SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JULY 31, 2019

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

1360

KA 16-02147

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAYMOND GONZALEZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered September 22, 2016. The judgment convicted defendant, upon a nonjury verdict, of manslaughter in the first degree.

It is hereby ORDERED that the judgment so appealed from is reversed on the facts, the indictment is dismissed, and the matter is remitted to Supreme Court, Erie County, for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of manslaughter in the first degree (Penal Law § 125.20 [4]) based on his alleged unintentional killing of the 13-month-old son of his then-girlfriend. We agree with defendant that the verdict is against the weight of the evidence. We therefore reverse the judgment and dismiss the indictment.

The victim in this case was a baby who lived with his mother, Erica, in Buffalo. Defendant was Erica's boyfriend. On May 2, 2010, Erica was at home with the victim and defendant, who had spent the night at her apartment. Erica fed the victim a bottle at 8:00 a.m. and did not notice anything wrong with the child. The victim was alert and took his bottle without incident. At about noon, defendant's mother came to the house for a visit. At approximately 2:15 p.m., after defendant's mother had left, Erica went to the store with her mother, who lived across the street. Prior to leaving, Erica put the victim in his crib for a nap, and the child appeared to be fine.

When Erica returned to her apartment with her mother close to an hour later, the victim was sleeping on a blanket on the living room floor. Although defendant told Erica that the victim had vomited

while she was gone, the baby appeared to be fine; he was breathing normally and had no visible signs of injury. After Erica's mother went home, defendant left the apartment for about 20 minutes before returning. With the victim still sleeping on the living room floor, Erica and defendant watched a movie in her bedroom and then took a nap.

Erica woke up from her nap at approximately 7:30 p.m. When she walked into the living room, she observed the victim lying on his stomach, covered with vomit, and gasping for air. When Erica told defendant to call 911, defendant said "No, CPS is going to come and take him away," or words to that effect. Erica nevertheless called 911 at 7:53 p.m., and paramedics arrived soon thereafter. The victim was taken by ambulance to the hospital, where he was diagnosed as brain dead at 12:52 a.m. on May 3. He was taken off life support later that day. According to the Medical Examiner who performed the autopsy, the victim had three bruises on his head under the skin, which were not visible externally, but his skull was not fractured. The victim also had bruises on his thigh, knee, back leg, and calf, among other places. The Medical Examiner determined the cause of death to be blunt force trauma to the head.

When questioned by the police at Erica's apartment later that morning, defendant denied having any physical contact with the victim and denied being alone with him that day. In a subsequent interview at the police station, defendant acknowledged being alone with the victim while Erica went to the store but denied causing the baby any harm. Erica similarly denied wrongdoing, although she explained that she may have caused some of the bruises to areas other than the victim's head when she picked him up in a panic when he was struggling to breathe. Although the police considered defendant to be a suspect, he was not arrested at that time, presumably because the police concluded that there was insufficient evidence to charge him.

Almost four years later, in March 2014, a detective was assigned to investigate the victim's apparent homicide as a "cold case." He interviewed defendant, who again denied hurting the victim, and then arranged for Erica to make recorded telephone calls to defendant in an attempt to obtain incriminating statements from him. Erica subsequently exchanged multiple text messages with defendant about the victim's death, and spoke to him twice on the phone and once in person. All of the conversations were recorded by the police. Although Erica essentially begged defendant to tell her what had happened to the victim, promising that she would not go to the police, defendant repeatedly and consistently denied harming the victim.

Defendant was arrested on March 22, 2015 and charged with manslaughter in the first degree under Penal Law § 125.20 (4). The case eventually proceeded to a nonjury trial, where Supreme Court rendered a guilty verdict.

A review of the weight of the evidence requires us to first determine whether an acquittal would not have been unreasonable (*see People v Danielson*, 9 NY3d 342, 348 [2007]). Where an acquittal would

not have been unreasonable, we "must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions" (*id.*). In reviewing the weight of the evidence, we "serve, in effect, as a second jury" with the power to "independently assess all of the proof" and substitute our own "credibility determinations for those made by the jury in an appropriate case" (*People v Delamota*, 18 NY3d 107, 116-117 [2011]).

Here, an acquittal would not have been unreasonable, and neither the People nor the dissent contend otherwise. Thus, we must independently weigh the evidence and determine whether the People proved defendant's guilt beyond a reasonable doubt. Viewing the evidence in light of the elements of the crime in this nonjury trial (*see Danielson*, 9 NY3d at 349), we conclude that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

The People's theory at trial was that the person who inflicted the victim's fatal injuries did so within 24 hours of his death in the early morning hours of May 3, 2010. The People reasoned that, because defendant was the only person alone with the victim on May 2 besides Erica, who denied causing the injuries, defendant was most likely the guilty party. But that theory was undermined by the testimony of the Medical Examiner, who was the only expert witness called by either party.

The Medical Examiner was asked by the prosecutor on direct examination whether the victim's brain injuries were "consistent" with being sustained on May 2, 2010, and he answered in the affirmative. The Medical Examiner further opined that the injuries were not consistent with having been sustained on May 1, 2010. That was so, the Medical Examiner explained, because the healing process, which occurs "roughly" within 24 hours of injury, had not yet commenced when the victim was declared brain dead at 12:52 a.m. on May 3. Thus, according to the People, the injury must have occurred no sooner than 12:52 a.m. on May 2.

On cross-examination, however, the Medical Examiner acknowledged that it is not uncommon with brain injuries for there to be a delay in the onset of symptoms, such as vomiting. He further acknowledged that a brain injury could occur up to 24 hours before the onset of symptoms, and that vomiting is one such symptom. Because there was evidence that the victim vomited in the early afternoon on May 2, while Erica was at the store with her mother, the injuries could have been sustained in the early afternoon on May 1. Moreover, when Erica called 911, she told the operator that the victim had been throwing up all day, thus pushing back even further the 24-hour window within which the injuries could have occurred.

It is undisputed that defendant was not with the victim on May 1. Aside from Erica, at least three other people spent time with the victim on May 1, but the police did not interview any of them because the investigators were told by the Medical Examiner that the fatal injuries were sustained on May 2. Under the circumstances, the fact

that defendant was alone with the victim for approximately an hour on May 2 is incriminating but not conclusive.

As the People note, there was other evidence at trial indicating that defendant was the guilty party. For instance, defendant told Erica not to call 911 while the victim was struggling to breathe, expressing a fear that the child may be removed by Child Protective Services, and he initially lied to the police when he said that he was never alone with the victim on May 2. There were also minor inconsistencies in the various statements he gave to the police. That evidence is clearly damaging to defendant, and may have been enough to justify an arrest and indictment of defendant based on probable cause. But the police evidently concluded otherwise, and defendant was not arrested until five years later after the police restarted the investigation. The new investigation, however, yielded little additional evidence of guilt.

The only evidence adduced at trial that was not within the knowledge of the police in 2010, when they decided not to arrest defendant, was the testimony of a woman who dated him from 2008 to 2013, with a one-year break in 2010 when he dated Erica. The witness testified that, in the years following the victim's death, defendant would sometimes talk about the victim and become emotional but would say that he was not guilty and "didn't do it." When questioned by the prosecutor about a written statement she had given to the police, the witness testified that defendant "admitted to doing something to the baby but he never said what or why." On cross-examination, the witness testified that defendant, whom she had not dated for years, never admitted that he harmed the victim. All in all, the witness' testimony was of only marginal probative value.

Given the equivocal medical evidence with respect to the time frame within which the fatal injuries could have been inflicted, the weakness of the circumstantial evidence, and the lack of direct evidence that defendant caused the victim's injuries, we conclude that the People failed to prove defendant's guilt beyond a reasonable doubt (*see generally People v Carter*, 158 AD3d 1105, 1106 [4th Dept 2018]).

In light of our determination, defendant's remaining contentions are academic.

All concur except DEJOSEPH and CURRAN, JJ., who dissent and vote to affirm in the following memorandum: We respectfully dissent because, while we agree with our colleagues in the majority that an acquittal of manslaughter in the first degree (Penal Law § 125.20 [4]) would not have been unreasonable, we disagree that the verdict is against the weight of the evidence.

It is true that defendant never admitted any wrongdoing with respect to the death of the victim. It is also undisputed that this is a circumstantial case because there is no direct evidence that defendant committed the crime. Nevertheless, 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 cannot conclude that Supreme

Court failed to give the evidence the weight it should be accorded (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

The victim's mother, Erica, testified that on April 30, 2010 she worked from 8:00 a.m. until 8:00 p.m. and, during that time, defendant took care of the victim. That was the first time that the victim was left alone with defendant. Erica did not notice anything unusual with the victim prior to leaving for work or upon returning home. On May 1, 2010, Erica and her sister were with the victim the whole day, and defendant was not present. Erica did not notice anything unusual with the victim on May 1, 2010. Defendant spent the night of May 1 at Erica's house. The first time Erica saw the victim on May 2, 2010 was around 8:00 a.m., when she fed him. The victim did not have any issues with eating at that time. From 12:00 p.m. until 1:30 p.m., defendant, defendant's mother, Erica, and the victim were in the house together. Defendant's mother left the house at approximately 1:30 p.m., and Erica left for the grocery store at around 2:00 p.m. Prior to leaving, Erica put the victim down for a nap, and he appeared to be normal. Upon Erica's return about 1 to 1½ hours later, defendant told Erica that the victim had vomited in the living room. Erica then woke the victim up and tried to feed him a bottle, but the victim refused the bottle. The victim remained on the living room floor thereafter. Defendant left in the afternoon for approximately 20 minutes. After defendant's return, he and Erica went to a back room to watch a movie. Prior to watching the movie, Erica checked on the victim and saw that he was sleeping. Erica fell asleep until approximately 7:30 p.m., at which time she went to check on the victim and found him on his stomach, covered in vomit, and gasping for air. When Erica asked defendant to get her phone so that she could call 911, defendant refused, stating that Child Protective Services would come and "take [the victim] away." Erica argued with defendant, but ultimately she called 911 around 8:00 p.m. After Erica called 911, she did not see defendant, who had apparently left the house. Erica went with the ambulance to the hospital and remained at the hospital from May 2, 2010 until May 3, 2010. Later in the day on May 3, 2010, the victim was pronounced dead. The victim had just turned one year old in April.

One of defendant's former girlfriends testified that "[t]he essence of [what defendant told her was that] he did something but wouldn't say what." That statement was not clarified on cross-examination. Indeed, it was originally stated on direct examination and repeated on redirect examination.

The Medical Examiner opined that the cause of death was multiple blunt trauma and that the victim's fatal injuries could only have occurred on May 2, 2010, not May 1 or April 30. During cross-examination, the Medical Examiner refused to agree that 24 hours prior to the initial onset of symptoms would bring the possible time frame for the infliction of the fatal injuries to May 1, 2010. He admitted that, based on a clinical study, the onset of symptoms could occur within 24 hours of the relevant injuries, which would bring the time period that such injuries could have occurred to May 1, but opined that, based on his autopsy, the fatal injuries to the victim could not

have occurred on May 1. That autopsy revealed, inter alia, that the victim had severe swelling on the brain, along with subdural and subarachnoid brain hemorrhages.

A detective with the Buffalo Police Homicide Unit testified that he responded to Erica's house around 2:00 a.m. on May 3, 2010. He interviewed defendant, and defendant stated that he was Erica's boyfriend. Defendant denied ever having physical contact with the victim and, on three separate occasions during that interview, defendant maintained that he was never alone with the victim.

In our view, the testimony at trial established that defendant was home alone with the victim for approximately one hour on May 2, 2010. Additionally, despite telling the police that he never had physical contact with the victim, the record supports that "something" happened during that hour. Erica, who had also been alone with the victim on May 2, denied doing anything harmful to the victim and, before Erica left the victim alone with defendant, the victim was in good health. Upon her return and after being left with defendant, the victim's health started to decline, and defendant oddly tried to convince Erica not to call 911. Defendant's response to Erica's request for her phone that Child Protective Services may take the victim away was highly questionable in light of the victim's condition. Furthermore, according to Erica, she did not see defendant after she called 911. The medical evidence presented by the People also eliminated any reasonable inference that the victim's injuries occurred in an accidental manner. The Medical Examiner was unwavering in his testimony that the fatal injuries sustained by the victim occurred on May 2, 2010, i.e., the date on which defendant was alone with the victim.

" 'In a bench trial, no less than a jury trial, the resolution of credibility issues by the trier of fact and its determination of the weight to be accorded the evidence presented are entitled to great deference' " (*People v McMillian*, 158 AD3d 1059, 1061 [4th Dept 2018], *lv denied* 31 NY3d 1119 [2018]). Our colleagues in the majority make no mention of that deference, and we see no basis to reject the court's credibility and weight determinations here. We especially find no support in the record for the majority's conclusion that the testimony of defendant's ex-girlfriend "was of only marginal probative value." We find the ex-girlfriend's testimony, i.e., that defendant admitted to doing "something but he wouldn't say what" to be quite probative under the circumstances of this case. Furthermore, the fact that this case went cold for four years is not relevant to this Court's role in assessing defendant's challenge to the weight of the evidence. In our view, based on the weight of the credible evidence adduced at trial, including the nature of the victim's injuries, defendant's behavior immediately upon learning of the victim's dire condition, defendant's admission to his ex-girlfriend that he had done something to the victim, and defendant's denial to the police of ever having been alone with the victim, we conclude that the court was justified in finding beyond a reasonable doubt that defendant committed the crime of manslaughter in the first degree (*see* Penal Law § 125.20 [4]; *see generally People v Stokes*, 28 AD3d 1094, 1094-1095

[4th Dept 2006], *lv denied* 7 NY3d 795 [2006], *reconsideration denied* 7 NY3d 870 [2006]; *People v Colbert*, 289 AD2d 976, 976 [4th Dept 2001], *lv denied* 97 NY2d 752 [2002]; *People v Hawkins-Rusch*, 212 AD2d 961, 961 [4th Dept 1995], *lv denied* 85 NY2d 910 [1995]). Inasmuch as we conclude that the remaining contentions raised by defendant do not require reversal or modification of the judgment, we would affirm.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

1389

CA 18-00894

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

DAVID DONAHUE, CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 115106.)

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (JEFFREY W. LANG OF COUNSEL), FOR DEFENDANT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (MICHAEL C. O'NEILL OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Nicholas V. Midey, Jr., J.), entered January 30, 2018. The judgment awarded claimant money damages.

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

Memorandum: Claimant commenced this action seeking damages for injuries that he sustained while he was an inmate at the Cape Vincent Correctional Facility. According to the claim, claimant sustained injuries "to his shoulder, bicep, and elbow" as a result of defendant's negligent failure to supervise a role play activity during a mandatory treatment program at the prison. We reject defendant's contention that the Court of Claims lacked subject matter jurisdiction to award claimant money damages for past and future lost wages because the claim failed to sufficiently set forth the claim with respect to that category of damages. Pursuant to Court of Claims Act § 11 (b), "[t]he claim shall state the time when and place where such claim arose, the nature of same, [and] the items of damage or injuries claimed to have been sustained." " 'What is required is not absolute exactness, but simply a statement made with sufficient definiteness to enable [defendant] . . . to investigate the claim promptly and to ascertain its liability under the circumstances' " (*Demonstoy v State of New York*, 130 AD3d 1337, 1337 [3d Dept 2015]). The requirements of section 11 (b) are "substantive conditions upon the State's waiver of sovereign immunity" (*Lepkowski v State of New York*, 1 NY3d 201, 207 [2003]; *see Davis v State of New York*, 64 AD3d 1197, 1197 [4th Dept 2009], *lv denied* 13 NY3d 717 [2010]), and noncompliance with the statute renders a claim jurisdictionally defective (*see Kolnacki v State of New York*, 8 NY3d 277, 281 [2007], *rearg denied* 8 NY3d 994 [2007]; *Lepkowski*, 1 NY3d at 209; *Davis*, 64 AD3d at 1197). Contrary

to defendant's contention, the court did not lack subject matter jurisdiction with respect to damages for past and future lost wages inasmuch as the facts alleged by claimant "were sufficient to apprise [defendant] of the general nature of the claim and to enable it to investigate the matter" (*Demonstoy*, 130 AD3d at 1338).

The plain language of the statute requires a claimant to specify "the items of damage or injuries claimed to have been sustained" and, "except in[, inter alia,] action[s] to recover damages for personal injury . . . , the total sum claimed" (Court of Claims Act § 11 [b]). Contrary to the view of our dissenting colleague, a natural reading of the statute requires a claimant to specify the items of damage to property or injuries to a person for which the claimant seeks compensation. Here, claimant sufficiently specified the nature of the claim, the time when and the place where the claim arose, and the injuries claimed to have been sustained, i.e., "injuries to his shoulder, bicep, and elbow" (*see* § 11 [b]; *Demonstoy*, 130 AD3d at 1337-1338; *cf. Davis*, 64 AD3d at 1197). Inasmuch as this is an action for damages for personal injury, claimant was not required to specify, in total or itemized by category, his claimed items of damage (*cf. Lepkowski*, 1 NY3d at 203-204, 208). Damages sought by claimant for claimed medical expenses or lost wages are matters for the bill of particulars.

All concur except PERADOTTO, J., who dissents and votes to modify in accordance with the following memorandum: Claimant is a former inmate at Cape Vincent Correctional Facility who was injured at the prison while participating in a role play activity during a mandatory treatment program. Claimant commenced this negligence action alleging in his claim, in pertinent part, that he "received injuries to his shoulder, bicep, and elbow" and that "[t]he particulars of [his] damages include[d]" "[m]edical [s]ervices," "[m]edicine," and "[p]ersonal [s]uffering" in certain amounts. Following trial, the Court of Claims awarded claimant damages for past and future pain and suffering, as well as for past and future lost wages. I respectfully dissent from the majority's affirmance of the judgment on defendant's appeal because, in my view, the court lacked jurisdiction to award damages for lost wages inasmuch as claimant did not comply with Court of Claims Act § 11 (b) when he failed to state in the claim lost wages as an item of damage or injuries. I would therefore modify the judgment as requested by defendant by vacating the award of damages for lost wages.

Inasmuch as "suits against the State are allowed only by the State's waiver of sovereign immunity and in derogation of the common law, statutory requirements conditioning suit must be strictly construed" (*Lepkowski v State of New York*, 1 NY3d 201, 206-207 [2003] [internal quotation marks omitted]; *see Kolnacki v State of New York*, 8 NY3d 277, 280 [2007]). Section 11 (b) of the Court of Claims Act "places five specific substantive conditions upon the State's waiver of sovereign immunity by requiring the claim to specify (1) 'the nature of [the claim]'; (2) 'the time when' it arose; (3) the 'place where' it arose; (4) 'the items of damage or injuries claimed to have been sustained'; and (5) 'the total sum claimed[,]' " except in

personal injury, medical malpractice and wrongful death actions (*Lepkowski*, 1 NY3d at 207; *see* § 11 [b], as amended by L 2007, ch 606). Only claimant's compliance with the fourth condition is relevant here.

