see Caster v Increda-Meal, Inc.* [appeal No. 2], 238 AD2d 917, 919 [4th Dept 1997]).

Contrary to petitioners' further contention, the court properly granted that part of the private respondents' cross motion seeking dismissal of the claims related to the 2012 permits. Petitioners did not appeal the issuance of those permits to the ZBA and thus did not exhaust their administrative remedies with respect thereto (*see Matter of Henderson v Zoning Bd. of Appeals*, 72 AD3d 684, 685-686 [2d Dept 2010], *lv denied* 15 NY3d 704 [2010]). We have no discretionary power to reach their challenges to the issuance of those permits (*see Matter of Nelson v Coughlin*, 188 AD2d 1071, 1071 [4th Dept 1992], *appeal dismissed* 81 NY2d 834 [1993]).

Petitioners contend that the ZBA's determination affirming the issuance of the building permit for a duplex on Lot 18 was arbitrary and capricious. We agree, and we therefore modify the judgment

accordingly. In addition, we further modify the judgment by granting the declaration sought by petitioners with respect to Lot 18. "It is well established that [c]ourts may set aside a zoning board determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure" (*Matter of Expressview Dev., Inc. v Town of Gates Zoning Bd. of Appeals*, 147 AD3d 1427, 1428 [4th Dept 2017] [internal quotation marks omitted]).

There is no dispute that duplexes are not currently permitted in R-1 zoning districts and, therefore, the private respondents may build a duplex, i.e., a nonconforming structure, only if their right to do so vested. "The New York rule . . . has been that where a more restrictive zoning ordinance is enacted, an owner will be permitted to complete a structure or a development which an amendment has rendered nonconforming only where the owner has undertaken substantial construction and made substantial expenditures prior to the effective date of the amendment . . . Whether rooted in equity or the common law, the operation and effect of the vested rights doctrine is the same and it has been applied alike to a single building or a subdivision" (*Matter of Ellington Constr. Corp. v Zoning Bd. of Appeals of Inc. Vil. of New Hempstead*, 77 NY2d 114, 122 [1990]). With respect to subdivisions, "a developer who improves his [or her] property pursuant to original subdivision approval may acquire a vested right in continued approval despite subsequent zoning changes . . . But, if the improvements would be equally useful under the new zoning requirements, a vested right in the already approved subdivision may not be claimed based on the alterations" (*Ramapo 287 Ltd. Partnership v Village of Montebello*, 165 AD2d 544, 547 [3d Dept 1991]; *see Matter of Mar-Vera Corp. v Zoning Bd. of Appeals of the Vil. of Irvington*, 84 AD3d 1238, 1240 [2d Dept 2011]). Here, the ZBA determined that multiple structures had already been erected, but failed to address whether the improvements on the vacant lots were equally useful under the amended zoning laws. In our view, that failure renders the determination arbitrary and capricious and irrational.

Based on the record before us, we conclude that any improvements on the property would be equally useful to single family residences and, therefore, the private respondents' right to build duplexes in the subdivision has not vested (*see Mar-Vera Corp.*, 84 AD3d at 1240; *Matter of Padwee v Lustenberger*, 226 AD2d 897, 899 [3d Dept 1996]; *Matter of Showers v Town of Poestenkill Zoning Bd. of Appeals*, 176 AD2d 1157, 1159 [3d Dept 1991]; *cf. Matter of Schoonmaker Homes—John Steinberg, Inc. v Village of Maybrook*, 178 AD2d 722, 725 [3d Dept 1991], *lv denied* 79 NY2d 757 [1992]).

In light of our determination, we do not reach petitioners' remaining contentions.

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

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CA 17-01541

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

BARBARA S. SCHOEN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOPS MARKETS, LLC, DEFENDANT-APPELLANT.

DIXON & HAMILTON, LLP, GETZVILLE (MICHAEL B. DIXON OF COUNSEL), FOR DEFENDANT-APPELLANT.

THE LAW OFFICES OF MICHAEL G. COOPER, HAMBURG (MICHAEL G. COOPER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered February 10, 2017. The order, insofar as appealed from, denied those parts of the motion of defendant for summary judgment seeking dismissal of the complaint to the extent that the complaint, as amplified by the bill of particulars, alleges that defendant had actual notice of or created the allegedly dangerous condition.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in part, and the complaint is dismissed to the extent that the complaint, as amplified by the bill of particulars, alleges that defendant had actual notice of or created the allegedly dangerous condition.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when she slipped and fell on “hair detangler” liquid that was spilled on the floor of defendant’s store. In her complaint, plaintiff alleges theories of negligence premised on actual notice, constructive notice, and creation of a dangerous condition. Defendant moved for summary judgment dismissing the complaint, and Supreme Court denied the motion. On appeal, defendant concedes that there are material issues of fact with respect to constructive notice, but contends that the court erred in denying those parts of its motion with respect to the theories of actual notice and creation of a dangerous condition. We agree with defendant that it met its initial burden on the motion with respect to those theories, and that plaintiff failed to raise a triable issue of fact with respect thereto (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). We therefore reverse the order insofar as

appealed from and grant those parts of defendant's motion.

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

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KA 14-02203

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TALYN D. WILLIAMS, DEFENDANT-APPELLANT.

BETH A. RATCHFORD, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered February 6, 2014. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the second degree (Penal Law § 160.10 [1]). Initially, we note that, even assuming, arguendo, that defendant's waiver of the right to appeal is invalid, as defendant contends, his further contention that he was denied effective assistance of counsel "does not survive his plea . . . inasmuch as defendant failed to demonstrate that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [defense counsel's] allegedly poor performance" (*People v Lucieer*, 107 AD3d 1611, 1612 [4th Dept 2013] [internal quotation marks omitted]). Although defendant's further contention that his plea was not otherwise voluntary survives a valid waiver of the right to appeal (*see People v Guantero*, 100 AD3d 1386, 1387 [4th Dept 2012], *lv denied* 21 NY3d 1004 [2013]), we reject defendant's contention that Supreme Court erred in denying his pro se motion to withdraw his plea on that ground without conducting a hearing. The record establishes that the court "conducted a sufficient inquiry before denying defendant's [motion] to withdraw his plea" (*People v Moore*, 39 AD3d 1199, 1200 [4th Dept 2007], *lv denied* 9 NY3d 867 [2007]), and there is no evidence of innocence, fraud or mistake in inducing the plea (*see People v Taylor*, 59 AD3d 973, 973-974 [4th Dept 2009], *lv denied* 12 NY3d 921 [2009]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

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CA 17-00577

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

HUDSON SPECIALTY INSURANCE COMPANY, AND ENDURANCE AMERICAN SPECIALTY INSURANCE COMPANY, AS SUBROGEES OF SPECIALTY TECHNICAL CONSULTANTS, INC., PLAINTIFFS-RESPONDENTS,

V ORDER

HALEY & ALDRICH, INC., AND COVERIS, INC., DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

DONOVAN HATEM LLP, NEW YORK CITY (SCOTT K. WINIKOW OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BARCLAY DAMON LLP, ROCHESTER (DENNIS R. MCCOY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered December 23, 2016. The order, among other things, granted plaintiffs' motion for summary judgment on the common-law indemnification causes of action.

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

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CA 17-00992

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

HUDSON SPECIALTY INSURANCE COMPANY, AND ENDURANCE AMERICAN SPECIALTY INSURANCE COMPANY, AS SUBROGEES OF SPECIALTY TECHNICAL CONSULTANTS, INC., PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

HALEY & ALDRICH, INC. AND COVERIS, INC., DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

DONOVAN HATEM LLP, NEW YORK CITY (SCOTT K. WINIKOW OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BARCLAY DAMON LLP, ROCHESTER (DENNIS R. MCCOY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered January 23, 2017. The judgment awarded plaintiffs the sum of $1,103,071.93 as against defendants.

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

Memorandum: Plaintiff insurance companies, as subrogees of their insured, Specialty Technical Consultants, Inc. (STC), commenced this action seeking common-law and contractual indemnification from defendants, Haley & Aldrich, Inc. (H&A) and CoVeris, Inc. (CoVeris). CoVeris, which was a subsidiary of H&A and later merged with H&A, conducted environmental, health, and safety audits for businesses. In April 2006, Cooper Cameron Corporation (Cameron) contracted with CoVeris for it to conduct environmental, health and safety audits of Cameron's facilities, including one in Buffalo. Two CoVeris employees and one other person hired by CoVeris examined the Buffalo facility for four days in June 2006 and prepared a draft audit report. In July 2006, STC purchased from H&A certain assets of CoVeris, including the contract with Cameron, and issued a final audit report to Cameron. Neither the draft nor the final audit report made any mention of a room referred to as the plenum room at Cameron's Buffalo facility. The plenum room had pipes that took air out of the room and fed it to compressors during testing. In November 2008, an employee of Cameron died of positional asphyxiation at work when he was sucked up against and partially drawn into an air intake pipe in the plenum room. The employee's estate sued STC and others and, as against STC, the estate

alleged that it conducted a deficient audit inasmuch as it failed to inspect the plenum room and warn Cameron of the hazardous conditions that existed there.

Contrary to defendants' contention, Supreme Court properly granted plaintiffs' motion for summary judgment on the common-law indemnification causes of action. Plaintiffs met their initial burden of establishing their entitlement to common-law indemnification inasmuch as STC was compelled to pay for the wrong of CoVeris (*see D'Ambrosio v City of New York*, 55 NY2d 454, 460 [1982]; *Genesee/Wyoming YMCA v Bovis Lend Lease LMB, Inc.*, 98 AD3d 1242, 1244 [4th Dept 2012]). As explained above, CoVeris employees conducted the audit of the Buffalo facility and prepared the draft audit report before the Cameron contract was transferred to STC. Although STC issued a final audit report to Cameron, the final audit report was based on the findings within the draft audit report prepared by the CoVeris auditors. The court properly concluded that the draft and final audit reports were substantially the same and that where they differed had no bearing on the allegations of negligence against STC, i.e., the failure to reference the plenum room. STC was not actively at fault because it had no reason to know about the failure to include the plenum room in the draft or final audit report; that was solely the fault of CoVeris, which conducted the audit and prepared the draft audit report.

In opposition to the motion, defendants failed to raise a triable issue of fact. Defendants contend that there is a triable issue whether STC was partially at fault for the deficient audit, which would defeat its claim for common-law indemnification. Defendants rely particularly on the fact that STC either conducted or should have conducted a peer review of the draft audit report before presenting it to Cameron as the final audit report. That contention is without merit. As the court properly determined, even if STC conducted a peer review of the draft audit report, there was no claim that STC should have made any changes to that report. STC had no responsibility for auditing the plenum room and had no reason to include it in the final audit report.

We reject defendants' contention that the court abused its discretion in denying their motion to compel disclosure of plaintiffs' insurance and subrogation claim files or, alternatively, production of a privilege log. Defendants contend that they sought that information to determine the reasonableness of the settlement amount with the employee's estate and the attorneys' fees claimed by plaintiffs. Plaintiffs provided defendants with non-protected documents, such as the deposition transcripts and the trial transcript of the estate's action against STC, and the remaining information sought, i.e., material prepared for litigation, was privileged (*see Lamberson v Village of Allegany*, 158 AD2d 943, 943 [4th Dept 1990]). Contrary to defendants' contention, they did not show that there was an "at issue" waiver here (*see Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust*, 43 AD3d 56, 63-66 [1st Dept 2007]). The "nonprivileged material [received by defendants] provides a more-than-ample basis for the parties to litigate the reasonableness—an objective standard—of

[STC's] decision to settle the . . . action . . . ; of the amount it paid to settle the case; and of the amount it spent on its defense" (*id.* at 65). We also reject defendants' contention regarding the amount awarded by the court. Defendants' further contention that the justice presiding over the case should have recused himself is not preserved for our review (*see Matter of Curry v Reese*, 145 AD3d 1475, 1476 [4th Dept 2016]).

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

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KA 16-00046

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHEILA M. KOWAL, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered February 19, 2013. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree, assault in the first degree and burglary in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting her, upon a jury verdict, of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), assault in the first degree (§ 120.10 [1]), and two counts of burglary in the first degree (§ 140.30 [2], [3]). Defendant's contention that the evidence is legally insufficient to support her conviction of attempted murder in the second degree and burglary in the first degree is not preserved for our review inasmuch as her general motion for a trial order of dismissal was not " 'specifically directed' at" the alleged shortcomings in the evidence raised on appeal (*People v Gray*, 86 NY2d 10, 19 [1995]). Contrary to defendant's further contention, viewing the evidence in light of the elements of the crimes of attempted murder and burglary as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence with respect to those crimes (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We reject defendant's contention that defense counsel was ineffective for failing to object to County Court's charge in which it used the phrase "personally or by acting in concert" with respect to the attempted murder count, even though the indictment used only the phrase "acting in concert" in that count. It is well settled that "[t]here is no distinction between liability as a principal and criminal culpability as an accessory and the status for which the

defendant is convicted has no bearing upon the theory of the prosecution" (*People v Duncan*, 46 NY2d 74, 79-80 [1978], *rearg denied* 46 NY2d 940 [1979], *cert denied* 442 US 910 [1979], *rearg dismissed* 56 NY2d 646 [1982]). Furthermore, "[a]n indictment charging a defendant as a principal is not unlawfully amended by the admission of proof and instruction to the jury that a defendant is additionally charged with acting-in-concert to commit the same crime" (*People v Rivera*, 84 NY2d 766, 769 [1995]), and the same is true where, as here, the defendant is originally charged only as an accomplice. Thus, we conclude that defense counsel was not ineffective inasmuch as " 'the jury was properly instructed concerning both theories based upon the evidence adduced at trial' " (*People v Young*, 55 AD3d 1234, 1235 [4th Dept 2008], *lv denied* 11 NY3d 901 [2008]).

Contrary to defendant's further contention, the sentence is not unduly harsh or severe. Finally, we note that the certificate of conviction in the stipulated record on appeal incorrectly recites that defendant is a second felony offender and that a 12-year order of protection was issued. The certificate of conviction therefore must be amended to remove any reference thereto (*see generally People v Young*, 74 AD3d 1864, 1865 [4th Dept 2010], *lv denied* 15 NY3d 811 [2010]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

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KA 15-01386

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES PELLIS, DEFENDANT-APPELLANT.

THOMAS J. EOANNOU, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered April 23, 2015. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of robbery in the second degree (Penal Law § 160.10 [1]). Contrary to defendant's contention, the People complied with their obligation to be ready for trial within six months of the commencement of the criminal action (*see* CPL 30.30 [1] [a]). The People concede a 154-day prereadiness delay, and we agree with the People that there was no postreadiness delay. Defendant's challenge to the time period from April 4, 2014 to June 10, 2014 is raised for the first time on appeal and thus is not preserved for our review, and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see People v Rivera*, 223 AD2d 476, 476 [1st Dept 1996], *lv denied* 88 NY2d 852 [1996]). The period of alleged postreadiness delay from June 10, 2014 to September 2, 2014 is not chargeable to the People because the People exercised due diligence in securing defendant's return to Erie County as soon as practicable once he was located in Texas (*see* CPL 30.30 [4] [e]). The record therefore establishes that "the total period of time chargeable to the People is less than six months" (*People v Hewitt*, 144 AD3d 1607, 1608 [4th Dept 2016], *lv denied* 28 NY3d 1185 [2017] [internal quotation marks omitted]).

Contrary to defendant's contention, Supreme Court did not abuse its discretion in denying his three motions for a mistrial. " 'The decision whether to declare a mistrial necessarily rests in the broad discretion of the trial court, which is best situated to consider all

the circumstances, and its determination is entitled to great weight on appeal' " (*People v Smith*, 143 AD3d 1005, 1005 [2d Dept 2016], *lv denied* 28 NY3d 1189 [2017]).

Finally, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

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CA 17-01518

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

MARK WEGNER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF CHEEKTOWAGA, MARY HOLTZ, SUPERVISOR, GERALD KAMINSKI, COUNCILMEMBER, JAMES ROGOWSKI, COUNCILMEMBER, AND CHRISTINE ADAMCZYK, COUNCILMEMBER, DEFENDANTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (RYAN J. LUCINSKI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered July 27, 2017. The order, inter alia, denied the motion of defendants to dismiss the complaint and granted the cross motion of plaintiff to compel discovery.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the cross motion is denied, the motion is granted, the complaint is dismissed, and in the exercise of discretion plaintiff is granted leave to replead.

Memorandum: Plaintiff commenced this defamation action seeking damages based on allegations that defendants made false accusations that plaintiff engaged in "monetary waste, abuse and criminal actions . . . in his deployment of manpower" in his role as the Highway Superintendent of the Town of Cheektowaga. Defendants moved to dismiss the complaint pursuant to CPLR 3016 (a), and plaintiff cross-moved to compel discovery. Defendants appeal from an order that denied their motion, granted the cross motion, and directed plaintiff to file an amended complaint within 60 days of receiving discovery from defendants.

We conclude that Supreme Court erred in denying defendants' motion. Plaintiff did not set forth in the complaint "the particular words complained of," as required by CPLR 3016 (a), and the complaint did not "state the 'time, place, and manner of the allegedly false statements and to whom such statements were made' " (*Nesathurai v University at Buffalo, State Univ. of N.Y.*, 23 AD3d 1070, 1072 [4th Dept 2005]; *see Keeler v Galaxy Communications, LP*, 39 AD3d 1202, 1203 [4th Dept 2007]).

We also conclude that the court erred in granting plaintiff's cross motion inasmuch as "he may not use discovery—either pre-action or pretrial—to remedy the defects in his pleading" (*Weinstein v City of New York*, 103 AD3d 517, 517-518 [1st Dept 2013]; *see Naderi v North Shore-Long Is. Jewish Health Sys.*, 135 AD3d 619, 620 [1st Dept 2016]). Nevertheless, because there may be a basis for a defamation cause of action against defendants, we grant plaintiff leave to replead in the exercise of our discretion (*see Keeler*, 39 AD3d at 1203).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

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KA 13-01704

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PHILLIP H. OWENS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, HARRIS BEACH PLLC, PITTSFORD (KELLY S. FOSS 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 (Gail Donofrio, J.), rendered September 13, 2013. The judgment convicted defendant, upon a jury verdict, of attempted assault in the first degree, criminal possession of a weapon in the third degree and criminal possession of a weapon in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed as a matter of discretion in the interest of justice and on the law and a new trial is granted on counts two through five of the indictment.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of one count each of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]) and criminal possession of a weapon in the third degree (§ 265.02 [1]), and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). The prosecution arose from an alleged incident in which defendant, while in a vehicle located in a convenience store parking lot, fired gunshots at a vehicle being driven by defendant's estranged wife. Prior to trial, defendant's first counsel was in possession of the multi-camera surveillance video from the convenience store at the intersection where the shooting occurred, but was unable to play it. It is undisputed that, after defendant was assigned new counsel, that attorney also had difficulty playing the video on a computer and was able to view the video only at a certain location with assistance. Defense counsel had his investigator record portions of the video on an iPad, i.e., footage of vehicles outside of the store in the parking lot, which were the only portions that defense counsel thought were relevant based upon the allegations. Defense counsel did not view the video from cameras inside the store. Defense counsel showed the recorded portions of the video to defendant in jail, but those portions did not include video from inside the store.

The evidence at trial established that the estranged wife made a 911 call approximately one hour after the shooting in which she reported that she was driving down a street in a green Lexus with the then-four-year-old son of the estranged wife and defendant, and that she was approaching the intersection where the convenience store was located when defendant fired gunshots from a vehicle in the convenience store parking lot. During the intervening hour before the 911 call, the estranged wife had made a significant number of phone calls, including to her divorce attorney. The estranged wife testified regarding the route that she took to the intersection and described seeing defendant firing a gun at her.

Although the surveillance video had been admitted in evidence during the People's case-in-chief, it was not played in court until summations. Upon watching the video played during the prosecutor's summation, including camera angles from inside the store, defendant recognized the estranged wife as the woman purchasing items and then exiting the convenience store parking lot with two children in a blueish-gray Nissan, which was different from the green Lexus that the estranged wife was supposedly driving when the shooting occurred at the intersection less than two minutes later. Thus, the video evidence depicted the estranged wife leaving the convenience store parking lot in a vehicle with two children even though the prosecution's theory at trial, as supported by the estranged wife's testimony, was that the estranged wife arrived at the scene less than two minutes later, approaching the intersection on a different street from the opposite direction in a different vehicle, with just the son in the back seat.

Following summations, defendant moved to reopen the proof to re-call the estranged wife for further cross-examination about the video evidence. Defendant argued, among other things, that it would be difficult for him to receive a fair trial when he was unable to access the video before trial and saw the video depicting the estranged wife for the first time during summations, and the video clearly contradicted the estranged wife's allegations upon which he was being prosecuted. Supreme Court denied defendant's motion to reopen the proof on the ground that defense counsel had the video in his possession for several months and "[i]t was incumbent on the defense to notify the prosecutor that he was not able to access all of the frames of the disk." On appeal, defendant contends, and the People concede, that reversal is required because the court abused its discretion in denying defendant's motion to reopen the proof and defendant was denied meaningful representation. We agree.

With respect to reopening the proof, although CPL 260.30 sets forth the sequence of a trial by jury, "[t]he statutory framework . . . is not a rigid one and the common-law power of the trial court to alter the order of proof 'in its discretion and in furtherance of justice' remains at least up to the time the case is submitted to the jury" (*People v Olsen*, 34 NY2d 349, 353 [1974]; *see People v Whipple*, 97 NY2d 1, 6 [2001]). Thus, the decision to permit a party to reopen the case, at least prior to its submission to the jury, lies within the discretion of the trial court (*see Whipple*, 97 NY2d at 6, 8;

People v Ventura, 35 NY2d 654, 655 [1974]; *Olsen*, 34 NY2d at 353; *People v Hollis*, 255 AD2d 615, 616 [3d Dept 1998], *lv denied* 92 NY2d 1033 [1998]; *People v Saddler*, 219 AD2d 796, 796 [4th Dept 1995], *lv denied* 88 NY2d 853 [1996]). A trial court's discretion to preclude evidence is nonetheless "circumscribed by the defendant's constitutional rights to present a defense and confront his [or her] accusers" (*People v Hudy*, 73 NY2d 40, 57 [1988], *abrogated on other grounds by Carmell v Texas*, 529 US 513 [2000]), because "[a] defendant always has the constitutional right to present a complete defense" (*People v Spencer*, 20 NY3d 954, 956 [2012] [internal quotation marks omitted]; *see Crane v Kentucky*, 476 US 683, 690 [1986]) and "to put before a jury evidence that might influence the determination of guilt" (*Pennsylvania v Ritchie*, 480 US 39, 56 [1987]; *see People v Jovanovic*, 263 AD2d 182, 183-184 [1st Dept 1999], *appeal dismissed* 95 NY2d 846 [2000], *rearg denied* 95 NY2d 888 [2000]; *see generally People v McLeod*, 122 AD3d 16, 19 [1st Dept 2014]).

Here, defendant's arguments in support of his motion to reopen the proof implicated the constitutional aspects of his contention raised on appeal, i.e., that reopening the proof was necessary to afford him a fair trial and his right to present a defense to the allegations upon which he was being prosecuted. To the extent that defendant did not preserve the constitutional aspects of his contention for our review by failing to raise them sufficiently before the trial court (*see People v Lane*, 7 NY3d 888, 889 [2006]; *People v Paulk*, 107 AD3d 1413, 1415 [4th Dept 2013], *lv denied* 21 NY3d 1076 [2013], *reconsideration denied* 22 NY3d 1157 [2014]), we exercise our power to review those aspects of his contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

As defendant correctly contends, defense counsel set forth a proffer of material evidence that was directly relevant to the issue whether the alleged victim and sole eyewitness had fabricated her story or was even at the scene at the time of the alleged shooting incident (*see People v Desire*, 113 AD2d 952, 952 [2d Dept 1985]). Inasmuch as the video depicted a woman identified by defendant as the estranged wife purchasing items and then leaving the store with two children in a vehicle different from the one that she supposedly occupied with just one child at the time of the shooting less than two minutes later, we agree with defendant that the video provided strong proof that the estranged wife was not at the intersection in a green Lexus at the time of the shooting. Although it is undisputed that defense counsel could have, with the exercise of due diligence, viewed the video in its entirety and reviewed it with defendant pursuant to his pretrial requests (*see People v Frieson*, 103 AD2d 1009, 1009 [4th Dept 1984]), the court erred in failing to recognize defendant's constitutional right to present a complete defense and confront his accuser with evidence that, under these circumstances, would certainly influence the jury's determination of guilt (*see generally People v Burke*, 176 AD2d 1000, 1001 [3d Dept 1991]; *People v Harami*, 93 AD2d 867, 867-868 [2d Dept 1983]). Inasmuch as the evidence of defendant's guilt is not overwhelming, the People cannot meet their burden of showing that the error is harmless beyond a reasonable doubt (*see*

People v Crimmins, 36 NY2d 230, 237 [1975]; *Burke*, 176 AD2d at 1001; *Harami*, 93 AD2d at 868). Defendant is thus entitled to a new trial on that ground.

We further agree with defendant and the People that defendant is entitled to a new trial on the separate ground that defense counsel's failure to secure a working copy of the video and to review the video in its entirety with defendant prior to trial deprived him of meaningful representation under the circumstances of this case. The record establishes that defense counsel, through a lack of due diligence, failed to obtain a reviewable copy of the video prior to trial, did not review the footage other than the views of the parking lot, and did not review the various camera angles in their entirety with defendant, despite defendant's pretrial insistence that the video be provided to him. Defendant established that those failures compromised his right to a fair trial because the video significantly—if not entirely—undermined the prosecution's theory by calling into doubt the estranged wife's veracity and the physical possibility of her account given the actions and travel distance necessary for her to have returned to the scene in a different vehicle with one less child, from a different direction, in less than two minutes. The record thus establishes that defendant was denied effective assistance of counsel (*see People v Canales*, 110 AD3d 731, 732-735 [2d Dept 2013]; *People v Cyrus*, 48 AD3d 150, 154 [1st Dept 2007], *lv denied* 10 NY3d 763 [2008]).

Finally, the jury acquitted defendant of the first count in the indictment, charging attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), and, without addressing the propriety of the court's acquit-first instruction with respect to the charges at issue, we note that the jury disregarded the instruction and rendered a verdict of not guilty on the sixth count in the indictment, charging reckless endangerment in the first degree (§ 120.25; *see* CPL 1.20 [12]; *cf. Matter of Suarez v Byrne*, 10 NY3d 523, 537 [2008], *rearg denied* 11 NY3d 753 [2008]; *People v Charles*, 78 NY2d 1044, 1047 [1991]). Inasmuch as double jeopardy bars retrial on both of those counts, we grant a new trial on counts two through five of the indictment only. In light of our determination, we do not address defendant's remaining contention.