It is undisputed that claimant failed to particularize lost wages as an item of recovery sought in his claim. Claimant nonetheless posits that the fourth condition of Court of Claims Act § 11 (b), which requires that a claimant state "the items of damage or injuries claimed to have been sustained," means that a claimant may recover for *any* item of damage or injuries sustained as long as the claimant pleads *either* that item of damage *or physical* injuries. I agree with defendant, however, that adopting claimant's construction of the statute would violate the well-settled principle that the pleading requirements under the Court of Claims Act must be strictly construed (*see Kolnacki*, 8 NY3d at 280; *Lepkowski*, 1 NY3d at 206-207), and that there is no reason to read into the statute the notion that, in a personal injury case, pleading physical injuries alone without itemizing any recovery sought whatsoever is sufficient to fulfill the fourth condition of section 11 (b). Claimant's disjunctive reading of the phrase "items of damage or injuries" ignores the principle that, in general, "or" is used in a statute preceding a word that is inserted to define that which precedes the word (*see* McKinney's Cons Laws of NY, Book 1, Statutes § 235 n 75). Here, the fourth condition of section 11 (b) merely recognizes that, depending on the nature of the case, the item of recovery sought by a claimant may be properly characterized as one of "damage" *or* "injuries," or perhaps both. Indeed, as defendant correctly contends, claimant's interpretation ignores that there are different types of injuries, both physical and economic, just as there are different types of damage. To obtain recovery for any type of injury, including an economic or pecuniary injury, that injury must be pleaded, just as any sought item of damage must be pleaded. Whether a loss of wages is characterized as an item of *damage* or an economic or pecuniary *injury*, it must be set forth in the claim in order to obtain recovery on it, and claimant failed to do so here (*see generally Young v State of New York [Univ. Hosp. of Brooklyn-Downstate Med. Ctr.]*, 82 AD3d 972, 973 [2d Dept 2011]; *Mujica v State of New York*, 24 AD3d 898, 899 [3d Dept 2005], *lv denied* 7 NY3d 701 [2006]).

The cases cited by the majority do not suggest otherwise. As the majority seemingly recognizes, in *Davis v State of New York* (64 AD3d 1197, 1197 [4th Dept 2009], *lv denied* 13 NY3d 717 [2010]), which happened to be a personal injury case, we merely concluded that the claim was defective because the claimant failed to state *any* injury; we did not have occasion to address whether the claimant had sufficiently particularized the recovery sought (*see id.*). Similarly, whether claimant was entitled to recovery for economic losses was not at issue or addressed in *Demonstoy v State of New York* (130 AD3d 1337, 1337-1338 [3d Dept 2015]).

Following claimant's interpretation of the fourth condition, which reads the phrase "damage or injuries" as disjunctive with

mutually exclusive nouns, would lead to unreasonable and unintended results, which should be avoided (*see Long v State of New York*, 7 NY3d 269, 273 [2006]; *Spiegelberg v Gomez*, 44 NY2d 920, 921-922 [1978]). For example, under claimant's interpretation, it would be sufficient for a claimant to plead (1) the nature of the claim as negligence occurring (2) at a certain time and (3) at a certain place, and resulting in (4) the item of damage of medical expenses, even if the claimant completely omitted any reference whatsoever to the physical harm allegedly suffered, e.g., a broken leg. The claimant would be permitted to leave defendant utterly in the dark about the physical harm allegedly suffered, thereby contravening the purpose of the claim, which is to enable defendant " 'to investigate the claim promptly and to ascertain its liability under the circumstances' " (*Demonstoy*, 130 AD3d at 1337, quoting *Heisler v State of New York*, 78 AD2d 767, 767 [4th Dept 1980]). The requirement that a claimant particularize the items of recovery sought in the claim in order to facilitate defendant's investigation of its potential liability is not an onerous burden (*see generally* PJI 2:301), and if a claimant does experience difficulty itemizing damage or injuries at the outset, "[a] claim may always be amended at a later time, if necessary" (*Kolnacki*, 8 NY3d at 281).

Moreover, the interpretation urged by claimant—i.e., that even absent itemization of the recovery sought, the specification of the actual harm allegedly suffered will alone suffice to fulfill the requirement of stating "the items of damage or injuries claimed to have been sustained"—does not conform with the underpinnings of Court of Appeals precedent. In *Lepkowski*, for example, the public employee claimants *did* specify the actual harm allegedly suffered, namely, defendant denied them overtime compensation to which they were entitled, but the Court of Appeals nevertheless concluded that the claimants failed to fulfill *both* the fourth and fifth conditions of section 11 (b) insofar as it was not sufficient itemization to merely allege that the claimants " 's[ought] recovery of all unpaid overtime compensation for all hours worked over 40 hours in a work week and not compensated at one and one-half times the regular rate' " (1 NY3d at 208). If simply listing the actual harm allegedly suffered in general terms without itemizing the recovery sought was sufficient, the Court of Appeals would have concluded in *Lepkowski* that the claimants had fulfilled the fourth condition.

I also disagree with the majority's suggestion that the possibility of a bill of particulars means that section 11 (b) does not require a claimant to particularize in the claim the items of recovery sought, e.g., lost wages, medical expenses, pain and suffering. Although the State can demand a bill of particulars, and a bill of particulars may even serve to supplement or effectively amend the claim, the claimant must still fulfill the substantive conditions of section 11 (b) (*see Oliver v State of N.Y. [SUNY] Health Science Ctr. at Brooklyn*, 40 AD3d 719, 719 [2d Dept 2007]).

In the end, the central proposition advanced by claimant, and now adopted by the majority, is that, "[b]y providing notice of his [shoulder, bicep, and elbow] injuries, [he] alerted [defendant] to

investigate the full extent of those injuries and how his injuries affected his life and employment." That proposition is fundamentally flawed. While claimant would have defendant ascertain that it could bear liability for lost wages solely from his allegation that he "received injuries to his shoulder, bicep, and elbow," "[t]he Court of Claims Act does not require the State to ferret out or assemble information that section 11 (b) obligates the claimant to allege" (*Lepkowski*, 1 NY3d at 208; *see Kolnacki*, 8 NY3d at 280).

Entered: July 31, 2019

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 16-01991

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAYMOND ALSTON, ALSO KNOWN AS RAYMOND AUSTIN,
DEFENDANT-APPELLANT.

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

RAYMOND ALSTON, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Erie County Court (David W. Foley, A.J.), rendered October 25, 2016. The judgment convicted defendant, after a nonjury trial, of burglary 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, following a nonjury trial, of burglary in the second degree (Penal Law § 140.25 [2]). We reject defendant's contentions in his main brief that the evidence is legally insufficient to establish his identity as one of the perpetrators of the crime and that the verdict is against the weight of the evidence with respect to the issue of identity (*see People v Garrison*, 39 AD3d 1138, 1140 [4th Dept 2007], *lv denied* 9 NY3d 844 [2007]). The trial evidence established that the victim awoke shortly after 2:00 a.m. to the sound of a loud crash in her apartment. She then discovered two men in her kitchen and one was pointing a gun at her. Although she could not see their faces, the victim observed that the taller of the two men, i.e., the man with the gun, was approximately six feet tall. He directed her to cover her face with a blanket and warned her not to look at them. The taller man restrained the victim while the shorter man searched her apartment.

Moments before the victim's home was invaded, one of the victim's neighbors had observed three men walking toward the end of the street where the victim lived. A short time later, just after 2:00 a.m., the neighbor observed the same three men coming from the direction of the victim's home. The neighbor noticed that two of the men were carrying

guns and called 911 to report the suspicious activity. The neighbor described for the dispatcher the suspects, their clothing, and the guns. The information provided by the neighbor to the dispatcher included that the tallest of the three men was approximately six feet tall, was carrying a silver gun, and got into the driver's seat of a dark-colored Jeep Cherokee and that the two other men, who were about five feet five inches tall, entered the passenger side. The neighbor also told the dispatcher where the Jeep was located and its direction of travel, and the dispatcher relayed that information to the police at about 2:05 a.m.

Less than 10 seconds after the dispatch, a police officer observed a dark-colored Jeep Cherokee in proximity to the area where the neighbor had last observed the suspect vehicle. The police attempted to corner the Jeep, but the driver managed to maneuver away from police. An officer who was in the passenger seat of one of the patrol vehicles pursuing the Jeep (officer) came within inches of the driver's side of the Jeep and observed the driver without obstruction. A high-speed chase ensued, and the Jeep thereafter crashed into a parked vehicle. Two of the occupants fled from the Jeep, and the police pursued them on foot. Defendant was apprehended a short time later and positively identified by the officer as being the same person who he had observed driving the Jeep. Police located a BB gun and a 9 millimeter handgun along the chase route. During booking, defendant was determined to be six feet tall.

Viewing that evidence in the light most favorable to the People (*see People v Delamota*, 18 NY3d 107, 113 [2011]), we conclude that " 'there is a[ ] valid line of reasoning and permissible inferences which could lead a rational person to the conclusion' " that defendant was one of the two perpetrators who unlawfully entered the victim's dwelling with the intent to commit a crime therein (*People v Smith*, 6 NY3d 827, 828 [2006], *cert denied* 548 US 905 [2006], quoting *People v Bleakley*, 69 NY2d 490, 495 [1987]; *see* Penal Law § 140.25 [2]). Furthermore, viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]; *People v Hutchings*, 142 AD3d 1292, 1293 [4th Dept 2016], *lv denied* 28 NY3d 1124 [2016]), we conclude that the verdict is not against the weight of the evidence with respect to the element of identity (*see generally Bleakley*, 69 NY2d at 495).

Defendant further contends in his main brief that County Court improperly considered burglary in the second degree (Penal Law § 140.25 [2]) as a lesser included offense of burglary in the first degree (§ 140.30 [1], [4]). Pursuant to CPL 300.50 (1), "[a]ny error respecting such [consideration by the court] . . . is waived by the defendant unless he [or she] objects thereto" in a timely manner, and defendant failed to make any such objection here (*see People v Harris*, 97 AD3d 1111, 1111 [4th Dept 2012], *lv denied* 19 NY3d 1026 [2012]).

Defendant's sentence is not unduly harsh or severe.

We have reviewed defendant's remaining contentions in the main brief and the contentions in his pro se supplemental brief and

conclude that none warrants modification or reversal of the judgment.

Entered: July 31, 2019

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 18-01676

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

IN THE MATTER OF ANDREW R. KOMAREK,
PETITIONER-APPELLANT,
AND ANKOM DEVELOPMENT LLC,
INTERVENOR-PETITIONER,

V MEMORANDUM AND ORDER

THE PLANNING BOARD OF MIDDLESEX, TOWN
BOARD OF MIDDLESEX AND TOWN OF MIDDLESEX,
RESPONDENTS-RESPONDENTS.

MORGENSTERN DEVOESICK PLLC, PITTSFORD (VIVEK J. THIAGARAJAN OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Yates County (William F. Kocher, A.J.), entered February 1, 2018 in a proceeding pursuant to CPLR article 78. The judgment, among other things, granted the motion of respondents to dismiss the amended petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the resolution of respondent Town of Middlesex (Town) denying his request to be personally reimbursed "at least $79,000.00" in fees paid by ANKOM Development LLC (ANKOM) to the Town in connection with an unsuccessful land development application. Petitioner appeals from a judgment that, inter alia, dismissed his amended petition. Despite being granted intervenor status in the proceeding, ANKOM did not appeal. We affirm.

It is undisputed that petitioner himself paid nothing to the Town and that ANKOM never sought reimbursement from the Town for the fees that it had paid. Thus, the rights of petitioner as a natural person are not actually controverted here, and we therefore conclude that petitioner's amended petition seeks an improper advisory opinion (*see Cuomo v Long Is. Light. Co.*, 71 NY2d 349, 357-358 [1988]; *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713 [1980]; *Hollows at Loch Lea Assn., Inc. v Town of Clarence*, 8 AD3d 994, 995 [4th Dept 2004]).

Contrary to petitioner's contention, his ownership of ANKOM is irrelevant to our analysis. "[T]he corporation was formed and the [payments] made [by] it, rather than [by] the individual who owned the corporate stock, because the parties sought to avail themselves of the rights the law accords to those who do business in corporate form under a franchise from the State. The fact that the sole owner of the stock of the corporation is an individual does not change those rights. He did not in his individual capacity [pay] any money" (*Jenkins v Moyse*, 254 NY 319, 325 [1930]). Thus, a "claim of [ANKOM], belonging to it as a corporate entity, cannot be asserted by [petitioner individually] . . . even though [he] owns all of its stock" (*Mel-Stu Constr. Corp. v Melwood Constr. Corp.*, 101 AD2d 809, 810-811 [2d Dept 1984], citing *Jenkins*, 254 NY at 324).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

71

KA 17-01068

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE L. HERNANDEZ, DEFENDANT-APPELLANT.

J. SCOTT PORTER, SENECA FALLS, FOR DEFENDANT-APPELLANT.

BARRY L. PORSCH, DISTRICT ATTORNEY, WATERLOO (CHRISTOPHER W. FOLK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Dennis F. Bender, J.), rendered May 1, 2017. The judgment convicted defendant, upon a jury verdict, of assault in the second degree (two counts), aggravated criminal contempt, menacing in the second degree and criminal possession of a weapon in the fourth 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 one, two, five, seven and eight of the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of assault in the second degree (Penal Law § 120.05 [1], [2]). Defendant contends that the evidence is legally insufficient to support the conviction because the People purportedly failed to prove that the crimes occurred on August 9, 2016 (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). We reject that contention. As permitted by statute (*see* CPL 200.50 [6]), the indictment alleged that the crimes occurred "on or about August 9, 2016." The jury was instructed accordingly. Thus, even if, as defendant claims, the People proved only that the crimes occurred on the evening of August 8, 2016, such proof establishes that the crimes occurred "on *or about* August 9, 2016" in accordance with the indictment and the jury instructions (emphasis added) (*see generally People v Rodriguez*, 88 AD3d 600, 601 [1st Dept 2011]).

We agree with defendant, however, that County Court erred in denying his challenge for cause to prospective juror number 13 (prospective juror). It is well established that "prospective jurors who give some indication of bias but do not provide an unequivocal assurance of impartiality must be excused for cause" (*People v Nicholas*, 98 NY2d 749, 750 [2002]; *see People v Arnold*, 96 NY2d 358, 362 [2001]; *People v Johnson*, 94 NY2d 600, 614 [2000]). Here, by repeatedly insisting that police officers were unlikely to lie under

oath because doing so would endanger their pensions, the prospective juror "cast serious doubt on [her] ability to render a fair verdict under the proper legal standards" and to follow the court's instructions concerning, at a minimum, issues of witness credibility (*People v Bludson*, 97 NY2d 644, 646 [2001]; *see People v Mitchum*, 130 AD3d 1466, 1467 [4th Dept 2015]; *People v Strassner*, 126 AD3d 1395, 1396 [4th Dept 2015]). The court was therefore "required to elicit some unequivocal assurance from the . . . prospective juror[] that [she was] able to reach a verdict based entirely upon the court's instructions on the law" (*Bludson*, 97 NY2d at 646). No such assurances were obtained from the prospective juror, and the court thus erred in denying defendant's challenge for cause with respect to that juror (*see id.* at 645-646). Because defendant peremptorily challenged the prospective juror and thereafter exhausted his peremptory challenges, we must reverse the judgment and grant a new trial on counts one, two, five, seven and eight of the indictment (*see* CPL 270.20 [2]; *Mitchum*, 130 AD3d at 1467; *Strassner*, 126 AD3d at 1396).

Because we are granting a new trial, we address defendant's challenge to the court's suppression ruling in the interest of judicial economy and conclude that the court erred in refusing to suppress defendant's statements to police at his home and at the police station. With respect to the statements at defendant's home, it is undisputed that defendant was ordered out of his bedroom by police officers in the middle of the night, directed to remain in a vestibule outside his apartment, and thereafter subjected to pointed, accusatory questions for about an hour. Under those circumstances, we agree with defendant that a reasonable person, innocent of any crime, would not have felt free to leave, and that he was thus in custody during the questioning, which the People correctly concede constituted interrogation (*cf. People v Thomas*, 166 AD3d 1499, 1500 [4th Dept 2018], *lv denied* 32 NY3d 1178 [2019]; *People v Kelley*, 91 AD3d 1318, 1318-1319 [4th Dept 2012], *lv denied* 19 NY3d 963 [2012]; *see generally People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]; *People v Boyle*, 239 AD2d 512, 512-513 [2d Dept 1997]; *People v Perkins*, 189 AD2d 830, 832-833 [2d Dept 1993]). Because defendant was not Mirandized before the custodial interrogation at his house, the statements that he made during that interrogation should have been suppressed (*see People v Mejia*, 64 AD3d 1144, 1145-1146 [4th Dept 2009], *lv denied* 13 NY3d 861 [2009]).

With respect to the statements at the police station, defendant unequivocally invoked his right to counsel by stating "I think I will take the lawyer" or "I think I need a lawyer" (*see People v Bethea*, 159 AD3d 710, 711-712 [2d Dept 2018], *lv denied* 31 NY3d 1115 [2018]; *see also People v Harris*, 93 AD3d 58, 67-70 [2d Dept 2012], *affd* 20 NY3d 912 [2012]; *People v Porter*, 9 NY3d 966, 967 [2007]). Thus, we agree with defendant that his statements following his unequivocal invocation of his right to counsel at the police station should have been suppressed as well (*see People v Jackson*, 171 AD3d 1458, 1459 [4th Dept 2019]; *Bethea*, 159 AD3d at 711-712).

Defendant’s remaining contentions are academic in light of our determination.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

104

CA 18-00548

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

TRUDY MENEAR AND CHARLES MENEAR,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

KWIK FILL, UNITED REFINING COMPANY, UNITED REFINING COMPANY, DOING BUSINESS AS KWIK FILL, HUSKY CORPORATION, DEFENDANTS-APPELLANTS, MOTOR COACH INDUSTRIES, INC., MOTOR COACH INDUSTRIES INTERNATIONAL, INC., MOTOR COACH INDUSTRIES, LTD., DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

PULLANO & FARROW, ROCHESTER (CHRISTINA M. DEATS OF COUNSEL), FOR DEFENDANTS-APPELLANTS KWIK FILL, UNITED REFINING COMPANY, AND UNITED REFINING COMPANY, DOING BUSINESS AS KWIK FILL.

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER (MEGHAN M. DIPASQUALE OF COUNSEL), FOR DEFENDANT-APPELLANT HUSKY CORPORATION.

BOTTAR LAW, PLLC, SYRACUSE (AARON J. RYDER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

GOLDBERG SEGALLA LLP, SYRACUSE (HEATHER ZIMMERMAN OF COUNSEL), AND HARTLINE DACUS BARGER DREYER LLP, DALLAS, TEXAS, FOR DEFENDANTS-RESPONDENTS.

Appeals from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered January 10, 2018. The order, insofar as appealed from, denied the motion of defendants Kwik Fill, United Refining Company and United Refining Company, doing business as Kwik Fill, for summary judgment and denied the motion of defendant Husky Corporation for summary judgment.

It is hereby ORDERED that the order insofar as appealed from is reversed on the law without costs, the motions of defendants Kwik Fill, United Refining Company, and United Refining Company, doing business as Kwik Fill and defendant Husky Corporation are granted, and the complaints against those defendants are dismissed.

Memorandum: Defendants Kwik Fill, United Refining Company, and United Refining Company, doing business as Kwik Fill (collectively, Kwik Fill defendants) and defendant Husky Corporation (Husky) appeal from an order that, inter alia, denied their motions for summary

judgment dismissing the complaints against them. We reverse the order insofar as appealed from, grant the motions, and dismiss the complaints against the Kwik Fill defendants and Husky.

On January 24, 2012, Trudy Menear (plaintiff), a limousine company employee, was driving a J4500 model bus manufactured by defendants Motor Coach Industries, Inc., Motor Coach Industries International, Inc., and Motor Coach Industries, Ltd. (collectively, Coach defendants). She stopped to refuel the bus at a gas station owned by the Kwik Fill defendants, pulled up to a diesel fuel dispenser, put the nozzle of the pump into the fuel tank, engaged the hold-open clip located on the nozzle, and waited while the bus refueled. Fuel began to spill out of the filler neck, i.e., the part that connects the gas cap to the fuel tank. She disengaged the hold-open clip, manually stopped the flow of fuel, and waited for the pressure to subside. After 20 or 30 seconds, she removed the nozzle, and diesel fuel ejected from the fuel tank, spraying her body, face, and eyes. Thereafter, plaintiffs commenced an action against the Kwik Fill defendants, and a separate action against, inter alia, Husky and the Coach defendants, seeking to recover damages for injuries that plaintiff sustained in the accident.

We agree with Husky, the manufacturer of the nozzle, that Supreme Court erred in denying its motion for summary judgment dismissing the complaint against it. An injured plaintiff may seek recovery against the manufacturer of a defective product on theories of strict products liability, negligence, or breach of express or implied warranty (*see Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 106 [1983]). A strict products liability cause of action may be based upon theories of defective manufacture, defective design, or failure to warn (*see id.* at 106-107).

With respect to defective manufacture and design, Husky met its initial burden of establishing entitlement to judgment as a matter of law by submitting evidence that its product was not defective (*see Ramos v Howard Indus., Inc.*, 10 NY3d 218, 221 [2008]; *Cassatt v Zimmer, Inc.*, 161 AD3d 1549, 1550 [4th Dept 2018]), and that it was reasonably safe for its intended use (*see generally Denny v Ford Motor Co.*, 87 NY2d 248, 257 [1995], *rearg denied* 87 NY2d 969 [1996]; *Voss*, 59 NY2d at 107). Particularly, Husky submitted an expert affidavit and the deposition testimony of its president. Husky's expert examined the nozzle, determined that the nozzle's automatic shut-off was functional, and opined that the nozzle was not unreasonably dangerous for its intended purpose and thus was not defective (*see generally Voss*, 59 NY2d at 107). Husky's president testified that its manufacturing processes complied with industry standards, and that every Husky nozzle was tested prior to leaving the factory (*see generally Ramos*, 10 NY3d at 223-224; *Beechler v Kill Bros. Co.*, 170 AD3d 1606, 1607 [4th Dept 2019]).

The burden then shifted to the nonmovants to raise an issue of fact by submitting evidence of a specific flaw in the product (*cf. Ramos*, 10 NY3d at 223), or circumstantial evidence that the product did not perform as intended excluding all causes for the product's

failure not attributable to Husky (*see id.* at 224; *Johnson v Bauer Corp.*, 71 AD3d 1586, 1587 [4th Dept 2010]). In opposition to Husky's motion, the Coach defendants submitted the affidavit of an expert and the deposition testimony of the vice president of engineering of defendant Motor Coach Industries, Ltd. The expert opined that the accident was caused by a nozzle malfunction. He did not, however, identify any particular defect in the nozzle, which he did not inspect. We thus conclude that the expert's opinion is based on mere speculation and is insufficient to raise an issue of fact (*see Ramos*, 10 NY3d at 224). Furthermore, the vice president testified that, in 2007, the Coach defendants received complaints about diesel fuel ejecting from the filler necks on J4500 model buses due to apparent fuel tank venting and pressurization issues. As a result, the Coach defendants conducted an investigation, changed the vents, prepared a service bulletin, and developed a kit to retrofit existing J4500 model buses. The Coach defendants' expert failed to exclude improper venting and pressurization of the fuel tank as a potential cause of plaintiff's accident, and thus failed to raise an issue of fact in that regard (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The remaining theories of liability against Husky also fail. Because Husky manufactured a product that was not defective, it had no duty to warn end users that its product might pose a danger if used to refuel an improperly vented fuel tank (*see generally Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 298 [1992]). The negligence cause of action against Husky fails because "there is almost no difference between a prima facie case in negligence and one in strict [products] liability" (*Preston v Peter Luger Enters., Inc.*, 51 AD3d 1322, 1325 [3d Dept 2008]; *see generally Hokenson v Sears, Roebuck & Co.*, 159 AD3d 1501, 1502 [4th Dept 2018]). The breach of warranty causes of action against Husky are "coextensive with [the] tort based [causes of action]," and thus Husky is entitled to summary judgment dismissing those causes of action as well (*Wyda v Makita Elec. Works*, 232 AD2d 407, 408 [2d Dept 1996]; *see Gian v Cincinnati Inc.*, 17 AD3d 1014, 1016 [4th Dept 2005]).

We agree with the Kwik Fill defendants that the court erred in denying their motion for summary judgment dismissing the complaint against them. Initially, plaintiffs concede that the action against the Kwik Fill defendants is based on a premises liability theory only. "Generally, a landowner owes a duty of care to maintain his or her property in a reasonably safe condition" (*Gronski v County of Monroe*, 18 NY3d 374, 379 [2011], *rearg denied* 19 NY3d 856 [2012]; *see Cox v McCormick Farms, Inc.*, 144 AD3d 1533, 1533-1534 [4th Dept 2016]). In seeking summary judgment, a defendant landowner has the initial burden of establishing its entitlement to judgment as a matter of law by demonstrating that it did not create or have actual or constructive notice of a dangerous condition on the premises (*see Parslow v Leake*, 117 AD3d 55, 63 [4th Dept 2014]).

We conclude that the Kwik Fill defendants met their burden. It is undisputed that the Kwik Fill defendants hired an outside vendor that regularly inspected and serviced their fuel pumps, and, in

support of their motion, the Kwik Fill defendants submitted evidence establishing that the vendor determined that the fuel pumps were working properly before and after the accident, thus establishing that the Kwik Fill defendants maintained their property in a reasonably safe condition (*see Ensher v Charlton*, 64 AD3d 1032, 1033 [3d Dept 2009]; *Lezama v 34-15 Parsons Blvd, LLC*, 16 AD3d 560, 560-561 [2d Dept 2005]; *Hunter v Riverview Towers*, 5 AD3d 249, 249-250 [1st Dept 2004]). Furthermore, the Kwik Fill defendants submitted documents, including the Coach defendants' internal correspondence, establishing that J4500 model buses were involved in similar diesel fuel-spraying accidents at other gas stations. As noted above, the Coach defendants conducted an investigation and concluded that the cause of those accidents was improper fuel tank venting resulting in the build-up of pressure. Thus, the evidence demonstrates that any dangerous condition was one that existed in the J4500 model bus manufactured by the Coach defendants and owned by plaintiff's employer, not one that existed on the Kwik Fill defendants' property. In opposition, plaintiffs and the Coach defendants failed to raise an issue of fact (*see generally Zuckerman*, 49 NY2d at 562).

Our dissenting colleague does not dispute that the Kwik Fill defendants' premises were maintained in a reasonably safe condition, and acknowledges that a dangerous condition existed only because plaintiff brought a defective product, i.e., the J4500 model bus, onto the premises. We decline to extend the doctrine of premises liability to encompass such circumstances.

All concur except DEJOSEPH, J., who dissents in part and votes to modify in accordance with the following memorandum: I respectfully dissent in part inasmuch as I agree with Supreme Court that defendants Kwik Fill, United Refining Company, and United Refining Company, doing business as Kwik Fill (collectively, Kwik Fill defendants) were not entitled to summary judgment dismissing the complaint against them. I would therefore modify the order by granting the motion of defendant Husky Corporation and dismissing the complaint against it, and otherwise affirm.

"It is beyond dispute that landowners and business proprietors have a duty to maintain their properties in reasonably safe condition" (*Di Ponzio v Riordan*, 89 NY2d 578, 582 [1997]). In order for a property owner to be liable in tort to a plaintiff who is injured as a result of an allegedly dangerous condition upon the property, it must be established that a dangerous condition existed and that the property owner affirmatively created the condition or had actual or constructive notice of its existence (*see Hanley v Affronti*, 278 AD2d 868, 869 [4th Dept 2000]). " 'Liability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of [the] premises . . . The existence of one or more of these elements is sufficient to give rise to a duty of care. Where none is present, a party cannot be held liable for injury caused by the defective or dangerous condition of the property' " (*Clifford v Woodlawn Volunteer Fire Co., Inc.*, 31 AD3d 1102, 1103 [4th Dept 2006]). "[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar

facts and circumstances of each case and is generally a question of fact for the jury" (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997] [internal quotation marks omitted]; *see Hayes v Texas Roadhouse Holdings, LLC*, 100 AD3d 1532, 1533 [4th Dept 2012]). To establish the notice element of a negligence claim, plaintiffs were required to demonstrate that defendants had notice of the conditions that were alleged to be dangerous, but plaintiffs were not required to demonstrate that defendants knew that those conditions were dangerous (*see Harris v Seager*, 93 AD3d 1308, 1309 [4th Dept 2012]).

Here, I conclude that the Kwik Fill defendants failed to meet their initial burden of establishing their entitlement to judgment as a matter of law. Plaintiffs' theory of liability with respect to Kwik Fill is that when the buses operated by plaintiff's employer and manufactured by defendants Motor Coach Industries, Inc., Motor Coach Industries International, Inc., and Motor Coach Industries, Ltd. (collectively, Coach defendants), came onto the Kwik Fill defendants' premises to refuel, a dangerous condition was created, i.e., inadvertent spillage or spraying of diesel fuel.

Although the Kwik Fill defendants did not create any dangerous condition on their property, the record is clear that they were aware of prior incidents involving buses owned by plaintiff's employer in which spilling or spraying of diesel fuel occurred at one of the Kwik Fill defendants' pumps. Specifically, an employee of the Kwik Fill defendants, i.e., the assistant manager of the gas station where the incident occurred, was aware of three prior incidents involving buses owned by plaintiff's employer and the leaking, spilling, or spraying of diesel fuel. The assistant manager testified at his deposition that he spoke to his manager about this issue. He also stated in his affidavit that "[t]he only vehicles that seem to have trouble fueling with the diesel pumps . . . appear to be the . . . limousine buses [owned by plaintiff's employer]. While I was employed with [the Kwik Fill defendants], I did not witness any similar incidents or problems occur with any other vehicle." Despite this actual knowledge of a dangerous condition, i.e., that the combination of buses owned by plaintiff's employer and the Kwik Fill defendants' diesel fuel pumps was causing fuel spills, the Kwik Fill defendants did not act to remedy the situation. Stated differently, the Kwik Fill defendants did not prohibit buses owned by plaintiff's employer from refueling, and they did not contact plaintiff's employer to discuss the situation or warn it of the possible hazard.

The fact that there is no evidence of a mechanical defect with the Kwik Fill defendants' pumps is irrelevant. Nor does the premises liability cause of action fail on the ground that the Kwik Fill defendants did not have actual or constructive knowledge of the alleged defect in the fuel ventilation system of the buses manufactured by the Coach defendants. The premises liability cause of action here is narrow and limited to one set of circumstances: when buses owned by plaintiff's employer come onto the Kwik Fill defendants' property, a dangerous condition is created; although the Kwik Fill defendants did not create the condition, they were aware of the resulting issue of the spilling or spraying of diesel fuel, and

the Kwik Fill defendants did nothing about it. Under these circumstances, I conclude that the Kwik Fill defendants failed to eliminate all questions of fact with respect to plaintiffs' premises liability cause of action.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

109

CA 17-01435

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

IN THE MATTER OF THE APPLICATION FOR DISCHARGE OF DEREK G., CONSECUTIVE NO. 195871, FROM CENTRAL NEW YORK PSYCHIATRIC CENTER PURSUANT TO MENTAL HYGIENE LAW SECTION 10.09, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, NEW YORK STATE OFFICE OF MENTAL HEALTH, AND NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENTS-RESPONDENTS.

SARAH M. FALLON, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (PATRICK T. CHAMBERLAIN OF COUNSEL), FOR PETITIONER-APPELLANT.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered July 28, 2017 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, directed that petitioner be subject to strict and intensive supervision and treatment.

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

Memorandum: Petitioner commenced this proceeding pursuant to Mental Hygiene Law article 10, seeking an order discharging him and/or releasing him to the community under a regimen of strict and intensive supervision and treatment (SIST). He appeals from an order, entered after an annual review hearing pursuant to Mental Hygiene Law § 10.09 (d), determining that he is a detained sex offender who suffers from a mental abnormality (*see* § 10.03 [i], [r]), and ordering his release to a regimen of SIST. We affirm.

Pursuant to our recent decision in *Matter of Luis S. v State of New York* (166 AD3d 1550, 1552-1553 [4th Dept 2018]), we reject petitioner's contention that basing the determination that he has a mental abnormality on a diagnosis of unspecified paraphilic disorder does not comport with the requirements of due process.

We further reject petitioner's contention that the evidence is not legally sufficient to establish that he has a " '[m]ental

abnormality' " (Mental Hygiene Law § 10.03 [i]), i.e., a "congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct" (*id.*). Respondents' expert testified at the hearing and diagnosed petitioner with antisocial personality disorder (ASPD), unspecified paraphilic disorder, unspecified depressive disorder, and a substance use disorder and alcohol use disorder that were both in remission. The expert identified petitioner as having psychopathic traits, emotional disregulation, and a history of sexual preoccupation. In the expert's opinion, petitioner's array of multiple paraphilic markers, including signs of sexual sadism and evidence of pedophilia, fit best under a diagnosis of unspecified paraphilic disorder and this combination of problems predisposed petitioner to commit sex offenses and resulted in serious difficulty controlling such conduct. The expert further opined that the unspecified paraphilic disorder and "sexual deviance" were "the green light driving behavior forward," while ASPD, which made petitioner more likely to disregard the rights and needs of others, was "the absence of a red light." Petitioner's depressive disorder led to strong emotional reactivity and irritability, which also affected petitioner's decisions and made him more likely to harm others. Respondents' expert based her opinion on several factors, including petitioner's high-risk score on the Violence Risk Scale—Sex Offender Version, "a test designed to evaluate an individual's risk of sexual violence" (*Luis S.*, 166 AD3d at 1552).

Viewing the evidence in the light most favorable to respondents (*see Matter of State of New York v Floyd Y.*, 30 NY3d 963, 964 [2017]; *Matter of State of New York v John S.*, 23 NY3d 326, 348 [2014], *rearg denied* 24 NY3d 933 [2014]), we conclude that it is legally sufficient to establish by clear and convincing evidence "the existence of a predicate 'condition, disease or disorder,' [and to] link that 'condition, disease or disorder' to a person's predisposition to commit conduct constituting a sex offense and to that person's 'serious difficulty in controlling such conduct' " (*Matter of State of New York v Dennis K.*, 27 NY3d 718, 726 [2016], *cert denied* 580 US —, 137 S Ct 579 [2016]; *see* Mental Hygiene Law § 10.07 [d]).

Finally, we conclude that the determination that petitioner suffers from a mental abnormality is not against the weight of the evidence. The court "was in the best position to evaluate the weight and credibility of the conflicting [expert] testimony presented . . . , and we see no reason to disturb the court's decision to credit the testimony of [respondents'] expert[]" (*Matter of State of New York v Parrott*, 125 AD3d 1438, 1439 [4th Dept 2015], *lv denied* 25 NY3d 911 [2015] [internal quotation marks omitted]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

111

CA 18-01646

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

CATHERINE A. BROOKS AND STEPHEN G. BROOKS,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

SARAH C. BLANCHARD, DEFENDANT-RESPONDENT.

JOHN J. FROMEN, ATTORNEYS AT LAW, SNYDER, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

SCHNITTER CICCARELLI MILLS PLLC, WILLIAMSVILLE (RYAN J. MILLS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment and order (one paper) of the Supreme Court, Erie County (Emilio L. Colaiacovo, J.), entered February 1, 2018. The judgment and order denied the motion of plaintiffs to set aside a jury verdict and for a new trial.

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

Memorandum: Plaintiffs commenced this action seeking to recover damages for injuries allegedly sustained by plaintiff Catherine A. Brooks (Catherine) when she was in a vehicle that was struck by a vehicle operated by defendant. Following a trial on the issue of liability, the jury found defendant 10% liable for the accident and Catherine 90% liable. Supreme Court denied plaintiffs' posttrial motion to set aside the verdict and entered a judgment in defendant's favor on the issue of liability on the basis of that verdict. Plaintiffs appeal, and we reverse.

At trial, the parties presented vastly divergent accounts of the manner in which the accident occurred and what happened after the collision. Catherine testified that she was seated in her vehicle, which was parked on the side of the road, when defendant's vehicle side-swiped her stationary vehicle from behind and continued driving. According to defendant's testimony, however, defendant was traveling along the road at the posted speed limit of 30 miles per hour when Catherine's vehicle backed out of a driveway and suddenly entered defendant's lane of travel, thereby causing the collision. Defendant testified that she attempted to avoid Catherine's vehicle by swerving to the left, applying her brakes, and sounding her horn. Plaintiff Stephen G. Brooks (Stephen), on the other hand, testified that he was

standing 25 feet away from the location of the accident and that he saw Catherine's vehicle parked against the curb and he observed defendant's vehicle traveling towards Catherine's parked vehicle at a "faster rate of speed." Stephen further testified that he did not hear the sound of a horn or the screeching of brakes prior to the accident. Also, defendant testified that, although she did not immediately stop after striking Catherine's vehicle, she stopped "at the end of the block" and exchanged contact and insurance information with Stephen. Stephen, however, testified that defendant "took off," and that, after Catherine got out of her vehicle, he got into the vehicle and chased after defendant, beeping the horn, yelling, and flashing his lights. According to Stephen's testimony, defendant turned five times and traveled down many different streets before she finally stopped.