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

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CA 17-01431

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

ADIRONDACK BANK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MIDSTATE FOAM AND EQUIPMENT, INC., DEFENDANT,
AND JAMES S. WHEELER, DEFENDANT-RESPONDENT.

MENTER, RUDIN & TRIVELPIECE, P.C., SYRACUSE (TERESA M. BENNETT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (Erin P. Gall, J.), entered April 12, 2017. The order, inter alia, granted that part of the motion of defendant James S. Wheeler for summary judgment dismissing the complaint against him and dismissed the complaint "as against all defendants."

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion and reinstating the complaint, and by granting the cross motion in part and awarding plaintiff judgment against defendant Midstate Foam and Equipment, Inc. in the amount of $145,858.74 together with interest at the rate of 5.25% commencing November 17, 2014, plus costs and attorneys' fees, and dismissing the 2nd, 3rd, and 5th through 11th affirmative defenses and all counterclaims of defendant James S. Wheeler, and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Oneida County, to determine the amount of costs and attorneys' fees in accordance with the following memorandum: In this action, plaintiff seeks to recover on a July 1, 2011 promissory note evidencing a $145,000 loan to defendant Midstate Foam and Equipment, Inc. (corporation). Plaintiff commenced this action against the corporation and its president, defendant James S. Wheeler, seeking to hold Wheeler liable under two guaranties, dated August 12, 2010 and February 18, 2011. According to the guaranties, Wheeler personally guaranteed "all . . . indebtedness" of the corporation to plaintiff and waived any defenses. The note and guaranties contain what appears to be Wheeler's signature.

Wheeler moved for summary judgment dismissing the complaint against him and for judgment on his third counterclaim, seeking sanctions based on plaintiff's alleged frivolous conduct, and plaintiff cross-moved for, inter alia, a default judgment against the

corporation and for judgment against defendants in the amount sought in the complaint. We agree with plaintiff that Supreme Court erred in granting that part of Wheeler's motion for summary judgment dismissing the complaint against him and in dismissing the complaint "as against all defendants" on the ground that the note was void ab initio. In support of his motion, Wheeler submitted, inter alia, the transcript of a guilty plea proceeding in a criminal action. At that proceeding, Wheeler's business partner admitted that he forged Wheeler's signature on the note. The forgery occurred in Wheeler's presence after Wheeler refused to sign the note himself. Wheeler's partner admitted that the purpose of the loan was to pay off prior loans and to provide working capital for the corporation. Wheeler also submitted his own affidavit denying that he signed the subject note and corroborating key portions of the plea proceeding. Wheeler averred that the guaranties were forged, that he lacked knowledge of them until this action was commenced, and that he had not been involved in the corporation since May 2010.

In opposition to the motion, plaintiff submitted loan documents establishing that the proceeds of the subject loan were used to pay off an intermediate loan, and the proceeds of the intermediate loan had been used to pay off an earlier loan that plaintiff made to Wheeler individually. A letter to Wheeler, dated August 11, 2010, indicated that plaintiff would "require [his] unlimited and continuing personal guaranty" in connection with the intermediate loan. Another letter addressed to Wheeler, dated August 20, 2010, confirmed payment in full of Wheeler's personal loan. Additionally, plaintiff submitted a corporate authorization resolution that Wheeler executed in October 2011 on the corporation's behalf.

On a motion for summary judgment, the moving party has the burden of establishing his or her entitlement to judgment as a matter of law (*see Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]). Here, although Wheeler submitted evidence that the note was forged, he failed to establish as a matter of law that it was void ab initio. It is well established that a forged instrument may be ratified where "the principal retains the benefit of an unauthorized transaction with knowledge of the material facts" (*Standard Funding Corp. v Lewitt*, 89 NY2d 546, 552 [1997]; *see Cashel v Cashel*, 15 NY3d 794, 796 [2010]). The evidence submitted in support of the motion contained sworn statements of Wheeler and his business partner establishing that the proceeds of the loan were used to provide the corporation with capital and that its president, Wheeler, knew that his signature had been forged on the documents authorizing the loan. Wheeler, however, never attempted to return the proceeds of the loan, and the loan "cannot now be repudiated" (*Skilled Invs., Inc. v Bank Julius Baer & Co., Ltd.*, 62 AD3d 424, 425 [1st Dept 2009], *lv dismissed* 13 NY3d 934 [2010]). Thus, Wheeler's own submissions raised issues of fact whether he ratified the forged note (*see Cashel*, 15 NY3d at 796).

Nevertheless, even if the note was ratified, Wheeler is not personally liable if his signature on the guaranties was forged and he lacked knowledge of the guaranties' existence, thus rendering the

guaranties void ab initio (*see generally Orlosky v Empire Sec. Sys.*, 230 AD2d 401, 403 [3d Dept 1997]). Even assuming, arguendo, that Wheeler established as a matter of law that the guaranties were forged, we conclude that plaintiff raised issues of fact whether he had knowledge of the guaranties and thus whether he ratified them (*see generally Standard Funding Corp.*, 89 NY2d at 552). More particularly, the August 11, 2010 letter to Wheeler stated that his continuing personal guaranty was required in return for the corporate loan that was used to pay off his individual loan. Thus, the court should have denied that part of Wheeler's motion for summary judgment dismissing the complaint against him, and we therefore modify the order by denying that part of the motion and reinstating the complaint against him. Inasmuch as there are issues of fact, however, we reject plaintiff's contention that the court should have granted that part of its cross motion seeking summary judgment on its complaint against Wheeler (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Plaintiff further contends that the court erred in denying that part of its cross motion seeking summary judgment dismissing Wheeler's affirmative defenses. We agree in part. The court should have dismissed his 2nd, 3rd, and 5th through 11th affirmative defenses inasmuch as plaintiff established that those defenses "were without merit or merely duplicative," and, in opposition, Wheeler failed to raise an issue of fact (*Emigrant Bank v Myers*, 147 AD3d 1027, 1028 [2d Dept 2017]).

Plaintiff also contends that the court erred in denying that part of its cross motion seeking summary judgment dismissing Wheeler's counterclaims. We agree, and we further modify the order accordingly. The first counterclaim, alleging abuse of process, should have been dismissed because plaintiff established that it "did not use process 'in a perverted manner to obtain a collateral objective' " (*Liss v Forte*, 96 AD3d 1592, 1593 [4th Dept 2012], quoting *Curiano v Suozzi*, 63 NY2d 113, 116 [1984]), and Wheeler failed to raise an issue of fact (*see generally Zuckerman*, 49 NY2d at 562). The second counterclaim alleged that plaintiff negligently hired, supervised, or retained the loan officer who conspired with Wheeler's business partner to arrange for the loans. That counterclaim should have been dismissed because plaintiff established that it did not know, nor should it have known, about its loan officer's malfeasance until January 2015, and plaintiff terminated the loan officer's employment only days later as a consequence (*see generally Jackson v New York Univ. Downtown Hosp.*, 69 AD3d 801, 801 [2d Dept 2010]), and Wheeler failed to raise an issue of fact (*see generally Zuckerman*, 49 NY2d at 562). The third counterclaim, seeking sanctions for alleged frivolous conduct, should have been dismissed because New York does not recognize a separate cause of action or counterclaim seeking the imposition of sanctions (*see Young v Crosby*, 87 AD3d 1308, 1309 [4th Dept 2011]).

In addition, we agree with plaintiff in any event that, to the extent that Wheeler sought sanctions, albeit in the improper form of a counterclaim, the court abused its discretion in awarding Wheeler costs and attorneys' fees pursuant to 22 NYCRR 130-1.1 (c) based on

plaintiff's alleged frivolous conduct. We therefore further modify the order accordingly. "[C]onduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false" (*id.*). In awarding costs or attorneys' fees based on frivolous conduct, the court must issue "a written decision setting forth the conduct on which the award or imposition is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded or imposed to be appropriate" (22 NYCRR 130-1.2). Here, the court stated only that plaintiff knew at the time the action was commenced that the note was forged and did not explain why it found that conduct to be frivolous. The award must be vacated for that reason alone (*see Gordon Group Invs., LLC v Kugler*, 127 AD3d 592, 595 [1st Dept 2015]). Furthermore, we conclude that the court's omission is particularly troubling because we cannot perceive how plaintiff's conduct could be deemed frivolous. The action arguably has merit and "does not approach the type of groundless litigation envisioned by the rule" (*Matter of Bozer v Higgins*, 204 AD2d 979, 980 [4th Dept 1994]). It was undertaken to recover on an outstanding debt, and Wheeler has not alleged that plaintiff made false statements.

Finally, we agree with plaintiff that the court abused its discretion in sua sponte dismissing the complaint against the corporation and in denying that part of plaintiff's cross motion seeking a default judgment against the corporation based on its failure to appear (*see* CPLR 3215 [a]). We therefore further modify the order by reinstating the complaint against the corporation and granting judgment in favor of plaintiff against the corporation in the amount of $145,858.74, together with interest at the contract rate of 5.25% commencing November 17, 2014, the date of default, and reasonable costs and attorneys' fees, and we remit the matter to Supreme Court for a determination of those costs and attorneys' fees.

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

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KA 14-00955

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARRELL BOYD, DEFENDANT-APPELLANT.

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

DARRELL BOYD, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered May 14, 2014. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]). The charge arose from an incident in 2007 in which defendant allegedly beat and strangled his former neighbor. Firefighters discovered the victim's body in her smoldering, smoke-filled apartment on Merchants Road in Rochester. An autopsy revealed that she died of asphyxial and blunt force injuries to her head and neck shortly before the fire. An ignitable liquid was found to be present on the victim's clothing and bedding, and fire investigators concluded that someone had intentionally set fire to her bed. Defendant was questioned by the police during the early stages of the investigation and, about 10 days after the murder, defendant told the investigators that he had been watching a Yankees versus Red Sox game on television at his wife's apartment on Brooks Avenue on the night of the victim's death, April 20, 2007. Defendant said that he left the apartment only once that day to go to the corner store before the game started, and surveillance video from his wife's apartment building showed defendant leaving the building through the west door at about 6:15 p.m. or 6:30 p.m., and returning about 15 or 20 minutes later with a shopping bag in his hand. The 911 report of the fire at the victim's apartment was placed at 7:43 p.m., and defendant did not reappear on the surveillance video at any time between 6:50 p.m. and 9:00 p.m. Thus, the surveillance footage appeared to corroborate defendant's alibi.

The investigation went cold until 2012, when a Combined DNA Index System (CODIS) database "hit" linked defendant's DNA profile to DNA material that had been collected from under the victim's fingernails on her right hand during her autopsy. Defendant was incarcerated on an unrelated matter at that time, and the investigators obtained a sample of his DNA for comparison. Further analysis by a forensic biologist at the Monroe County Crime Laboratory confirmed not only that defendant could not be excluded as a contributor to the DNA that was under the victim's fingernails, but also that "the probability of randomly selecting an unrelated individual who could be a contributor to the mixture obtained under the fingernail clippings of the right hand of [the victim] was less than 1 in 59.4 million."

Defendant and his wife had lived next door to the victim from 2002 to 2005 in the apartment building on Merchants Road where the victim died. Defendant, his wife, and the victim were neighbors and friends until 2005, when the victim witnessed a domestic altercation between the couple and intervened. The victim called the police, and defendant was arrested and prohibited from having contact with his wife. Defendant was on parole at the time, and the domestic violence incident was subsequently proved to be a violation of defendant's parole. As a consequence, defendant was incarcerated for 15 months. At defendant's trial on the murder charge herein, defendant's ex-wife testified that defendant blamed the victim for his incarceration after the 2005 incident. In addition, a jailhouse informant testified that defendant made various admissions to him, including that, after defendant returned to Rochester, he went to see a woman in an apartment building where he and his wife used to live, that he had choked the woman after she scratched him, and that he "burned up the bed" in an effort to cover up the evidence.

We reject defendant's contention that he was deprived of a fair trial by the cumulative effect of several alleged evidentiary errors made by Supreme Court. First, the court properly exercised its discretion in admitting testimony that the victim had intervened in a domestic incident involving defendant and his wife in 2005 that resulted in defendant's parole violation and incarceration. That evidence was inextricably interwoven with the material facts of the case and relevant to demonstrate defendant's motive (*see People v Ray*, 63 AD3d 1705, 1706 [4th Dept 2009], *lv denied* 13 NY3d 838 [2009]), and the court did not abuse its discretion in determining that the "probative value [of the evidence admitted] exceed[ed] the potential for prejudice resulting to the defendant" (*People v Alvino*, 71 NY2d 233, 242 [1987]; *see generally People v Pryor*, 48 AD3d 1217, 1217-1218 [4th Dept 2008], *lv denied* 10 NY3d 868 [2008]). The court minimized the potential for prejudice to defendant by prohibiting the People from eliciting testimony that defendant hit and choked his wife during the domestic incident, by precluding testimony concerning the nature of the underlying crime for which defendant was on parole, and by giving prompt limiting instructions to the jury (*see People v Harris*, 147 AD3d 1328, 1330 [4th Dept 2017]).

Second, the court properly exercised its discretion in admitting evidence that, in 2007, defendant exited his wife's apartment through

a window to avoid a parole officer. Contrary to defendant's contention, no other logical conclusion can reasonably be drawn from the facts, and the evidence is relevant and probative of a material issue in the case, i.e., defendant's manner of ingress and egress at his wife's apartment. Surveillance video from the night of the murder appears to corroborate defendant's alibi that he was inside his wife's apartment on Brooks Avenue. A jailhouse informant testified, however, that defendant told him that he snuck in and out of his wife's apartment through her front and back windows, and that he avoided the security cameras by passing through two "blind spots" that he had identified. The informant further testified that defendant told him that he went into his wife's apartment in the view of the security cameras before he committed the crime, and then he left the apartment through a blind spot and committed the crime. Under the circumstances presented here, we conclude that the court did not abuse its discretion in admitting the above evidence (*see generally People v Barnes*, 109 AD2d 179, 183-186 [4th Dept 1985]).

Third, the court did not abuse its discretion in admitting, with a prompt limiting instruction, testimony from the victim's granddaughter that, shortly before the victim's death, the victim told her granddaughter that defendant had stopped by her apartment and that she was afraid that he would return. Inasmuch as evidence introduced prior to the admission of that testimony established that defendant was aware of the victim's unwelcoming state of mind toward him, and because the victim's statements did not refer to any threats or bad acts by defendant (*cf. People v Meadow*, 140 AD3d 1596, 1598-1599 [4th Dept 2016], *lv denied* 28 NY3d 933 [2016]), we conclude that the testimony of the victim's granddaughter was properly admitted under the state of mind exception to the hearsay rule (*see People v Wlasiuk*, 32 AD3d 674, 679 [3d Dept 2006], *lv dismissed* 7 NY3d 871 [2006]; *see also People v Kimes*, 37 AD3d 1, 17-18 [1st Dept 2006], *lv denied* 8 NY3d 881 [2007], *reconsideration denied* 9 NY3d 846 [2007]). Defendant's ex-wife testified that, after the domestic incident in 2005, the victim "disliked" defendant, and defendant "blamed the victim for everything." Although she did not know defendant to have a friendship with the victim in 2007, defendant's ex-wife testified that defendant stopped by the victim's apartment twice during the month preceding the victim's death. Defendant said he "was going down to the old apartment building" to "say hi to [the victim]" in March 2007. Shortly thereafter, defendant and his wife visited the victim at her apartment and invited her to join them for lunch. Defendant's ex-wife testified that, upon seeing defendant, the victim said she could not go and shut the door. The evidence demonstrated that defendant knew that he had not reestablished a positive relationship with the victim after the domestic incident in 2005, and he was aware of the victim's unwelcoming state of mind toward him. Contrary to the defense theory that defendant and the victim had an amicable and even sexual relationship prior to the victim's death, the evidence established that defendant was aware that the victim did not want him to visit her apartment.

In addition, we conclude that the court minimized the potential for prejudice to defendant by instructing the jury that the victim's

statements to her granddaughter were not to be considered for their truth, but only as proof of the victim's general state of mind of not wanting defendant to visit her, regardless of whether he actually visited or intended to do so (*see People v Reynoso*, 73 NY2d 816, 819 [1988]). In any event, inasmuch as there is overwhelming proof of defendant's guilt and there is no significant probability that defendant otherwise would have been acquitted, we further conclude that any error in admitting the testimony of the victim's granddaughter's is harmless (*see People v Williams*, 25 NY3d 185, 194 [2015]; *People v Smith*, 289 AD2d 960, 961 [4th Dept 2001], *lv denied* 97 NY2d 761 [2002]; *see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Fourth, the court did not abuse its discretion in admitting in evidence a portion of a telephone call recorded in jail. During the call, defendant described a distinctive and unique modus operandi that was sufficiently similar to the manner in which the instant crime was committed. On the recording, defendant discussed evading surveillance cameras and using fire as a weapon, and such discussion is probative of his identity as the perpetrator (*see People v Frederick*, 152 AD3d 1242, 1242-1243 [4th Dept 2017]). The portion of the telephone call played to the jury is more probative than prejudicial (*see People v Matthews*, 142 AD3d 1354, 1355 [4th Dept 2016], *lv denied* 28 NY3d 1125 [2016]), and " 'the court's limiting instruction minimized any prejudice to defendant' " (*Frederick*, 152 AD3d at 1243).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is against the weight of the evidence (*see People v Jackson*, 66 AD3d 1415, 1416 [4th Dept 2009]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). We note that issues of credibility and the weight to be accorded to the evidence are primarily for the jury's determination (*see People v Witherspoon*, 66 AD3d 1456, 1457 [4th Dept 2009], *lv denied* 13 NY3d 942 [2010]), and we see no basis for disturbing the jury's determinations in this case.

We reject defendant's further contention that the court erred in refusing to suppress his statements to the police and his DNA sample on the ground that he was unlawfully subjected to custodial interrogation while incarcerated on an unrelated matter. Contrary to defendant's contention, the recording of the investigators' interview with defendant at the prison supports the court's determination that the meeting was brief and nonaccusatory in nature. Defendant met with the investigators in a large, open room, and agreed to speak with them about the "cold case." There were no threats or promises made by the investigators to induce or coerce defendant, and defendant voluntarily agreed to provide a sample of his DNA to the investigators upon their request. There was no "added constraint" that would have led defendant to believe that some other restriction had been placed on him "over and above that of ordinary confinement in a correctional facility" (*People v Jackson*, 141 AD3d 1095, 1096 [4th Dept 2016], *lv denied* 28 NY3d 1146 [2017] [internal quotation marks omitted]; *see generally People v Alls*, 83 NY2d 94, 100 [1993], *cert denied* 511 US

1090 [1994]).

We further conclude that the court did not err in denying defendant's request for an unredacted copy of a police incident report. The court conducted an in camera review of the report and determined that disclosure to defendant of the information that had been redacted from defendant's copy was unwarranted because the information was not relevant to the case (*see generally* CPL 240.20 [1]; *Matter of Brown v Grosso*, 285 AD2d 642, 644 [2d Dept 2001], *lv denied* 97 NY2d 605 [2001]).

Defendant contends in his pro se supplemental brief that he was deprived of effective assistance of counsel because his attorney failed to object to the prosecutor's characterization of the DNA evidence during summation. In particular, defendant contends that the prosecutor erroneously stated on summation that the DNA found under the victim's fingernails was in fact defendant's, in contrast to the testimony of the forensic biologist, who testified only that defendant could not be excluded as a source of the DNA. Given the forensic biologist's testimony concerning the extremely high odds of randomly selecting an unrelated individual who could be a contributor to the mixture found under the victim's fingernail clippings, we conclude that the prosecutor's statements on summation were "fair comment on the evidence" (*People v Speaks*, 28 NY3d 990, 992 [2016]). Even assuming, arguendo, that the prosecutor's comments on the DNA evidence found under the victim's fingernails could be considered a mischaracterization of the forensic biologist's testimony, we conclude that defense counsel's failure to object did not amount to ineffective assistance of counsel (*see People v Smith*, 150 AD3d 1664, 1667 [4th Dept 2017]; *see also People v Ramsaran*, 29 NY3d 1070, 1071 [2017]). Defendant's own testimony that he had been "having sex" with the victim as often as three times per week, and as recently as two days prior to her death, raised the reasonable possibility that his DNA might have been found on the victim (*see People v Wright*, 25 NY3d 769, 783 [2015]; *cf. People v Jones*, 134 AD3d 1588, 1589 [4th Dept 2015]). Thus, we reject defendant's implicit assertion underlying his ineffective assistance contention that he was somehow misidentified as the perpetrator by the use of the DNA evidence. 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 [1981]).

The remaining contentions in defendant's main and pro se supplemental briefs are either based on matters outside the record and are appropriately raised by way of a CPL 440.10 motion (*see People v DeJesus*, 110 AD3d 1480, 1482 [4th Dept 2013], *lv denied* 22 NY3d 1155 [2014]), or are unpreserved for our review (*see People v Jackson*, 236 AD2d 628, 629 [2d Dept 1997], *lv denied* 90 NY2d 859 [1997]), and we decline to exercise our power to review any such unpreserved contentions as a matter of discretion in the interest of justice (*see*

CPL 470.15 [6] [a]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

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CA 17-00704

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

COREY J. HOGAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ISKALO OFFICE HOLDINGS III LLC,
DEFENDANT-APPELLANT.

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

HOGAN WILLIG, PLLC, AMHERST (THOMAS B. HUGHES OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered January 30, 2017. The order and judgment, insofar as appealed from, granted the motion of plaintiff for summary judgment in lieu of complaint and entered judgment in plaintiff's favor.

It is hereby ORDERED that the order and judgment insofar as appealed from is unanimously reversed on the law without costs, the motion is denied, and the second decretal paragraph is vacated.

Memorandum: Plaintiff loaned defendant $90,000 in connection with a commercial real estate project in the Town of Amherst, Erie County. When defendant failed to repay the loan in accordance with the terms of the corresponding note, plaintiff moved for summary judgment in lieu of complaint pursuant to CPLR 3213. Supreme Court, inter alia, granted the motion and entered judgment in plaintiff's favor. We reverse the order and judgment insofar as appealed from, deny the motion, and vacate the second decretal paragraph entering judgment in plaintiff's favor. In accordance with CPLR 3213, "the moving and answering papers shall be deemed the complaint and answer, respectively."

To prevail on a motion pursuant to CPLR 3213, the plaintiff must prove, inter alia, that he or she satisfied all conditions precedent to commencing the action (*see Woodlaurel, Inc. v Wittman*, 199 AD2d 497, 498 [2d Dept 1993], citing, inter alia, *1014 Fifth Ave. Realty Corp. v Manhattan Realty Co.*, 67 NY2d 718 [1986]; *see also TD Bank, N.A. v Leroy*, 121 AD3d 1256, 1260 n [3d Dept 2014]; *see generally Logan v Williamson & Co.*, 64 AD2d 466, 470 [4th Dept 1978], *appeal dismissed* 46 NY2d 996 [1979]). Plaintiff failed to meet that burden here. The note contains a condition precedent to suit, i.e.,

plaintiff must obtain the mortgage lender's written consent before "commenc[ing] or prosecut[ing] any action or other legal proceeding relating to th[e] Note." Plaintiff's moving papers, however, do not establish that he satisfied that condition precedent by obtaining the lender's written consent. Indeed, plaintiff's moving papers ignore the condition precedent entirely. We therefore agree with defendant that the court erred in granting the motion (*see 1014 Fifth Ave. Realty Corp.*, 67 NY2d at 720-721; *Hutchins v Hutchins*, 150 AD3d 426, 426 [1st Dept 2017], *appeal dismissed* 30 NY3d 929 [2017]; *TD Bank, N.A.*, 121 AD3d at 1257-1259; *Woodlaurel, Inc.*, 199 AD2d at 498).

We reject plaintiff's contrary interpretation of the note. According to plaintiff, the condition precedent is inoperable "unless and until [he] is notified by the [mortgage lender] that [defendant] has defaulted in the payment of any Mortgage Loan." That, however, is not what the note provides. Rather, the note contains a provision that authorizes plaintiff to "receive" defendant's payments on the note "unless and until [plaintiff] is notified by the [mortgage lender] that [defendant] has defaulted in the payment of any Mortgage Loan." Upon such notification, plaintiff may no longer "accept or collect" any payments on the note from defendant; indeed, any payments received by plaintiff in derogation of that provision must be "held in trust and promptly delivered to the [lender]." As its plain text reveals, the provision upon which plaintiff relies entitles him to "receive," i.e., keep, any payments from defendant unless and until he is notified of defendant's default on the mortgage loan, at which point he is no longer entitled to "accept or collect" any payments on the note from defendant. Contrary to plaintiff's contention, the provision does not qualify or eliminate his separate obligation to secure the lender's written consent before commencing an action on the note.

The parties' remaining contentions are academic in light of our determination.

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

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CA 17-01400

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

BELINDA C. COOPER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DEANNA M. NESTOROS AND SCOTT A. SLONIKER,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

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

LAW OFFICES OF JOHN TROP, BUFFALO (LEAH A. COSTANZO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered May 17, 2017. The order denied plaintiff's posttrial motion pursuant to CPLR 4404 (a).

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

Memorandum: Plaintiff commenced this action to recover damages for injuries that she allegedly sustained when her vehicle collided with a vehicle owned by defendant Deanna M. Nestoros and operated by defendant Scott A. Sloniker. In appeal No. 1, plaintiff appeals from an order that denied her posttrial motion pursuant to CPLR 4404 (a) in which she requested that Supreme Court set aside the verdict and direct a judgment in her favor or, alternatively, order a new trial. In appeal No. 2, plaintiff appeals from a judgment entered on the jury's verdict of no cause of action. We note at the outset that the appeal from the judgment in appeal No. 2 brings up for review the propriety of the order in appeal No. 1, and thus the appeal from the order in appeal No. 1 must be dismissed (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435, 435 [2d Dept 1989]).

Plaintiff contends that the court erred in denying that part of her motion pursuant to CPLR 4401 for a directed verdict on the issue of causation. We reject that contention. "A jury is not required to accept an expert's opinion to the exclusion of the facts and circumstances disclosed by other testimony [ ]or the facts disclosed on cross-examination . . . Indeed, a jury is at liberty to reject an expert's opinion if it finds the facts to be different from those [that] formed the basis for the opinion or if, after careful consideration of all the evidence in the case, it disagrees with the

opinion" (*Lai Nguyen v Kiraly* [appeal No. 2], 82 AD3d 1579, 1580 [4th Dept 2011] [internal quotation marks omitted]; *see Bennice v Randall*, 71 AD3d 1454, 1455 [4th Dept 2010]).