We agree with plaintiffs that the court erred in excluding Stephen's testimony that defendant exhibited indicia of intoxication during their interaction immediately after the accident and that, in his opinion, she was intoxicated. Although defendant's failure to remain at the scene meant that Stephen was the only witness who had an opportunity to observe defendant and interact with her after the accident, the court prohibited Stephen from testifying about his observations of defendant on the ground that he was not an "expert" in signs of intoxication. Contrary to the court's ruling, it is well settled that a lay witness may testify regarding his or her observation that another individual exhibited signs of intoxication (*see Felska v New York Cent. & Hudson Riv. R.R. Co.*, 152 NY 339, 343-344 [1897]; *see also* Jerome Prince, Richardson on Evidence § 7-202 [h] [Farrell 11th ed 1995]), and also regarding his or her opinion that another individual was intoxicated (*see Felska*, 152 NY at 344; *Bhowmik v Santana*, 140 AD3d 460, 461 [1st Dept 2016]; *Burke v Tower E. Restaurant*, 37 AD2d 836, 836 [2d Dept 1971]). Although " '[t]rial courts are accorded wide discretion in making evidentiary rulings [and], absent an abuse of discretion, those rulings should not be disturbed on appeal' " (*Mazella v Beals*, 27 NY3d 694, 709 [2016]; *see generally People v Acevedo*, 136 AD3d 1386, 1387 [4th Dept 2016], *lv denied* 27 NY3d 1127 [2016]), we conclude that the ruling at issue here was an abuse of discretion.

Here, the jury was asked, inter alia, to determine whether defendant was negligent and whether any such negligence was a substantial factor in causing the collision, and to apportion liability. To make those determinations, the jury was required to evaluate the conflicting testimony of the witnesses regarding what occurred before, during, and after the collision. Inasmuch as the jury's findings depended on their determinations of the credibility and reliability of the witnesses, evidence of defendant's possible intoxication was not only "relevant in determining the extent of [her] liability in this case" (*Ellison v New York City Tr. Auth.*, 63 NY2d 1029, 1030 [1984]), but also to the jury's determination of her reliability as a witness, which is particularly important where, as here, there is conflicting witness testimony (*see generally McGruder v Gray* [appeal No. 1], 265 AD2d 822, 822 [4th Dept 1999]). Under these

circumstances, we conclude that plaintiffs should have been permitted to present Stephen's testimony with respect to whether defendant appeared to be intoxicated, which would allow the jury to consider whether and to what degree alcohol impaired defendant's senses and her ability to accurately perceive and recall the events about which she testified at trial.

Furthermore, Stephen's proposed testimony regarding his observations of defendant, i.e., that she fumbled with her license, slurred her speech, and smelled of alcohol, was not cumulative of other evidence already before the jury (*cf. Mohamed v Cellino & Barnes*, 300 AD2d 1116, 1116-1117 [4th Dept 2002], *lv denied* 99 NY2d 510 [2003]). Defendant testified that she was on her way home from a bar, where she had consumed "[t]wo drinks" over the course of three to four hours, and the court permitted Stephen to testify that he did not call the police when defendant finally pulled over because "[he] believe[d] she may have been drinking and [he] did not want to get her in any more trouble." There was no evidence before the jury, however, suggesting that defendant was intoxicated or that her mental faculties and physical abilities may have been impaired due to her consumption of alcohol. Without the excluded testimony, there was no reason for the jury to question or doubt defendant's testimony that she had only "[t]wo drinks" and left the scene of the accident because she was "very shook up and probably in a little shock."

Moreover, even assuming, arguendo, that the court did not abuse its discretion in excluding Stephen's testimony from plaintiffs' case-in-chief, we conclude that the court erred in refusing to allow plaintiffs to present that testimony in rebuttal. Defendant testified that she did not fumble with her license, her speech was not slurred, she did not recall her eyes being "glassy," and there was no alcohol on her breath. Thus, the excluded testimony from Stephen would have provided " 'evidence in denial of some affirmative fact which [defendant] has endeavored to prove' " (*People v Harris*, 57 NY2d 335, 345 [1982]; *cf. Syracuse Airport Metroplex v City of Syracuse*, 249 AD2d 926, 927 [4th Dept 1998]) and therefore fell within the scope of permissible rebuttal evidence.

Where, as here, the excluded evidence would " 'have had a substantial influence in bringing about a different verdict' " (*Czerniejewski v Stewart-Glapat Corp.*, 269 AD2d 772, 773 [4th Dept 2000]), and the proffered testimony could "enlighten the jury further" (*Hutchinson v Shaheen*, 55 AD2d 833, 834 [4th Dept 1976]), reversal is required. We therefore reverse the judgment and order, grant plaintiffs' posttrial motion, set aside the verdict, and grant a new trial.

In light of our determination, we need not address plaintiffs' remaining contentions.

Entered: July 31, 2019

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 17-00508

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

V MEMORANDUM AND ORDER

CARLOS A. VAIL, ALSO KNOWN AS VAIL-MATEO, ALSO KNOWN AS CARLOS ALVARO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Ontario County (Elma A. Bellini, J.), rendered January 13, 2017. The judgment convicted defendant, upon a jury verdict, of kidnapping in the first degree.

It is hereby ORDERED that the judgment so appealed from is reversed on the law and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of kidnapping in the first degree (Penal Law § 135.25 [2] [a]). Defendant met an underage girl (victim) while living in Florida. Defendant helped the victim's family move to New York, began pursuing a romantic relationship with her, and remained in New York. The record reflects that, at some point thereafter, defendant decided to return to Florida. Defendant, who at that time was over the age of 21, agreed to a request by the then 14-year-old victim to take her with him to Florida. The victim crawled out of a window of her mother's home and entered defendant's car. While driving to Florida, defendant engaged in intercourse with her twice. The vehicle was ultimately stopped by police in Georgia, at which point defendant admitted to having a sexual relationship with the victim.

Defendant's contention that Supreme Court erroneously instructed the jury on the issue of geographical jurisdiction pursuant to CPL 20.40 is unpreserved because he failed to object to that charge (*see People v Hall*, 294 AD2d 112, 112-113 [1st Dept 2002], *lv denied* 98 NY2d 710 [2002]; *see generally People v Roulhac*, 166 AD3d 1066, 1068 [3d Dept 2018], *lv denied* 32 NY3d 1128 [2018]; *People v Hinds*, 77 AD3d 429, 430-431 [1st Dept 2010], *lv denied* 15 NY3d 953 [2010]). Defendant likewise failed to preserve his contention that the jury charge on geographical jurisdiction, together with the trial

testimony, rendered the indictment duplicitous or otherwise created the possibility that defendant was convicted of an unindicted offense (*see People v Allen*, 24 NY3d 441, 449-450 [2014]; *People v Smith*, 145 AD3d 1628, 1629 [4th Dept 2016], *lv denied* 31 NY3d 1017 [2018]).

We reject defendant's further contention that defense counsel was ineffective for failing to object to the jury charge regarding venue. Evidence presented at trial established that defendant met with the victim after she left her mother's Ontario County residence, thus establishing venue in Ontario County by virtue of an element of the offense occurring in that county (*see* CPL 20.40 [1] [a]). Defendant's contention on appeal that the victim walked in a specific direction and crossed into a neighboring county before being met by defendant was unsupported at trial. Thus, any challenge to the jury charge would have had " 'little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005]). Defendant also contends that defense counsel was ineffective for failing to correct misstatements made by the prosecutor and the court during plea negotiations regarding the minimum sentence that he could receive after trial. That contention is based on matters outside the record on appeal and therefore must be raised in a proceeding pursuant to CPL article 440 (*see People v Surowka*, 103 AD3d 985, 986-987 [3d Dept 2013]; *see also People v Burgos*, 130 AD3d 1493, 1494 [4th Dept 2015]).

Defendant's challenge to the legal sufficiency of the evidence of abduction is unpreserved for our review because "his motion for a trial order of dismissal was not specifically directed at that alleged shortcoming in the evidence" (*People v Lasher*, 163 AD3d 1424, 1425 [4th Dept 2018], *lv denied* 32 NY3d 1005 [2018] [internal quotation marks omitted]). 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 with respect to the elements of abduction and intent pursuant to Penal Law § 135.25 (2) (a), and with respect to venue (*see generally People v Pritchard*, 149 AD3d 1479, 1479 [4th Dept 2017]).

The dissent disputes the weight of the evidence regarding the element of abduction, which as relevant here "means to restrain a person with intent to prevent his liberation by . . . secreting or holding him in a place where he is not likely to be found" (Penal Law § 135.00 [2] [a]). Although the victim requested that defendant take her with him when he returned to Florida, one may "restrict a person's movements intentionally and unlawfully in such a manner as to interfere substantially with [her] liberty," i.e., "restrain" her, even with the "acquiescence of the victim, if [she] is a child less than sixteen years old" absent the acquiescence of the parent or guardian in the movement or confinement (§ 135.00 [1] [b]). Here, defendant had requested and been denied permission by the victim's mother to date the victim, and the evidence at trial supported a finding that defendant lacked consent from her mother to take the victim when he returned to Florida. Further, after the victim's family discovered that she was missing from their home, both her mother and sister attempted to contact defendant. While driving with the victim to Florida, defendant told both the mother and sister that

the victim was not with him and that he was already in Florida, neither of which was true and both of which hindered any attempt to locate the victim by those attempting to find her. Defendant thus secreted the victim by explicitly misrepresenting both of their whereabouts, denying that he had taken her with him, and keeping the victim where she was not likely to be found, i.e., in a moving vehicle driving across multiple state lines. Contrary to the dissent's suggestion, applying the definition of abduction to those facts does not render otherwise innocuous or innocent conduct criminal. Indeed, the definition of "restraint," an element of abduction, requires that the defendant act "with knowledge that the restriction is unlawful" (§ 135.00 [1]). The facts here—including that defendant had requested and been denied permission to date the victim, that defendant picked the victim up at night after she crawled from a window in her mother's home, that defendant misrepresented his and her location as they drove, and that he engaged in intercourse with the minor victim twice on the trip—each support a finding that defendant acted with knowledge that his conduct in driving her from her home was unlawful. Those facts distinguish this case from innocent, day-to-day activities that the dissent worries our decision here might criminalize. Simply put, the weight of the evidence supports a determination that defendant did not innocently acquiesce to the mere request of a 14-year-old acquaintance to drive her to Florida, but rather took advantage of a 14-year-old child's age and inexperience, by driving the victim across multiple state lines, away from her family, in order to engage in an unlawful sexual relationship with a child.

We agree with defendant, however, that the court erred in instructing the jury on the element of intent pursuant to Penal Law § 135.25 (2) (a), and we therefore reverse the judgment and grant a new trial. Section 135.25 (2) (a) provides in relevant part that "[a] person is guilty of kidnapping in the first degree when he abducts another person and when . . . [h]e restrains the person abducted for a period of more than twelve hours with intent to . . . [i]nflict physical injury upon him or violate or abuse him sexually." On appeal, defendant specifically contends that the court erroneously instructed the jury regarding "intent to . . . violate or abuse . . . sexually" (*id.*). We interpret the statute to mean that kidnapping in the first degree requires that a defendant both restrain a victim for more than 12 hours *and* possess, for more than 12 hours during the period of restraint, the intent to violate or abuse the victim sexually. Here, however, the court instructed the jury that "intent does not require advanced planning, nor is it necessary that the intent be in the person's mind for any particular period of time." After deliberations began, the jury returned multiple notes requesting further guidance on the relevant intent element. One note stated, "Please define intent, and if there is any time-frame given to defining intent." The court responded by rereading the above instruction. Viewing the charge as a whole and in light of the evidence produced at trial (*see People v Walker*, 26 NY3d 170, 174-175 [2015]), we conclude that the instruction was erroneous inasmuch as it permitted the jury to find that the element of intent pursuant to section 135.25 (2) (a) had been established even if the jury did not find that the intent existed for more than 12 hours during a period of

over 12 hours of restraint. Consequently, "the instruction did not adequately convey the meaning of intent to the jury and instead created a great likelihood of confusion such that the degree of precision required for a jury charge was not met" (*People v Medina*, 18 NY3d 98, 104 [2011]). The error in the intent instruction is particularly significant because, "by their specific questions, the jurors indicated that they had focused upon the time defendant's criminal intent was formed" (*People v Gaines*, 74 NY2d 358, 363 [1989]).

In light of the above conclusion, we need not address defendant's remaining contentions regarding the severity of his sentence and the imposition of an improper fee.

CENTRA, J.P., CARNI, and TROUTMAN, JJ., concur; LINDLEY, J., concurs in the result in the following memorandum: The majority and dissent agree, as do I, that Supreme Court provided an erroneous instruction on the element of intent pursuant to Penal Law § 135.25 (2) (a) for kidnapping in the first degree. The issue separating my colleagues is whether the People established beyond a reasonable doubt that defendant secreted or held the victim with the intent to prevent her liberation, as required for the abduction element of kidnapping (*see* § 135.00 [2] [a]). I agree with the majority on that point. In my view, however, the People failed to establish that defendant restricted the victim's "movements intentionally and unlawfully in such a manner as to interfere substantially with [her] liberty" (§ 135.00 [1]). Without such a restriction, there can be no restraint, which is another element of kidnapping (*see* § 135.25 [2]).

As the dissent points out, defendant merely took the victim where she wanted to go and when she wanted to go. She knew that defendant was returning to Florida, where he resided, and she asked to go with him. He agreed, and she then snuck out of her house to meet up with him. Defendant did not force or coerce the victim to do anything, and there is no evidence that he restricted her movements in any way at any time.

The People asserted at trial that, because the victim was 14 years old and defendant did not obtain permission from her mother to take her to Florida, the victim was restrained as a matter of law. But the fact that the victim was 14 years old is relevant only to her inability to consent; it does not obviate the need for the People to establish that defendant restricted the victim's movements in such a manner as to substantially interfere with her liberty. Indeed, the court properly charged the jury that restriction of movements and lack of consent are separate elements that both must be proven.

In any event, although a person is moved or confined "without consent" by, among other things, the "acquiescence of the victim, if he [or she] is a child less than sixteen years old" and the child's parent or guardian "has not acquiesced in the movement or confinement" (Penal Law § 135.00 [1] [b]), the victim here did not acquiesce to anything proposed by defendant. Rather, it was defendant who acquiesced to the victim's request that he drive her to Florida.

Thus, even if defendant had restricted the victim's movements, it is by no means clear that he did so without the victim's consent.

Absent evidence that defendant restrained the victim by restricting her movements in a manner that substantially interfered with her liberty, the People failed to prove the crime of kidnapping in the first or second degree (Penal Law §§ 135.25, 135.20; *see* Penal Law § 135.00 [1], [2]). On appeal, however, defendant does not challenge the restraint element of kidnapping. In fact, defendant concedes the issue. Thus, inasmuch as we do not generally address the merits of an issue not raised by the appellant, I am constrained to agree with the majority that the proper remedy here is a new trial rather than dismissal of the indictment. If defendant had not conceded the element of restraint, I would agree with the dissent that the People also failed to prove that defendant abducted the victim.

NEMOYER, J., dissents and votes to reverse and dismiss the indictment in accordance with the following memorandum: Although I agree with my colleagues that the judgment should be reversed, I would not order a new trial. Instead, I would dismiss the indictment because, in my view, defendant's conviction of kidnapping in the first degree (Penal Law § 135.25 [2] [a]) is against the weight of the evidence. By holding otherwise, the majority has expanded the reach of the kidnapping statute well beyond any other reported case in New York. I must therefore dissent.

"Most people no doubt think they know what 'kidnapping' means, but the term is a hard one to define" (*People v Leonard*, 19 NY3d 323, 326 [2012]). "A person is guilty of kidnapping" when, inter alia, he or she "abducts another person" (Penal Law §§ 135.25, 135.20). Insofar as relevant here, the term "abduct" means "to restrain a person with intent to prevent his liberation by . . . secreting or holding him in a place where he is not likely to be found" (§ 135.00 [2] [a]). As thus laid out in the statute, abduction requires proof beyond a reasonable doubt of four elements: (1) restraint, which itself has about seven distinct sub-elements (*see* § 135.00 [1]); (2) intent to prevent liberation; (3) secreting or holding; and (4) in a place not likely to be found.

Those four elements are separate and distinct, and they must be afforded independent effect within the statutory scheme (*see generally People v Giordano*, 87 NY2d 441, 448 [1995]). Indeed, we must "assume the Legislature had a purpose" (*id.*) when it used phrases like "secreting or holding" and "intent to prevent liberation" in section 135.00 (2) (a), and we must "avoid a construction which makes th[ose] words superfluous" (*Giordano*, 87 NY2d at 448). The Court of Appeals applied the foregoing constructional canons in *Leonard* by analyzing each relevant element and sub-element of kidnapping separately, notwithstanding the Court's frank recognition of the complexity of the statutory scheme and the occasionally counterintuitive results its application engenders (19 NY3d at 326-329).

The kidnapping statute does not define either "secrete" or "hold," nor does it elaborate on what it meant by an intent to prevent

"liberation." But in my view, no reasonable construction of "secrete," "hold," or "liberation" can result in a conviction on the uncontested facts of this case. It is undisputed that the purported kidnapping victim, then 14 years old, sought out defendant and asked him to drive her from New York to Florida, where she had originally met defendant and had previously resided. The trip was her idea, not his. She was voluntarily in his vehicle at all relevant times, and there is no allegation that she ever changed her mind or that defendant prevented her from leaving the vehicle. Nor is there any indication that, had the purported victim changed her mind, defendant would not have honored her wishes and immediately allowed her to leave the car.

Under these circumstances, it cannot be said that defendant either "secreted" or "held" the victim in his car, or that he intended to prevent her "liberation." She was there voluntarily and of her own accord, which is the very antithesis of being "secreted" or "held" somewhere. Taking a person to the destination of their choosing is also the very opposite of preventing that person's "liberation"; to the contrary, such transportation actually furthers the person's own agency. Put simply, no person needs to be "liberated" from their own travel plans. To say otherwise would mean that every driver is necessarily secreting or holding any passenger in their vehicle and that the driver is doing so with the intent to prevent the passenger's liberation—even when the passenger willingly entered the vehicle, is perfectly content to remain inside, and asked to be taken to a specific destination.

In short, unlike the majority, I am not prepared to rule that a person who voluntarily enters a vehicle and who expresses no desire to leave is being "secreted or held" by the driver, or that such a driver is intending to prevent the passenger's "liberation." Thus, because defendant did not either "secrete" or "hold" the purported victim inside his vehicle and did not intend to prevent her "liberation" from their voluntary excursion, he did not "abduct" her and cannot be guilty of kidnapping in either the first or second degree (*see People v Belden*, 215 AD2d 889, 889 [3d Dept 1995], *lv denied* 86 NY2d 840 [1995]).

Contrary to the majority's determination, the fact that defendant might have misled the mother of the purported victim about her daughter's whereabouts during the trip to Florida cannot, by itself, constitute the "secreting" to which the statute refers. To my mind, the notion of "secreting" necessarily assumes that the person being "secreted" would want to be located, and that is simply not the case here. In fact, any so-called misleading in this case occurred at the behest of the purported victim, who did not want her mother to know that she was returning to Florida. In my view, a person who misleads others about the location of another person is not "secreting" that person if the person allegedly being "secreted" is voluntarily fleeing or is otherwise going into hiding or seclusion. Put simply, if a person does not want to be found, then he or she cannot be "secreted" for purposes of the kidnapping statute. Any other construction would, in my view, drain the word "secrete" of any meaning.

Contrary to the majority's further determination, the fact that the purported victim was a minor at the time of the trip to Florida does not, by itself, mean that defendant necessarily abducted her. According to the plain text of the kidnapping statute, a victim's age is dispositive of only one of the approximately seven sub-elements of *restraint*, i.e., lack of consent, and restraint is itself only one of the four distinct elements of abduction (*see* Penal Law § 135.00 [1] [b]). Put differently, the sub-elements of restraint do not amount to proof of the other freestanding elements such as "hold or secrete" and "intent to prevent liberation" and, under the statutory scheme as adopted by the legislature, the victim's age has no dispositive significance to any other requirement of abduction apart from the lack of consent sub-element of the element of restraint. Thus, although the victim's age unquestionably satisfied the lack-of-consent sub-element of restraint, that sub-element comprises but a small portion of the total requirements for an "abduction" under New York law.

Notwithstanding the legislature's surgically-precise identification of the role to be played by the victim's age in the overall calculus of defining abduction—i.e., as irrefutable proof only of one sub-element of one element of abduction—the majority's analysis of the word "secrete" transforms the victim's minority status into a trump card that overwhelms the many elements and sub-elements of abduction to which the victim's age is not dispositive—i.e., every element and sub-element except the lack-of-consent sub-element of restraint. As a result, the majority's analysis would seemingly permit a conviction for kidnapping in the second degree—a class B felony (*see* Penal Law § 135.20)—whenever a nonparent drives a minor in a car (however briefly) without having first obtained parental consent. That is an unacceptable and unjust result, and the legislature prudently drafted the statute to incorporate additional elements—hold/secrete and intent to prevent liberation, chief among them—precisely to prevent such a miscarriage of justice. I do not think it is wise to, in effect, delete the very safeguards that protect a person from being convicted of a class B felony simply for driving their son's 14-year-old friend to post-hockey pizza without first consulting the friend's parent.

From a broader perspective, the drafters of the Penal Law viewed an abduction—the core aspect of any kidnapping—"as a 'very serious form of restraint, savoring strongly of the substantial removal, isolation and/or violence usually associated with *genuine* kidnapping' " (William C. Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law § 135.00 at 318, quoting Staff Comments of the Commn on Rev of Penal Law and Crim Code, 1965 Proposed Penal Law § 135.00 at 277 [emphasis added]). This case, however, has none of the hallmarks of a "genuine" kidnapping for which the legislature prescribed the extremely severe penalties attendant to class A and B felonies. Indeed, the typical affirmed kidnapping conviction looks nothing like this case. For example, in *People v Robinson* (168 AD3d 605, 606 [1st Dept 2019], *lv denied* 33 NY3d 953 [2019]), the defendant took a five-year-old girl to a hotel and refused to disclose her whereabouts in order to get revenge on the victim's mother; in *People v Manning* (151 AD3d 1936, 1937 [4th Dept

2017], *lv denied* 30 NY3d 951 [2017]), the defendants pretended to be FBI agents, handcuffed a woman on the street, hoisted her into their car, and drove away; in *People v Barnette* (150 AD3d 1136, 1137 [2d Dept 2017], *lv denied* 29 NY3d 1123 [2017]), the kidnapping was "marked by brutal and degrading treatment" and was carried out as part of a plan to rob the victim; and in *People v Grohoske* (148 AD3d 97, 102-103 [1st Dept 2017], *lv denied* 28 NY3d 1184 [2017]), the defendant "put [the victim's] hands behind his back, bound him with duct tape, took his cell phone and wallet . . . , forced him into a car, drove him from Manhattan to Philadelphia and abandoned him on an empty street shortly after midnight." The facts of this case, although unsavory, cannot be what the legislature had in mind when it classified kidnapping in the first degree as a class A-I felony punishable by life imprisonment—the same sentence prescribed for intentional murder (*see* Penal Law §§ 70.00 [2] [a]; 125.25 [1]; 135.25).

In closing, nothing said herein should be construed to suggest that I approve of defendant's conduct or that I think he is morally blameless. Quite the contrary, he repeatedly committed statutory rape in other states. But it is improper and unjust, in my view, to convict defendant of a crime he plainly did not commit (kidnapping) merely because, as the People acknowledge, New York lacks territorial jurisdiction to prosecute him for the statutory rape he committed elsewhere. At the end of the day, defendant should be held accountable for the crimes he committed in the fora in which he committed them, and that simply does not include a kidnapping in New York.

Entered: July 31, 2019

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 18-01679

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

PARKLANDS EAST, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROBERT E. SPANGENBERG, INDIVIDUALLY AND AS TRUSTEE, AND ERICH SPANGENBERG, AS TRUSTEE, DEFENDANTS-RESPONDENTS.

HARTER SECREST & EMERY LLP, BUFFALO (SHELDON K. SMITH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MUSCATO, DIMILLO & VONA, LLP, LOCKPORT (JOHN C. NELSON OF COUNSEL), AND THE NELSON LAW FIRM, ELLICOTTVILLE, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered April 15, 2015. The order, insofar as appealed from, denied plaintiff's cross motion for summary judgment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the cross motion is granted, and the seventh affirmative defense is dismissed.

Memorandum: Plaintiff commenced this action to quiet title to certain property (disputed property) that it held title to, and defendants answered and asserted an affirmative defense alleging that they had acquired title to the disputed property by adverse possession. Defendants moved for summary judgment dismissing the complaint based on that affirmative defense, and plaintiff cross-moved for summary judgment dismissing that affirmative defense. Supreme Court denied both the motion and cross motion, and plaintiff now appeals from the order insofar as it denied its cross motion. We agree with plaintiff that the court erred in denying its cross motion, and we therefore reverse the order insofar as appealed from and dismiss the affirmative defense for adverse possession.

Defendants own lakefront property on Rushford Lake, and their deed references a subdivision map (Donahue Subdivision Map) that depicts a 25-foot-wide strip of land, called a "stub trail," that borders defendants' property. There are designated trails around Rushford Lake that were owned by nonparties Paul and Eunice Strabel and are depicted on the Donahue Subdivision Map. The stub trails branch off from the trails and lead directly to the lake. In 1972, the Strabels transferred their interest in certain trails and stub

trails, including the stub trail at issue, to the not-for-profit corporation Hillcrest Alltrails, Inc. (Hillcrest). As reflected in the Strabel to Hillcrest deed, the Strabels conveyed the trails and stub trails to Hillcrest to provide for the management and control of the trails and stub trails, which were to be used for the benefit of lot owners in the subdivision to access their properties and for the benefit of non-lakefront property owners in the subdivision to access the lake.

Defendants acquired property abutting the relevant stub trail in 1974, at which time nonparties Roy and Elaine Miller owned neighboring lakefront property on the other side of the stub trail. In 1989, after a disagreement between defendants and the Millers regarding the location of their property lines, they entered into and recorded a boundary line agreement (Boundary Agreement). The Boundary Agreement first set forth that the Donahue Subdivision Map was inexact, that the various landowners in the area have established their own boundary lines, and that the Millers and defendants desired to have a clear agreement regarding the boundaries for their respective properties. The Boundary Agreement then stated that the stub trail at issue on the Donahue Subdivision Map "was never actually laid out or established as a trail and did not provide a route or means of access . . . to Rushford Lake." In addition, the stub trail "has not been traversed by any persons as a means of access to Rushford Lake, and is not physically capable of being traversed by a vehicle or by an individual on foot without great difficulty due to the rough terrain and steep slope." The Boundary Agreement stated that the attached survey, conducted in 1988, "accurately sets forth the lines of occupation of the premises owned by Millers and [defendants], and . . . the location of the boundaries." As depicted on the survey, the Boundary Agreement gave both the Millers and defendants a gradual widening of their borders as the stub trail approaches the lake. Eventually, the stub trail ends, and the lake frontage is divided between the Millers and defendants.

In 2007, plaintiff acquired Hillcrest's ownership interest in the trails and stub trails. Plaintiff entered into an agreement with the Millers' successors whereby they transferred their purported interest in the stub trail to plaintiff, and plaintiff commenced this action against defendants seeking to quiet title to the portion of the stub trail that defendants claimed ownership of in the Boundary Agreement, i.e., the disputed property.

To establish a claim of adverse possession, a party is required to show that possession of the relevant property was: "(1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period" (*Walling v Przybylo*, 7 NY3d 228, 232 [2006]; *see Estate of Becker v Murtagh*, 19 NY3d 75, 81 [2012]; *Ray v Beacon Hudson Mtn. Corp.*, 88 NY2d 154, 159 [1996]; *Reardon v Broadwell*, 121 AD3d 1546, 1546 [4th Dept 2014]). " 'Reduced to its essentials, this means nothing more than that there must be possession in fact of a type that would give the owner a cause of action in ejectment against the occupier throughout the

prescriptive period' " (*Ray*, 88 NY2d at 159).

We agree with plaintiff that it met its initial burden on the cross motion of establishing as a matter of law that defendants' use of the disputed property was not hostile and instead was permissive (*see Diaz v Mai Jin Yang*, 148 AD3d 672, 674 [2d Dept 2017]; *Dekdebrun v Kane*, 82 AD3d 1644, 1646 [4th Dept 2011]; *Palumbo v Heumann*, 295 AD2d 935, 936 [4th Dept 2002]), and defendants failed to raise a triable issue of fact in opposition (*see Chaner v Calarco*, 77 AD3d 1217, 1218-1219 [3d Dept 2010], *lv denied* 16 NY3d 707 [2011]). The hostility element "is satisfied where an individual asserts a right to the property that is 'adverse to the title owner and also in opposition to the rights of the true owner' " (*Estate of Becker*, 19 NY3d at 81; *see Corigliano v Sunick*, 56 AD3d 1121, 1122 [4th Dept 2008]). " 'Possession is hostile when it constitutes an actual invasion of or infringement upon the owner's rights' " (*Corigliano*, 56 AD3d at 1122). However, "[w]hen the entry upon land has been by permission or under some right or authority derived from the owner, adverse possession does not commence until such permission or authority has been repudiated and renounced and the possessor thereafter has assumed the attitude of hostility to any right in the real owner" (*Hinkley v State of New York*, 234 NY 309, 316 [1922]; *see Dekdebrun*, 82 AD3d at 1646). "The purpose of the hostility requirement is to provide the title owner notice of the adverse claim through the 'unequivocal acts of the usurper' " (*Bratone v Conforti-Brown*, 150 AD3d 1068, 1070 [2d Dept 2017], *lv denied* 31 NY3d 902 [2018]).

The Strabel to Hillcrest deed demonstrated that defendants' use of the disputed property was permissive pursuant to the terms of that deed, which allowed property owners around Rushford Lake to use the stub trail at issue that was owned by Hillcrest. The acts of defendants in mowing the lawn, removing weeds, adding fill to the area, and planting trees were fully consistent with the intent of the Strabel to Hillcrest deed, which was to allow property owners to use the trails and stub trails and improve them when needed. The acts of defendants did not give Hillcrest a cause of action in ejectment inasmuch as Hillcrest was required under the terms of the deed to allow property owners such as defendants to use and maintain the trail (*see generally Ray*, 88 NY2d at 159).

We reject defendants' contention that their use of the disputed property was not permissive because the Strabel to Hillcrest deed allowed only back lot owners to use and maintain the stub trails, not lakefront owners such as defendants. As they note, the deed provides that "both the lake front property owners and those owners who do not have lake frontage property will equally co-operate in management and control and maintenance of the main trails which are used by and service the properties of both the lake front property owners and those not having lake frontage property; and that the termination of said trails, commonly known and designated as stubs, would be under the exclusive care and control of lot owners who do not have lake frontage property on Rushford Lake." It is clear from the overall

language of the Strabel to Hillcrest deed, however, that the trails and stub trails were to be used by property owners in the Rushford Lake subdivision, and defendants were undeniably property owners in the subdivision. Moreover, even assuming, arguendo, that Hillcrest knew that the stub trail at issue had been maintained by someone, we conclude that it was not on notice of an adverse claim (*see generally Bratone*, 150 AD3d at 1070).

Plaintiff also established that permission to use the disputed property was never repudiated or renounced (*see Palumbo*, 295 AD2d at 936). Defendants rely on the Boundary Agreement, but Hillcrest was never on notice of that agreement. The Boundary Agreement was not presented to Hillcrest, filed in Hillcrest's chain of title, or approved by a court. Filing the Boundary Agreement in defendants' chain of title did not give Hillcrest notice of the adverse claim to the disputed property. Inasmuch as defendants' use of the disputed property was permissive and not hostile, that defeats defendants' claim of adverse possession (*see generally Estate of Becker*, 19 NY3d at 81-82; *Corigliano*, 56 AD3d at 1122).

Entered: July 31, 2019

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 18-00738

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

IN THE MATTER OF LINDA MARTIN BARBER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BORGWARNER, INC., BORGWARNER MORSE TEC LLC,
AND YORK INTERNATIONAL CORPORATION,
RESPONDENTS-APPELLANTS.

GILBERT LLP, WASHINGTON, D.C. (MARK A. PACKMAN, OF THE DISTRICT OF COLUMBIA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND REED SMITH LLP, NEW YORK CITY, FOR RESPONDENTS-APPELLANTS.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), AND CLAUSEN MILLER, PC, CHICAGO, ILLINOIS, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered February 13, 2018. The order, inter alia, granted the petition to quash nonparty subpoenas and denied the cross motion of respondents to compel the deposition of petitioner.

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

Memorandum: Petitioner commenced this proceeding seeking to quash nonparty subpoenas served on her pursuant to CPLR 3119 by respondents, which are out-of-state corporations involved in pending litigation in Illinois against TIG Insurance Company (TIG). In the Illinois action, respondents seek recovery from TIG of defense costs they incurred in defending thousands of asbestos claims. TIG is the successor in interest to International Insurance Company (International), for which petitioner worked between 1994 and 1998. TIG contends in the Illinois action that it is not obligated to reimburse respondents for defense costs because it did not consent to such costs, as required by the relevant excess liability insurance policies that it issued to respondents. Supreme Court granted the petition and denied respondents' cross motion to compel petitioner to submit to a deposition. We now reverse.

"CPLR 3101 (a) (4) allows a party to obtain discovery from a nonparty, and provides that '[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof' " (*Snow v DePaul Adult Care*

Communities, Inc., 149 AD3d 1573, 1574 [4th Dept 2017]). The phrase "material and necessary" in CPLR 3101 "must 'be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity' " (*Matter of Kapon v Koch*, 23 NY3d 32, 38 [2014], quoting *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]).

"An application to quash a subpoena should be granted [o]nly where the futility of the process to uncover anything legitimate is inevitable or obvious . . . or where the information sought is utterly irrelevant to any proper inquiry" (*Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 331-332 [1988] [internal quotation marks omitted]), and the burden is on the party seeking to quash a subpoena to make such a showing (*see Matter of A'Hearn v Committee on Unlawful Practice of Law of N.Y. County Lawyers' Assn*., 23 NY2d 918, 918 [1969], *cert denied* 395 US 959 [1969]; *Snow*, 149 AD3d at 1574).

Here, petitioner, in support of her petition, asserted that her testimony is not material or necessary to the Illinois action because she has no personal knowledge of the underlying asbestos claims and no personal knowledge of the underlying policies or the insureds. "[A] witness's sworn denial of any relevant knowledge," however, is insufficient, standing alone, to establish that the discovery sought is utterly irrelevant to the action or that the subpoena, if honored, will obviously and inevitably fail to turn up relevant evidence (*Menkes v Beth Abraham Health Servs*., 120 AD3d 408, 409 [1st Dept 2014]). In any event, even if petitioner lacks personal knowledge of the underlying claims, policies or insureds, her deposition testimony is still potentially relevant because she has personal knowledge of how International interpreted and enforced similar "consent" provisions of other excess policies while she was employed by International. Indeed, she was the head of claims at International, handling claims made on excess liability insurance policies with respect to asbestos cases, among other things. We note that the court in the Illinois action has ruled that evidence relating to the "custom and practice" in the insurance industry of interpreting and enforcing consent provisions of excess policies is admissible at trial. The court rejected TIG's contention that the consent provisions are unambiguous and should be interpreted as written and that custom and practice evidence is inadmissible under the parol evidence rule.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

156

KA 17-00072

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CAMILLE MCCOY, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (JULIE BENDER FISKE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered November 16, 2016. The judgment convicted defendant, upon a nonjury verdict, of burglary in the first degree, criminal possession of a weapon in the third degree, criminal contempt in the first degree and menacing 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 on count one of the indictment to a determinate term of imprisonment of five years and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting her following a nonjury trial of, inter alia, burglary in the first degree (Penal Law § 140.30 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [1]), defendant contends that Supreme Court violated CPL 730.30 (4) when it failed to hold a hearing on the issue whether she was competent to stand trial. We reject that contention. Contrary to defendant's contention, despite a typographical error in one examiner's report, which was ultimately corrected, the psychiatric examiners were unanimous in their opinion regarding defendant's mental capacity. As a result, defendant was not entitled to a mandatory hearing pursuant to CPL 730.30 (4) (*cf. People v Pett*, 148 AD3d 1524, 1525 [4th Dept 2017]). Defendant further contends that the court was required to delay the grand jury proceedings until a determination of her mental capacity could be made. To the extent that defendant's contention may be construed as a contention that she was denied her right to testify before the grand jury, that contention was waived by her failure to move to dismiss the indictment on that ground within five days of her arraignment (*see* CPL 190.50 [5] [c]; *People v Mulcahy*, 155 AD3d 1594, 1595 [4th Dept 2017], *lv denied* 30 NY3d 1107 [2018]; *People v Kyle*, 56 AD3d 1203, 1203 [4th Dept 2008], *lv denied*

12 NY3d 785 [2009]).

In any event, defendant's contention lacks merit. "[I]nasmuch as it is the proper purpose of an indictment to bring a defendant to trial on a prima facie case, which, if unexplained, would warrant a conviction . . . , the People are justified in relying on the presumption of sanity" in presenting a case to the grand jury (*People v Lancaster*, 69 NY2d 20, 29-30 [1986], *cert denied* 480 US 922 [1987]). Moreover, "where the court has ordered a competency examination, CPL 730.40 (3) allows a grand jury to vote an indictment without hearing from a defendant who has requested to testify" (*People v Johnson*, 128 AD3d 412, 413 [1st Dept 2015], *lv denied* 27 NY3d 999 [2016]; *see People v Peterson*, 11 AD3d 336, 336-337 [1st Dept 2004], *lv denied* 4 NY3d 766 [2005]; *see generally Lancaster*, 69 NY2d at 30-31). We thus conclude that there was no error in permitting the grand jury to vote the indictment in this case without hearing from defendant and before all of the CPL 730.30 examination reports were received by the court.