Here, both of plaintiff's treating physicians testified that they relied on her self-reported medical history in concluding that her injuries were proximately caused by the motor vehicle accident. Plaintiff's chiropractor testified that, based on that history, he did not believe that plaintiff had suffered a neck injury before the date of the accident, and he further testified that he would have to reevaluate his conclusion if he had been given inaccurate information. Plaintiff's orthopedic surgeon testified that he initially believed that plaintiff's shoulder pain was caused by an injury to her neck but ultimately concluded that it was caused by an injury to her shoulder. Although plaintiff maintained on direct examination that she did not suffer a neck injury prior to the date of the accident, that testimony was directly contradicted by her medical records, which indicated that she had complained of chronic neck pain five months before the accident. Thus, we conclude that there is a rational process by which the jury could have found that the accident was not a substantial factor in causing plaintiff's injuries (*see generally Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]; *Tapia v Dattco, Inc.*, 32 AD3d 842, 844 [2d Dept 2006]).

Our determination with respect to the issue of causation renders moot plaintiff's further contention that the court erred in denying those parts of her motion for a directed verdict on the issues of serious injury and negligence (*see Cummings v Jiayan Gu*, 42 AD3d 920, 923 [4th Dept 2007]; *see also Boehm v Rosario*, 154 AD3d 1298, 1299 [4th Dept 2017]).

For reasons similar to those discussed above with respect to the issue of causation, we reject plaintiff's contention that the court erred in refusing to set aside the verdict and to direct judgment in her favor or, alternatively, to order a new trial (*see* CPLR 4404 [a]). We conclude that a fair interpretation of the evidence supports the jury's conclusion (*see Sanchez v Dawson*, 120 AD3d 933, 934 [4th Dept 2014]; *Barrow v Dubois*, 82 AD3d 1685, 1686 [4th Dept 2011]).

Plaintiff further contends that the court abused its discretion in redacting a portion of the orthopedic surgeon's videotaped deposition. In that portion of the deposition, the surgeon used a video of an arthroscopic surgery to explain the surgery that he performed on plaintiff. The surgeon testified, however, that the surgery depicted in the video was different in nature from the surgery performed on plaintiff, and thus the court in its discretion may have concluded that the video could serve to mislead or confuse the jury (*cf. Blanchard v Whitlark*, 286 AD2d 925, 926-927 [4th Dept 2001]). We therefore cannot say "that the court abused its discretion in redacting [those] portions of the recorded testimony" (*Nary v Jonientz*, 110 AD3d 1448, 1449 [4th Dept 2013]).

Plaintiff failed to preserve for our review her remaining contentions that the court abused its discretion in admitting her

medical records in evidence inasmuch as she did not object to the challenged evidence on the specific grounds that she now raises on appeal (*see id.* at 1448).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

112

CA 17-01402

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

BELINDA C. COOPER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DEANNA M. NESTOROS AND SCOTT A. SLONIKER,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

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

LAW OFFICES OF JOHN TROP, BUFFALO (LEAH A. COSTANZO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Niagara County (Frank Caruso, J.), entered May 17, 2017. The judgment awarded defendants costs and disbursements as against plaintiff following the jury's verdict of no cause of action.

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

Same memorandum as in *Cooper v Nestoros* ([appeal No. 1] — AD3d — [Mar. 16, 2018] [4th Dept 2018]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

113

CA 16-01603

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

IN THE MATTER OF YOUSIF KARAMALLA,
PETITIONER-PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SHARON DEVINE, EXECUTIVE DEPUTY COMMISSIONER,
NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY
ASSISTANCE, RESPONDENT-DEFENDANT-APPELLANT,
ET AL., RESPONDENT-DEFENDANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JOSEPH M. SPADOLA OF COUNSEL), FOR RESPONDENT-DEFENDANT-APPELLANT SHARON DEVINE, EXECUTIVE DEPUTY COMMISSIONER, NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE.

EMPIRE JUSTICE CENTER, ALBANY (SAIMA A. AKHTAR OF COUNSEL), FOR PETITIONER-PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered July 5, 2016 in a hybrid CPLR article 78 proceeding, declaratory judgment action, and action under 42 USC § 1983. The order granted petitioner-plaintiff's application for certification of a class.

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

Memorandum: Petitioner-plaintiff (petitioner) commenced this hybrid CPLR article 78 proceeding, declaratory judgment action, and action under 42 USC § 1983 on behalf of himself and a purported class of individuals who had been or would be denied Safety Net Assistance (SNA), a form of public assistance, based on their temporary protected immigration status (TPS). Petitioner sought, inter alia, the annulment of the determination of the New York State Office of Temporary and Disability Assistance (OTDA) affirming the denial of his application for SNA benefits by the Erie County Department of Social Services (DSS); a declaration that OTDA's denial of SNA benefits to him and members of the class violated their equal protection rights under the New York State and Federal Constitutions; certification of a class; and an order directing OTDA to identify and redetermine the eligibility of all class members who were denied SNA benefits as a result of their TPS, and to provide all identified class members with written notice of the redetermination of their eligibility. Supreme Court determined, inter alia, that the denial of SNA benefits based on

TPS was unlawful and directed DSS to redetermine petitioner's eligibility to receive those benefits. As relevant to this appeal, the court also issued a class certification order certifying a class of "[a]ll past, present, and future applicants for [SNA] in New York State who filed or submitted, or who will file or submit, their applications to their local social services districts on or after June 17, 2012, and who were or are individuals granted TPS . . . ; and who were or will be denied [SNA] solely as a result of their immigration status." For the purpose of identifying members of the class, the court directed OTDA and DSS to "keep track and make a list" of future denials that are based on TPS, and for OTDA to "issue guidance to the county departments of social services" to examine where SNA was denied based on TPS. We affirm.

Respondent-defendant Sharon Devine, as Executive Deputy Commissioner of OTDA (respondent) contends that petitioner's claim based on CPLR article 78 is subject to a four-month statute of limitations and, therefore, class members may obtain relief with respect to denials occurring only up to four months before the commencement of this proceeding. We note, however, that by failing to plead a statute of limitations defense in her answer, respondent has waived that contention (*see* CPLR 3018 [b]; 7804 [f]; *Matter of Watt v Town of Gaines*, 140 AD2d 947, 947 [4th Dept 1988], *lv dismissed in part and denied in part* 72 NY2d 1040 [1988]; *see also Nichols v Diocese of Rochester* [appeal No. 2], 42 AD3d 903, 905 [4th Dept 2007]). In any event, petitioner is seeking the same substantive relief with his equal protection claim asserted under 42 USC § 1983, which is subject to a three-year statute of limitations (*see Mulcahy v New York City Dept. of Educ.*, 99 AD3d 535, 536 [1st Dept 2012]*; see generally Barry v Cadman Towers, Inc.*, 136 AD3d 951, 952 [2d Dept 2016], *lv denied* 28 NY3d 913 [2017]; *Acquest Wehrle, LLC v Town of Amherst*, 129 AD3d 1644, 1646 [4th Dept 2015], *appeal dismissed* 26 NY3d 1020 [2015]).

Respondent's further contention that the order provides for retroactive relief is improperly raised for the first time on appeal (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). In any event, we conclude that the contention is premature inasmuch as the order does not grant retroactive benefits to the class members by directing redeterminations, as respondent contends, nor does it grant "notice relief" by directing OTDA to inform class members that they may have their eligibility reexamined, as petitioner contends. The class certification order merely certifies the class, directs OTDA and DSS to identify class members, and directs OTDA to issue guidance to the county departments of social services to examine denials in order to identify members of the class (*see generally Matter of Town of Evans [International Bhd. of Elec. Workers, Local 41]*, 6 AD3d 1157, 1158 [4th Dept 2004]; *Matter of Harris v Grey Adv.*, 180 AD2d 879, 880 [3d Dept 1992]).

Finally, respondent contends that the class certification order is overbroad because it includes future applicants who will be denied SNA solely as a result of their immigration status. We reject that

contention and conclude that the court did not abuse its discretion by including in the certified class future applicants who might prospectively be denied SNA based solely on their TPS, where, as here, OTDA did not change its policy until several months after the court issued its order (*see Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 398 [2014]). Contrary to respondent's contention, the fact that she issued a general information system message to the social service departments in October 2016, recommending that they follow the guidance provided by OTDA, did not render the inclusion of future applicants in the class unnecessary. The message was issued three months after the class certification order was entered, and thus it was proper for the court to make allowance in its order for those prospective class members who may have applied for benefits during that intervening period.

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

114

TP 17-01438

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

IN THE MATTER OF JENNIFER MULE AND GARY BALLOWE,
PETITIONERS,

V MEMORANDUM AND ORDER

TOWN OF BOSTON, RESPONDENT.

THE TARANTINO LAW FIRM, LLP, BUFFALO (JACOB A. PIORKOWSKI OF COUNSEL), FOR PETITIONERS.

BARTH SULLIVAN BEHR, BUFFALO (DAVID H. WALSH OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Joseph R. Glownia, J.], entered August 7, 2017) to review a determination of respondent. The determination, inter alia, assessed a fine of $35,146.92 against petitioners.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by striking paragraphs six and seven of the determination, and as modified the determination is confirmed without costs.

Memorandum: In 2012 petitioners purchased residential property in respondent, Town of Boston (Town), at a tax foreclosure sale. After petitioners performed work on the structure, the Town Code Enforcement Officer advised petitioners and the Town that the property was in violation of the Code of the Town of Boston (Town Code) inasmuch as no required building permit had been obtained for such work. Pursuant to Town Code § 57-2 (A), a building permit is required prior to commencing "the erection, construction, enlargement, alteration, improvement, removal or demolition of any building or structure." No such permit is required, however, for "[t]he performance of necessary repairs which are not of a structural nature" or "[a]lterations to existing buildings, provided that the alterations . . . [d]o not materially affect structural features" (§ 57-2 [A] [1], [2] [a]). In addition, the Town Code provides that "[n]o building . . . upon which work has been performed which required the issuance of a building permit shall be occupied or used unless a certificate of occupancy has been issued" (§ 57-3 [A]). Finally, as relevant to the work on petitioners' property, the Town Code further provides that "[a]ny building constructed without a building permit . . . is hereby

declared to be an unsafe building" (§ 47-2).

The Town Board conducted a hearing and thereafter issued a determination that, inter alia, petitioners performed alterations to their property for which a permit was required and, as a result, the property was unsafe pursuant to Town Code § 47-2. The Town Board further determined that the Town "may, in its discretion, assess fees against [petitioners] in the amount of $250.00, representing each daily violation by [petitioners] of Chapter 57 of the Town of Boston Code and the costs incurred by the Town . . . in investigating this matter." In addition, the Town Board determined that it was authorized, pursuant to section 47-10 of the Town Code, to "assess all costs and expenses incurred by the Town" in the proceeding, and the Town Board assessed a fine of $35,146.92, the amount of attorney's fees and costs allegedly incurred by the Town, together with a fine in the amount of $250 for each day that the violation of the building permit and certificate of occupancy requirements continued from the date of the determination. The Town thereafter fixed a notice of condemnation to the property.

Petitioners commenced this CPLR article 78 proceeding challenging the determination, and the matter was transferred to this Court pursuant to CPLR 7804 (g). At the outset, we reject the Town's contention that petitioners failed to exhaust their administrative remedies, inasmuch as there were no administrative remedies available to petitioners under the Town Code (*see Matter of DeRosa v Dyster*, 90 AD3d 1470, 1471 [4th Dept 2011]; *Matter of Custom Topsoil Inc. v City of Buffalo*, 12 AD3d 1168, 1170 [4th Dept 2004).

Contrary to petitioners' contention, the hearing conducted by the Town Board was authorized by the Town Code (*see* § 47-7) and, in any event, petitioners waived any objection to the hearing by expressly agreeing to it and participating in it (*see Matter of Snyder Dev. Co., Inc. v Town of Amherst Town Bd.*, 12 AD3d 1092, 1093 [4th Dept 2004]). We reject petitioners' challenges to the determination insofar as it found that they violated the requirements of the Town Code with respect to building permits. The testimony of the Code Enforcement Officer and the memorandum of the professional engineer who inspected the property support the Town Board's findings that the alterations were structural in nature, thereby triggering the building permit requirement, and that petitioners misrepresented to Town officials the nature and scope of the alterations. It is also undisputed that petitioners did not apply for or obtain a building permit, and thus the Town Board was entitled to declare the structure unsafe under the Town Code. We conclude, therefore, that the findings set forth in the first five paragraphs of the Town's determination are not arbitrary and capricious and are supported by the record (*see generally id.* at 1092-1093).

We reach a different conclusion, however, with respect to the fines and fees assessed by the Town. The Town Board lacked jurisdiction in the first instance to impose such fines and fees, which is properly a judicial function (*see generally Matter of Stoffer v Department of Pub. Safety of the Town of Huntington*, 77 AD3d 305,

316-317 [2d Dept 2010]). Furthermore, section 47-10 of the Town Code, on which the Town relies, permits the Town Board to "assess all the costs and expenses incurred by the Town in connection with the proceedings to remove or secure a dangerous or unsafe building or structure . . . against the land on which said building or structure is located." Even assuming, arguendo, that the Town Board incurred any costs and expenses contemplated by that section, we conclude that it has not substantiated such costs or expenses, nor did it assess them against petitioners' property. Rather, it imposed retroactive and prospective fines and fees against petitioners based upon their "willful disregard" of the Town Code. Inasmuch as the Town Board lacked authority to assess such fines and fees, we modify the determination and grant the petition in part by striking paragraphs six and seven, thereby vacating the fines and fees imposed therein. We have considered petitioners' remaining contentions and conclude that none requires further modification of the determination.

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

120

KA 16-01012

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARNELL JACKSON, DEFENDANT-APPELLANT.

ADAM H. VANBUSKIRK, AUBURN, FOR DEFENDANT-APPELLANT.

DARNELL JACKSON, DEFENDANT-APPELLANT PRO SE.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (JESSE M. ESHKOL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered January 12, 2016. The judgment convicted defendant, upon a jury verdict, of promoting prison contraband in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of promoting prison contraband in the first degree (Penal Law § 205.25 [2]), defendant contends that the evidence is legally insufficient to establish that the item he was charged with possessing, i.e., a small, sharpened piece of metal in a pen cap, constitutes dangerous contraband within the meaning of Penal Law § 205.00 (4). Defendant failed, however, to preserve that contention for our review inasmuch as his motion for a trial order of dismissal was not " 'specifically directed' " at that alleged deficiency in the People's evidence (*People v Gray*, 86 NY2d 10, 19 [1995]; *see People v Womack*, 151 AD3d 1852, 1852-1853 [4th Dept 2017], *lv denied* 29 NY3d 1135 [2017]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict, insofar as it rests upon the jury's implicit finding that the item at issue constituted dangerous contraband, is against the weight of the evidence (*see People v Hood*, 145 AD3d 1565, 1565-1566 [4th Dept 2016]).

Defendant failed to preserve for our review his contention that County Court improperly penalized him for exercising his right to a jury trial when it imposed a sentence greater than that offered during plea negotiations (*see People v Coapman*, 90 AD3d 1681, 1683-1684 [4th

Dept 2011], *lv denied* 18 NY3d 956 [2012]). In any event, that contention lacks merit (*see People v Dorn*, 71 AD3d 1523, 1524 [4th Dept 2010]). Furthermore, the sentence imposed is not unduly harsh or severe.

Defendant's remaining contentions are raised in his pro se supplemental brief. Defendant failed to preserve for our review the contentions that the jury was tainted when an individual juror viewed defendant in shackles outside the courtroom (*see People v McCummings*, 195 AD2d 880, 881 [3d Dept 1993]; *People v Soltis*, 137 AD2d 732, 733 [2d Dept 1988], *lv denied* 71 NY2d 1033 [1988]), and that he was denied due process because he stood trial in prison garb (*see People v McNitt*, 96 AD3d 1641, 1641 [4th Dept 2012], *lv denied* 19 NY3d 998 [2012]; *see also People v Cruz*, 14 AD3d 730, 732 [3d Dept 2005], *lv denied* 4 NY3d 852 [2005]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject defendant's further contention that defense counsel was ineffective in failing to move for a mistrial based upon the juror's observation of defendant in shackles, "[i]nasmuch as a motion for a mistrial would have had 'little or no chance of success' " (*People v Alexander*, 109 AD3d 1083, 1085 [4th Dept 2013]). Finally, contrary to defendant's contention, we conclude that defense counsel's failure to object to defendant's appearance in prison garb did not constitute ineffective assistance of counsel (*see People v Jefferson*, 58 AD3d 753, 753 [2d Dept 2009], *lv denied* 12 NY3d 784 [2009]; *People v Marshall*, 2 AD3d 1157, 1158 [3d Dept 2003], *lv denied* 2 NY3d 743 [2004]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

121

KA 11-00794

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH BARKSDALE, DEFENDANT-APPELLANT.

WILLIAM G. PIXLEY, PITTSFORD, 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 (Robert B. Wiggins, A.J.), rendered March 22, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]), defendant contends that Supreme Court (Valentino, J.) erred in refusing to suppress statements he made to a police officer. We reject that contention. Defendant was arrested and taken to a police substation, where an officer began to read the *Miranda* warnings to defendant. When the officer asked defendant if he understood his rights, defendant replied " '[n]ope, nope, nope. Yeah, I've been through this since you were both in diapers.' " When the officer then asked if he could continue the process, defendant indicated yes, and then waived his rights and indicated that he was willing to talk to the officer. It is well settled that the court's "determination that defendant did not unequivocally invoke his right to remain silent is 'granted deference and will not be disturbed unless unsupported by the record' " (*People v Zacher*, 97 AD3d 1101, 1101 [4th Dept 2012], *lv denied* 20 NY3d 1015 [2013]; *see People v Smith*, 140 AD3d 1774, 1775 [4th Dept 2016], *lv denied* 28 NY3d 1127 [2016]). Here, the record fully supports the court's determination that defendant "waived his *Miranda* rights and did not make an unequivocal assertion of his right to remain silent at that time" (*People v Young*, 153 AD3d 1618, 1619 [4th Dept 2017]; *see People v Ingram*, 19 AD3d 101, 102 [1st Dept 2005], *lv denied* 5 NY3d

806 [2005]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

125

KA 15-02119

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BENILUIS RUIZ, DEFENDANT-APPELLANT.

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (SHIRLEY A. GORMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered July 22, 2015. The judgment convicted defendant upon a jury verdict of, inter alia, sexual abuse in the first degree, rape in the third degree and criminal sexual act in the third degree (three counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed as a matter of discretion in the interest of justice and on the law and a new trial is granted on counts 1, 4, 5 and 7 through 12 of the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, sexual abuse in the first degree (Penal Law § 130.65 [2]), rape in the third degree (§ 130.25 [2]), and three counts of criminal sexual act in the third degree (§ 130.40 [2]). The charges arose from defendant's sexual conduct with a relative when she was less than 17 years old.

Defendant's motion for a trial order of dismissal was based upon defense counsel's argument that the victim, during her testimony, had unspecified "problems with dates," and thus defendant failed to preserve for our review his present challenges to the legal sufficiency of the evidence supporting the felony charges (*see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Morse*, 111 AD3d 569, 570 [1st Dept 2013], *lv denied* 22 NY3d 1157 [2014]). Viewing the evidence in light of the elements of those crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict on the felony charges is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). " 'The credibility of the victim and the weight to be accorded her testimony were matters for the jury,' " and we perceive no basis to disturb the jury's credibility determinations (*People v Robinson*, 41

AD3d 1183, 1183 [4th Dept 2007], *lv denied* 9 NY3d 880 [2007]).

We reject defendant's contention that County Court erred in denying his motion to preclude the People's expert witness from testifying based upon the lack of timely notice concerning the expert's testimony. "Pretrial discovery in criminal proceedings is governed by statute," and defendant identifies no statute requiring the People to provide discovery concerning the identity of the expert or the content of her testimony (*People v Thompson*, 92 AD3d 1139, 1140 [3d Dept 2012], *affd* 21 NY3d 555 [2013]). Defendant failed to preserve for our review his further contention that the testimony of the expert was improperly admitted in evidence because the jury did not require expert testimony concerning child sexual abuse accommodation syndrome (CSAAS) (*see* CPL 470.05 [2]; *People v Mason*, 162 AD2d 144, 144 [1st Dept 1990], *lv denied* 76 NY2d 860 [1990]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant also failed to preserve for our review his contention that the testimony of the expert was improperly utilized to prove that the charged crimes occurred and to bolster the victim's testimony. We agree with defendant, however, that the challenged testimony was improperly admitted, inasmuch as it was introduced primarily to prove that the charged crimes took place (*see People v Knupp*, 179 AD2d 1030, 1031-1032 [4th Dept 1992]), and we conclude that the error in its admission "operated to deprive defendant of a fair trial and thus warrant[s] reversal in the interest of justice" (*id*. at 1032; *see* CPL 470.05 [6] [a]).

In reaching that conclusion, we acknowledge that expert testimony concerning CSAAS and similar psychological syndromes has long been admissible to explain the behavior of a victim that might be puzzling to a jury (*see People v Spicola*, 16 NY3d 441, 465 [2011], *cert denied* 565 US 942 [2011]). Here, however, the expert witness did not confine her testimony to "educat[ing] the jury on a scientifically recognized 'pattern of secrecy, helplessness, entrapment [and] accommodation' experienced by a child victim" (*People v Nicholson*, 26 NY3d 813, 828 [2016]). Instead, the expert explained "grooming" and other behaviors associated with perpetrators of child sexual abuse. Her detailed description of a typical perpetrator's modus operandi, moreover, closely tracked the victim's testimony concerning defendant's conduct, and the prosecutor on summation urged the jury to conclude that defendant's interactions with the victim fit the description of a typical perpetrator's conduct as described by the expert. In sum, that part of the testimony of the expert describing the conduct of a typical perpetrator was not directed at explaining the victim's behavior. Rather, it was presented "for the purpose of proving that the [victim] was sexually abused" (*People v Duell*, 163 AD2d 866, 866 [4th Dept 1990]), which purpose was reinforced by the prosecutor's summation. Inasmuch as we conclude that the challenged expert testimony denied defendant his right to a fair trial, we reverse the judgment and grant defendant a new trial on counts 1, 4, 5 and 7 through 12 of the indictment.

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

129

CA 17-01526

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

KRISTIN AHRENS, PLAINTIFF-RESPONDENT,

V ORDER

PETER W. AHRENS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE MCGORRY LAW FIRM, LLP, BUFFALO (MICHAEL P.J. MCGORRY OF COUNSEL), FOR DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (SHARI JO REICH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Sharon S. Townsend, J.), entered April 19, 2017 in a divorce action. The order, among other things, denied defendant's request for maintenance.

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

130

CA 17-01527

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

KRISTIN AHRENS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PETER W. AHRENS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE MCGORRY LAW FIRM, LLP, BUFFALO (MICHAEL P.J. MCGORRY OF COUNSEL), FOR DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK, BUFFALO (SHARI JO REICH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Sharon S. Townsend, J.), entered May 15, 2017 in a divorce action. The judgment, among other things, adjudged that neither party is entitled to maintenance.

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

Memorandum: Defendant husband appeals from a judgment of divorce in which Supreme Court determined, among other things, that he is not entitled to maintenance from plaintiff wife. Contrary to the husband's contention, we conclude that the court did not err in imputing to him an annual income in the amount of $135,000 for the purpose of determining whether he should receive maintenance (*see Lauzonis v Lauzonis*, 105 AD3d 1351, 1351 [4th Dept 2013]). It is well settled that, in making such determinations, the court may consider a party's past income and demonstrated earning potential as evidenced by a party's income from investments, deferred compensation, substantial distributions (*see Lennox v Weberman*, 109 AD3d 703, 703-704 [1st Dept 2013]), and offers of employment (*see Ceravolo v DeSantis*, 125 AD3d 113, 120 [3d Dept 2015]). Here, the court considered that, for most of the parties' 20-year marriage, the husband's income ranged from $140,000 to $190,000 annually. It was therefore not an abuse of discretion for the court to conclude that the husband's current income of $89,183, inclusive of expense reimbursements, was a dramatic departure from his past earnings that had been reduced only in the past two years. It also was within the court's discretion to consider a job offer that the husband received during the course of the divorce proceedings with a base salary in the amount of $135,000. We agree with the husband that his decision to decline that job offer did "not render his job search less than diligent," insofar as his decision was

based upon his concern that the job was two and one half hours away from where his younger child was residing (*Jelfo v Jelfo*, 81 AD3d 1255, 1257 [4th Dept 2011]). We conclude, however, that the court's decision to impute income at a level slightly below the husband's traditional median earning range was reasonable, and the amount thereof is supported by the record (*see Lauzonis*, 105 AD3d at 1351).

We reject the husband's contention that the court erred in imputing to him over $14,500 in unreported fringe benefits. It is well settled that a court in its discretion may impute income based on fringe benefits provided as compensation for employment (*see Matter of Geller v Geller*, 133 AD3d 599, 600 [2d Dept 2015], citing Family Ct Act § 413 [1] [b] [5] [iv]). Here, the husband testified that his income included various unreported fringe benefits reimbursed to him by his employer, including meal, travel, and entertainment expenses, and he conceded that his bank account reflected at least one instance in which he deposited a check for such reimbursements. There were also several deposits of over $1,000 each month that the husband testified may have been reimbursements for such expenses. We therefore conclude that the court did not abuse its discretion in imputing those amounts as income to the husband (*see id.*).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

149

CAF 16-00306

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

IN THE MATTER OF MICHAEL S. AND GABRIEL S.

CHAUTAUQUA COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KATHRYNE T., RESPONDENT,
AND TIMOTHY S., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

REBECCA L. DAVISON-MARCH, MAYVILLE, FOR PETITIONER-RESPONDENT.

MARY S. HAJDU, LAKEWOOD, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered February 4, 2016 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, determined that respondents had permanently neglected the subject children.

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

Memorandum: In appeal No. 1, respondent father appeals from an order determining that the subject children are permanently neglected. With the consent of the parties, Family Court suspended judgment for six months. In appeal No. 2, the father appeals from an order revoking the suspended judgment and terminating his parental rights with respect to the children.

Contrary to the father's contention in appeal No. 1, the court properly determined that petitioner demonstrated by the requisite clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the father and the children (*see Matter of Jerikkoh W. [Rebecca W.]*, 134 AD3d 1550, 1550 [4th Dept 2015], *lv denied* 27 NY3d 903 [2016]). "Diligent efforts include reasonable attempts at providing counseling, scheduling regular visitation with the child[ren], providing services to the parents to overcome problems that prevent the discharge of the child[ren] into their care, and informing the parents of their child[ren]'s progress" (*Matter of Jessica Lynn W.*, 244 AD2d 900, 900-901 [4th Dept 1997]). Here, petitioner had the father psychologically evaluated, provided him with a copy of the report, connected him with

mental health providers to address some of his issues, coordinated regular visitation with the children, provided him with parenting classes, encouraged him to schedule medical appointments for the children, provided him with transportation assistance, offered him budget counseling, and encouraged him to maintain safe, suitable, and stable housing.

With respect to appeal No. 2, "it is well settled that, '[i]f [petitioner] establishes by a preponderance of the evidence that there has been noncompliance with any of the terms of the suspended judgment, the court may revoke the suspended judgment and terminate parental rights' " (*Matter of Savanna G. [Danyelle M.]*, 118 AD3d 1482, 1483 [4th Dept 2014]). Here, there is a sound and substantial basis in the record to support the court's determination that the father failed to comply with the terms of the suspended judgment and that it is in the children's best interests to terminate his parental rights (*see Matter of Amanda M. [George M.]*, 140 AD3d 1677, 1678 [4th Dept 2016]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

150

CAF 16-00307

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

IN THE MATTER OF MICHAEL S. AND GABRIEL S.

CHAUTAUQUA COUNTY DEPARTMENT OF HEALTH AND
HUMAN SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KATHRYNE T., RESPONDENT,
AND TIMOTHY S., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

REBECCA L. DAVISON-MARCH, MAYVILLE, FOR PETITIONER-RESPONDENT.

MARY S. HAJDU, LAKEWOOD, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered February 4, 2016 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, revoked a suspended judgment and terminated the parental rights of respondents with respect to the subject children.

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

Same memorandum as in *Matter of Michael S. [Timothy S.]* ([appeal No. 1] — AD3d — [Mar. 16, 2018] [4th Dept 2018]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

164

CA 17-01159

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

LATOYIA BAITY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO AND THOMAS LEATHERBARROW,
DEFENDANTS-RESPONDENTS.

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

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (DAVID M. LEE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), entered February 18, 2015. The order, inter alia, granted the motion of defendants to dismiss the complaint.

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

Memorandum: Plaintiff commenced this action asserting various tort claims under state law against defendants as a result of being arrested, detained, and then released on August 7, 2006 without charges being filed. Plaintiff timely served a notice of claim against defendant City of Buffalo, and commenced this action against defendants on July 15, 2008. Plaintiff appeals from an order that, inter alia, granted defendants' motion pursuant to CPLR 3211 (a) (5) to dismiss the complaint as time-barred. We affirm.

We reject plaintiff's contention that defendants waived their statute of limitations defense because their motion was made more than 60 days after interposing their answer. The 60-day waiver rule does not apply to motions to dismiss based on the statute of limitations (*see* Siegel, NY Prac § 111 at 208-209 [5th ed 2011]; *see also Goldenberg v Westchester County Health Care Corp.*, 16 NY3d 323, 327 [2011]).

We reject plaintiff's further contention that a three-year statute of limitations applies to the claims she asserts under New York's "constitutional tort law." General Municipal Law § 50-i (1) (c) provides that any action for personal injury against a municipality shall be commenced within one year and 90 days after the happening of the event upon which the claim is based (*see Broyles v Town of Evans*, 147 AD3d 1496, 1497 [4th Dept 2017]). General

Municipal Law § 50-i (2) further provides that the limitations period is applicable "notwithstanding any inconsistent provisions of law" (*see generally Wright v City of Newburgh*, 259 AD2d 485, 486 [2d Dept 1999]). We therefore conclude that Supreme Court properly applied the limitations period under General Municipal Law § 50-i (1) (c) in dismissing the complaint as time-barred (*see Drake v City of Rochester*, 96 Misc 2d 86, 93-94 [Sup Ct, Monroe County 1978], *affd for reasons stated* 74 AD2d 996 [4th Dept 1980]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

168

KA 12-01087

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARCUS J. MCMILLAN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON 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 (James J. Piampiano, J.), rendered March 8, 2012. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree and assault in the first degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him, upon his plea of guilty, of manslaughter in the first degree (Penal Law § 125.20 [1]) and assault in the first degree (§ 120.10 [1]). In appeal No. 2, he appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (§ 220.16 [1]). Contrary to defendant’s contention in both appeals, the sentences are not unduly harsh or severe.

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

169

KA 12-01086

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARCUS J. MCMILLAN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON 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 (James J. Piampiano, J.), rendered April 26, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Same memorandum as in *People v McMillan* ([appeal No. 1] — AD3d — [Mar. 16, 2018] [4th Dept 2018]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

177

KA 16-01759

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONALD JOHNSON, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered January 29, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]), defendant contends that Supreme Court erred in refusing to suppress a handgun that was seized from a vehicle in which he was the front seat passenger. We reject that contention.

The record from the suppression hearing establishes that, at approximately 6:55 p.m., the police received a report that gunshots had been fired near a specified street and the shooter entered the front passenger side of a red Chevy Trailblazer with a specific license plate number and a total of five occupants. When officers responded to the scene, they spoke with the identified citizen complainant, who repeated the same information. The complainant had been sitting in the driver's side of his vehicle when the shooter and another man walked past. The shooter turned and shot twice at the vehicle. One bullet had entered the rear window and was lodged in the driver's seat headrest. The complainant gave the same information to the officers as they had received on their police dispatch, with the additional information that the two men who had walked by were "light skinned."

Ten minutes later, another police officer observed the same Chevy

Trailblazer approximately three blocks from the site of the shooting. The officer stopped the vehicle and removed the three passengers. While defendant was being frisked by one officer, another officer began to search the vehicle, discovering and seizing the loaded handgun from a compartment behind the glove box. Defendant and the two other occupants were arrested.

We conclude that, contrary to defendant's contention, the court properly deemed the search permissible under the automobile exception to the warrant requirement, which permits police officers to "search a vehicle without a warrant when they have probable cause to believe that evidence or contraband will be found there" (*People v Galak*, 81 NY2d 463, 467 [1993]; *see People v Blasich*, 73 NY2d 673, 678 [1989]; *see also Pennsylvania v Labron*, 518 US 938, 940 [1996]). The exception requires "both probable cause to search the automobile generally and a nexus between the probable cause to search and the crime for which the arrest is being made" (*People v Langen*, 60 NY2d 170, 181 [1983], *cert denied* 465 US 1028 [1984]).

" 'In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act' . . . Probable cause does not require proof beyond a reasonable doubt," but merely requires "a reasonable ground for belief" (*People v Simpson*, 244 AD2d 87, 90-91 [1st Dept 1998], quoting *Brinegar v United States*, 338 US 160, 175 [1949]).

Here, we conclude that the police, at the time of the search, had probable cause to believe that a handgun was in the vehicle, and that the police therefore were not required to obtain a warrant. "The police had information, provided by [an] identified citizen-witness[ ] speaking from personal knowledge," that the person who had shot at the witness had entered the front passenger seat of that specific vehicle with the handgun (*People v Robertson*, 109 AD3d 743, 743 [1st Dept 2013], *lv denied* 22 NY3d 1090 [2014]; *see People v Williams*, 301 AD2d 543, 543 [2d Dept 2003], *lv denied* 100 NY2d 589 [2003]; *cf. People v Torres*, 74 NY2d 224, 230-231 [1989]). "[T]he spatial and temporal factors" as well as the description of the specific vehicle and seat occupied by the shooter "provided more than sufficient probable cause . . . to search the [vehicle] for a gun pursuant to the automobile exception" (*People v Hayes*, 291 AD2d 334, 335 [1st Dept 2002], *lv denied* 98 NY2d 697 [2002]; *see generally Galak*, 81 NY2d at 467).

Based on our resolution, we do not address the court's secondary justification for upholding the search.

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

179

KA 16-01601

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL FISHER, DEFENDANT-APPELLANT.

JAMES S. KERNAN, PUBLIC DEFENDER, LYONS (CARA A. WALDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHRISTOPHER BOKELMAN, ACTING DISTRICT ATTORNEY, LYONS (BRUCE A. ROSEKRANS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered May 24, 2016. The judgment convicted defendant upon his plea of guilty of, inter alia, burglary in the second degree and attempted burglary 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 his plea of guilty of, inter alia, burglary in the second degree (Penal Law § 140.25 [2]) and two counts of attempted burglary in the second degree (§§ 110.00, 140.25 [2]). Defendant's contention that County Court erred in denying his request to appoint a special prosecutor was forfeited by defendant's guilty plea (*see People v McGuay*, 120 AD3d 1566, 1567 [4th Dept 2014], *lv denied* 25 NY3d 1167 [2015]). We conclude that the sentence is not unduly harsh or severe.

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

195

KA 14-01100

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NEKIA R. BURGESS, DEFENDANT-APPELLANT.

KIMBERLY J. CZAPRANSKI, FAIRPORT, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (JOSEPH PLUKAS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered June 5, 2014. The judgment convicted defendant, after a nonjury trial, of criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). By failing to move for a trial order of dismissal, defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction (*see People v Scott*, 60 AD3d 1396, 1397 [4th Dept 2009], *lv denied* 12 NY3d 821 [2009]). Contrary to defendant's contention, his CPL 330.30 motion did not preserve the issue for our review (*see People v Malave*, 52 AD3d 1313, 1314 [4th Dept 2008], *lv denied* 11 NY3d 790 [2008]). In any event, that contention lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The evidence at trial established that two police officers observed defendant engage in what appeared to be a hand-to-hand drug transaction with a man in a red jacket. The police found drugs stashed on the ground next to a log, in the same location where the officers had observed defendant kneeling down before handing something to the man in the red jacket. When defendant was arrested, the police found crumpled bills in his front right pocket, which was consistent with drug dealers quickly taking money and stuffing it into their pockets. We conclude that there is a "valid line of reasoning and permissible inferences that could lead a rational person to conclude that every element of the charged crime has been proven beyond a reasonable doubt" (*People v Delamota*, 18 NY3d 107, 113 [2011]). Viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we

further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant's contention that County Court erred in failing to consider the lesser included offense of criminal possession of a controlled substance in the seventh degree is not preserved for our review (*see People v Youngs*, 101 AD3d 1589, 1590 [4th Dept 2012], *lv denied* 20 NY3d 1105 [2013]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's contention that he was denied effective assistance of counsel. Counsel's failure to pursue a probable cause hearing or make a motion for a trial order of dismissal does not constitute ineffective assistance of counsel inasmuch as such motions had little or no chance of success (*see People v Galens*, 111 AD3d 1322, 1323 [4th Dept 2013], *lv denied* 22 NY3d 1088 [2014]; *People v Murray*, 7 AD3d 828, 830-831 [3d Dept 2004], *lv denied* 3 NY3d 679 [2004]; *see generally People v Caban*, 5 NY3d 143, 152 [2005]). Defense counsel's stipulation that the substance recovered by the police was cocaine was a matter of trial strategy inasmuch as defendant called a witness who testified that the cocaine belonged to him (*see generally People v Benevento*, 91 NY2d 708, 712 [1998]). Likewise, defense counsel's failure to object to the admission of certain photographs was a matter of strategy inasmuch as she used those photographs to challenge the vantage point of the officers when they conducted the surveillance. We have examined the remaining allegations of ineffective assistance of counsel raised by defendant and conclude that they lack merit (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). We have considered defendant's remaining contentions and conclude that they are also without merit.

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

201

KA 15-00130

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK CARRIGAN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (JOHN J. GILSENAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered May 1, 2014. The judgment convicted defendant upon a jury verdict of, inter alia, use of a child in a sexual performance (four counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of use of a child in a sexual performance under counts one and two of the indictment and dismissing those counts of the indictment, and as modified the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, four counts of use of a child in a sexual performance (Penal Law § 263.05). In appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of grand larceny in the third degree (§ 155.35).

We note at the outset that we dismiss the appeal from the judgment in appeal No. 2 because defendant raises no contentions with respect thereto (*see generally People v Minemier*, 124 AD3d 1408, 1408 [4th Dept 2015]).

We agree with defendant in appeal No. 1 that County Court erred in denying his motion for a trial order of dismissal with respect to counts one and two of the indictment, both charging him with use of a child in a sexual performance, on the ground that the indictment failed to provide defendant with sufficient notice of the time periods during which he allegedly committed those acts (*see People v Keindl*, 68 NY2d 410, 419 [1986]; *People v Bennett*, 57 AD3d 688, 690-691 [2d Dept 2008], *lv denied* 12 NY3d 781 [2009]; *People v Aaron V.*, 48 AD3d 1200, 1201 [4th Dept 2008], *lv denied* 10 NY3d 955 [2008]). We

therefore modify the judgment accordingly. Viewing the evidence in light of the elements of the crime of use of a child in a sexual performance as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict with respect to the third and fourth counts of the indictment is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Finally, we reject defendant's contention that he was denied the right to effective assistance of counsel. The record establishes that defense counsel, inter alia, made clear and cogent opening and closing statements, pursued a legitimate strategy of attempting to cast the entirety of the victims' testimony as vague and overbroad in an attempt to convince the jury that none of it could be believed, and conducted meaningful cross-examination of the People's witnesses. 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 [1981]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

202

KA 15-00131

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK CARRIGAN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (JOHN J. GILSENAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered May 1, 2014. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the third degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Carrigan* ([appeal No. 1] — AD3d — [Mar. 16, 2018] [4th Dept 2018]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

203

KA 14-01444

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOEL A. TULL, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LAW OFFICE OF MATTHEW BOROWSKI, BUFFALO (MATTHEW BOROWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered May 22, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of marihuana 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 criminal possession of marihuana in the second degree (Penal Law § 221.25) and criminal sale of marihuana in the first degree (§ 221.55), respectively. In both appeals, we reject defendant's contention that his guilty pleas were involuntary because County Court did not advise him that he may be deported as a consequence thereof (*see generally People v Peque*, 22 NY3d 168, 193 [2013]). In *Peque*, "the Court of Appeals held that, as part of its independent obligation to ascertain whether a defendant is pleading guilty voluntarily, a trial court must alert a *noncitizen* defendant that he or she may be deported as a consequence of the plea of guilty" (*People v Lopez-Alvarado*, 149 AD3d 981, 981 [2d Dept 2017] [emphasis added]). During the plea colloquy in this case, however, defense counsel told the court that defendant was a citizen of the United States. Defense counsel's statement to the court was binding upon defendant (*see generally People v Brown*, 98 NY2d 226, 232-233 [2002]; *People v Sacco*, 199 AD2d 288, 288 [2d Dept 1993], *lv dismissed* 82 NY2d 853 [1993], *lv denied* 84 NY2d 832 [1994], *reconsideration denied* 84 NY2d 939 [1994]). Thus, defendant is not entitled to relief under *Peque* (*see People v Brazil*, 123 AD3d 466, 467 [1st Dept 2014], *lv denied* 25 NY3d 1198 [2015]).

People v Palmer (— AD3d — [Feb. 1, 2018] [1st Dept 2018]) is

distinguishable. In that case, the defendant had well-documented mental health issues that called into question the reliability of his claim to United States citizenship. No such mental health concerns are present in this case. Moreover, unlike in *Palmer*, nothing in this record casts doubt on the accuracy of defense counsel's statement concerning defendant's citizenship. Indeed, the only other mention of defendant's citizenship status in the record is an arrest report wherein defendant is described as a citizen of the United States.

Finally, defendant's contention in both appeals that he was denied effective assistance of counsel is based on matters outside the record and must therefore be raised in a motion pursuant to CPL article 440 (*see People v Pastor*, 28 NY3d 1089, 1091 [2016]; *People v Haffiz*, 19 NY3d 883, 885 [2012]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

204

KA 14-01445

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOEL A. TULL, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LAW OFFICE OF MATTHEW BOROWSKI, BUFFALO (MATTHEW BOROWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered May 22, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal sale of marihuana in the first degree.

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

Same memorandum as in *People v Tull* ([appeal No. 1] — AD3d — [Mar. 16, 2018] [4th Dept 2018]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

206

CA 17-01001

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

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40 STATE LLC, PLAINTIFF-RESPONDENT,

V ORDER

SUZANNE KARR, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

PHETERSON SPATORICO LLP, ROCHESTER (DERRICK A. SPATORICO OF COUNSEL), FOR DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (ROBERT D. HOOKS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Renee Forgensi Minarik, A.J.), entered December 5, 2016. The order, among other things, granted plaintiff's motion for partial summary judgment.

Now, upon reading and filing the stipulation of discontinuance with attached Exhibit A signed by the attorneys for plaintiff and defendant-appellant on January 30, 2018,

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

207

CA 17-01003

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

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40 STATE LLC, PLAINTIFF-RESPONDENT,

V ORDER

SUZANNE KARR, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

PHETERSON SPATORICO LLP, ROCHESTER (DERRICK A. SPATORICO OF COUNSEL), FOR DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (ROBERT D. HOOKS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended judgment of the Supreme Court, Monroe County (Renee Forgensi Minarik, A.J.), entered February 3, 2017. The amended judgment, among other things, awarded plaintiff the sum of $52,470.21 as against defendants.

Now, upon reading and filing the stipulation of discontinuance with attached Exhibit A signed by the attorneys for plaintiff and defendant-appellant on January 30, 2018,

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

219

KA 15-01731

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ANTHONY DRUMGOOLE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered August 26, 2014. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree (four counts).

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

220

KA 16-01275

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYLEE D. GAINES, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MICHAEL S. DEAL OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (SHIRLEY A. GORMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Michael F. Pietruszka, A.J.), rendered May 26, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]). Contrary to defendant's contention, we conclude that he knowingly, intelligently, and voluntarily waived his right to appeal as a condition of the plea (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]), and the record establishes that defendant "understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*id*.). Contrary to defendant's related contention, the oral waiver of the right to appeal was "buttressed by [his] written waiver of appeal, which explicitly enumerated the rights that were to be relinquished and [in which defendant] acknowledged that [he] had discussed the consequences of the waiver with counsel" (*People v Giovanni*, 53 AD3d 778, 778 [3d Dept 2008], *lv denied* 11 NY3d 832 [2008]). Finally, we conclude that defendant's valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 255).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

222

KA 11-01135

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MUZZAMMIL S. HASSAN, ALSO KNOWN AS MO HASSAN,
DEFENDANT-APPELLANT.

KATHRYN FRIEDMAN, BUFFALO, FOR DEFENDANT-APPELLANT.

MUZZAMMIL S. HASSAN, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered March 9, 2011. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]). Defendant contends that he is entitled to a new trial because County Court improperly limited the scope of his pretrial statements to the press to the general nature of the charges against him and his intended defense, thereby allegedly preventing him from adequately responding to press coverage purportedly favorable to the People. He argues that the court's ruling "unconstitutionally infected" the jury pool and precluded him from finding jurors who were not biased against him. Even assuming, arguendo, that the court abused the discretion afforded to it to take affirmative measures to ensure a fair trial and to prevent or reduce prejudicial pretrial publicity (*see generally Sheppard v Maxwell*, 384 US 333, 363 [1966]; *Matter of National Broadcasting Co. v Cooperman*, 116 AD2d 287, 289 [2d Dept 1986]), we conclude that defendant failed to preserve his contention for our review because he never moved for a change of venue or other relief based on the purportedly tainted jury pool (*see People v Perkins*, 62 AD3d 1160, 1162 [3d Dept 2009], *lv denied* 13 NY3d 748 [2009]). Instead, subsequent to the court's ruling, defense counsel participated in five full days of jury selection, during which time the prospective jurors were thoroughly questioned on their media exposure and potential biases, and counsel acquiesced to the selected jurors being sworn without objection (*see id*.). We decline to

exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's further contention that the court committed a mode of proceedings error by granting defendant's midtrial request to proceed pro se. Although the right to represent oneself is "severely constricted" once a trial has begun, an otherwise untimely motion to proceed pro se may still "be granted in the trial court's discretion and . . . in compelling circumstances" (*People v McIntyre*, 36 NY2d 10, 17 [1974]; *see People v Dashnaw*, 116 AD3d 1222, 1231-1232 [3d Dept 2014], *lv denied* 23 NY3d 1019 [2014]). We conclude, upon our review of "the whole record, not simply . . . the waiver colloquy" (*People v Providence*, 2 NY3d 579, 583 [2004]), that the requisite compelling circumstances existed. For instance, defendant's serial termination of multiple prior attorneys evidenced his unrealistic expectations of counsel's role in his defense. In addition, trial counsel informed the court that, despite midtrial conciliatory efforts, the attorney-client relationship had reached an unresolvable impasse because of counsel's inability to adhere to defendant's requests while ethically representing defendant (*see People v Chandler*, 109 AD3d 1202, 1203 [4th Dept 2013], *lv denied* 23 NY3d 1019 [2014]).

Defendant's contention that the court failed to make a sufficient inquiry into juror misconduct when informed that an unidentified female juror may have been discussing defendant's guilt or innocence before deliberations had begun is unpreserved for our review, inasmuch as defendant acquiesced in the court's decision not to interview the other jurors with whom the female juror was speaking (*see People v Hodge*, 147 AD3d 1502, 1503 [4th Dept 2017], *lv denied* 29 NY3d 1032 [2017]; *see also People v Hicks*, 6 NY3d 737, 739 [2005]; *see generally People v Morgan*, 96 AD3d 1418, 1418 [4th Dept 2012], *lv denied* 20 NY3d 987 [2012]). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

225

KAH 16-00853

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
JASMINE VALENTIN, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK
STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, AND SHERYL ZENZEN, SUPERINTENDENT,
ALBION CORRECTIONAL FACILITY,
RESPONDENTS-RESPONDENTS.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BENJAMIN L. NELSON OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JEFFREY W. LANG OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

ALEXANDER A. REINERT, NEW YORK CITY, FOR THE PEOPLE OF THE STATE OF NEW YORK EX REL. JASMINE VALENTIN, AMICUS CURIAE.

Appeal from a judgment (denominated order) of the Supreme Court, Orleans County (James P. Punch, A.J.), entered February 11, 2016 in a habeas corpus proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing her petition for a writ of habeus corpus. The appeal has been rendered moot by petitioner's release to parole supervision (*see People ex rel. Moore v Stallone*, 151 AD3d 1839, 1839 [4th Dept 2017]; *People ex rel. Yourdon v Semrau*, 133 AD3d 1351, 1351 [4th Dept 2015]), and the exception to the mootness doctrine does not apply (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

226

CAF 16-01805

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

IN THE MATTER OF DANIEL C. SOUDER,
PETITIONER-RESPONDENT,

V ORDER

MICHELLE COPPOLA, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

MEGAN MISITI CUMBO, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Tracey A. Kassman, R.), entered August 29, 2016 in a proceeding pursuant to Family Court Act article 6. The order granted the petition to modify an order of custody and visitation dated May 25, 2012.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051, 1051 [4th Dept 1990]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

227

CAF 16-02243

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

IN THE MATTER OF DANIEL C. SOUDER,
PETITIONER-RESPONDENT,

V ORDER

MICHELLE COPPOLA, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

MEGAN MISITI CUMBO, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an amended order of the Family Court, Erie County (Tracey A. Kassman, R.), entered October 18, 2016 in a proceeding pursuant to Family Court Act article 6. The amended order granted the petition to modify an order of custody and visitation dated May 25, 2012.

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

228

CAF 17-00088

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

IN THE MATTER OF JAMES DRAJEM,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SARAH CARR, RESPONDENT-APPELLANT.

KATHLEEN E. CASEY, BARKER, FOR RESPONDENT-APPELLANT.

ALVIN M. GREENE, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Niagara County (John F. Batt, J.), entered December 12, 2016 in a proceeding pursuant to Family Court Act article 6. The order modified a prior joint custody order by awarding petitioner sole legal and physical custody of the subject child, with visitation to respondent.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that modified a prior joint custody order by awarding petitioner father sole legal and physical custody of the subject child, with visitation to the mother. Initially, we note that the mother does not dispute that the continued deterioration of the parties' relationship and their inability to coparent constitutes a significant change in circumstances warranting an inquiry into whether a change in custody is in the child's best interests (*see Werner v Kenney*, 142 AD3d 1351, 1351 [4th Dept 2016]; *Matter of Ladd v Krupp*, 136 AD3d 1391, 1392 [4th Dept 2016]).

"[A] court's determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record" (*Matter of Bryan K.B. v Destiny S.B.*, 43 AD3d 1448, 1449 [4th Dept 2007] [internal quotation marks omitted]; *see Eschbach v Eschbach*, 56 NY2d 167, 173-174 [1982]). Here, we conclude, contrary to the contention of the mother, that Family Court properly considered the appropriate factors in making its custody determination, and the record supports the court's conclusion that awarding sole custody to the father is in the child's best interests (*see Werner*, 142 AD3d at

1352; *Ladd*, 136 AD3d at 1392-1393).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

229

CA 17-01234

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

IN THE MATTER OF THE ESTATE OF THEODORE K. HENRY,
DECEASED.

THE HOMESTEAD AT SOLDIER'S AND SAILOR'S MEMORIAL HOSPITAL, OBJECTANT-APPELLANT;

BRUCE T. HENRY AND RICHARD B. HENRY, CO-EXECUTORS OF THE ESTATE OF THEODORE K. HENRY, DECEASED, RESPONDENTS-RESPONDENTS.

MEMORANDUM AND ORDER

MICHAEL D. CALARCO, NEWARK, FOR OBJECTANT-APPELLANT.

LECLAIR KORONA VAHEY COLE LLP, ROCHESTER (JEREMY M. SHER OF COUNSEL), FOR RESPONDENT-RESPONDENT BRUCE T. HENRY, CO-EXECUTOR OF THE ESTATE OF THEODORE K. HENRY, DECEASED.

HARRIS BEACH PLLC, PITTSFORD (KARA E. STODDART OF COUNSEL), FOR RESPONDENT-RESPONDENT RICHARD B. HENRY, CO-EXECUTOR OF THE ESTATE OF THEODORE K. HENRY, DECEASED.

Appeal from an order of the Surrogate's Court, Yates County (Dennis F. Bender, S.), entered August 22, 2016. The order denied the motion of objectant for an order, inter alia, striking the accounting and granted the cross motion of respondents for, among other things, summary judgment dismissing the objections.

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

Memorandum: Decedent lived in a nursing home operated by objectant until he passed away in November 2008. After waiting several years, objectant commenced a proceeding seeking to recover the costs of decedent's care, but the proceeding was dismissed. Objectant thereafter submitted a claim for the costs of that care to decedent's estate, and when respondents (hereafter, coexecutors) denied the claim as untimely, objectant commenced this proceeding seeking a compulsory accounting of decedent's estate and related relief pursuant to SCPA 2205. The coexecutors subsequently filed a final accounting of the estate. Objectant filed objections and points of law and thereafter moved for an order, inter alia, striking the accounting, and the coexecutors cross-moved for, among other relief, summary judgment dismissing the objections. By order filed and served with notice of entry on August 25, 2016, Surrogate's Court denied the motion and granted the cross motion. Objectant purported to file a notice of

appeal dated August 31, 2016, but mistakenly filed it in the Yates County Clerk's Office rather than in Surrogate's Court. Objectant also sent a copy of the notice of appeal to counsel for the coexecutors by email, although the parties agree that counsel had not agreed to accept service in that manner, and there is no indication in the record that any prior papers had been served by email. It appears that the notice of appeal reached the County Clerk's Office on September 8, 2016. By letter dated September 27, 2016, the Yates County Clerk rejected the notice of appeal on the ground that it was filed in the wrong venue, and remitted it to objectant's counsel. Objectant electronically filed an "Amended Notice of Appeal" in Surrogate's Court on October 3, 2016 using the New York State Courts Electronic Filing System (*see* 22 NYCRR 207.4-aa [a]). We agree with the coexecutors that objectant did not timely file or serve a notice of appeal, and we therefore dismiss the appeal.