We reject defendant's additional contention that the court erred in denying her requests to remove her third assigned attorney, which were made two weeks before trial, on the day the trial commenced and before sentencing. Considering "the timing of the . . . request[s], [their] effect on the progress of the case and whether [defense counsel] [would] likely provide . . . defendant with meaningful assistance" (*People v Linares*, 2 NY3d 507, 510 [2004]; *see People v Goossens*, 96 AD3d 1687, 1688 [4th Dept 2012], *lv denied* 19 NY3d 1102 [2012]), we conclude that the court's denial of defendant's requests "constituted a proper exercise of discretion" (*Linares*, 2 NY3d at 511) and did not deprive defendant of her right to counsel at any stage of the proceedings. Additionally, the court made "a sufficient inquiry into defendant's complaints . . . [,] 'repeatedly allowed defendant to air [her] concerns about defense counsel, and after listening to them reasonably concluded that defendant's vague and generic objections had no merit or substance' " (*People v Reese*, 23 AD3d 1034, 1035 [4th Dept 2005], *lv denied* 6 NY3d 779 [2006]; *see also People v Whitelow*, 2 AD3d 1393, 1393 [4th Dept 2003], *lv denied* 2 NY3d 748 [2004]).

With respect to defendant's contention that she did not validly waive the right to a jury trial, "[d]efendant did not challenge the adequacy of the allocution related to that waiver [and thus] failed to preserve for our review [her] challenge to the sufficiency of the court's inquiry" (*People v Hailey*, 128 AD3d 1415, 1415 [4th Dept 2015], *lv denied* 26 NY3d 929 [2015]; *see People v Adger*, 156 AD3d 1458, 1458 [4th Dept 2017], *lv denied* 31 NY3d 980 [2018], *reconsideration denied* 31 NY3d 1114 [2018]). Regardless, defendant's contention lacks merit inasmuch as she "waived [her] right to a jury trial in open court and in writing in accordance with the requirements of NY Constitution, art I, § 2 and CPL 320.10 (2) . . . , and the record establishes that defendant's waiver was knowing, voluntary and intelligent" (*People v Wegman*, 2 AD3d 1333, 1334 [4th Dept 2003], *lv denied* 2 NY3d 747 [2004]; *see generally People v Smith*, 6 NY3d 827, 828 [2006], *cert denied* 548 US 905 [2006]).

We conclude, however, that the 12-year term of incarceration imposed on the count of burglary in the first degree is unduly harsh and severe. Before indictment, defendant was offered the opportunity to plead to a charge for which probation was a sentencing option. After indictment, she was offered the opportunity to plead guilty to the charges with a sentence promise of five years. At the time of the latter offer, all of the relevant facts were known to the court, including those related to defendant's history of mental illness. The victims of the offenses were defendant's parents, and they opposed a lengthy prison sentence, contending that she needed treatment not incarceration. Indeed, defendant's mother stated at sentencing that her daughter needed mental health treatment and that "jail [was] not the answer."

Moreover, all of defendant's prior convictions, none of which were felonies, were committed within three years of these offenses and only after defendant began to suffer from significant mental health issues. Under the circumstances of this case, where no new facts were set forth during the nonjury trial and the victims were opposed to incarceration, we conclude that the sentence on the burglary count should be reduced to a determinate term of incarceration of five years, and we therefore modify the judgment accordingly. Inasmuch as defendant did not address the sentences imposed on the remaining counts, we likewise do not address them.

We note, however, that the certificate of conviction must be amended to reflect that the sentence imposed on the count of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]) was an indeterminate term of incarceration of 2⅓ to 7 years. In both the certificate of conviction and the original uniform sentence and commitment form, the term is stated to be 2½ to 7 years, which is an illegal sentence (*see* § 70.00 [2] [d]; [3] [b]). At sentencing, the court pronounced a sentence of 2⅓ to 7 years and, when alerted to the error on the sentence and commitment form, the court issued an amended uniform sentence and commitment form. It did not, however, issue an amended certificate of conviction. The certificate of conviction must therefore be amended accordingly (*see People v Correa*, 145 AD3d 1640, 1641 [4th Dept 2016]; *People v Owens*, 51 AD3d 1369, 1372-1373 [4th Dept 2008], *lv denied* 11 NY3d 740 [2008]; *cf. People v Fish*, 61 AD3d 1355, 1355 [4th Dept 2009], *lv denied* 12 NY3d 915 [2009]). In addition, the certificate of conviction erroneously states the year of conviction as 2017 instead of 2016. The certificate of conviction must also be amended to correct that clerical error.

Entered: July 31, 2019

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 18-01316

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

IN THE MATTER OF FRONTIER STONE, LLC, ZELAZNY FAMILY ENTERPRISES, LLC, JAMES J. ZELAZNY, ROBERT W. KWANDRANS, AND DAVID KRUG, PETITIONERS-PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF SHELBY, TOWN BOARD OF TOWN OF SHELBY, AND TOWN OF SHELBY PLANNING BOARD, RESPONDENTS-DEFENDANTS-RESPONDENTS.

BROWN DUKE & FOGEL, P.C., SYRACUSE (GREGORY M. BROWN OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (CHARLES W. MALCOMB OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Orleans County (Tracey A. Bannister, J.), entered February 8, 2018 in a CPLR article 78 proceeding and declaratory judgment action. The judgment dismissed the petition-complaint in its entirety.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reinstating the petition-complaint to the extent that it seeks a declaration and granting judgment in favor of respondents-defendants as follows:

> It is ADJUDGED AND DECLARED that Local Law No. 3 of 2017 of the Town of Shelby is valid,

and as modified the judgment is affirmed without costs.

Memorandum: Petitioners-plaintiffs (petitioners) commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, to declare invalid Local Law No. 3 of 2017 (2017 Law) of respondent-defendant Town of Shelby (Town), which created a wildlife refuge overlay district within the Town, and to annul the negative declaration issued by respondent-defendant Town Board of Town of Shelby (Town Board) under the State Environmental Quality Review Act ([SEQRA] ECL art 8) with respect to the 2017 Law. Respondents-defendants filed an answer seeking dismissal of the petition-complaint (petition). Following oral argument, Supreme Court dismissed the petition, and petitioners now appeal.

We note at the outset that, inasmuch as petitioners sought declaratory relief, the court erred in dismissing the petition without declaring the rights of the parties (*see generally Restuccio v City of Oswego*, 114 AD3d 1191, 1191 [4th Dept 2014]), and we therefore modify the judgment accordingly. We otherwise affirm.

In March 2006, petitioner-plaintiff Frontier Stone, LLC applied for a mining permit for a proposed stone quarry in an agricultural/residential (AR) zoning district in the Town. Shortly thereafter, the Town Board adopted a moratorium on processing special permit applications for mining and excavation projects. The Town Board then adopted Local Law No. 5 of 2007 (2007 Law), which effectively removed excavation and mining from the list of conditional uses in the Town's AR zoning district. The 2007 Law also provided that certain large mining operations could occur only: (1) in a newly formed mining/excavation (ME) overlay district; (2) with a special use permit; (3) within an industrial district; and (4) pursuant to an approved site plan.

Later, the Town Board proposed Local Law No. 2 of 2016 (2016 Law), which would create a wildlife refuge overlay district (overlay district) covering both the Iroquois National Wildlife Refuge (INWR) and a buffer area of nearby land that included the land on which the project site is located, and which would prohibit mining and excavation therein. The proposed 2016 Law was not adopted but, on June 19, 2017, the Town Board issued a negative declaration for a proposed new law, i.e., the 2017 Law. In issuing the negative declaration, the Town Board determined that the 2017 Law would not have a significant adverse environmental impact. The 2017 Law proposed to amend the 2016 Law "to limit the impact area necessary to protect the refuge by reducing the size of the buffer from 3000 to 2000 feet." The buffer area, however, still included the land on which the project site is located. The Town Board adopted the 2017 Law, which defined the overlay district as including the INWR and the reduced buffer area, and which prohibited mining within the overlay district.

Petitioners initially contend that the 2017 Law conflicts with the Town's comprehensive plan, and thus the Town Board lacked authority to adopt it. We reject that contention. " 'If the validity of the legislative classification for zoning purposes [is] fairly debatable, the legislative judgment must be allowed to control . . . Thus, where the [parties challenging the zoning classification] fail[] to establish a clear conflict with the comprehensive plan, the zoning classification must be upheld' " (*Matter of Ferraro v Town Bd. of Town of Amherst*, 79 AD3d 1691, 1694 [4th Dept 2010], *lv denied* 16 NY3d 711 [2011]; *see Restuccio*, 114 AD3d at 1191-1192; *Bergstol v Town of Monroe*, 15 AD3d 324, 325 [2d Dept 2005], *lv denied* 5 NY3d 701 [2005]). Here, the 2007 Law, which the parties agree was made part of the Town's comprehensive plan, effectively banned mining in the AR district in which the project site is located. Moreover, no industrial zones were present within the overlay district created by the 2017 Law. Thus, we conclude that petitioners failed to establish a clear conflict between the 2017 Law and the Town's comprehensive

plan.

Contrary to petitioners' further contention, we conclude that, in issuing its negative declaration, the Town Board properly "identified the relevant areas of environmental concern as related to the proposed action, took the requisite 'hard look' at them and . . . set forth a reasoned elaboration of the basis for its determination" (*Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 689-690 [1996]; *see Matter of Wells v Board of Trustees of Inc. Vil. of Northport*, 40 AD3d 652, 653 [2d Dept 2007]). In particular, the Town Board made specific findings about the need to preserve and protect the INWR and its unique wildlife habitat, and the Town Board clarified that the new overlay district would not authorize any development, but would rather restrict land uses to protect the environment. Moreover, the record reflects that the Town Board considered the potential effects of the 2017 Law and rationally concluded that the law would have no significant adverse environmental impacts. Although petitioners contend that the Town Board erred by failing to take into consideration the potential beneficial impact of their proposed quarry on water levels in the overlay district, especially in light of the presumed effects of climate change, we reject that contention. The Town Board had the discretion to select the environmental impacts most relevant to its determination and to overlook those "of doubtful relevance" (*Matter of Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d 297, 308 [2009]; *see Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986]; *Matter of Gabrielli v Town of New Paltz*, 116 AD3d 1315, 1318 [3d Dept 2014]).

We further reject petitioners' contention that the 2017 Law is preempted by the New York State Mined Land Reclamation Law ([MLRL] ECL 23-2701 *et seq.*). "[T]he MLRL does not preempt [a] [t]own's authority to determine that mining should not be a permitted use of land within the [t]own, and to enact amendments to the local zoning ordinance in accordance with that determination" (*Gernatt Asphalt Prods.*, 87 NY2d at 683). However, "[w]hile a locality retains general authority to regulate land use, and has the authority to determine that mining will not be a use within its confines, it may not regulate the specifics of the extractive mining or reclamation process" (*Philipstown Indus. Park v Town Bd. of Town of Philipstown*, 247 AD2d 525, 527-528 [2d Dept 1998]). Here, because the 2017 Law prohibits mining in a certain portion of the Town and does not affect the process or method of mining, it is not preempted by the MLRL.

Petitioners additionally contend that the Town's determination enacting the 2017 Law must be annulled because the Town failed to comply with lawful procedure. We reject that contention. Initially, inasmuch as the 2017 Law was enacted pursuant to the Municipal Home Rule Law, the procedural requirements of the Town Law do not apply to its enactment (*see Matter of Dalrymple Gravel & Contr. Co. v Town of Erwin*, 305 AD2d 1036, 1037 [4th Dept 2003]). Petitioners' contention that the Town's Zoning Code (Code) requires notice to adjoining counties was raised for the first time in their reply brief and is therefore not properly before us (*see O'Sullivan v O'Sullivan*, 206 AD2d 960, 960-961 [4th Dept 1994]). Furthermore, we conclude that,

under the circumstances, the Town Board satisfied the applicable requirements in the Municipal Home Rule Law and the Code regarding the holding of a public hearing and referral to respondent-defendant Town of Shelby Planning Board (Planning Board) (*see* Municipal Home Rule Law § 20 [5]; Code § 112 [C]) through the public hearing and Planning Board referral carried out in connection with the proposed 2016 Law (*see Gernatt Asphalt Prods.*, 87 NY2d at 678-679; *Matter of Benson Point Realty Corp. v Town of E. Hampton*, 62 AD3d 989, 991-992 [2d Dept 2009], *lv dismissed* 13 NY3d 788 [2009]). The changes between the proposed 2016 Law and the 2017 Law were minor and did not result in a substantially different law or one that was not "embraced within the [prior] public notice" (*Gernatt Asphalt Prods.*, 87 NY2d at 679; *see Lighthouse Shores v Town of Islip*, 41 NY2d 7, 10-11 [1976]; *Benson Point Realty Corp.*, 62 AD3d at 991; *Caruso v Town of Oyster Bay*, 250 AD2d 639, 640 [2d Dept 1998]; *cf. Matter of Calverton Manor, LLC v Town of Riverhead*, 160 AD3d 842, 844-845 [2d Dept 2018]), and the Planning Board was "clearly notified" of the effect of the proposed 2016 Law (*Gernatt Asphalt Prods.*, 87 NY2d at 680).

We have reviewed petitioners' remaining contentions and conclude that none requires further modification or reversal of the judgment.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

214

CA 18-01230

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

GREGORY L. PETERSON AND CYNTHIA H. PETERSON,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

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

MERLIN LAW GROUP, P.A., NEW YORK CITY (VERNE PEDRO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Chautauqua County (Frank A. Sedita, III, J.), entered August 31, 2017. The order granted the motion of defendant to strike the complaint and dismissed the action.

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

Memorandum: Gregory L. Peterson and Cynthia H. Peterson (Peterson plaintiffs) and Kathleen S. Durnell (collectively, plaintiffs) owned real property that was insured under policies issued by defendant. Plaintiffs, who were represented by the same attorney, commenced separate actions against defendant after defendant failed to satisfy their claims of property damage resulting from a hail storm. In appeal No. 1, the Peterson plaintiffs appeal from an order striking their complaint and dismissing the action due to the Peterson plaintiffs' failure to comply with discovery orders. In appeal No. 2, Durnell appeals from an order striking her complaint and dismissing the action due to Durnell's failure to comply with discovery orders. We affirm in both appeals.

The facts underlying both appeals are nearly identical. On September 30, 2016, defendant served upon plaintiffs discovery demands, including, inter alia, notices for discovery and inspection, interrogatories, demands for collateral sources, notices to permit entry on real property, demands for expert disclosure, and CPLR 3017 demands. Plaintiffs failed to timely respond to defendant's discovery demands. In November 2016, plaintiffs' attorney notified defendant that the delays in responding resulted from staffing issues, and in

November and again in December 2016, defendant extended plaintiffs' deadlines to respond to the demands by 30 days and 15 days, respectively. Plaintiffs, however, failed to respond.

In February 2017, defendant moved in each action to compel plaintiffs' discovery responses within 30 days. In orders dated April 10, 2017 Supreme Court granted defendant's motions and ordered plaintiffs to respond to defendant's discovery demands by May 31, 2017. On May 18, 2017, however, the court issued scheduling orders with a discovery deadline of July 16, 2017. Plaintiffs failed to respond to defendant's demands by either the May or July deadline. On July 18, 2017, plaintiffs' attorney emailed defendant partial responses, although defendant had not consented to receive discovery by email. The responses to the interrogatories were unsworn and incomplete, and plaintiffs failed to respond to, among other things, defendant's demands for collateral sources and expert disclosure. Thereafter defendant moved in each action to strike the complaint, and the court granted defendant's motions and dismissed the actions.

Initially, we note that, in each appeal, "[i]n the absence of any indication that defendant[was] misled or prejudiced, the notice of appeal is deemed amended to correct the name of appellant" from plaintiffs' attorney to the individual plaintiffs (*Texido v Waters of Orchard Park*, 300 AD2d 1150, 1150 [4th Dept 2002]; *see Woloszuk v Logan-Young*, 162 AD3d 1548, 1549 [4th Dept 2018]).

We reject plaintiffs' contentions in both appeals that the court abused its discretion in striking their respective complaints and dismissing the actions pursuant to CPLR 3126 (3). "It is well settled that [t]rial courts have broad discretion in supervising disclosure and, absent a clear abuse of that discretion, a trial court's exercise of such authority should not be disturbed" (*Hann v Black*, 96 AD3d 1503, 1504 [4th Dept 2012] [internal quotation marks omitted]; *see Allen v Wal-Mart Stores, Inc.*, 121 AD3d 1512, 1513 [4th Dept 2014]). "[T]he striking of a pleading is appropriate only where [the moving party establishes] that the failure to comply with discovery demands is willful, contumacious, or in bad faith" (*Hann*, 96 AD3d at 1504 [internal quotation marks omitted]). " 'Once a moving party establishes that the failure to comply with a disclosure order was willful, contumacious or in bad faith, the burden shifts to the nonmoving party to offer a reasonable excuse' " (*id.* at 1504-1505).

Here, the conclusion that plaintiffs' conduct was willful and contumacious can be inferred from their repeated failure to comply with the court's scheduling orders, defendant's demands for discovery, and the motions to compel, despite defendant's good faith extensions of time to respond to the demands (*see Getty v Zimmerman*, 37 AD3d 1095, 1096-1097 [4th Dept 2007]; *Kopin v Wal-Mart Stores*, 299 AD2d 937, 937-938 [4th Dept 2002]). Thus, in each action, defendant met its initial burden, and the burden shifted to plaintiffs to offer a reasonable excuse (*see Hill v Oberoi*, 13 AD3d 1095, 1096 [4th Dept 2004]).

Although in both actions plaintiffs' attorney offered the excuse of "staffing issues" in November 2016, this was the only excuse provided by plaintiffs. They failed to offer any excuse for their continued failure to respond during the ensuing eight months, despite repeated requests, deadlines imposed by the court, and a motion by defendant in each action. To the extent plaintiffs eventually responded in part to defendant's discovery demands, those responses were inadequate, inasmuch as the responses were untimely, incomplete (*see generally Hogan v Vandewater*, 104 AD3d 1164, 1165 [4th Dept 2013]), unsworn (*see generally* CPLR 3133 [b]; *Hogan*, 104 AD3d at 1165; *Kyung Soo Kim v Goldmine Realty, Inc.*, 73 AD3d 709, 710 [2d Dept 2010]), and improperly served (*see generally* CPLR 2103 [b] [7]; *Matter of Henry*, 159 AD3d 1393, 1394-1395 [4th Dept 2018]). Under these circumstances, we conclude that plaintiffs failed to meet their respective burdens. Thus, we conclude that the court did not abuse its discretion in granting the motions to strike the complaints and dismissing the actions.