Pursuant to CPLR 5513 (a), a notice of appeal must be served within 30 days of service of the order from which the appeal is taken, with notice of entry thereof. An additional five days is added where, as here, the order and notice of entry are served by mail (*see* CPLR 5513 [d]; *see also* CPLR 2103 [b] [2]). Furthermore, the CPLR provides that "[a]n appeal shall be taken by serving on the adverse party a notice of appeal and filing it in the office where the judgment or order of the court of original instance is entered" (CPLR 5515 [1]) and, in this instance, the order was filed in Surrogate's Court. Thus, to bring a timely appeal, objectant was required to serve the notice of appeal on the opposing party and to file the notice of appeal in Surrogate's Court by September 29, 2016 (*see* CPLR 5515 [1]). "A complete failure to comply with CPLR 5515 deprives this Court of jurisdiction to entertain the appeal" (*AXA Equit. Life Ins. Co. v Kalina*, 101 AD3d 1655, 1657 [4th Dept 2012]; *see M Entertainment, Inc. v Leydier*, 13 NY3d 827, 828-829 [2009]).

Here, there was such a complete failure. Although objectant's attorney sent the notice of appeal to the attorneys for the opposing parties, he did so by email, and objectant concedes that neither coexecutor agreed to accept service in that manner. In addition, although objectant's attorney attempted to file the notice of appeal, he did not do so in the correct venue (*cf. Perlbinder v Board of Mgrs. of 411 E. 53rd St. Condominium*, 154 AD3d 467, 468 [1st Dept 2017], *lv denied* 30 NY3d 910 [2018]). "A timely notice of appeal is a jurisdictional prerequisite, and the time to take an appeal cannot be extended [where, as here,] the notice of appeal was neither timely filed nor served" (*Matter of Jones v Coughlin*, 207 AD2d 1037, 1037 [4th Dept 1994]; *see Murphy v Niagara Frontier Transp. Auth.*, 207 AD2d 1038, 1038 [4th Dept 1994]; *see also Cappiello v Cappiello*, 66 NY2d 107, 108-109 [1985]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

235.1

CA 18-00275

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

RANDY AGNESS AND ANNETTE AGNESS,
CLAIMANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 123203.)
(APPEAL NO. 2.)

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

LOTEMPIO P.C. LAW GROUP, BUFFALO (BRIAN D. KNAUTH OF COUNSEL), FOR CLAIMANTS-RESPONDENTS.

Appeal from a judgment of the Court of Claims (Diane L. Fitzpatrick, J.), entered August 30, 2017. The judgment granted claimants partial summary judgment on the issue of liability.

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

Memorandum: Claimants commenced this action seeking damages for injuries that Randy Agness (claimant) sustained as a result of being bitten by a rabid fox while camping at Sampson State Park. Defendant appeals from an interlocutory judgment denying defendant's motion for summary judgment dismissing the claim and granting claimants' motion for partial summary judgment on the issue of liability.

Defendant contends that the Court of Claims erred in granting claimants' motion and denying its motion inasmuch as it was engaged at all relevant times in a governmental function involving the exercise of discretion, and it was therefore immune from liability for money damages. We reject that contention. " 'When a negligence claim is asserted against a municipality, the first issue for a court to decide is whether the municipal entity was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose' " (*Turturro v City of New York*, 28 NY3d 469, 477 [2016], quoting *Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 425 [2013]). "The relevant inquiry in determining whether a governmental agency is acting within a governmental or proprietary capacity is to examine . . . 'the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred' " (*Matter of World Trade Ctr. Bombing Litig.*, 17 NY3d 428,

447 [2011], *rearg denied* 18 NY3d 898 [2012], *cert denied* 568 US 817 [2012], quoting *Miller v State of New York*, 62 NY2d 506, 513 [1984]).

Here, claimant's injuries allegedly resulted from defendant's negligent failure to take adequate steps to protect park patrons from reasonably foreseeable danger, despite having actual notice of a potentially rabid animal on the park premises hours before the incident. "It is well settled that regardless of whether or not it is a source of income the operation of a public park by a municipality is a quasi-private or corporate and not a governmental function" (*Caldwell v Village of Is. Park*, 304 NY 268, 273 [1952]). Further, "a municipality is under a duty to maintain its park . . . facilities in a reasonably safe condition" (*Rhabb v New York City Hous. Auth.*, 41 NY2d 200, 202 [1976]). That "duty goes beyond the mere maintenance of the physical condition of the park . . . and, although strict or immediate supervision need not be provided, the municipality may be obliged to furnish an adequate degree of general supervision which may require the regulation or prevention of such activities [or other conditions] as endanger others utilizing the park" (*id.*). Thus, we conclude that the court properly determined that claimants' allegations that defendant failed "to minimize the risk posed with a relevant warning and effective notification to the [p]ark [p]olice" implicated defendant's proprietary, not governmental, duties.

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

235

CA 17-01197

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

RANDY AGNESS AND ANNETTE AGNESS,
CLAIMANTS-RESPONDENTS,

V ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 123203.)
(APPEAL NO. 1.)

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

LOTEMPIO P.C. LAW GROUP, BUFFALO (BRIAN D. KNAUTH OF COUNSEL), FOR CLAIMANTS-RESPONDENTS.

Appeal from an order of the Court of Claims (Diane L. Fitzpatrick, J.), entered August 23, 2016. The order granted the motion of claimants for partial summary judgment on the issue of liability and denied the motion of defendant for summary judgment dismissing the claim.

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

236

CA 17-01672

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

THOMAS P. BERGMAN, PLAINTIFF-RESPONDENT,

V ORDER

GREGORY C. DINANT, JOAN E. STOCK,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

LAW OFFICE OF KEITH D. MILLER, LIVERPOOL (KEITH D. MILLER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered March 13, 2017. The order, inter alia, denied the motion of defendants-appellants for summary judgment dismissing the complaint against them.

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

239

KA 14-00974

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, AND NEMOYER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TAJERON WILLIAMS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (LINDA M. CAMPBELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered April 3, 2014. The appeal was held by this Court by order entered March 24, 2017, and the matter was remitted to Monroe County Court for further proceedings (148 AD3d 1701). The proceedings were held and completed.

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

Memorandum: We previously held this case, reserved decision, and remitted the matter to County Court to determine and state for the record whether defendant is a youthful offender (*People v Williams*, 148 AD3d 1701, 1702 [4th Dept 2017]; *see generally People v Middlebrooks*, 25 NY3d 516, 525-527 [2015]; *People v Rudolph*, 21 NY3d 497, 499-501 [2013]). Upon remittal, the court determined that defendant is not an eligible youth because he was convicted of robbery in the first degree (Penal Law § 160.15 [4]), an armed felony offense (*see* CPL 720.10 [2] [a] [ii]), and neither of the factors set forth in CPL 720.10 (3) applies (*see People v Lewis*, 128 AD3d 1400, 1400 [4th Dept 2015], *lv denied* 25 NY3d 1203 [2015]). We conclude that the court's determination does not constitute an abuse of its discretion (*see generally Middlebrooks*, 25 NY3d at 526-527; *People v Garcia*, 84 NY2d 336, 342-343 [1994]). We decline to grant defendant's request that we exercise our interest of justice jurisdiction to determine that mitigating circumstances exist pursuant to CPL 720.10 (3) (i) and to adjudicate him a youthful offender (*see People v Hall*, 130 AD3d 1495, 1496 [4th Dept 2015], *lv denied* 26 NY3d 968 [2015]; *Lewis*, 128 AD3d at 1400-1401; *cf. People v Amir W.*, 107 AD3d 1639, 1640-1641 [4th Dept 2013]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

240

TP 17-01650

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

IN THE MATTER OF JERRY MCLAMORE, PETITIONER,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered September 15, 2017) to review a determination of respondent. The determination found after a tier III hearing that petitioner violated various inmate rules.

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

241

KA 16-01400

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TREVON KILLINGS, DEFENDANT-APPELLANT.

ADAM H. VANBUSKIRK, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered January 12, 2016. The judgment convicted defendant, upon a jury verdict, of promoting prison contraband in the first degree and tampering with physical evidence.

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 promoting prison contraband in the first degree (Penal Law § 205.25 [2]) and tampering with physical evidence (§ 215.40 [2]). Defendant's conviction arose from an incident that occurred when he was an inmate in a correctional facility, in which he fought with another inmate. Defendant was observed making slashing motions toward the other inmate, who sustained a laceration on his cheek. The fight was observed by one correction officer and, when other correction officers arrived to assist, the inmates stopped fighting and assumed a position to be frisked. No contraband was recovered.

Defendant contends that the conviction of promoting prison contraband in the first degree is not based on legally sufficient evidence with respect to his identity and his possession of the dangerous contraband. We reject that contention. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that defendant's identity as the inmate who was fighting with another inmate while making slashing motions and his possession of dangerous contraband is supported by legally sufficient evidence (*see People v Hurd*, 161 AD2d 841, 842 [3d Dept 1990], *lv denied* 76 NY2d 858 [1990]). The correction officer who witnessed the fight was unable to make an in-court identification of defendant at trial, but he testified that he confirmed defendant's identification immediately after the fight by

being shown defendant's identification card. In addition, other correction officers who arrived at the scene after the fight ended identified defendant at trial as one of the two inmates who was frisked and interviewed after the incident. Although no weapon was recovered, the evidence further established that the other inmate sustained a cut to his cheek that required 30 sutures, and there was testimony that the injury was consistent with a weapon fashioned from a razor blade, scalpel, can lid, or exacto knife. The jury could thus infer based on that evidence that defendant possessed dangerous contraband (*see People v Blunt*, 149 AD3d 1573, 1573 [4th Dept 2017], *lv denied* 29 NY3d 1123 [2017]). We reject defendant's further contention that his conviction of tampering with physical evidence is not based on legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). In addition, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Contrary to defendant's contention, County Court properly denied his request for a missing witness charge with respect to the other inmate involved in the fight. Defendant failed to meet his burden of establishing that the witness would provide testimony that was favorable to the People (*see People v Edwards*, 14 NY3d 733, 735 [2010]; *People v Santos*, 151 AD3d 1620, 1622 [4th Dept 2017], *lv denied* 29 NY3d 1133 [2017]). Indeed, in requesting the missing witness charge, defendant asserted that it was anticipated that the inmate "would testify favorably for the defense." Finally, we reject defendant's contention that the sentence is unduly harsh and severe.

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

242

KA 15-01818

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES D. WISNER, DEFENDANT-APPELLANT.

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

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN, FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered October 13, 2015. The judgment convicted defendant upon his plea of guilty of, inter alia, criminal possession of a weapon 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, inter alia, criminal possession of a weapon in the first degree (Penal Law § 265.04 [2]), defendant contends that he did not validly waive his right to appeal and that the sentence is unduly harsh and severe. We agree with defendant that his purported waiver of the right to appeal is not valid inasmuch as "the perfunctory inquiry made by [County] Court was insufficient to establish that the court engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Beaver*, 128 AD3d 1493, 1494 [4th Dept 2015] [internal quotation marks omitted]). Although "[a] detailed written waiver can supplement a court's on-the-record explanation of what a waiver of the right to appeal entails, . . . a written waiver does not, standing alone, provide sufficient assurance that the defendant is knowingly, intelligently and voluntarily giving up his or her right to appeal" (*People v Banks*, 125 AD3d 1276, 1277 [4th Dept 2015], *lv denied* 25 NY3d 1159 [2015] [internal quotation marks omitted]). Here, although defendant signed such a written waiver, "the record establishes that County Court did not sufficiently explain the significance of the appeal waiver or ascertain defendant's understanding thereof" (*id.*; *see People v Welcher*, 138 AD3d 1481, 1482 [4th Dept 2016], *lv denied* 28 NY3d 938 [2016]; *cf. People v Ramos*, 7 NY3d 737, 738 [2006]). We thus conclude that, "despite defendant's execution of a written waiver of the right to appeal, he did not knowingly, intelligently or voluntarily waive his right to appeal as the record fails to demonstrate a full appreciation of the consequences of such waiver"

(*People v Elmer*, 19 NY3d 501, 510 [2012] [internal quotation marks omitted]). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

244

KA 15-02039

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW W. ECK, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered November 7, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted murder 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 his plea of guilty of two counts of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]). As the People correctly concede, defendant's waiver of the right to appeal is invalid because it was not knowing, voluntary and intelligent (*see People v Brown*, 296 AD2d 860, 860 [4th Dept 2002], *lv denied* 98 NY2d 767 [2002]; *see also People v Maracle*, 19 NY3d 925, 928-929 [2012]). Contrary to defendant's contention, however, we conclude that the sentence is not unduly harsh or severe.

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

245

KA 14-02274

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY WARE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered December 16, 2014. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that his waiver of the right to appeal is not valid. We agree. It is well settled that, for a waiver of the right to appeal to be valid, the plea minutes must establish that it was knowingly, voluntarily and intelligently entered, and the plea court "must make certain that a defendant's understanding of the terms and conditions of a plea agreement is evident on the face of the record" (*People v Lopez*, 6 NY3d 248, 256 [2006]). "When a trial court characterizes an appeal as one of the many rights automatically extinguished upon entry of a guilty plea, a reviewing court cannot be certain that the defendant comprehended the nature of the waiver of appellate rights" (*id.*). Here, we agree with defendant that the plea minutes fail to "establish that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*id.*), and thus the waiver is invalid (*see People v Mallard*, 151 AD3d 1957, 1958 [4th Dept 2017], *lv denied* 29 NY3d 1130 [2017]; *People v Cintron*, 125 AD3d 1333, 1333 [4th Dept 2015], *lv denied* 25 NY3d 1071 [2015]).

Nevertheless, we affirm. Even assuming, arguendo, that defendant preserved for our review his contention that County Court coerced him to plead guilty, we conclude that his contention "is belied by [his] statement during the plea proceeding that [he] was not threatened,

coerced or otherwise influenced against [his] will into pleading guilty" (*People v Beaty*, 303 AD2d 965, 965 [4th Dept 2003], *lv denied* 100 NY2d 559 [2003]; *see People v Strasser*, 83 AD3d 1411, 1411 [4th Dept 2011]). In addition, "the court did not coerce defendant into pleading guilty merely by informing him of the range of sentences that he faced if he proceeded to trial and was convicted" (*People v Pitcher*, 126 AD3d 1471, 1472 [4th Dept 2015], *lv denied* 25 NY3d 1169 [2015]; *see People v Carr*, 147 AD3d 1506, 1507 [4th Dept 2017], *lv denied* 29 NY3d 1030 [2017]). Defendant also failed to establish that the court coerced him to plead guilty by denying his attorney's request to adjourn the trial. It is well settled that a " 'court's exercise of discretion in denying a request for an adjournment will not be overturned absent a showing of prejudice' " (*People v Peterkin*, 81 AD3d 1358, 1360 [4th Dept 2011], *lv denied* 17 NY3d 799 [2011]; *see People v Rogers*, 103 AD3d 1150, 1151 [4th Dept 2013], *lv denied* 21 NY3d 946 [2013]), and defendant failed to make such a showing here.

Defendant's contention that he was denied effective assistance of counsel survives his guilty plea only to the extent that he "contends that his plea was infected by the allegedly ineffective assistance and that he entered the plea because of his attorney's allegedly poor performance" (*People v Bethune*, 21 AD3d 1316, 1316 [4th Dept 2005], *lv denied* 6 NY3d 752 [2005]; *see People v Collins*, 129 AD3d 1676, 1676-1677 [4th Dept 2015], *lv denied* 26 NY3d 1038 [2015]). Defendant " 'must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial' " (*People v Hernandez*, 22 NY3d 972, 975 [2013], *cert denied* — US —, 134 S Ct 1900 [2014], quoting *Hill v Lockhart*, 474 US 52, 59 [1985]; *see People v Bank*, 28 NY3d 131, 137-138 [2016]), and defendant failed to even allege that he would have proceeded to trial absent counsel's alleged deficiencies.

Contrary to defendant's further contention, the court properly refused to suppress his statements to the police. To the contrary, the court properly concluded that defendant "did not clearly communicate a desire to cease all questioning indefinitely" (*People v Caruso*, 34 AD3d 860, 863 [3d Dept 2006], *lv denied* 8 NY3d 879 [2007]; *see People v Flowers*, 122 AD3d 1396, 1397 [4th Dept 2014], *lv denied* 24 NY3d 1219 [2015]), and thus did not make an " 'unequivocal and unqualified' " assertion of his right to remain silent (*People v Zacher*, 97 AD3d 1101, 1101 [4th Dept 2012], *lv denied* 20 NY3d 1015 [2013]; *see People v Young*, 153 AD3d 1618, 1619 [4th Dept 2017], *lv denied* 30 NY3d 1065 [2017]; *People v Cole*, 59 AD3d 302, 302 [1st Dept 2009], *lv denied* 12 NY3d 924 [2009]). Defendant failed to preserve for our review his contention that the court should have suppressed his statements based on unfulfilled promises made by the police inasmuch as he "failed to raise that specific contention in his motion papers or at the suppression hearing as a ground for suppressing his statements" (*People v Schluter*, 136 AD3d 1363, 1363 [4th Dept 2016], *lv denied* 27 NY3d 1138 [2016]; *see People v Keegan*, 133 AD3d 1313, 1314 [4th Dept 2015], *lv denied* 27 NY3d 1152 [2016]). In any event, our review of the record discloses " 'no evidence of a promise that defendant would not be prosecuted or that he would receive lenient

treatment' " that might justify suppression of the ensuing statements (*People v Sachs*, 280 AD2d 966, 966 [4th Dept 2001], *lv denied* 96 NY2d 834 [2001], *reconsideration denied* 97 NY2d 708 [2002]).

Finally, the sentence is not unduly harsh or severe.

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

246

KA 15-01222

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered May 22, 2015. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree, attempted assault in the first degree, assault in the second degree and strangulation 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 attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), attempted assault in the first degree (§§ 110.00, 120.10 [1]), assault in the second degree (§ 120.05 [2]), and strangulation in the second degree (§ 121.12). Defendant's conviction stems from his brutal assault of his paramour. After defendant found out that the victim had cheated on him, the victim left the residence but returned the next day after defendant had removed his belongings. Defendant sent the victim numerous text messages stating that he would "stab" and "kill" her. The following morning, defendant came to the residence and began to beat the victim. The victim testified that defendant punched her in the head, and the last thing she remembered before waking up in the hospital was defendant squeezing his hands around her neck while saying that he was going to kill her. A neighbor called the police during the incident and, when the police entered the residence, they heard sounds of someone being struck and a male voice saying "I'm going to . . . kill you." In the bathroom, the officers found defendant on top of the motionless victim, punching her while saying "die, bitch." After defendant was secured by the police, he laughed and said, "I'm a nice guy, I didn't cut her throat, yet." The police recovered a bloody serrated knife in the bathtub. The victim sustained, inter alia, cuts to her face and hand and bruising around her neck and shoulders.

Medical professionals testified that the cuts were caused by a sharp instrument.

Defendant contends that the verdict is against the weight of the evidence because he did not have the intent to kill the victim, he did not possess the knife, and the victim did not lose consciousness. We reject that contention. Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The jury was justified in finding defendant's intent to kill based on his threatening messages to the victim, the brutal assault, and his statements during and after the assault (*see People v Williams*, 154 AD3d 1290, 1291 [4th Dept 2017]; *see generally Danielson*, 9 NY3d at 348). The jury was also justified in finding that defendant possessed the knife, which was within his reach when the police entered the residence, and used it against the victim (*see* Penal Law §§ 120.05 [2]; 120.10 [1]; *see generally People v Winter*, 51 AD3d 599, 600 [1st Dept 2008], *lv denied* 10 NY3d 966 [2008]), and that defendant caused the victim to lose consciousness when he placed his hands around her neck (*see* § 121.12; *People v Ryder*, 146 AD3d 1022, 1025 [3d Dept 2017], *lv denied* 29 NY3d 1086 [2017]).

Contrary to defendant's further contention, County Court did not err in denying his *Batson* challenge concerning the People's use of a peremptory challenge to excuse an African-American juror. The prosecutor gave race-neutral reasons for excluding that prospective juror, including her education in psychology (*see People v Jiles*, 158 AD3d 75, 78 [4th Dept 2017]) and her prior service as a juror (*see People v Richie*, 217 AD2d 84, 89 [2d Dept 1995], *lv denied* 88 NY2d 940 [1996]). Defendant did not meet his ultimate burden of establishing that those reasons were pretextual (*see People v Torres*, 129 AD3d 1535, 1536 [4th Dept 2015], *lv denied* 26 NY3d 936 [2015]).

Finally, the sentence is not unduly harsh or severe. Contrary to defendant's contention, "the fact that the court imposed a more severe sentence after trial than that offered during plea negotiations does not demonstrate that defendant was punished for exercising his right to a trial" (*People v McCallum*, 96 AD3d 1638, 1640 [4th Dept 2012], *lv denied* 19 NY3d 1103 [2012]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

252

CAF 16-00862

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

IN THE MATTER OF PETER J. UNCZUR, JR.,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

DEBRA A. WELCH, RESPONDENT-PETITIONER-RESPONDENT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (ELIZABETH deV. MOELLER OF COUNSEL), FOR PETITIONER-RESPONDENT-APPELLANT.

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

AVERY S. OLSON, JAMESTOWN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Chautauqua County (Jeffrey A. Piazza, J.), entered April 22, 2016 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, modified the parties' existing custodial arrangement by granting respondent-petitioner sole custody of the subject child.

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

Memorandum: Petitioner-respondent father appeals from an order that, inter alia, modified the parties' existing custodial arrangement by granting respondent-petitioner mother sole custody of the parties' child, with visitation to the father. The father contends that Family Court abused its discretion in granting the Attorney for the Child's motion to change venue from Madison County to Chautauqua County inasmuch as the court failed to consider the hardship on the father. The father, however, failed to include the motion papers and any transcript of proceedings on the motion in the record on appeal. Inasmuch as it is the father's responsibility, as the appellant, to assemble an adequate record on appeal, and he has failed to do so with respect to this issue, we cannot review the propriety of the court's decision to change venue (*see Matter of Christopher D.S. [Richard E.S.]*, 136 AD3d 1285, 1286-1287 [4th Dept 2016]; *Matter of Lopez v Lugo*, 115 AD3d 1237, 1237 [4th Dept 2014]).

Contrary to the father's further contention, the court properly determined that he failed to establish by clear and convincing evidence that the mother willfully violated the terms of the custody order with respect to his visitation (*see Matter of Palazzolo v Giresi-Palazzolo*,138 AD3d 866, 867 [2d Dept 2016]). The record

establishes that the purported violations were the result of the child's refusal to comply with the order (*see Matter of James XX. v Tracey YY.*, 146 AD3d 1036, 1038 [3d Dept 2017]), or were based on misunderstandings between the parties.

We conclude that there is a sound and substantial basis in the record for the court's award of sole custody to the mother (*see Matter of Terramiggi v Tarolli*, 151 AD3d 1670, 1671 [4th Dept 2017]). Contrary to the father's contention, the record established the requisite change in circumstances warranting an inquiry into whether a change in custody is in the best interests of the child based on, inter alia, the inability of the parties to communicate in a manner conducive to sharing joint custody (*see Werner v Kenney*, 142 AD3d 1351, 1351-1352 [4th Dept 2016]). Moreover, the court properly concluded that awarding sole custody of the child to the mother, with whom the child had principally resided, was in the best interests of the child (*see generally Matter of Gorton v Inman*, 147 AD3d 1537, 1537-1539 [4th Dept 2017]; *Williams v Williams*, 100 AD3d 1347, 1348 [4th Dept 2012]). The hearing testimony established that the mother provided a more stable environment for the child and was better able to nurture the child. "Even assuming, arguendo, that the court did not set forth sufficient findings with respect to the best interests of the child, we conclude that reversal is not thereby warranted inasmuch as the record is adequate for us to make a best interests determination, and it supports the result reached by the court" (*Matter of Montalbano v Babcock*, 155 AD3d 1636, 1638 [4th Dept 2017]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

253

CAF 16-01941

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

IN THE MATTER OF JUSTIN S. TALBOT,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CRYSTAL EDICK, RESPONDENT-APPELLANT.

JOHN A. HERBOWY, ROME, FOR RESPONDENT-APPELLANT.

MICHELLE K. FASSETT, HERKIMER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Herkimer County (John J. Brennan, J.), entered July 22, 2016 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole custody of the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that awarded petitioner father sole custody of the parties' child, with supervised visitation with the mother. We affirm. The mother does not dispute that an award of sole custody is appropriate, but she contends that Family Court should have awarded sole custody to her rather than to the father. We reject that contention. In making a custody determination, "the court must consider all factors that could impact the best interests of the child, including the existing custody arrangement, the current home environment, the financial status of the parties, the ability of each parent to provide for the child's emotional and intellectual development and the wishes of the child" (*Matter of Marino v Marino*, 90 AD3d 1694, 1695 [4th Dept 2011]; *see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]). Here, we will not disturb the court's determination "inasmuch as the record establishes that it is the product of the court's 'careful weighing of [the] appropriate factors' . . . , and it has a sound and substantial basis in the record" (*Matter of Thillman v Mayer*, 85 AD3d 1624, 1625 [4th Dept 2011]; *see Matter of Joyce S. v Robert W.S.*, 142 AD3d 1343, 1344 [4th Dept 2016], *lv denied* 29 NY3d 906 [2017]). Furthermore, we reject the mother's contention that the court erred in imposing supervised visitation, inasmuch as that determination is also supported by the requisite sound and substantial basis in the record

(*see Joyce S.*, 142 AD3d at 1344-1345).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

254

CAF 16-01927

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

IN THE MATTER OF ALEESA ANN BERMUDEZ-HOGAN,
PETITIONER-RESPONDENT,

V ORDER

RAYMOND LLOYD CRANDALL, JR., RESPONDENT-APPELLANT.

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

JOHN P. AMUSO, CLINTON, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered October 6, 2016 in a proceeding pursuant to Family Court Act article 6. The order, among other things, adjudged that the primary physical residence of the children be with petitioner.

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

255

CAF 16-01814

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

IN THE MATTER OF BRIANA ELIZABETH MATTICE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH M. PALMISANO, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (ELIZABETH deV. MOELLER OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

DOUGLAS M. DEMARCHÉ, JR., NEW HARTFORD, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (William W. Rose, R.), entered September 21, 2016 in a proceeding pursuant to Family Court Act article 6. The order granted the petition of petitioner seeking to modify a prior custody and visitation order by awarding her sole legal and primary physical custody of the subject child.

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

Memorandum: Respondent-petitioner father contends in appeal No. 1 that Family Court erred in granting the petition of petitioner-respondent mother seeking to modify a prior custody and visitation order by awarding the mother sole legal and primary physical custody of the subject child, and he contends in appeal No. 2 that the court erred in dismissing his cross petition seeking to modify that prior custody and visitation order by awarding him primary physical custody of the child while maintaining joint legal custody.

Contrary to the father's contention in each appeal, "the orders therein do not lack 'the essential jurisdictional predicate of [the father's] consent' to have the matters heard and decided by the Referee" (*Matter of Johnson v Streich-McConnell*, 66 AD3d 1526, 1527 [4th Dept 2009]). The record establishes that the father and his attorney previously signed a stipulation permitting a referee or judicial hearing officer to hear and determine the issues involved in these proceedings, as well as all future proceedings concerning this matter, i.e., custody of and visitation with the child (*see Matter of Johnson v Prichard*, 137 AD3d 1617, 1617 [4th Dept 2016], *lv denied* 28

NY3d 902 [2016]; *Johnson*, 66 AD3d at 1527; *cf. Matter of Osmundson v Held-Cummings*, 306 AD2d 950, 950-951 [4th Dept 2003]). To the extent that the father's further jurisdictional challenge is properly before us, we conclude that it lacks merit (*see generally Matter of Phelps v Hunter*, 101 AD3d 1689, 1689-1690 [4th Dept 2012], *lv denied* 20 NY3d 862 [2013]).

The father contends in appeal No. 1 that the mother failed to establish the requisite change in circumstances subsequent to the entry of the prior order. We reject that contention. "It is well settled that 'the continued deterioration of the parties' relationship is a significant change in circumstances justifying a change in custody' " (*Matter of Ladd v Krupp*, 136 AD3d 1391, 1392 [4th Dept 2016]). We conclude that the court properly concluded that there had been a sufficient change in circumstances inasmuch as "the evidence at the hearing established that 'the parties have an acrimonious relationship and are not able to communicate effectively with respect to the needs and activities of their child[ ], and it is well settled that joint custody is not feasible under those circumstances' " (*id.*).

The father further contends with respect to both appeals that, even if the requisite change in circumstances occurred, the court erred in granting the mother's petition for sole legal and primary physical custody of the child and instead should have granted his cross petition seeking primary physical custody while maintaining joint legal custody. We also reject that contention. "The court's determination with respect to the child's best interests 'is entitled to great deference and will not be disturbed [where, as here,] it is supported by a sound and substantial basis in the record' " (*id.* at 1393; *see Williams v Williams*, 100 AD3d 1347, 1348 [4th Dept 2012]).

Finally, the father failed to preserve for our review his contention in each appeal that reversal is warranted because the court was biased against him, inasmuch as "he failed to make a motion asking the court to recuse itself" (*Matter of Shonyo v Shonyo*, 151 AD3d 1595, 1596 [4th Dept 2017], *lv denied* 30 NY3d 901 [2017]). In any event, we conclude that the father's contention lacks merit inasmuch as " '[t]he record does not establish that the court was biased or prejudiced against [him]' " (*Matter of Kaylee D. [Kimberly D.]*, 154 AD3d 1343, 1343 [4th Dept 2017]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

256

CAF 16-01815

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

IN THE MATTER OF JOSEPH M. PALMISANO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BRIANA ELIZABETH MATTICE, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (ELIZABETH deV. MOELLER OF COUNSEL), FOR PETITIONER-APPELLANT.

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

DOUGLAS M. DEMARCHÉ, JR., NEW HARTFORD, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (William W. Rose, R.), entered September 21, 2016 in a proceeding pursuant to Family Court Act article 6. The order dismissed the cross petition of petitioner for modification of a prior custody and visitation order.

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

Same memorandum as in *Matter of Mattice v Palmisano* ([appeal No. 1] — AD3d — [Mar. 16, 2018] [4th Dept 2018]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

257

CA 17-00550

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

STAFF LEASING OF CENTRAL NEW YORK INC.,
PLAINTIFF-RESPONDENT,

V ORDER

HEIDI J. LUPI, MARK PIETROWSKI, MICHAEL J. LUCIA,
AND PINNACLE EMPLOYEE SERVICES, LLC,
DEFENDANTS-APPELLANTS.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JEFFREY M. NARUS OF COUNSEL), FOR DEFENDANTS-APPELLANTS HEIDI J. LUPI, MARK PIETROWSKI AND MICHAEL J. LUCIA.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (ELIZABETH A. HOFFMAN OF COUNSEL), FOR DEFENDANT-APPELLANT PINNACLE EMPLOYEE SERVICES, LLC.

MENTER, RUDIN & TRIVELPIECE, P.C., SYRACUSE (TERESA M. BENNETT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered July 8, 2016. The order, among other things, granted plaintiff's motion to compel certain discovery.

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

262

OP 17-01798

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

IN THE MATTER OF CHARLES E. HENRY, JR.,
PETITIONER-PLAINTIFF,

V MEMORANDUM AND ORDER

HON. MARK H. FANDRICH, JON E. BUDELMANN, ESQ.,
CAYUGA COUNTY DISTRICT ATTORNEY'S OFFICE AND
COUNTY OF CAYUGA, RESPONDENTS-DEFENDANTS.

JARROD W. SMITH, P.L.L.C., JORDAN (JARROD W. SMITH OF COUNSEL), FOR PETITIONER-PLAINTIFF.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (FREDERICK R. WESTPHAL OF COUNSEL), FOR RESPONDENTS-DEFENDANTS JON E. BUDELMANN, ESQ., CAYUGA COUNTY DISTRICT ATTORNEY'S OFFICE AND COUNTY OF CAYUGA.

Hybrid CPLR article 78 proceeding and declaratory judgment action (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]). Petitioner-plaintiff seeks, inter alia, a declaration that he is eligible for judicial diversion and that respondent-defendant judge should have referred his case to the Cayuga County Treatment Court Judge for a hearing.

It is hereby ORDERED that said petition/complaint is unanimously denied without costs.

Memorandum: Petitioner-plaintiff (petitioner) commenced this original hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, a declaration that he is eligible for judicial diversion and that respondent-defendant judge (respondent judge) should have referred his case to the Cayuga County Treatment Court Judge for a hearing. Respondent judge found that petitioner was statutorily eligible for diversion pursuant to CPL 216.00, but he denied petitioner's application to transfer his case to judicial diversion. We conclude that petitioner is not entitled to mandamus relief. "[T]he remedy of mandamus is available to compel a governmental entity or officer to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion" (*Matter of Brusco v Braun*, 84 NY2d 674, 679 [1994]). Inasmuch as the determination whether to allow a defendant to participate in judicial diversion is a discretionary one to be made by the court (*see* CPL 216.05 [4]; *People v Driscoll*, 147 AD3d 1157, 1159 [3d Dept 2017], *lv denied* 29 NY3d 1078 [2017]; *Matter of Doorley v*

DeMarco, 106 AD3d 27, 34 [4th Dept 2013]), petitioner has failed to demonstrate a clear legal right to the relief sought (*see Matter of Carty v Hall*, 92 AD3d 1191, 1192 [3d Dept 2012]; *Matter of Duffy v Jaeger*, 78 AD3d 830, 830 [2d Dept 2010], *lv denied* 17 NY3d 705 [2011]; *see generally Matter of Francois v Dolan*, 95 NY2d 33, 37 [2000]). We further conclude that petitioner is not entitled to a writ of prohibition or declaratory relief. Those forms of relief are not appropriate where a criminal defendant may "raise legal arguments and receive appropriate relief . . . in the criminal prosecution" (*Cayuga Indian Nation of N.Y. v Gould*, 14 NY3d 614, 633 [2010], *cert denied* 562 US 953 [2010]). Petitioner may raise the legal arguments he now raises in an appeal from any subsequent judgment of conviction (*see e.g. People v Chavis*, 151 AD3d 1757, 1758 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017]; *People v DeYoung*, 95 AD3d 71, 77-80 [2d Dept 2012]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

263

TP 17-01816

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

IN THE MATTER OF MARK MARENTETTE, PETITIONER,

V MEMORANDUM AND ORDER

CITY OF CANANDAIGUA AND JOHN GOODWIN, ASSISTANT CITY MANAGER APPOINTING AUTHORITY, RESPONDENTS.

TREVETT CRISTO P.C., ROCHESTER (MICHAEL T. HARREN OF COUNSEL), FOR PETITIONER.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Ontario County [William F. Kocher, A.J.], dated October 13, 2017) to annul a determination terminating petitioner from the position of Fire Chief of respondent City of Canandaigua.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination finding him guilty of disciplinary charges and terminating his employment as Fire Chief for respondent City of Canandaigua (City) following a hearing pursuant to Civil Service Law § 75. The Hearing Officer found that petitioner committed acts of insubordination inasmuch as he repeatedly violated the directive of his superior, the City Manager, by making unauthorized entries on his subordinates' time sheets, and that petitioner committed acts of incompetence by authorizing the expenditure of public funds on several occasions in violation of the City's procurement policies. Although the Hearing Officer recommended that petitioner be demoted, respondents determined that termination was warranted given the gravity of the misconduct, petitioner's disciplinary record, previous unsuccessful attempts at remediation, and the loss of trust in petitioner.

We reject petitioner's contention that preponderance of the evidence is the applicable evidentiary standard in this case. It is well established that substantial evidence is generally the applicable evidentiary standard for disciplinary matters involving public employees under Civil Service Law § 75, and that due process requires

application of the preponderance of the evidence standard only "when the penalty of dismissal is accompanied by some added stigma" (*Matter of Suitor v Keller*, 256 AD2d 1140, 1140 [4th Dept 1998]; *see Matter of Miller v DeBuono*, 90 NY2d 783, 794 [1997]; *Matter of Field v Board of Educ., Yonkers Pub. Sch. Dist.*, 148 AD3d 702, 703 [2d Dept 2017]; *Matter of James v Hoosick Falls Cent. Sch. Dist.*, 93 AD3d 1131, 1132-1133 [3d Dept 2012]). Here, we conclude that no such stigma is present inasmuch as "[n]othing in the record suggests that, as a result of the termination of his employment as [Fire Chief] with the [City], the petitioner is [effectively] prohibited from obtaining future . . . employment [as a firefighter or an officer of a fire department], or that he is subjected to a public registry of any sort" (*Matter of Lebron v Village of Spring Val.*, 143 AD3d 720, 722 [2d Dept 2016]; *see Field*, 148 AD3d at 703; *Suitor*, 256 AD2d at 1140; *cf. Miller*, 90 NY2d at 791-794).

Contrary to petitioner's further contention, the determination that he committed acts of insubordination and incompetence is supported by substantial evidence (*see Matter of Gaffney v Addison*, 132 AD3d 1360, 1360-1361 [4th Dept 2015]), i.e., by "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*300 Gramatan Ave. Assoc. v State Div. of Human Right*s, 45 NY2d 176, 180 [1978]). Petitioner's exculpatory explanations for his conduct raised an issue of credibility that the Hearing Officer was entitled to resolve against him (*see Gaffney*, 132 AD3d at 1361; *Matter of Civil Serv. Empls. Assn., Local #1000, AFSCME, AFL-CIO, by Local #854 v Tioga County*, 288 AD2d 802, 804 [3d Dept 2001]; *Matter of Dinnocenzo v Staniszewski*, 270 AD2d 840, 841 [4th Dept 2000]).

Finally, petitioner contends that termination of his employment was unjustified under the circumstances. "Our review of the penalty, however, is extremely limited; we do not have any 'discretionary authority or interest of justice jurisdiction in reviewing the penalty imposed' " (*Matter of Oliver v D'Amico*, 151 AD3d 1614, 1618 [4th Dept 2017], quoting *Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001], *rearg denied* 96 NY2d 854 [2001]). We conclude that the penalty of termination is not " 'so disproportionate to the offense[s] as to be shocking to one's sense of fairness,' " and thus does not constitute an abuse of discretion as a matter of law (*Kelly*, 96 NY2d at 38), particularly in light of petitioner's conduct underlying the charges and his history of disciplinary infractions during his tenure as Fire Chief (*see Matter of Short v Nassau County Civ. Serv. Commn.*, 45 NY2d 721, 722-723 [1978]; *Matter of Shafer v Board of Fire Commr., Selkirk Fire Dist.*, 107 AD3d 1229, 1231 [3d Dept 2013]; *Matter of Barhite v Village of Medina*, 23 AD3d 1114, 1115 [4th Dept 2005]; *Dinnocenzo*, 270 AD2d at 840-841).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

266

TP 17-01843

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

IN THE MATTER OF JAMES NELSON, PETITIONER,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered October 23, 2017) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

267

KA 16-00625

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL LAYOU, DEFENDANT-APPELLANT.

MICHAEL LAYOU, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered April 5, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fourth degree.

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

Memorandum: Defendant appeals, pro se, from a judgment convicting him following a plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]). Although defendant contends that the felony complaint was jurisdictionally defective, "[t]he felony complaint was superseded by the indictment to which defendant pleaded guilty, and he therefore may not challenge the felony complaint" on this appeal (*People v Anderson*, 90 AD3d 1475, 1477 [4th Dept 2011], *lv denied* 18 NY3d 991 [2012]; *see People v Mitchell*, 132 AD3d 1413, 1416 [4th Dept 2015], *lv denied* 27 NY3d 1072 [2016]).

Defendant further contends that County Court erred in refusing to suppress physical evidence seized from the vehicle in which defendant was a passenger because the stop of the vehicle, his subsequent detention and the search of the vehicle were all unlawful. We reject defendant's contention. "It is well established that police stops of automobiles in this State are legal only pursuant to routine, nonpretextual traffic checks to enforce traffic regulations[,] when there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime . . . or where the police have probable cause to believe that the driver . . . has committed a traffic violation" (*People v Robinson*, 122 AD3d 1282, 1283 [4th Dept 2014] [internal

quotation marks omitted]; *see generally People v Robinson*, 97 NY2d 341, 349 [2001]; *People v Spencer*, 84 NY2d 749, 753 [1995], *cert denied* 516 US 905 [1995]).

Here, we conclude that the stop of the vehicle was lawful inasmuch as the police had reasonable suspicion to stop the vehicle based on the contents of the 911 call from an identified citizen informant. The information provided by the informant " 'was reliable under the totality of the circumstances, satisfied the two-pronged *Aguilar-Spinelli* test for the reliability of hearsay tips in this particular context and contained sufficient information about' [the driver's] commission of the crime of driving while [ability impaired by drugs]" (*People v Wisniewski*, 147 AD3d 1388, 1388 [4th Dept 2017], *lv denied* 29 NY3d 1038 [2017], quoting *People v Argyris*, 24 NY3d 1138, 1140-1141 [2014], *rearg denied* 24 NY3d 1211 [2015], *cert denied* — US —, 136 S Ct 793 [2016]; *see People v Van Every*, 1 AD3d 977, 978 [4th Dept 2003], *lv denied* 1 NY3d 602 [2004]).

Even assuming, arguendo, that defendant was illegally pursued and detained after he fled from the stopped vehicle (*see People v Robbins*, 83 NY2d 928, 930 [1994]; *People v Hightower*, 136 AD3d 1396, 1397 [4th Dept 2016]; *People v Perez*, 149 AD2d 344, 345 [1st Dept 1989]), we conclude that defendant's "entirely unprovoked flight, leaving the vehicle and his companion[] . . . , constituted an abandonment of the . . . narcotics found in the . . . car and undermined any claim to a reasonable expectation of privacy he might otherwise have had" (*People v Gonzalez*, 25 AD3d 620, 621 [2d Dept 2006], *lv denied* 6 NY3d 833 [2006]). In any event, the narcotics found in the vehicle " 'were not obtained by exploitation' of the allegedly illegal detention" (*People v Holmes*, 63 AD3d 1649, 1650 [4th Dept 2009], *lv denied* 12 NY3d 926 [2009]). Rather, the evidence was seized after the owner gave her consent to search the vehicle and was thus "derived from a source independent of the detention and was attenuated from any illegal activity" (*People v Laws*, 208 AD2d 317, 322 [1st Dept 1995]; *see People v Jackson*, 143 AD2d 471, 472 [3d Dept 1988]; *see generally Wong Sun v United States*, 371 US 471, 487 [1963]).

Finally, 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 [1981]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

268

KA 15-01070

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MILTON BURKE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered May 22, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree.

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

269

KA 16-00888

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON M. WEIG, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MICHAEL S. DEAL OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (SHIRLEY A. GORMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered November 9, 2015. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [9]). Contrary to his contention, defendant validly waived his right to appeal. County Court "did not improperly conflate the waiver of the right to appeal with those rights automatically forfeited by a guilty plea" (*People v Mills*, 151 AD3d 1744, 1745 [4th Dept 2017], *lv denied* 29 NY3d 1131 [2017] [internal quotation marks omitted]; *see People v Lopez*, 6 NY3d 248, 256 [2006]). Furthermore, the court "engaged defendant 'in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*Mills*, 151 AD3d at 1745). The valid waiver of the right to appeal encompasses defendant's challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 255; *Mills*, 151 AD3d at 1745).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

276

KA 12-01620

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EUGENE S. BROWN, ALSO KNOWN AS EUGENE NESMITH,
DEFENDANT-APPELLANT.

JEFFREY WICKS, PLLC, ROCHESTER (JEFFREY WICKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered May 3, 2012. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]). Defendant failed to preserve for our review his contention that County Court erred in failing to conduct an inquiry into whether jurors were sleeping during the trial (*see People v Lancaster*, 143 AD3d 1046, 1051 [3d Dept 2016], *lv denied* 28 NY3d 1147 [2017], *reconsideration denied* 29 NY3d 999 [2017]; *People v Quinones*, 41 AD3d 868, 868 [2d Dept 2007], *lv denied* 9 NY3d 1008 [2007]). We note that defendant asked the court to discharge one juror on the ground that he was "grossly unqualified" (CPL 270.35 [1]), the court granted his request and discharged the juror, and defendant did not request that the court inquire into the conduct of any other particular juror. Defendant also failed to preserve for our review his challenges to the court's *Sandoval* ruling (*see People v Huitt*, 149 AD3d 1481, 1482 [4th Dept 2017], *lv denied* 30 NY3d 950 [2017]), and its *Molineux* ruling (*see People v Pendergraph*, 150 AD3d 1703, 1704 [4th Dept 2017], *lv denied* 29 NY3d 1132 [2017]). We decline to exercise our power to review those unpreserved contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

277

CAF 16-02295

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

IN THE MATTER OF BRITTANY C.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

MICHAEL C., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

JESSICA M. PEASLEE, BATH, FOR PETITIONER-RESPONDENT.

VIVIAN CLARA STRACHE, BATH, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Steuben County (Mathew K. McCarthy, A.J.), entered October 25, 2016 in a proceeding pursuant to Social Services Law § 384-b. The order determined that the subject child is a permanently neglected child and terminated the parental rights of respondent.

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

278

CAF 16-02296

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

IN THE MATTER OF BRITTANY C.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

MICHAEL C., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

JESSICA M. PEASLEE, BATH, FOR PETITIONER-RESPONDENT.

VIVIAN CLARA STRACHE, BATH, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Steuben County (Mathew K. McCarthy, A.J.), entered October 25, 2016 in a proceeding pursuant to Social Services Law § 384-b. The order freed the subject child for adoption.

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

279

CAF 16-02297

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

IN THE MATTER OF AMBER C.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

MICHAEL C., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

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

JESSICA M. PEASLEE, BATH, FOR PETITIONER-RESPONDENT.

VIVIAN CLARA STRACHE, BATH, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Steuben County (Mathew K. McCarthy, A.J.), entered October 25, 2016 in a proceeding pursuant to Social Services Law § 384-b. The order determined that the subject child is a permanently neglected child and terminated the parental rights of respondent.

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

Entered: March 16, 2018#

Mark W. Bennett
Clerk of the Court

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

280

CAF 16-02298

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

IN THE MATTER OF AMBER C.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

MICHAEL C., RESPONDENT-APPELLANT.
(APPEAL NO. 4.)

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

JESSICA M. PEASLEE, BATH, FOR PETITIONER-RESPONDENT.

VIVIAN CLARA STRACHE, BATH, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Steuben County (Mathew K. McCarthy, A.J.), entered October 25, 2016 in a proceeding pursuant to Social Services Law § 384-b. The order freed the subject child for adoption.

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

281

CAF 16-02299

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

IN THE MATTER OF NICHOLE C.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

MICHAEL C., RESPONDENT-APPELLANT.
(APPEAL NO. 5.)

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

JESSICA M. PEASLEE, BATH, FOR PETITIONER-RESPONDENT.

VIVIAN CLARA STRACHE, BATH, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Steuben County (Mathew K. McCarthy, A.J.), entered October 25, 2016 in a proceeding pursuant to Social Services Law § 384-b. The order determined that the subject child is a permanently neglected child and terminated the parental rights of respondent.

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

282

CAF 16-02300

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

IN THE MATTER OF NICHOLE C.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

MICHAEL C., RESPONDENT-APPELLANT.
(APPEAL NO. 6.)

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

JESSICA M. PEASLEE, BATH, FOR PETITIONER-RESPONDENT.

VIVIAN CLARA STRACHE, BATH, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Steuben County (Mathew K. McCarthy, A.J.), entered October 25, 2016 in a proceeding pursuant to Social Services Law § 384-b. The order freed the subject child for adoption.

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

288

CA 17-01383

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

SARAH J. GREGORY AND BRIAN C. GREGORY,
PLAINTIFFS-RESPONDENTS,

V ORDER

STEVEN R. CAVARELLO, DEFENDANT,
NATIONAL FUEL GAS DISTRIBUTION CORP., MUNICIPAL
PIPE CO., LLC, AND CITY OF BUFFALO,
DEFENDANTS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANTS-APPELLANTS NATIONAL FUEL GAS DISTRIBUTION CORP., AND MUNICIPAL PIPE CO., LLC.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (DAVID M. LEE OF COUNSEL), FOR DEFENDANT-APPELLANT CITY OF BUFFALO.

Appeals from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered April 11, 2017. The order denied the motion of defendants National Fuel Gas Distribution Corp. and Municipal Pipe Co., LLC, for bifurcation.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see generally Turner v CSX Transp., Inc.*, 72 AD3d 1646, 1647 [4th Dept 2010]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

294

TP 17-01851

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

IN THE MATTER OF ANGEL MORALES, PETITIONER,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered October 23, 2017) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

295

KA 14-00943

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DETROIT A. KELLY, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered February 26, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). The record establishes that defendant knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Smith*, 153 AD3d 1129, 1130 [4th Dept 2017], *lv denied* 30 NY3d 983 [2017]; *People v Tyler*, 140 AD3d 1694, 1694 [4th Dept 2016], *lv denied* 28 NY3d 975 [2016]; *see generally People v Lopez*, 6 NY3d 248, 256 [2006]). Defendant's contention that he was denied effective assistance of counsel "does not survive his plea or the valid waiver of the right to appeal inasmuch as defendant failed to demonstrate that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [defense counsel's] allegedly poor performance" (*People v Brinson*, 151 AD3d 1726, 1726 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017] [internal quotation marks omitted]; *see People v Smith*, 122 AD3d 1300, 1301 [4th Dept 2014], *lv denied* 25 NY3d 1172 [2015]). Defendant's further contention that County Court failed to make an appropriate inquiry into his request for substitution of counsel " 'is encompassed by the plea and the waiver of the right to appeal except to the extent that the contention implicates the voluntariness of the plea' " (*People v Morris*, 94 AD3d 1450, 1451 [4th Dept 2012], *lv denied* 19 NY3d 976 [2012]; *see People v Guantero*, 100 AD3d 1386, 1387 [4th Dept 2012], *lv denied* 21 NY3d 1004

[2013]). In any event, "defendant abandoned his request for new counsel when he 'decid[ed] . . . to plead guilty while still being represented by the same attorney' " (*Guantero*, 100 AD3d at 1387; *see Morris*, 94 AD3d at 1451).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

296

KA 17-00886

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAWRENCE J. SMITH, DEFENDANT-APPELLANT.

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

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara Sheldon, J.), rendered December 16, 2016. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of assault in the first degree (Penal Law § 120.10 [1]), defendant challenges the severity of the sentence. Contrary to defendant's contention, his waiver of the right to appeal encompasses that challenge. The record establishes that he voluntarily, knowingly and intelligently waived the right to appeal with respect to all aspects of his case, including his sentence, and that he was informed of the maximum sentence that County Court could impose (*see People v Lococo*, 92 NY2d 825, 827 [1998]; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

297

KA 14-00037

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KENNETH BROWN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered December 9, 2013. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree (three counts).

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

298

KA 16-00849

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EMMANUEL L. JENKINS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered April 26, 2016. The judgment convicted defendant, upon his plea of guilty, of predatory sexual assault (three counts), aggravated sexual abuse in the third degree (two counts), 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 affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, three counts of predatory sexual assault (Penal Law § 130.95 [2]) and one count of rape in the first degree (§ 130.35 [1]). We reject his contention that Supreme Court erred in refusing to suppress his statements to the police. The evidence presented at the suppression hearing, which included a video recording of the police interrogation at issue, demonstrated that defendant was informed of his *Miranda* rights, that he understood those rights, and that he was not under duress or undue influence when he made the challenged statements (*see People v DeAngelo*, 136 AD3d 1119, 1120 [3d Dept 2016]; *see also People v Rodwell*, 122 AD3d 1065, 1067 [3d Dept 2014], *lv denied* 25 NY3d 1170 [2015]). The tactics used by the police during the interrogation "did not overbear defendant's will or create a substantial risk that he would falsely incriminate himself" (*People v Tompkins*, 107 AD3d 1037, 1040 [3d Dept 2013], *lv denied* 22 NY3d 1044 [2013]). Thus, we conclude that the People established that defendant validly waived his *Miranda* rights (*see generally People v Knapp*, 124 AD3d 36, 41 [4th Dept 2014]).

Defendant did not object to the court's ultimate *Sandoval* ruling, and thus he failed to preserve for our review his contention that the court's ruling constitutes an abuse of discretion (*see People v Huitt*,

149 AD3d 1481, 1482 [4th Dept 2017], *lv denied* 30 NY3d 950 [2017]). Defendant also failed to preserve for our review his contention that the photo array identification was unduly suggestive because he failed to raise at the *Wade* hearing the specific grounds that he now raises on appeal (*see People v Evans*, 137 AD3d 1683, 1683 [4th Dept 2016], *lv denied* 27 NY3d 1131 [2016]). In any event, those contentions lack merit. Finally, the sentence is not unduly harsh or severe.