We have considered plaintiffs' remaining contentions in both appeals and conclude that they lack merit.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

222

CA 18-01229

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

KATHLEEN S. DURNELL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

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

MERLIN LAW GROUP, P.A., NEW YORK CITY (VERNE PEDRO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Chautauqua County (Frank A. Sedita, III, J.), entered August 31, 2017. The order granted the motion of defendant to strike the complaint and dismissed the action.

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

Same memorandum as in *Peterson v New York Cent. Mut. Fire Ins. Co.* (— AD3d — [July 31, 2019] [4th Dept 2019]).

Entered: July 31, 2019

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 14-01254

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONNELL LLOYD, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY 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.), entered June 10, 2014. The order denied defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting defendant of murder in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals by permission of this Court pursuant to CPL 460.15 from an order denying his motion pursuant to CPL article 440 seeking to vacate the judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). The proof at trial included the testimony of defendant's neighbor who saw defendant shoot the victim twice at close range, testimony that another witness heard the shots and that the victim had implicated defendant as the shooter, and ballistics evidence linking the bullets that killed the victim with ammunition that was seized from defendant's residence as part of a parole search (*People v Lloyd*, 99 AD3d 1230, 1230-1231 [4th Dept 2012], *lv denied* 20 NY3d 1101 [2013]). Defendant moved to vacate the judgment of conviction on the ground that the evidence seized from his residence should have been suppressed because the term of postrelease supervision (PRS) that he was serving at the time of the parole search had been improperly imposed administratively by the state entity now known as the Department of Corrections and Community Supervision (DOCCS) after the sentencing judge on defendant's prior conviction failed to pronounce the PRS component of the sentence (*see* CPL 440.10 [1] [d]; *see generally Matter of Garner v New York State Dept. of Correctional Servs.*, 10 NY3d 358, 362-363 [2008]; *People v Sparber*, 10

NY3d 457, 469-470 [2008]). Defendant also sought vacatur on the ground that trial counsel was ineffective for failing to seek suppression on the abovementioned basis (*see* CPL 440.10 [1] [h]). Supreme Court denied the motion without a hearing upon concluding, in pertinent part, that application of the exclusionary rule was not justified in this case. We affirm.

It is well established that "[e]vidence that is obtained through illegal police action is not automatically subject to the exclusionary rule" (*People v Bradford*, 15 NY3d 329, 333 [2010]; *see e.g. People v Jones*, 2 NY3d 235, 241-242 [2004]; *People v Young*, 55 NY2d 419, 425 [1982], *cert denied* 459 US 848 [1982]). Indeed, the exclusionary rule—"a judicially created tool for the effectuation of constitutionally guaranteed rights . . . [f]ormulated as a pragmatic response to law enforcement procedures violative of individual liberties[—] . . . has never enjoyed the stature of an end in itself, but, rather, has served solely as a means to an end: a remedial device operating essentially upon a principle of deterrence" (*People v McGrath*, 46 NY2d 12, 20-21 [1978], *cert denied* 440 US 972 [1979]; *see Jones*, 2 NY3d at 241; *Young*, 55 NY2d at 425). The Court of Appeals has recognized that the deterrent purpose of the exclusionary rule is broader as a matter of state constitutional law than it is as a matter of federal constitutional law because, while "[t]he exclusionary rule 'was originally created to deter police unlawfulness by removing the incentive' to disregard the law, [it] also 'serves to insure that the State itself, and not just its police officers, respect the constitutional rights of the accused' " (*Jones*, 2 NY3d at 241, quoting *People v Payton*, 51 NY2d 169, 175 [1980]; *see generally People v P.J. Video*, 68 NY2d 296, 303-305 [1986], *cert denied* 479 US 1091 [1987]). Nonetheless, "the application of the rule must be restricted to those areas where its remedial objectives are most 'efficaciously served' and not merely 'tenuously demonstrable' " (*Young*, 55 NY2d at 425). "[I]t has always been incumbent upon the courts to balance the societal cost of losing reliable and competent evidence against the probable effectuation and enhancement of Fourth Amendment principles" and, consequently, "the application of the exclusionary rule is dependent 'upon a balancing of its probable deterrent effect against its detrimental impact upon the truth-finding process' " (*id.*, quoting *McGrath*, 46 NY2d at 21; *see Jones*, 2 NY3d at 241).

Here, although we agree with defendant that his constitutional rights were violated by the warrantless search of his residence when he was not validly subject to PRS (*see* US Const Fourth Amend; NY Const, art I, § 12), we nonetheless conclude that suppression of the seized evidence is not warranted because, even under the broader protection afforded as a matter of state constitutional law, the exclusionary rule does not apply under the circumstances of this case. The errors leading to the eventual constitutional violation were made by the sentencing judge, who initially failed to pronounce the PRS component of the sentence on defendant's prior conviction, and by the agency that administratively added and retained the PRS period against him, not by the parole officer who reasonably initiated and conducted, with the assistance of police officers, the search of defendant's residence that led to the discovery of ammunition linking defendant to

the shooting (*Lloyd*, 99 AD3d at 1230-1231). Thus, the improper conduct sought to be deterred by application of the exclusionary rule in this case is the unauthorized administrative imposition of PRS by a state entity rather than a sentencing judge. In that regard, defendant contends that the state criminal justice system disregarded the Second Circuit's decision in *Earley v Murray* (451 F3d 71 [2d Cir 2006]), which held that the administrative imposition of PRS is unconstitutional (*see id.* at 74-76), and he contends that application of the exclusionary rule here is necessary to deter similar "misconduct" in the future. We reject that contention.

First, when the parole search took place, in 2007, the issue whether it is proper for the state to administratively impose PRS had not yet been settled (*see Garner*, 10 NY3d at 362-363; *Sparber*, 10 NY3d at 469-470; *Moulton v State of New York*, 114 AD3d 115, 117-118 [3d Dept 2013]; *Nazario v State of New York*, 75 AD3d 715, 717 [3d Dept 2010], *lv denied* 15 NY3d 712 [2010]; *see also Donald v State of New York*, 17 NY3d 389, 395-396 [2011]; *Collins v State of New York*, 69 AD3d 46, 51-52 [4th Dept 2009]). Second, and more importantly, it is now settled as a matter of state statutory law that only a court may lawfully pronounce a term of PRS as a component of a sentence (*see Garner*, 10 NY3d at 362-363; *Sparber*, 10 NY3d at 469-470; *cf. Earley*, 451 F3d at 74-76; *see also* CPL 380.20, 380.40 [1]; Penal Law § 70.45 [1]) and, consequently, all the relevant government actors are now well aware of the law. Under the circumstances, the deterrent effect of applying the exclusionary rule is marginal or nonexistent inasmuch as there is little or no danger that DOCCS or other non-court entities will hereafter sua sponte impose an unpronounced term of PRS on an inmate that might facilitate a subsequent warrantless search of the inmate after being released to the purported term of PRS. In other words, the purpose of the exclusionary rule would not be frustrated in this case because allowing the People to use the seized evidence would not place "a premium . . . on the illegal police action" or create "a positive incentive . . . to others to engage in similar lawless acts in the future" (*People v Bigelow*, 66 NY2d 417, 427 [1985]). After all, "[t]he underlying purpose of the exclusionary rule is not to redress the injury to the accused's privacy for that privacy once invaded, may never be restored[; r]ather, the rule's primary objective is to deter future unlawful police conduct" (*Young*, 55 NY2d at 424), and its broader objective is "to insure that the State itself . . . respect[s] the constitutional rights of the accused" (*Payton*, 51 NY2d at 175), "thereby effectuat[ing] the Fourth Amendment's proscription against unreasonable searches and seizures" (*Young*, 55 NY2d at 424). We conclude that the marginal deterrent effect, if any, that application of the exclusionary rule may have in this case by discouraging future administrative errors in imposing PRS that subsequently result in constitutional violations is insufficient to justify its use when balanced against the "heavy price [extracted] by encroaching upon the public interest in prosecuting persons accused of criminal activity and having their guilt or innocence determined on the basis of all the evidence which exposes the truth" (*People v Arnau*, 58 NY2d 27, 32 [1982], *cert denied* 468 US 1217 [1984]).

We further note that our affirmance of the order on the

abovementioned ground does not violate CPL 470.15 (1). Although we agree with defendant that the court's reference to the good faith of the police officers in conducting its analysis was misplaced inasmuch as the Court of Appeals has declined to adopt the good-faith exception to the exclusionary rule (*see Bigelow*, 66 NY2d at 426-427; *see also P.J. Video*, 68 NY2d at 305), the court also concluded more broadly that the deterrent effect of the exclusionary rule did not justify its application in this case. Our determination affirming the order on the ground that the exclusionary rule does not apply here even in light of the conception of deterrence as a matter of state constitutional law, and without reliance on any good faith of the police officers, does not constitute "the type of appellate overreaching prohibited by CPL 470.15 (1)" because such affirmance is not "on grounds explicitly different from those of the trial court, or on grounds that were clearly resolved in a defendant's favor" (*People v Nicholson*, 26 NY3d 813, 826 [2016]; *see People v Garrett*, 23 NY3d 878, 885 n 2 [2014], *rearg denied* 25 NY3d 1215 [2015]).

Finally, we conclude that the court properly rejected defendant's contention that he was denied effective assistance of counsel inasmuch as trial counsel could have legitimately concluded that seeking suppression on the abovementioned ground would have " 'little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005]).

Entered: July 31, 2019

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 18-01062

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

STACHE INVESTMENTS CORPORATION,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LEONARD J. CIOLEK, DEFENDANT-APPELLANT.

JOSEPH G. MAKOWSKI, LLC, BUFFALO (JOSEPH G. MAKOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (DAVID J. RUDROFF OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Henry J. Nowak, Jr., J.), entered April 19, 2018. The judgment awarded plaintiff money damages.

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

Memorandum: Defendant appeals from a statement for judgment awarding plaintiff damages in the amount of $524,617.31, which was the balance due on a promissory note executed by the parties. Upon our review of the judgment, we conclude that Supreme Court erred in granting plaintiff's motion for summary judgment in lieu of complaint pursuant to CPLR 3213, and we therefore reverse and, in accordance with CPLR 3213, "the moving and answering papers shall be deemed the complaint and answer, respectively."

Plaintiff met its initial burden on the motion by submitting the promissory note, which had extended a line of credit to defendant in an amount up to $600,000.00; a pledge and security agreement (pledge), which provided, inter alia, security for the payment and performance of defendant's obligations under the note; and evidence of defendant's default (*see Birjukow v Niagara Coating Servs., Inc.*, 165 AD3d 1586, 1586-1587 [4th Dept 2018]; *Sandu v Sandu*, 94 AD3d 1545, 1546 [4th Dept 2012]). In opposition to the motion, however, defendant raised a triable issue of fact by submitting evidence of a " 'bona fide defense of the note,' " i.e., a mutual mistake (*Sandu*, 94 AD3d at 1546).

It is well established that, "[w]here a written agreement between sophisticated, counseled business[persons] is unambiguous on its face, one party cannot defeat summary judgment by a conclusory assertion that, owing to mutual mistake . . . , the writing did not express his

[or her] own understanding of the oral agreement reached during negotiations" (*Chimart Assoc. v Paul*, 66 NY2d 570, 571 [1986]). "In the proper circumstances, mutual mistake . . . may furnish the basis for reforming a written agreement . . . In a case of mutual mistake, the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement" (*id.* at 573). Stated differently, "[w]hen an error is not in the agreement itself, but in the instrument that embodies the agreement, equity will interfere to compel the parties to execute the agreement which they have actually made, rather than enforce the instrument in its mistaken form" (*EGW Temporaries, Inc. v RLI Ins. Co.*, 83 AD3d 1481, 1482 [4th Dept 2011] [internal quotation marks omitted]). "Because the thrust of a reformation claim is that a writing does not set forth the actual agreement of the parties, generally . . . the parol evidence rule . . . [does not] appl[y] to bar proof, in the form of parol or extrinsic evidence, of the claimed agreement" (*Chimart Assoc.*, 66 NY2d at 573). Nevertheless, "there is a 'heavy presumption that a deliberately prepared and executed written instrument manifest[s] the true intention of the parties' . . . and a correspondingly high order of evidence is required to overcome that presumption" (*id*. at 574). "The proponent of reformation must 'show in no uncertain terms, not only that mistake . . . exists, but exactly what was really agreed upon between the parties' " (*id*.).

Here, in opposition to the motion, defendant submitted the affidavit of the former chief investment officer (CIO) of plaintiff, who was "responsible for making investment decisions [for plaintiff], which included negotiating and entering into a loan transaction in February 2014 with [defendant]." In his affidavit, the CIO stated that he and defendant "discussed and agreed" that plaintiff's right to secure repayment of the loan would be limited to defendant's stock interest in a certain corporation. In other words, the parties intended to create a "non-recourse" loan and under no circumstances was it the intention of the CIO or plaintiff to require defendant to personally repay the note independent of his stock interest. Defendant also submitted his own affidavit, in which he stated nearly the same understanding of the agreement as that of the CIO. Despite the mutual understanding between the CIO and defendant, the plain and unambiguous language of the note and pledge do not support defendant's non-recourse, i.e., sole remedy, understanding of the agreement.

Unlike in *Chimart Assoc.*, defendant here set forth, in detail, the basis for his contention that both parties reached an agreement different from that set forth in the note. The affidavits of the CIO and defendant contain the identical assertion that both parties—plaintiff via the CIO and defendant—agreed that plaintiff's right to secure repayment of the loan would be limited to defendant's stock interest (*cf. id.* at 574-575). The affidavits of the CIO and defendant are based upon personal knowledge and state in detail their understanding of the negotiations and the resulting agreement. Moreover, the CIO averred that he negotiated the loan on behalf of plaintiff at the time he was its chief investment officer, and he concluded that the terms of the note did not reflect what the parties had intended. Thus, in opposition to plaintiff's motion, we conclude

that defendant submitted the requisite "high level" of proof required to raise a triable issue of fact regarding mutual mistake.

We respectfully disagree with our dissenting colleague and her suggestion that the affidavits of the CIO and defendant were unsubstantiated. Documentary evidence is not required. Rather, as noted, defendant was required to submit "a 'high level' of proof in evidentiary form" that raised a triable issue of fact (*id.* at 574), which defendant did here. Nor do we agree that the affidavit of the CIO is inconsistent. " 'It is . . . well established that [a summary judgment] motion should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility' " (*Katz v Beil*, 142 AD3d 957, 964 [2d Dept 2016]; *see Meyer v University Radiology*, 133 AD3d 1307, 1308 [4th Dept 2015]). At best, the fact that the CIO may not have read the note, or after reading it failed to object, raises an issue of fact whether he diligently performed his duties as plaintiff's chief investment officer. It does not, however, make his position inconsistent. The CIO very clearly and consistently stated that, "[i]n entering into the loan transaction in February 2014, [he] and [defendant] discussed and agreed that [plaintiff's] right to secure repayment of the loan would come solely from [defendant's] 20% stock interest in [the relevant corporation] by the reduction of his share interest in the company . . . The loan by [plaintiff] to [defendant] was a non-recourse loan . . . [Plaintiff] could only look to [defendant's] 20% ownership interest in [the corporation] to repay the [note]." Lastly, the court and our dissenting colleague list several points that were not addressed in the affidavits of either the CIO or defendant. "Issue finding rather than issue determination is the function of the court on a motion for summary judgment" (*Powell v Tarantino Foods*, 234 AD2d 989, 989 [4th Dept 1996]). Similarly, it is not the function of the court to determine what could have or should have been provided to raise a triable issue of fact. Instead, it is the function of the court to determine whether what has been provided is sufficient to raise a triable issue of fact.

All concur except PERADOTTO, J.P., who dissents and votes to affirm in the following memorandum: I respectfully dissent because I cannot agree with the majority's conclusion that defendant's submissions in opposition are sufficient to defeat plaintiff's motion for summary judgment. I would therefore affirm.

Defendant entered into a line of credit note (note) whereby plaintiff extended $600,000 in credit to defendant and defendant thereafter borrowed just over $518,000 for the construction of a residential home. In addition to the note, defendant also executed a pledge and security agreement (pledge), in which he pledged as collateral for the line of credit his shares of stock in a corporation. The plain language of the note and the pledge (collectively, agreement) unambiguously provided that, upon default, the outstanding principal and accrued interest together with any additional amounts payable could be accelerated and become immediately due and payable at plaintiff's option, that plaintiff could exercise any of the rights and remedies under the agreement or applicable law,

and that plaintiff's rights and remedies were cumulative and not exclusive of any others under the agreement or applicable law.

Defendant defaulted on a debt of principal and accrued interest totaling over $524,000. After defendant failed to comply with a demand for payment made a few years later, plaintiff moved for summary judgment in lieu of complaint pursuant to CPLR 3213 seeking judgment totaling approximately $607,000, i.e., the principal with additional accrued interest. It is undisputed that plaintiff met its initial burden on the motion.

In opposition, defendant contended that there was a mutual mistake present in the agreement, namely, that both parties had intended the agreement to constitute a "non-recourse" loan in which plaintiff's remedy for collecting on the note would be limited solely to "the valuation and appropriate reduction" of defendant's relevant stock ownership, and that under no circumstances was the intention to allow plaintiff to seek repayment from defendant personally independent of his stock ownership. Defendant submitted his own affidavit, which was materially the same as the affidavit he submitted from plaintiff's former chief investment officer (CIO). The CIO averred that, during his former employment, he was "responsible for making investment decisions for [plaintiff], which included negotiating and entering into [the subject] loan transaction." According to the CIO, he and defendant discussed and agreed that plaintiff's right to secure repayment of the loan would be limited to defendant's stock interest in the corporation. The agreement constituted a non-recourse loan in which plaintiff could use defendant's stock ownership to repay the note or, alternatively, defendant could pay the note when due in order to preserve his stock ownership. The CIO averred that he stated as much to defendant and that under no circumstances was it his or plaintiff's intention to require defendant to personally repay the note independent of his stock interest. The CIO further averred that, "[i]n connection with the loan, at [his] request [plaintiff's] outside legal counsel . . . drafted the loan documents." The CIO concluded that, "[t]o the extent that [plaintiff] maintains in this action that the [n]ote provides that [plaintiff's] right to repayment of the loan was not limited solely to the reduction of [defendant's] shares . . . , this was a mistake in drafting by [plaintiff's] outside counsel."

Supreme Court granted plaintiff's motion upon determining in its written decision that defendant's submissions were insufficient in several respects.

"Where a written agreement between sophisticated, counseled business[persons] is unambiguous on its face, one party cannot defeat summary judgment by a conclusory assertion that, owing to mutual mistake or fraud, the writing did not express his [or her] own understanding of the oral agreement reached during negotiations" (*Chimart Assoc. v Paul*, 66 NY2d 570, 571 [1986]). "[T]here is a 'heavy presumption that a deliberately prepared and executed written instrument manifest[s] the true intention of the parties' . . . , and a correspondingly high order of evidence is required to overcome that

presumption" (*id.* at 574). Thus, "a party resisting pretrial dismissal of a reformation claim [must] tender a 'high level' of proof in evidentiary form" (*id.*). Evidence that "is conclusory, unsubstantiated, and internally inconsistent in a manner that appears 'designed to raise feigned factual issues in an effort to avoid the consequences' of [an] otherwise valid motion for summary judgment" is insufficient to raise a triable issue of fact (*Birjukow v Niagara Coating Servs., Inc.*, 165 AD3d 1586, 1587 [4th Dept 2018]).