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

301

KA 15-01614

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SAMUEL CHANDLER, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS 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 (M. William Boller, A.J.), dated June 24, 2015. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

303

CAF 16-01127

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

IN THE MATTER OF AMYN C.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CHELSEA K., RESPONDENT-APPELLANT.

WILLIAM D. BRODERICK, JR., ELMA, FOR RESPONDENT-APPELLANT.

JAMES E. BROWN, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), dated June 23, 2016 in a proceeding pursuant to Family Court Act article 6. The order terminated respondent's parental rights to 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 terminating her parental rights with respect to the subject child. We reject the mother's contention that she was denied effective assistance of counsel (*see generally Matter of Elijah D. [Allison D.]*, 74 AD3d 1846, 1847 [4th Dept 2010]). Furthermore, the mother failed to preserve for our review her challenge to the admission in evidence of the report of petitioner's expert inasmuch as she did not object thereto (*see Matter of Ayden W. [John W.]*, 156 AD3d 1389, 1390 [4th Dept 2017]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

308

CA 16-01351

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

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

V MEMORANDUM AND ORDER

STEVEN M., JR., RESPONDENT-APPELLANT.

THE SAGE LAW FIRM GROUP, PLLC, BUFFALO (KATHRYN FRIEDMAN OF COUNSEL), FOR RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Cattaraugus County (John L. Michalski, A.J.), entered May 4, 2016 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, committed respondent to a secure treatment facility.

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

Memorandum: Petitioner commenced this proceeding seeking a determination that respondent is a sex offender requiring civil management (*see* Mental Hygiene Law § 10.01 *et seq.*). Following a nonjury trial, Supreme Court determined that respondent is a detained sex offender who suffers from a mental abnormality (*see* § 10.07 [d]). The matter proceeded to a dispositional hearing, after which the court issued an order determining that respondent is a dangerous sex offender requiring confinement and committing him to a secure treatment facility (*see* § 10.07 [f]).

Contrary to respondent's contention, we conclude that the evidence is legally sufficient to establish that he suffers from "a congenital or acquired condition, disease or disorder that affects [his] emotional, cognitive, or volitional capacity . . . in a manner that predisposes him . . . to the commission of conduct constituting a sex offense" (Mental Hygiene Law § 10.03 [i]). One of petitioner's experts testified that respondent has a provisional diagnosis of pedophilia because he satisfies the diagnostic criteria for early onset pedophilia, and also has diagnoses of alcohol dependence, cannabis abuse, and antisocial personality disorder (ASPD). In addition, petitioner's other expert testified that, although most persons who are diagnosed with ASPD never commit a sex offense, respondent is atypical because of his sexual preoccupation, which

causes him to channel his antisocial behaviors into conduct constituting sex offenses. Considering the evidence in the light most favorable to petitioner, we conclude that the evidence is legally sufficient to sustain the finding of mental abnormality (*see Matter of Gooding v State of New York*, 144 AD3d 1644, 1644-1645 [4th Dept 2016]; *Matter of Vega v State of New York*, 140 AD3d 1608, 1608-1609 [4th Dept 2016]).

Respondent failed to preserve for our review his contention that the evidence is legally insufficient to establish that he has serious difficulty in controlling his sexual misconduct inasmuch as he did not move for a directed verdict pursuant to CPLR 4401 or otherwise challenge the sufficiency of the evidence on that point (*see Vega*, 140 AD3d at 1609). In any event, the contention lacks merit.

Finally, we conclude that the determination is not against the weight of the evidence. The conflicting testimony of respondent's and petitioner's experts presented a credibility issue for the court to resolve, and we decline to disturb the court's determination in that regard (*see Matter of Christopher J. v State of New York*, 149 AD3d 1549, 1551 [4th Dept 2017]; *Vega*, 140 AD3d at 1609).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

310

CA 17-01679

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

IN THE MATTER OF KELIANN M. ARGY (ELNISKI),
PETITIONER-RESPONDENT,

V ORDER

NIAGARA FALLS COACH LINES, INC.,
RESPONDENT-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (TIMOTHY J. GRABER OF COUNSEL), FOR RESPONDENT-APPELLANT.

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (JOSEPH E. ZDARSKY OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered July 20, 2017. The order, inter alia, granted the application of petitioner to compel respondent to produce certain corporate books and records.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 1, 2018,

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

315

KA 16-01335

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

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THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL SWEAT, DEFENDANT-RESPONDENT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Penny M. Wolfgang, J.), dated May 16, 2016. The appeal was held by this Court by order entered March 24, 2017, decision was reserved and the matter was remitted to Supreme Court, Erie County, for further proceedings (148 AD3d 1641). The proceedings were held and completed.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: We previously held this case, reserved decision, and remitted the matter to Supreme Court to determine whether defendant has standing to challenge the allegedly unlawful search of the home where the police discovered the gun that defendant sought to suppress and, if so, whether one of the lessors of the home consented to the search (*People v Sweat*, 148 AD3d 1641 [4th Dept 2017]). Upon remittal, the court determined that defendant lacks standing to challenge the warrantless search of the home. That was error.

"[A] defendant seeking to suppress evidence, on the basis that it was obtained by means of an illegal search, must allege standing to challenge the search and, if the allegation is disputed, must establish standing" (*People v Sylvester*, 129 AD3d 1666, 1666-1667 [4th Dept 2015], *lv denied* 26 NY3d 1092 [2015] [internal quotation marks omitted]). To establish standing, the defendant must demonstrate that he or she has a legitimate expectation of privacy in the place searched (*see People v Ramirez-Portoreal*, 88 NY2d 99, 108-109 [1996]). A defendant has no expectation of privacy in a home where he or she is merely a casual visitor with tenuous ties to it (*see People v Smith*, 155 AD3d 1674, 1675 [4th Dept 2017]), or is a mere occasional visitor (*see People v Hailey*, 128 AD3d 1415, 1417 [4th Dept 2015], *lv denied* 26 NY3d 929 [2015]). In such cases, the defendant does not have standing to challenge the legality of the search of the home (*see*

Hailey, 128 AD3d at 1417).

According to the unrefuted testimony at the suppression hearing of defendant's brother and sister-in-law, the lessors of the home, defendant resided there until two months prior to the incident. Nevertheless, defendant maintained the address associated with the home as his permanent mailing address, and, although he removed much of his property, he continued to keep clothes there. He returned frequently to care for his nieces and nephews, and he was entrusted with the home when his brother and sister-in-law were away. Defendant was at the home often and slept there overnight between 5 and 12 times per month. Thus, we conclude that defendant's "connection with the premises was substantially greater than that of a casual visitor, and . . . that . . . defendant had a reasonable expectation of privacy in the home" (*People v Moss*, 168 AD2d 960, 960 [4th Dept 1990]).

Inasmuch as "our review is limited to the issues determined by the court" (*People v Schrock*, 99 AD3d 1196, 1197 [4th Dept 2012]), and the court failed to determine whether one of the lessors of the home consented to the search, we continue to hold the case and reserve decision, and we remit the matter to Supreme Court to determine that issue.

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

318

KA 15-00204

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD LIVINGSTON, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (JOHN J. GILSENAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD LIVINGSTON, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (James H. Cecile, A.J.), rendered November 25, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). Preliminarily, we agree with defendant that he did not validly waive his right to appeal (*see People v Sampson*, 149 AD3d 1486, 1486-1487 [4th Dept 2017]; *People v Mason*, 144 AD3d 1589, 1589 [4th Dept 2016], *lv denied* 28 NY3d 1186 [2017]). Nevertheless, the sentence is not unduly harsh or severe. We have considered the contentions in defendant's pro se supplemental brief and conclude that none warrants reversal or modification of the judgment.

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

320

KA 16-01005

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LLOYD W. WHEELER, III, DEFENDANT-APPELLANT.

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

LLOYD W. WHEELER, III, DEFENDANT-APPELLANT PRO SE.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (COLLEEN SULLIVAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered June 1, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that the sentence is unduly harsh and severe. We reject that contention. Defendant received the benefit of an advantageous plea agreement in which he pleaded guilty to one count in satisfaction of the two counts charged in the indictment, and County Court imposed the minimum term of incarceration of 3½ years (*see* § 70.02 [3] [b]), to be followed by three years of postrelease supervision (*see* § 70.45 [2] [f]). In his pro se supplemental letter brief, defendant further contends that he was denied effective assistance of counsel by defense counsel's alleged failure to obtain a plea offer to a misdemeanor. To the extent that defendant's contention survives his guilty plea, we conclude that it lacks merit (*see People v Rockwell*, 137 AD3d 1586, 1586 [4th Dept 2016]; *see generally People v Ford*, 86 NY2d 397, 404 [1995]). Where, as here, "an indictment charges . . . a class C violent felony offense, then a plea of guilty must include at least a plea of guilty to a class D violent felony offense" (CPL 220.10 [5] [d] [ii]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

321

KA 16-00560

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW M. EDWARDS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered February 29, 2016. The judgment convicted defendant, upon a jury verdict, of rape in the second degree (13 counts), criminal sexual act in the second degree (13 counts) and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, 13 counts each of rape in the second degree (Penal Law § 130.30 [1]) and criminal sexual act in the second degree (§ 130.45 [1]). Defendant failed to preserve for our review his contention that the indictment was multiplicitous (*see People v Quinn*, 103 AD3d 1258, 1258 [4th Dept 2013], *lv denied* 21 NY3d 946 [2013]), and duplicitous (*see People v Becoats*, 17 NY3d 643, 650-651 [2011], *cert denied* 566 US 964 [2012]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant also failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence inasmuch as his motion for a trial order of dismissal was not specifically directed at the grounds advanced on appeal, and we also note in any event that he failed to renew his motion after presenting evidence (*see People v Roman*, 85 AD3d 1630, 1630 [4th Dept 2011], *lv denied* 17 NY3d 821 [2011]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). With respect to the credibility of the victim, we note that her testimony "was not so

inconsistent or unbelievable as to render it incredible as a matter of law" (*People v Black*, 38 AD3d 1283, 1285 [4th Dept 2007], *lv denied* 8 NY3d 982 [2007]). Issues of credibility are primarily for the jury's determination (*see People v Witherspoon*, 66 AD3d 1456, 1457 [4th Dept 2009], *lv denied* 13 NY3d 942 [2010]), and we see no basis for disturbing the jury's credibility determinations in this case.

Defendant contends that he was denied effective assistance of counsel based on counsel's failure to object to alleged prosecutorial misconduct on summation. We reject that contention. Most of the alleged instances of misconduct were fair comment on the evidence and fair response to defense counsel's summation (*see People v Redfield*, 144 AD3d 1548, 1550 [4th Dept 2016], *lv denied* 28 NY3d 1187 [2017]) and, to the extent that the prosecutor made inappropriate remarks, we conclude that they were "not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Young*, 153 AD3d 1618, 1620 [4th Dept 2017], *lv denied* 30 NY3d 1065 [2017]). We therefore conclude that defense counsel's failure to object to the alleged instances of prosecutorial misconduct did not constitute ineffective assistance of counsel (*see People v Blair*, 121 AD3d 1570, 1571 [4th Dept 2014]). Finally, the sentence is not unduly harsh or severe.

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

326

KA 15-01284

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONALD LEFLER, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (NATHANIEL V. RILEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered December 23, 2014. The judgment convicted defendant, upon his plea of guilty, of rape in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of rape in the first degree (Penal Law § 130.35 [4]). We reject defendant's contention that his waiver of the right to appeal was not knowing, voluntary, and intelligent (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]). County Court "did not conflate that right with those automatically forfeited by a guilty plea" (*People v McCrea*, 140 AD3d 1655, 1655 [4th Dept 2016], *lv denied* 28 NY3d 933 [2016] [internal quotation marks omitted]), and we conclude that "the court engaged defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Massey*, 149 AD3d 1524, 1525 [4th Dept 2017] [internal quotation marks omitted]). The valid waiver of the right to appeal forecloses defendant's challenge to the severity of his sentence (*see generally Lopez*, 6 NY3d at 255).

Defendant further contends that his guilty plea was not knowingly, intelligently, and voluntarily entered and that the court abused its discretion in denying his motion to withdraw his plea on that ground. Although that contention survives defendant's waiver of the right to appeal (*see Massey*, 149 AD3d at 1525), defendant's claim that he "did not fully understand what he was doing" is belied by the record. Defendant articulated to the court that he fully understood the rights he was giving up as part of the plea bargain and that he had consulted with his attorney. He further admitted his guilt, recited all of the elements and facts of the crime with which he was

charged, and stated that his decision to plead guilty was voluntary. Thus, we conclude that the court did not abuse its discretion in denying defendant's motion to vacate the plea (*see generally People v Schluter*, 136 AD3d 1363, 1364 [4th Dept 2016], *lv denied* 27 NY3d 1138 [2016]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

328

CA 16-02272

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

RICHARD C. JANES AND ROSEMARY JANES,
PLAINTIFFS,

V ORDER

2630 ATTICA ROAD, INC., INDIVIDUALLY AND DOING
BUSINESS AS BLUE DOG SALOON, AND SHANNON SZALAY,
DEFENDANTS.

BROWN CHIARI, LLP, APPELLANT,

V

COLLINS & COLLINS ATTORNEYS, LLC, RESPONDENT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM, BUFFALO (R. ANTHONY RUPP, III, OF COUNSEL), FOR APPELLANT.

COLLINS & COLLINS ATTORNEYS, LLC, BUFFALO (MICHAEL SZCZYGIEL OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Wyoming County (Michael F. Griffith, A.J.), entered December 5, 2016. The order adjudged that the law firm of Brown Chiari, LLP is entitled to recover an amount equal to 25% of the counsel fees held in escrow in connection with the settlement of plaintiffs' action as their share of said fee.

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

333

CA 17-01762

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

JOSEPH G. RUSNAK, M.D., MARY TURKIEWICZ, M.D., JAMES FITZGERALD, M.D., JOHN FITZGERALD, M.D., AND CLAUDIA FOSKET, M.D., PLAINTIFFS-RESPONDENTS,

V ORDER

THOMAS O. MASON, M.D., ET AL., DEFENDANTS, AND SOUTHTOWNS RADIOLOGY, LLC, DEFENDANT-APPELLANT.

BOND SCHOENECK & KING, PLLC, BUFFALO (MITCHELL J. BANAS, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (DAVID J. MCNAMARA OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered May 19, 2017. The order and judgment, inter alia, granted the motion of plaintiffs for partial summary judgment awarding damages for withheld distributions.

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

335

CA 17-01578

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

TRACY BUTLER, PLAINTIFF-RESPONDENT,

V ORDER

BUFFALO MUNICIPAL HOUSING AUTHORITY,
DEFENDANT-APPELLANT.

COUTU LANE PLLC, BUFFALO (JACLYN WANEMAKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF MARK H. CANTOR, LLC, BUFFALO (DAVID J. WOLFF, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered November 21, 2016. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

339

TP 17-01852

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

IN THE MATTER OF MARVIN VASSAR, PETITIONER,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered October 23, 2017) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

340

TP 17-01667

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

IN THE MATTER OF BRANDEL WILLIAMS, PETITIONER,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

BRANDEL WILLIAMS, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Livingston County [Robert B. Wiggins, A.J.], entered September 18, 2017) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

341

KA 16-00771

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NATHANIEL RAY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered April 29, 2016. 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 modified as a matter of discretion in the interest of justice by reducing the sentence imposed to an indeterminate term of incarceration of 16 years to life and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him following a jury trial of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that the warrantless police search of the vehicle he was driving was unlawful and that Supreme Court therefore erred in refusing to suppress the loaded handgun found by the police in an area behind the glove compartment. We rejected that same contention in the appeal of a codefendant (*People v Johnson*, — AD3d — [4th Dept 2018] [decided herewith]), ruling that the search was lawful under the automobile exception to the warrant requirement because the police had probable cause to believe that there was a gun in the vehicle (*see generally People v Galak*, 81 NY2d 463, 466-467 [1993]; *People v Blasich*, 73 NY2d 673, 678 [1989]), and there is no reason to reach a different result here. At the time of the search, the police were acting upon information from an identified citizen that someone had fired shots at him 10 minutes earlier and then entered defendant's vehicle, which defendant drove away. The police stopped the vehicle three blocks from the shooting and conducted the search after ordering its three occupants to exit the vehicle. Although it is possible, as defendant contends, that the gun was no longer in the vehicle by the time it was stopped, it was more probable than not that it was still there, thus justifying the

search. "Probable cause does not require proof beyond a reasonable doubt," but merely requires "a reasonable ground for belief" (*People v Simpson*, 244 AD2d 87, 91 [1st Dept 1998]).

We reject defendant's further contention that the People failed to prove beyond a reasonable doubt that he possessed the weapon. Pursuant to the automobile presumption set forth in Penal Law § 265.15 (3), "[t]he presence in an automobile, other than a stolen one or a public omnibus, of any firearm . . . is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon . . . is found," with exceptions not relevant here. The presumption applies here because the gun was found inside the vehicle that defendant was driving, and there was no evidence at trial to rebut the presumption. Moreover, the evidence at trial established that defendant must have known that the gun was in his vehicle, and he took no steps to distance himself from it during the 10-minute period between the shooting and the stop of his vehicle by the police. Thus, viewing the evidence in the light most favorable to the People, as we must (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is a valid line of reasoning and permissible inferences that could lead a rational person to conclude that defendant possessed the loaded firearm (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). "Even assuming, arguendo, that a different verdict would not have been unreasonable, we cannot conclude that the jury failed to give the evidence the weight it should be accorded" (*People v Terborg*, 156 AD3d 1320, 1321 [4th Dept 2017]; *see generally Bleakley*, 69 NY2d at 495).

We agree with defendant, however, that the sentence imposed, an indeterminate term of imprisonment of 25 years to life as a persistent violent felony offender, is unduly harsh and severe. Defendant did not fire or even directly possess the weapon, and there is no evidence that he knew that his codefendant intended to use it unlawfully. Although defendant has multiple prior felony convictions, several of which are for weapon offenses, he has no history of violence on his record, and his conduct in this case does not in our view warrant the maximum sentence permitted by law. We therefore modify the judgment as a matter of discretion in the interest of justice by reducing the sentence to an indeterminate term of imprisonment of 16 years to life (*see generally* CPL 470.15 [6] [b]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

342

KA 16-00656

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HAKIM OWENS, ALSO KNOWN AS HAKIM JONES,
DEFENDANT-APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (JULIE BENDER FISKE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered September 23, 2015. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of assault in the second degree (Penal Law § 120.05 [2]). Contrary to defendant's contention, his waiver of the right to appeal is valid (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]). County Court "engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Hicks*, 89 AD3d 1480, 1480 [4th Dept 2011], *lv denied* 18 NY3d 924 [2012] [internal quotation marks omitted]), and the record establishes that he "understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*Lopez*, 6 NY3d at 256). Defendant's valid waiver of the right to appeal forecloses his challenge to the court's suppression rulings (*see People v Kemp*, 94 NY2d 831, 833 [1999]), and we note in any event that defendant withdrew his suppression motion before he pleaded guilty. Even assuming, arguendo, that defendant's contention with respect to the sentence imposed survives his valid waiver of the right to appeal, we conclude that it lacks merit.

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

343

KA 15-01388

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN MILLER, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CARA A. WALDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JEFFERY R. FRIESEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered January 7, 2015. The judgment convicted defendant upon his plea of guilty of, inter alia, criminal sale of a controlled substance in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, two counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). We agree with defendant that his waiver of the right to appeal does not encompass his challenge to the severity of the sentence. " '[N]o mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal his conviction that he was also waiving his right to appeal the harshness of his sentence' " (*People v Grucza*, 145 AD3d 1505, 1506 [4th Dept 2016]; *see People v Maracle*, 19 NY3d 925, 928 [2012]). "Furthermore, '[a]lthough the record establishes that defendant executed a written waiver of the right to appeal, there was no colloquy between [County] Court and defendant regarding the waiver of the right to appeal to ensure that' defendant was aware that it encompassed his challenge to the severity of the sentence" (*People v Avellino*, 119 AD3d 1449, 1449-1450 [4th Dept 2014]). We nevertheless conclude that the negotiated sentence is not unduly harsh or severe.

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

344

KA 17-00462

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUAN CIRINO, DEFENDANT-APPELLANT.

LINDA M. CAMPBELL, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered February 5, 2015. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree and assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a plea of guilty, of murder in the second degree (Penal Law § 125.25 [1]) and assault in the first degree (§ 120.10 [1]). As defendant correctly concedes, he failed to preserve for our review his contention that County Court erred in accepting his guilty plea inasmuch as he did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Karlsen*, 147 AD3d 1466, 1468 [4th Dept 2017], *lv denied* 29 NY3d 1082 [2017]), and this case does not fall within the rare exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666 [1988]). We reject defendant's challenge to the severity of the sentence.

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

345

KA 17-01727

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AMOS R. GOODWIN, DEFENDANT-APPELLANT.

BRUCE R. BRYAN, SYRACUSE, FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN, FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered April 6, 2017. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). We note at the outset that defendant's purported waiver of the right to appeal is not valid inasmuch as "the perfunctory inquiry made by [County] Court was insufficient to establish that the court engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Beaver*, 128 AD3d 1493, 1494 [4th Dept 2015] [internal quotation marks omitted]; *see People v Elmer*, 19 NY3d 501, 510 [2012]; *People v Banks*, 125 AD3d 1276, 1277 [4th Dept 2015], *lv denied* 25 NY3d 1159 [2015]).

Although defendant's contention that the court erred in denying his preplea request for an adjournment to enable him to retain new counsel "survives his guilty plea inasmuch as the right to counsel of one's choosing 'is so deeply intertwined with the integrity of the process in [the court] that defendant's guilty plea is no bar to appellate review' " (*People v Booker*, 133 AD3d 1326, 1327 [4th Dept 2015], *lv denied* 27 NY3d 1149 [2016], quoting *People v Griffin*, 20 NY3d 626, 630 [2013]; *see generally People v Hansen*, 95 NY2d 227, 230-231 [2000]), we conclude that it lacks merit. It is well settled that "the constitutional right to [a defense] by counsel of one's own choosing does not bestow upon a criminal defendant the absolute right to demand that his trial be delayed while he selects another attorney to represent him at trial . . . Whether a continuance should be granted is largely within the discretion of the [t]rial [court]"

(*People v Arroyave*, 49 NY2d 264, 271 [1980]; *see People v Robinson*, 132 AD3d 1407, 1409 [4th Dept 2015], *lv denied* 27 NY3d 1005 [2016]). Under the circumstances of this case, we conclude that defendant was not denied the right "to retain counsel of his own choosing and the . . . court did not abuse its discretion in denying defendant's request to delay the [impending suppression hearing and scheduled] trial" (*People v Michalek*, 195 AD2d 1007, 1008 [4th Dept 1993], *lv denied* 82 NY2d 807 [1993]; *see Booker*, 133 AD3d at 1327; *Robinson*, 132 AD3d at 1409).

To the extent that defendant's further contention that his guilty plea was not knowing, voluntary, and intelligent is preserved for our review by his motion to withdraw his plea (*see People v Johnson*, 23 NY3d 973, 975 [2014]; *cf. People v Gibson*, 140 AD3d 1786, 1787 [4th Dept 2016], *lv denied* 28 NY3d 1072 [2016]), we conclude that it is without merit. Defendant's assertion that he was not afforded sufficient time to discuss the plea with defense counsel is belied by the record, which establishes that the court granted defendant's request for a recess for that purpose and that defendant thereafter confirmed that he had discussed the matter with defense counsel and never indicated that he needed more time (*see People v Spates*, 142 AD3d 1389, 1389 [4th Dept 2016], *lv denied* 28 NY3d 1127 [2016]). In addition, "the fact that defendant was required to accept or reject the plea offer within a short time period does not amount to coercion" (*People v Carr*, 147 AD3d 1506, 1507 [4th Dept 2017], *lv denied* 29 NY3d 1030 [2017] [internal quotation marks omitted]). Contrary to defendant's further contention, the record establishes that the court accurately advised him of the rights that he was forfeiting by pleading guilty and that he had a full understanding of the consequences of the plea (*see People v Sougou*, 26 NY3d 1052, 1055-1056 [2015]; *People v Stimus*, 100 AD3d 1542, 1542 [4th Dept 2012], *lv denied* 20 NY3d 1015 [2013]). Furthermore, to the extent that defendant contends otherwise, we conclude that the court did not abuse its discretion in denying his motion to withdraw his guilty plea inasmuch as his " 'conclusory and unsubstantiated claim of innocence is belied by his admissions during the plea colloquy' " (*People v Roberts*, 126 AD3d 1481, 1481 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016]).

Defendant further contends that he was denied effective assistance of counsel, which also established that his plea was involuntary, because he did not have sufficient communication with defense counsel prior to forgoing the suppression hearing in favor of pleading guilty, defense counsel did not adequately advise him about the nature and consequences of the plea, and defense counsel was unprepared for the suppression hearing. Defendant's contention 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 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016] [internal quotation marks omitted]). Here, however, defendant's contention " 'involve[s] matters outside the record on appeal and therefore must

be raised by way of a motion pursuant to CPL article 440' " (*id.* at 1536; *see People v Atkinson*, 105 AD3d 1349, 1350 [4th Dept 2013], *lv denied* 24 NY3d 958 [2014]). To the extent that defendant's contention is reviewable on direct appeal, we conclude that it lacks merit inasmuch as he "received an advantageous plea, and 'nothing in the record casts doubt on the apparent effectiveness of counsel' " (*People v Shaw*, 133 AD3d 1312, 1313 [4th Dept 2015], *lv denied* 26 NY3d 1150 [2016], quoting *People v Ford*, 86 NY2d 397, 404 [1995]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

346

KA 15-00101

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES FOX, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), entered August 18, 2014. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of failure to register and/or verify as a sex offender (Correction Law §§ 168-f [4]; 168-t) and sentencing him to a term of incarceration based on his admission that he violated three terms and conditions of probation. Defendant contends that his admission to having violated probation by failing to participate in sex offender treatment should be vacated because his refusal to admit the underlying sex offense was not a refusal to participate in sex offender treatment. That contention is unpreserved for our review because defendant "failed to move to withdraw his admission or to vacate the judgment revoking his sentence of probation on that ground" (*People v Obbagy*, 56 AD3d 1223, 1224 [4th Dept 2008], *lv denied* 11 NY3d 928 [2009]; *see People v Hamdy*, 46 AD3d 1383, 1383 [4th Dept 2007], *lv denied* 10 NY3d 765 [2008]), and we decline to exercise our power to address that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We note in any event that defendant admitted to two other violations, which provide a sufficient basis for finding a violation of probation (*see Hamdy*, 46 AD3d at 1383).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

356

CAF 16-00099

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

IN THE MATTER OF RASHAWN J., JR. AND MISHAWN J.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

VERONICA H.-B., RESPONDENT-APPELLANT,
AND RASHAWN J., SR., RESPONDENT.

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

MICHAEL E. DAVIS, COUNTY ATTORNEY, ROCHESTER (PETER A. ESSLEY OF COUNSEL), FOR PETITIONER-RESPONDENT.

SARA E. ROOK, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Monroe County (Patricia E. Gallaher, J.), entered December 14, 2015 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent Veronica H.-B. had neglected the subject children.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the findings that respondent Veronica H.-B. neglected the subject children by using illegal drugs and engaging in domestic violence in their presence and by failing to supply adequate food, medical care, and education, and as modified the order is affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order adjudging that she directly neglected her sons. Family Court also found, in the alternative, that the sons were derivatively neglected based on its conclusion that the mother neglected the sons' half-sister. We conclude that the court's finding of direct neglect by excessive corporal punishment with respect to the older son, as well as the half-sister, which is relevant to the alternative finding of derivative neglect, is supported by a preponderance of the evidence adduced at the fact-finding hearing (*see* §§ 1012 [f] [i] [B]; 1046 [b] [i]).

Contrary to the mother's contention, the half-sister's out-of-court statements that the mother had caused her injuries by striking her with a jump rope were sufficiently corroborated by the

observations of the school nurse and caseworkers, photographic evidence of the injuries, and the testimony of petitioner's medical expert who reviewed the photographs (*see Matter of Bryan O. [Zabiullah O.]*, 153 AD3d 1641, 1642 [4th Dept 2017]; *Matter of Dustin B. [Donald M.]*, 71 AD3d 1426, 1426-1427 [4th Dept 2010]; *Matter of Christopher P.*, 30 AD3d 307, 308 [1st Dept 2006], *lv denied* 7 NY3d 713 [2006]). In addition, the half-sister's out-of-court statements indicating that the mother inflicted excessive corporal punishment or allowed such harm to be inflicted upon the older son were sufficiently corroborated by the caseworkers' testimony and the photographs of his injuries (*see Bryan O.*, 153 AD3d at 1642). Contrary to the mother's further contention, we conclude that the court was entitled to reject the purported exculpatory explanations given to caseworkers and others regarding the older son's injuries (*see Matter of Seth G.*, 50 AD3d 1530, 1531 [4th Dept 2008]). Indeed, the court properly drew " 'the strongest possible negative inference' against the [mother] after [she] failed to testify at the fact-finding hearing" (*Matter of Kennedie M. [Douglas M.]*, 89 AD3d 1544, 1545 [4th Dept 2011], *lv denied* 18 NY3d 808 [2012]; *see Matter of Brittany W. [Patrick W.]*, 103 AD3d 1217, 1218 [4th Dept 2013]).

The mother further contends that the court's alternative finding of derivative neglect with respect to both sons lacks a sound and substantial basis in the record. We reject that contention. Here, the mother's neglect of the half-sister "is so closely connected with the care of [the sons] as to indicate that the [sons are] equally at risk" (*Matter of Marino S.*, 100 NY2d 361, 374 [2003], *cert denied* 540 US 1059 [2003]; *see Matter of Raymond D.*, 45 AD3d 1415, 1416 [4th Dept 2007]; *Matter of Steven L.*, 28 AD3d 1093, 1093 [4th Dept 2006], *lv denied* 7 NY3d 706 [2006]).

We agree with the mother, however, that the court erred in finding that she neglected the sons by using illegal drugs and engaging in domestic violence in their presence, and by failing to supply them with adequate food, medical care, and education (*see* Family Ct Act § 1012 [f] [i] [A], [B]). Those findings of direct neglect are not supported by a preponderance of the evidence admitted at the fact-finding hearing (*see* § 1046 [b] [i], [iii]; *see Bryan O.*, 153 AD3d at 1642-1643). We therefore modify the order accordingly.

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

358

CA 17-00081

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

IN THE MATTER OF MICHAEL JACKSON,
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 (JOSEPH M. SPADOLA OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered November 14, 2016 in a CPLR article 78 proceeding. 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 CPLR article 78 petition seeking to annul the Parole Board's determination denying his request for release to parole supervision. This appeal has been rendered moot by petitioner's reappearance before the Parole Board and his subsequent release from custody (*see generally Matter of Hill v Annucci*, 149 AD3d 1540, 1541 [4th Dept 2017]), and the exception to the mootness doctrine does not apply (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

359

CA 17-01741

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

CHRISTINE MASON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RAVI ADHIKARY, M.D., AND KATHERINE WILLER, D.O.,
DEFENDANTS-APPELLANTS.

SUGARMAN LAW FIRM LLP, SYRACUSE (JEFFREY M. NARUS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DEFRANCISCO & FALGIATANO LLP, EAST SYRACUSE (JEANMARIE WESTLAKE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered January 20, 2017. The order denied defendants' motion for summary judgment dismissing plaintiff's complaint.

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

Memorandum: In this medical malpractice action, defendants appeal from an order denying their motion for summary judgment dismissing the complaint. We affirm. Plaintiff commenced this action seeking damages for injuries she allegedly sustained as a result of a delay in diagnosing her breast cancer. On July 3, 2013, plaintiff presented to defendant Ravi Adhikary, M.D. after she and her general practitioner had discovered a lump in her left breast. Plaintiff underwent bilateral mammograms, mammograms with magnification, and bilateral ultrasounds. Adhikary reviewed and interpreted the imaging, finding that there were "likely benign cystic lesions in [plaintiff's] breast," including a "palpable area" that was approximately six centimeters by four centimeters in size in the left breast. Adhikary classified the lesions as "probably benign," and recommended that plaintiff have follow-up imaging performed in six months. Adhikary did not conduct a biopsy. Plaintiff had follow-up imaging performed six months later, and defendant Katherine Willer, D.O. reviewed and interpreted the study. Willer found "numerous complicated cysts, clustered microcysts, and complex cystic areas in both breasts[,] and no suspicious lesion was seen in either breast[]." She recommended that plaintiff have follow-up imaging performed in July 2014. Willer did not conduct a biopsy. Plaintiff did not have follow-up imaging performed in July 2014, and she was diagnosed with stage four breast cancer during a hospital stay in May 2015. The cancer had

metastasized to other parts of her body, and plaintiff's diagnosis was terminal.

Plaintiff does not dispute that defendants met their initial burden on their motion, and defendants' sole contention on appeal is that Supreme Court erred in determining that the affidavit of plaintiff's expert raised a triable issue of fact sufficient to defeat defendants' motion. We reject that contention. Where, as here, a nonmovant's expert affidavit "squarely opposes" the affirmation of the moving parties' expert, the result is "a classic battle of the experts that is properly left to a jury for resolution" (*Blendowski v Wiese*, — AD3d —, —, 2018 NY Slip Op 00973, *2 [4th Dept 2018] [internal quotation marks omitted]). This is not a case in which plaintiff's expert "misstate[d] the facts in the record," nor is the affidavit " 'vague, conclusory, [or] speculative' " (*Occhino v Fan*, 151 AD3d 1870, 1871 [4th Dept 2017]; *see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

362

CA 17-01574

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

IN THE MATTER OF WELLSVILLE REALTY, LLC/WELLSVILLE CARE MANOR, PETITIONER-APPELLANT,

V ORDER

BOARD OF ASSESSORS AND/OR ASSESSOR OF TOWN OF WELLSVILLE AND BOARD OF ASSESSMENT REVIEW, RESPONDENTS-RESPONDENTS.

HERMAN KATZ CANGEMI & CLYNE, LLP, MELVILLE (JACQUELYN L. MASCETTI OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from an order of the Supreme Court, Allegany County (Terrence M. Parker, A.J.), entered October 21, 2016 in proceedings pursuant to RPTL article 7. The order denied the petition challenging the real property tax assessment for the 2014-2015 tax year.

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

365

KA 17-01306

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES M. KNIGHT, DEFENDANT-APPELLANT.

SIMON K. MOODY, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (AMANDA L. CASSELMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered September 22, 2015. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). Defendant's valid waiver of the right to appeal with respect to both the conviction and sentence encompasses his contention that the sentence imposed is unduly harsh and severe (*see People v Lopez*, 6 NY3d 248, 255 [2006]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

367

KA 17-00609

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LISA M. KISH, DEFENDANT-APPELLANT.

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

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered March 1, 2016. The judgment convicted defendant, upon her plea of guilty, of attempted promoting prison contraband in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of attempted promoting prison contraband in the first degree (Penal Law §§ 110.00, 205.25 [2]). Contrary to defendant's contention, the record establishes that she knowingly, voluntarily and intelligently waived her right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *People v Hidalgo*, 91 NY2d 733, 737 [1998]; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

368

KA 15-01987

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MATTHEW BENNETT, DEFENDANT-APPELLANT.

DANIELLE C. WILD, PENFIELD, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered November 10, 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.

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

376

CA 17-01442

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

IN THE MATTER OF MICHAEL BUREL AND NEW YORK STATE CORRECTIONAL OFFICERS AND POLICE BENEVOLENT ASSOCIATION, INC., PETITIONERS-APPELLANTS,

V ORDER

NEW YORK STATE OFFICE OF MENTAL HEALTH, ANN MARIE T. SULLIVAN, M.D., COMMISSIONER, NEW YORK STATE OFFICE OF MENTAL HEALTH, J. LYNN HEATH, DIRECTOR, CENTER FOR HUMAN RESOURCES MANAGEMENT OF NEW YORK STATE OFFICE OF MENTAL HEALTH, AND PHILIP GRIFFIN, ACTING INTERIM EXECUTIVE DIRECTOR, ROCHESTER PSYCHIATRIC CENTER, RESPONDENTS-RESPONDENTS.

LIPPES, MATHIAS, WEXLER & FRIEDMAN LLP, ALBANY (GREGORY T. MYERS OF COUNSEL), FOR PETITIONERS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (LAURA ETLINGER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (William K. Taylor, J.), entered March 23, 2017 in a proceeding pursuant to CPLR article 78. The judgment, inter alia, dismissed the petition.

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

377

CA 16-01221

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

JANET M. HINES, PLAINTIFF-APPELLANT,

V ORDER

JOSHUA J. HINES, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

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

TULLY RINCKEY, PLLC, SYRACUSE (CHRISTINE F. REDFIELD OF COUNSEL), FOR DEFENDANT-RESPONDENT.

SCOTT A. OTIS, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Supreme Court, Onondaga County (Kevin G. Young, J.), entered December 9, 2015. The order, among other things, awarded defendant sole legal custody and primary physical residence of the subject child.

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

378

CAF 17-00264

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

IN THE MATTER OF JANET HINES,
PETITIONER-APPELLANT-RESPONDENT,

V ORDER

JOSHUA HINES, RESPONDENT-RESPONDENT-APPELLANT.

IN THE MATTER OF JOSHUA HINES,
PETITIONER-RESPONDENT-APPELLANT,

V

JANET HINES, RESPONDENT-APPELLANT-RESPONDENT.
(APPEAL NO. 2.)

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

TULLY RINCKEY, PLLC, SYRACUSE (CHRISTINE F. REDFIELD OF COUNSEL), FOR RESPONDENT-RESPONDENT-APPELLANT AND PETITIONER-RESPONDENT-APPELLANT.

SCOTT A. OTIS, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal and cross appeal from an order of the Family Court, Oswego County (James K. Eby, J.), entered December 29, 2016 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded respondent-petitioner sole legal and physical custody of the subject child.

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

381

CAF 16-01336

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

IN THE MATTER OF SCOTT SHEPHERD,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JAMIE STOCKER, RESPONDENT-RESPONDENT.

SCOTT OTIS, ATTORNEY FOR CHILD,
APPELLANT.

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

SCOTT OTIS, WATERTOWN, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

DONALD R. GERACE, UTICA, FOR RESPONDENT-RESPONDENT.

Appeals from an order of the Family Court, Lewis County (Daniel R. King, J.), entered June 21, 2016 in a proceeding pursuant to Family Court Act article 6. The order denied the petition.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner father and the Attorney for the Child (AFC) each appeal from an order that denied the father's petition for permission to relocate with the subject child to the State of Alabama, and thus for primary residency of the child. Pursuant to a prior custody and visitation order, the father and respondent mother have joint custody and joint residency of the child. Based on our review of the evidence at the fact-finding hearing, we conclude that Family Court properly considered the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741 [1996]) in determining that the father failed to meet his burden of establishing by a preponderance of the evidence that the proposed relocation is in the child's best interests (*see Matter of Williams v Luczynski*, 134 AD3d 1576, 1576 [4th Dept 2015]). The father's primary motivation for wanting to relocate to Alabama is based on the fact that his parents and siblings have moved there. The father, however, "failed to establish that the child's life would 'be enhanced economically, emotionally and educationally' by the proposed relocation" (*Matter of Hill v Flynn*, 125 AD3d 1433, 1434 [4th Dept 2015], *lv denied* 25 NY3d 910 [2015]). Although the father asserted that there were better job opportunities in Alabama, he failed to establish that the jobs he had researched in that area would pay any

more than his employment in New York. The father also failed to establish that the child would receive a better education in Alabama. The evidence supports the court's determination that the proposed relocation would have a negative impact on the child's relationship with the mother, as well as the mother's relatives, who have visited often from Pennsylvania. In sum, we conclude that the court's determination to deny the father's relocation petition has a sound and substantial basis in the record and therefore should not be disturbed (*see Matter of Ramirez v Velazquez*, 91 AD3d 1346, 1347 [4th Dept 2012], *lv denied* 19 NY3d 802 [2012]).

The AFC contends on his appeal that the court erred in preventing the AFC at trial from examining the child during the *Lincoln* hearing. Upon our review of that hearing, we conclude that, despite the court's statement that it would not allow the AFC to question the child, the AFC was in fact able to question the child and elicit certain information, and she raised no further objection. We therefore conclude that the AFC's contention is not preserved for our review (*see generally Matter of Clark v Hawkins*, 140 AD3d 1753, 1754 [4th Dept 2016]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

385

CAF 16-01632

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

IN THE MATTER OF NICHOLAS J. KAMMEYER,
PETITIONER-RESPONDENT,

V ORDER

JAMI R. MANGES-MERRIMAN, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

RUTHANNE G. SANCHEZ, WATERTOWN, FOR PETITIONER-RESPONDENT.

SCOTT A. OTIS, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered August 8, 2016 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted primary physical custody of the subject child to petitioner.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051, 1051 [4th Dept 1990]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

386

CAF 16-01633

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

IN THE MATTER OF NICHOLAS J. KAMMEYER,
PETITIONER-RESPONDENT,

V ORDER

JAMI R. MANGES-MERRIMAN, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

RUTHANNE G. SANCHEZ, WATERTOWN, FOR PETITIONER-RESPONDENT.

SCOTT A. OTIS, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal from an amended order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered August 11, 2016 in a proceeding pursuant to Family Court Act article 6. The amended order, inter alia, granted primary physical custody of the subject child to petitioner.

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

388

KA 13-02025

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID D. HARMON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered October 1, 2013. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence is unanimously dismissed (*see People v Haywood*, 203 AD2d 966, 966 [4th Dept 1994], *lv denied* 83 NY2d 967 [1994]), and the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the first degree (Penal Law § 120.10 [1]) arising from an incident where defendant repeatedly stabbed the victim after an argument during which the victim spat in his face. Defendant contends that his plea was not knowingly, voluntarily and intelligently entered because Supreme Court should have confirmed that defendant was aware of and waiving any potential defenses based on his mental health and mental state at the time of the crime. Defendant failed to move to withdraw the plea or to vacate the judgment of conviction on that ground and thus failed to preserve his contention for our review (*see People v Briggs*, 115 AD3d 1245, 1246 [4th Dept 2014], *lv denied* 23 NY3d 1018 [2014]). This case does not fall within the rare exception to the preservation rule set forth in *People v Lopez* (71 NY2d 662, 666 [1988]). To the extent that defendant contends that his statement during the plea colloquy that he "lost it" before stabbing the victim casts significant doubt upon his guilt, the record shows that the court conducted a further inquiry to ensure that defendant's plea was knowing and voluntary, i.e., the court ensured that defendant knew what he was doing at the time, that he was aware that he had possession of the knife, and that he intentionally stabbed the victim (*see Briggs*, 115 AD3d at 1246). To the extent that defendant relies on defense counsel's comments at

sentencing regarding defendant's mental health, we conclude that the court had no duty to conduct a further inquiry based on those comments (*see People v Vogt*, 150 AD3d 1704, 1705 [4th Dept 2017]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

389

KA 16-00443

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK L. BURDICK, II, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC. (MICHAEL S. DEAL OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered January 25, 2016. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of assault in the second degree (Penal Law § 120.05 [2]). Contrary to defendant's contention, the record establishes that his waiver of his right to appeal was knowing, intelligent and voluntary (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]). Defendant's valid waiver of the right to appeal forecloses his challenge to the severity of the sentence (*see id.* at 255).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

393

KA 15-01776

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DENNIS R., JR., DEFENDANT-APPELLANT.

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

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

Appeal from an adjudication of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered February 23, 2015. The adjudication convicted defendant, upon his plea of guilty, of robbery in the first degree as a youthful offender.

It is hereby ORDERED that the adjudication so appealed from is unanimously modified on the law by vacating the surcharge and crime victim assistance fee and as modified the adjudication is affirmed.

Memorandum: Defendant appeals from a youthful offender adjudication based upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [4]). As the People correctly concede, the surcharge and crime victim assistance fee imposed must be vacated because defendant was a juvenile offender (*see* Penal Law §§ 60.00 [2]; 60.10; *People v Stump*, 100 AD3d 1457, 1458 [4th Dept 2012], *lv denied* 20 NY3d 1104 [2013]). We therefore modify the adjudication accordingly. Contrary to defendant's further contention, the sentence is not unduly harsh or severe.

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

395

CA 17-01867

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

RUSSELL ANTHONY CRONIN, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.

RENE MYATT, HOLLIS, FOR CLAIMANT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Renee Forgensi Minarik, J.), entered January 3, 2017. The order denied the motion of claimant for leave to file a late notice of claim.

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

400

CA 17-01760

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

JEREMIAH G. CULLEN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHAD GERALD RIDER, DEFENDANT-APPELLANT.

GOZIGIAN, WASHBURN & CLINTON, COOPERSTOWN (EDWARD GOZIGIAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHERUNDOLO LAW FIRM, PLLC, SYRACUSE (J. PATRICK LANNON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered May 5, 2017. The amended order, among other things, denied defendant's motion for summary judgment dismissing plaintiff's complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that he sustained when the motorcycle he was riding collided with a vehicle driven by defendant. Contrary to defendant's contention, Supreme Court properly denied his motion for summary judgment dismissing the complaint. Defendant failed to meet his initial burden of establishing as a matter of law that he was free from negligence and that plaintiff's conduct was the sole proximate cause of the accident (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Based on defendant's own deposition testimony, we conclude that there is a triable issue of fact whether defendant "observe[d] that which there was to be seen," and thus whether defendant was "negligent in failing to look or in not looking carefully" at the time of the accident (1A NY PJI3d 2:77.1 at 484 [2018]; *see generally Regdos v City of Buffalo*, 132 AD3d 1343, 1344 [4th Dept 2015]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

401

CA 16-01648

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

IN THE MATTER OF STEVEN I. GOLDSTEIN, AS GENERAL DIRECTOR AND CHIEF EXECUTIVE OFFICER OF STRONG MEMORIAL HOSPITAL, PETITIONER, REGARDING THE APPOINTMENT OF A GUARDIAN FOR WILLIE COWART, ALSO KNOWN AS WILLIE COWART, SR., AN INCAPACITATED PERSON, DECEASED.

ORDER

TERLESA COWART, APPELLANT;

CATHOLIC CHARITIES OF THE DIOCESE OF ROCHESTER, DOING BUSINESS AS CATHOLIC FAMILY CENTER, AS GUARDIAN OF WILLIE COWART, ALSO KNOWN AS WILLIE COWART, SR., AN INCAPACITATED PERSON, AND DUTCHER & ZATKOWSKY, RESPONDENTS.

TERLESA COWART, APPELLANT PRO SE.

DUTCHER & ZATKOWSKY, ROCHESTER (YOLANDA RIOS OF COUNSEL), FOR RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered September 2, 2016. The order, inter alia, denied the motion of Terlesa Cowart for the imposition of sanctions.

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

403

CA 17-01830

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

DERRICK PERKINS AND HELENA PERKINS,
PLAINTIFFS-RESPONDENTS,

V ORDER

UPSTATE ORTHOPEDICS, LLP, DANIEL M.
DEMARTINI, P.A., DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

SUGARMAN LAW FIRM, LLP, SYRACUSE (DANIELLE MIKALAJUNAS FOGEL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WEISBERG & ZUKHER, PLLC, SYRACUSE (DAVID E. ZUKHER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered July 11, 2017. The order, among other things, denied the motion of defendants Daniel M. DeMartini, P.A., and Upstate Orthopedics, LLP, for summary judgment dismissing the complaint against them.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on February 28, 2018, and filed in the Onondaga County Clerk’s Office on March 2, 2018,

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

405.1

KA 13-00204

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLARENCE E. COOPER, III, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE, PLLC, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (JOSEPH R. PLUKAS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Robert B. Wiggins, A.J.), rendered March 18, 2009. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree, attempted burglary in the second degree and attempted petit larceny.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of, inter alia, burglary in the second degree (Penal Law § 140.25 [2]). As the People correctly concede, reversal is required. The record establishes that defendant was excluded from Supreme Court's *Sandoval* conference (*see generally People v Dokes*, 79 NY2d 656, 662 [1992]) and, because "[t]he court's *Sandoval* ruling in this case was not wholly favorable to defendant, . . . 'it cannot be said that defendant's presence at the hearing would have been superfluous' " (*People v Gardner*, 144 AD3d 1546, 1547 [4th Dept 2016]; *see generally People v Odiat*, 82 NY2d 872, 874 [1993]).

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

420

CAF 16-01635

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

IN THE MATTER OF JEANNA CHEBAT,
PETITIONER-APPELLANT,

V ORDER

CHRISTOPHER TODD MILLER, RESPONDENT-RESPONDENT.

IN THE MATTER OF CHRISTOPHER TODD MILLER,
PETITIONER-RESPONDENT,

V

JEANNA CHEBAT, RESPONDENT-APPELLANT.

WILLIAM D. BRODERICK, JR., ELMA, FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

NORA B. ROBSHAW, WILLIAMSVILLE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered July 19, 2016 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded the parties joint legal custody and respondent-petitioner primary physical custody of the subject child.

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

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

425

CA 17-01826

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

HENDERSON HARBOR MARINERS' MARINA, INC., AND
MARLA COHEN, PLAINTIFFS-RESPONDENTS,

V ORDER

I.F.S. LISBON, ET AL., DEFENDANTS,
AND UPSTATE NATIONAL BANK, DEFENDANT-APPELLANT.

BARCLAY DAMON LLP, SYRACUSE (ALAN R. PETERMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

AMDURSKY, PELKY, FENNELL AND WALLEN, P.C., OSWEGO (TIMOTHY J. FENNELL OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), dated January 6, 2017. The order, among other things, denied in part the motion of defendant Upstate National Bank for summary judgment.

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

Entered: March 16, 2018

Mark W. Bennett
Clerk of the Court

MOTION NO. (476/01) KA 00-01851. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RAMONE TOLBERT, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, DEJOSEPH, WINSLOW, JJ. (Filed Mar. 16, 2018.)

MOTION NO. (986/06) KA 06-00506. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MIKE FELIX, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, CARNI, LINDLEY, DEJOSEPH, JJ. (Filed Mar. 16, 2018.)

MOTION NO. (1573/07) KA 05-00983. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAMES F. CAHILL, III, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, PERADOTTO, LINDLEY, CURRAN, JJ. (Filed Mar. 16, 2018.)

MOTION NO. (401/10) KA 09-02116. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EDWARD CARRASQUILLO, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., LINDLEY, NEMOYER, CURRAN, WINSLOW, JJ. (Filed Mar. 16, 2018.)

MOTION NO. (1155/12) KA 10-00517. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V FRANK GARCIA, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CURRAN, TROUTMAN, JJ. (Filed Mar. 16, 2018.)

MOTION NO. (249/17) TP 16-01478. -- IN THE MATTER OF MICHAEL LAFFERTY, PETITIONER, V ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT. -- Motion for renewal and reconsideration denied. PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed Mar. 16, 2018.)

MOTION NO. (944/17) KA 14-00643. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JEFFREY J. TERBORG, DEFENDANT-APPELLANT. -- Motion for reargument and reconsideration denied. PRESENT: WHALEN, P.J., SMITH, CENTRA, PERADOTTO, AND CARNI, JJ. (Filed Mar. 16, 2018.)

MOTION NO. (1119/17) CA 16-02179. -- EUNICE M. CARACAUS, PLAINTIFF-RESPONDENT, V CONIFER CENTRAL SQUARE ASSOCIATES, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ. (Filed Mar. 16, 2018.)

MOTION NO. (1120/17) CA 17-00135. -- EUNICE M. CARACAUS, PLAINTIFF-RESPONDENT, V CONIFER CENTRAL SQUARE ASSOCIATES, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ. (Filed Mar. 16, 2018.)

MOTION NO. (1191/17) CA 17-00681. -- BEVERLY BRADLEY, AS GUARDIAN OF THE

PERSON AND PROPERTY OF RHOEMEL LAMPKIN, AND BEVERLY BRADLEY, INDIVIDUALLY, PLAINTIFF-RESPONDENT, V RAMESH KONAKANCHI, D.O., DEFENDANT-APPELLANT, ET AL., DEFENDANT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND CURRAN, JJ. (Filed Mar. 16, 2018.)

MOTION NO. (1224/17) TP 17-00672. -- IN THE MATTER OF LEROY JOHNSON, PETITIONER, V STEWART ECKERT, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY, RESPONDENT. -- Motion for renewal of or, in the alternative, leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND TROUTMAN, JJ. (Filed Mar. 16, 2018.)

MOTION NO. (1346/17) CA 17-00075. -- ESSEX INSURANCE COMPANY, PLAINTIFF-RESPONDENT, V NDC REALTY, INC., DEFENDANT, AND SCOTT LIGER, DEFENDANT-APPELLANT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., PERADOTTO, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ. (Filed Mar. 16, 2018.)

MOTION NO. (1475/17) KAH 17-00488. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. TREVOR FREDERICK, PETITIONER-APPELLANT, V SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, CARNI, TROUTMAN, AND WINSLOW, JJ. (Filed Mar. 16, 2018.)

MOTION NO. (1538/17) CA 17-00378. -- HONGXING YIN, CLAIMANT-APPELLANT, V STATE OF NEW YORK, DEFENDANT-RESPONDENT. (CLAIM NO. 119163.) -- Motion for reargument denied. PRESENT: SMITH, J.P., CARNI, DEJOSEPH, NEMOYER, AND CURRAN, JJ. (Filed Mar. 16, 2018.)