I agree with plaintiff for the reasons that follow that, contrary to the majority's conclusion, the court properly determined that defendant's submissions in opposition fall short of the requisite high level of proof needed to defeat plaintiff's motion.

First, the CIO's affidavit is inconsistent. The CIO asserted that he was "responsible for . . . negotiating and entering into [the subject] loan transaction" and had the agreement drafted by outside counsel "at [his] request," but that the agreement did not reflect his intentions. Thus, either the CIO failed to read the agreement drafted at his request by outside counsel, which is inconsistent with his claimed responsibilities of negotiating and entering into the transaction, or he read the agreement and did not object thereto upon determining that the unambiguous language reflected his intentions, which is inconsistent with the representations he now claims to have made to defendant.

Second, the affidavits are unsubstantiated. As the court observed, neither the CIO nor defendant submitted any documentary evidence to substantiate their purported intention to limit plaintiff's remedies (*see Bell v Marine Midland Banks*, 230 AD2d 758, 759 [2d Dept 1996], *lv denied* 89 NY2d 808 [1997]). Thus, the affidavits provide little more than vague and unsubstantiated allegations regarding terms that are different than those reflected in the unambiguous, plain language of the agreement (*see South Fork Broadcasting Corp. v Fenton*, 141 AD2d 312, 314 [1st Dept 1988], *lv dismissed* 73 NY2d 809 [1988]).

Third, the affidavits do not attempt to explain the abovementioned inconsistencies and are conclusory with respect to how the alleged mutual mistake supposedly arose. As the court properly noted, the CIO did not specify what instructions he provided to outside counsel regarding the drafting of the agreement, the CIO and defendant did not explain how the drafted agreement excluded the allegedly agreed-upon limitation of plaintiff's remedies, they did not address whether they read the agreement when they received it from outside counsel, and they did not explain how they missed such a significant change from their alleged intentions if they had read the agreement. Nor did the affidavits explain how the purported mutual mistake went undiscovered until after the default and the commencement of litigation. Instead, the CIO and defendant set forth unsubstantiated allegations of prior communications between them and then concluded, without any further explanation, that the agreement reflected a mistake in drafting by outside counsel. I note also that, contrary to defendant's contention, the observations by the court with

respect to the affidavits do not constitute improper credibility determinations; rather, by evaluating what was included in and excluded from the affidavits, the court properly performed its function on a summary judgment motion to determine whether there was sufficient proof in evidentiary form to raise a triable issue of fact (*see generally Montas v JJC Constr. Corp.*, 92 AD3d 559, 560 [1st Dept 2012], *affd* 20 NY3d 1016 [2013]).

Finally, although the CIO's employment as an officer of plaintiff who purportedly negotiated and entered into the agreement may factually distinguish this case from those involving a mere unilateral mistake, his former position with plaintiff does not remedy any of the abovementioned substantive deficiencies in his affidavit, which is "conclusory, unsubstantiated, and internally inconsistent in a manner that appears 'designed to raise feigned factual issues in an effort to avoid the consequences' of [an] otherwise valid motion for summary judgment" (*Birjukow*, 165 AD3d at 1587). By accepting the affidavits submitted in opposition to the motion here as sufficient to raise an issue of fact, the majority dilutes the "high order of evidence" required to overcome the " 'heavy presumption that a deliberately prepared and executed written instrument manifest[s] the true intention of the parties' " (*Chimart Assoc.*, 66 NY2d at 574).

Entered: July 31, 2019

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 17-02113

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON SLISHEVSKY, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Onondaga County Court (Gordon J. Cuffy, A.J.), dated September 22, 2017. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.). Defendant failed to preserve for our review his contention that County Court's acceptance of his waiver of appearance constituted a violation of due process (*see People v Poleun*, 119 AD3d 1378, 1378-1379 [4th Dept 2014], *affd* 26 NY3d 973 [2015]; *People v Wall*, 112 AD3d 900, 901 [2d Dept 2013]).

Contrary to defendant's further contention, the court properly assessed 15 points under risk factor 11 for a history of alcohol abuse. Defendant's preplea investigation report and case summary both indicate that he has a history of alcohol abuse, and the case summary reflects defendant's admission that he has abused alcohol. The case summary additionally states that defendant was convicted of driving while intoxicated in 1987 and 2006; that New York State Department of Corrections and Community Supervision testing placed him in the "alcoholic" range; and that he completed Alcohol and Substance Abuse Treatment (*see People v Leeson*, 148 AD3d 1677, 1678 [4th Dept 2017], *lv denied* 29 NY3d 912 [2017]; *People v Glanowski*, 140 AD3d 1625, 1626 [4th Dept 2016], *lv denied* 28 NY3d 902 [2016]). Contrary to defendant's contention, "[t]he fact that alcohol was not a factor in the underlying offense is not dispositive inasmuch as the [SORA 2006 Risk Assessment Guidelines and Commentary] provide that [a]n offender need not be abusing alcohol or drugs at the time of the instant

offense to receive points in this category" (*People v Cathy*, 134 AD3d 1579, 1579 [4th Dept 2015] [internal quotation marks omitted]). Moreover, defendant's purported abstinence while incarcerated "is not necessarily predictive of his behavior when [he is] no longer under such supervision" (*People v Jackson*, 134 AD3d 1580, 1581 [4th Dept 2015] [internal quotation marks omitted]).

We reject defendant's contention that the court abused its discretion in denying his request for a downward departure from the presumptive level three risk. "A defendant seeking a downward departure has the initial burden of . . . identifying, as a matter of law, an appropriate mitigating factor, namely, a factor which tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the risk assessment guidelines" (*People v Collette*, 142 AD3d 1300, 1301 [4th Dept 2016], *lv denied* 28 NY3d 912 [2017] [internal quotation marks omitted]; *see People v Gillotti*, 23 NY3d 841, 861 [2014]), and defendant failed to make that showing (*see Collette*, 142 AD3d at 1301). We have considered defendant's remaining contention and conclude that it does not warrant modification or reversal of the order.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

310

CA 18-02007

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

MICHEL SAVOIE AND JENNIFER SAVOIE,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

PAUL C. GIGLIOTTI, JOHN A. MARTINO, TREBROS INC.,
AND TREBROS INC., DOING BUSINESS AS MISTER B'S
RESTAURANT & TAVERN, DEFENDANTS-RESPONDENTS.

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

WALSH, ROBERTS & GRACE LLP, BUFFALO (MARK P. DELLA POSTA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS PAUL C. GIGLIOTTI AND JOHN A. MARTINO.

THERESA L. PREZIOSO, PLLC, NIAGARA FALLS (THERESA L. PREZIOSO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS TREBROS INC. AND TREBROS INC., DOING BUSINESS AS MISTER B'S RESTAURANT & TAVERN.

Appeal from an order of the Supreme Court, Niagara County (Daniel Furlong, J.), entered April 24, 2018. The order granted the motions of defendants for summary judgment dismissing the complaint.

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

Memorandum: Supreme Court properly granted defendants' respective motions for summary judgment dismissing the complaint against them in this negligence action, which stems from plaintiff Michel Savoie's fall down a staircase at defendants' restaurant. Defendants demonstrated their prima facie entitlement to judgment as a matter of law by showing that they maintained the subject staircase and surrounding area in a reasonably safe condition, and plaintiffs failed to raise a triable issue of fact in opposition (*see Oehler v Diocese of Buffalo*, 277 AD2d 967, 968 [4th Dept 2000]). Because the staircase and its environs were reasonably safe, defendants had no duty to warn upon which liability could be predicated (*see Plis v North Bay Cadillac*, 5 AD3d 578, 578 [2d Dept 2004]; *see generally Christmann v Murphy*, 226 AD2d 1069, 1070 [4th Dept 1996], *lv denied* 89 NY2d 801 [1996]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

324

CA 18-01246

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

IN THE MATTER OF KEVIN JANIGA, MARSHA JANIGA, JASON WIEPERT, LYNDSAY ROMANCHAUK, JEFF WESLEY AND CHRIS WESLEY, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF WEST SENECA ZONING BOARD OF APPEALS, MARRANO/MARC EQUITY, INC., NICK CROGLIO AND VINCENT CROGLIO, RESPONDENTS-RESPONDENTS.

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

JOHN J. FENZ, TOWN ATTORNEY, WEST SENECA, FOR RESPONDENT-RESPONDENT TOWN OF WEST SENECA ZONING BOARD OF APPEALS.

COLUCCI & GALLAHER, P.C., BUFFALO (MARC S. SMITH OF COUNSEL), FOR RESPONDENT-RESPONDENT MARRANO/MARC EQUITY, INC.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (FRANK J. JACOBSON OF COUNSEL), FOR RESPONDENTS-RESPONDENTS NICK CROGLIO AND VINCENT CROGLIO.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered December 18, 2017 in a proceeding pursuant to CPLR article 78. The judgment, among other things, granted the motions of respondents to dismiss the petition.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking to annul a determination of respondent Town of West Seneca Zoning Board of Appeals (ZBA), which interpreted the meaning of a required "buffer" area between petitioners' properties and a proposed subdivision adjoining them. Respondents Nick Croglio and Vincent Croglio moved to dismiss the petition against them on the grounds that petitioners failed to timely serve them with the notice of petition and the petition and also failed to join, as a necessary party, LNC Properties, LLC (LNC), which owned the subdivision at the time of the ZBA's determination. The ZBA and respondent Marrano/Marc Equity, Inc. (Marrano) each moved to dismiss the petition against them on the ground that petitioners failed to timely serve them with the notice of petition and the petition. Petitioners cross-moved for,

inter alia, an extension of time to serve the ZBA, Marrano, and Nick Croglio and leave to file and serve an amended petition to join LNC as a respondent. Supreme Court denied petitioners' cross motion and granted respondents' respective motions to dismiss the petition, and petitioners appeal. As a preliminary matter, we note the court's failure to set forth its reasons for granting respondents' motions and denying petitioners' cross motion (*see generally O'Hara v Holiday Farm*, 147 AD3d 1454, 1454 [4th Dept 2017]).

As petitioners correctly concede, the ZBA, Marrano, and Nick Croglio were not timely served pursuant to CPLR 306-b, and we reject petitioners' contention that they demonstrated that the time for service should be extended for good cause shown or in the interest of justice. To establish good cause, " 'reasonable diligence in attempting service must be shown' " (*Hourie v North Shore-Long Is. Jewish Health Sys., Inc.-Lenox Hill Hosp.*, 150 AD3d 707, 708 [2d Dept 2017]; *see Vanyo v Buffalo Police Benevolent Assn., Inc .*, 159 AD3d 1448, 1449 [4th Dept 2018]; *Swaggard v Dagonese*, 132 AD3d 1395, 1396 [4th Dept 2015]). Here, petitioners failed to show that any attempt to serve the ZBA, Marrano, or Nick Croglio was made during the applicable statutory period (*see Valentin v Zaltsman*, 39 AD3d 852, 852 [2d Dept 2007]).

" '[T]he interest of justice standard . . . [is] a separate, broader and more flexible provision' " (*Moss v Bathurst*, 87 AD3d 1373, 1374 [4th Dept 2011]) that permits the court to take into account "diligence, or lack thereof, along with any other relevant factor . . . , including expiration of the [s]tatute of [l]imitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of [the petitioners'] request for the extension of time, and prejudice to [the respondents]" (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105-106 [2001]; *see Swaggard*, 132 AD3d at 1396). We note that petitioners here did not seek an extension until more than four months after the expiration of the service period and nearly three months after respondents moved to dismiss the petition. In addition, the statute of limitations had expired, and petitioners failed to demonstrate the meritorious nature of their claim. Those factors, considered as a whole, weigh against extending petitioners' time for service in the interest of justice. Thus, we conclude that the court properly denied the cross motion and granted the motions insofar as they sought dismissal of the petition as against the ZBA, Marrano, and Nick Croglio on the ground that they were not timely served.

Furthermore, inasmuch as the CPLR article 78 proceeding no longer includes the "body or officer" having made the determination sought to be annulled, the petition must be dismissed in its entirety (CPLR 7802 [a]; *see Matter of Emmett v Town of Edmeston*, 3 AD3d 816, 818 [3d Dept 2004], *affd* 2 NY3d 817 [2004]; *Matter of Tecler v Lake George Park Commn.*, 261 AD2d 690, 691 [3d Dept 1999], *lv denied* 94 NY2d 751 [1999]; *see generally* CPLR 7802, 7803).

Finally, the issues whether LNC is a necessary party or united in interest with Nick Croglio are rendered academic by the dismissal of

the petition.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

339

KA 16-01980

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TORRENCE JACKSON, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered August 9, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree and resisting arrest.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]). On appeal, defendant contends that Supreme Court erred in refusing to suppress the drugs found on his person during a search incident to an arrest for unlawful imprisonment. We affirm.

Contrary to defendant's contention, the conduct reported by an identified citizen to his wife via text message, which the wife in turn reported to police, supplied probable cause to believe that defendant—who matched the perpetrator's description and was found driving a vehicle matching the wife's description in the very circumstances alleged by her husband—had committed, at a minimum, unlawful imprisonment in the second degree (Penal Law § 135.05; *see e.g. People v Spaulding*, 271 AD2d 463, 463-464 [2d Dept 2000], *lv denied* 95 NY2d 858 [2000]; *People v Guo Fai Liu*, 271 AD2d 695, 696 [2d Dept 2000], *lv denied* 95 NY2d 866 [2000]). The record belies defendant's assertion that "[t]here was no way for the court below to determine what information [the husband] provided based on circumstances personally observed and whether [the wife] supplemented those facts [in her 911 call]." We reject defendant's contention that the People were obligated to introduce the text messages and 911 recording at the suppression hearing in order to establish probable cause for defendant's arrest (*see People v Parris*, 83 NY2d 342,

345-349 [1994]; *People v Petralia*, 62 NY2d 47, 51-52 [1984], *cert denied* 469 US 852 [1984]).

Contrary to defendant's further contention, the husband's basis of knowledge was adequately established for purposes of the *Aguilar-Spinelli* test (*see People v Myhand*, 120 AD3d 970, 974 [4th Dept 2014], *lv denied* 25 NY3d 952 [2015]; *People v Holmes*, 115 AD3d 1179, 1180-1181 [4th Dept 2014], *lv denied* 23 NY3d 1038 [2014]). Finally, contrary to defendant's contention, because the wife, as an identified citizen, was a reliable source for relaying her husband's first-hand observations of defendant's conduct (*see generally Parris*, 83 NY2d at 349-350), the extent to which those observations were corroborated by the police before the arrest is irrelevant to the *Aguilar-Spinelli* analysis (*see People v Read*, 74 AD3d 1245, 1246 [2d Dept 2010]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

346

CA 18-01188

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

JAMES HATCH AND PATRICIA HATCH,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ST. JOSEPH'S HOSPITAL HEALTH CENTER,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

SIDNEY P. COMINSKY, LLC, SYRACUSE (SIDNEY P. COMINSKY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GALE GALE & HUNT, LLC, SYRACUSE (MAX D. GALE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered April 26, 2018. The order granted the motion of defendant St. Joseph's Hospital Health Center for summary judgment and dismissed the amended complaint against it.

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

Memorandum: Plaintiffs commenced this medical malpractice action seeking damages for injuries that James Hatch (plaintiff) sustained after undergoing an attempted lumbar fusion surgery at defendant St. Joseph's Hospital Health Center (hospital). The vascular portion of the surgery was performed primarily by defendant J. Timothy Riley, M.D., who was assisted by a vascular surgical resident, who is not a party to this action, and a second vascular surgeon, defendant Robert E. Carlin, M.D. It is undisputed that, early in the surgery, Riley encountered difficulties with plaintiff's iliac veins, which began to bleed profusely, and that attempts to repair the veins led to additional tearing and blood loss. Plaintiff spent several months in the hospital undergoing a lengthy recovery process, and plaintiffs thereafter commenced this action seeking damages for the alleged medical malpractice of defendants. The hospital and Carlin moved separately for summary judgment dismissing the amended complaint against them. In appeal No. 1, plaintiffs appeal from an order granting the hospital's motion, and we affirm. In appeal No. 2, plaintiffs appeal from an order granting Carlin's motion, and we modify the order, deny Carlin's motion in part, and reinstate the second and seventh causes of action against him.

We note at the outset that plaintiffs do not challenge in either appeal the dismissal of their first cause of action against the hospital and Carlin, for lack of informed consent, and they are therefore deemed to have abandoned any contention with respect thereto (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

In appeal No. 1, we conclude that the hospital met its initial burden on its motion by establishing that the resident–whom the hospital had agreed to defend, indemnify, and hold harmless for any negligence claims–did not exercise independent medical judgment during the surgery. It is well settled that a "resident who assists a doctor during a medical procedure, and who does not exercise any independent medical judgment, cannot be held liable for malpractice so long as the doctor's directions did not so greatly deviate from normal practice that the resident should be held liable for failing to intervene" (*Wulbrecht v Jehle*, 92 AD3d 1213, 1214 [4th Dept 2012] [internal quotation marks omitted]; *see Reading v Fabiano*, 137 AD3d 1686, 1687 [4th Dept 2016]). Here, it is undisputed that plaintiff was Riley's patient, and Riley directly oversaw the resident's limited participation in the procedure, including directing the resident on where to hold and place the retractors. We therefore conclude that the hospital met its burden on the motion by establishing that the resident did not exercise independent medical judgment, and plaintiffs failed to raise an issue of fact (*see Blendowski v Wiese* [appeal No. 2], 158 AD3d 1284, 1285 [4th Dept 2018]; *Nasima v Dolen*, 149 AD3d 759, 760 [2d Dept 2017]; *Lorenzo v Kahn*, 74 AD3d 1711, 1713 [4th Dept 2010]). Plaintiffs' claim that the hospital was liable because the resident was not qualified to participate in the surgery was raised for the first time in opposition to the hospital's motion, and "[a] plaintiff cannot defeat an otherwise proper motion for summary judgment by asserting a new theory of liability . . . for the first time in opposition to the motion" (*DeMartino v Kronhaus*, 158 AD3d 1286, 1286 [4th Dept 2018] [internal quotation marks omitted]).

In appeal No. 2, we conclude that Carlin met his initial burden with respect to the second cause of action against him, for medical malpractice, by submitting evidence establishing that he did not deviate or depart " 'from the applicable standard of care' " (*Occhino v Fan*, 151 AD3d 1870, 1871 [4th Dept 2017]). His expert opined that Carlin's action to stop the bleeding was "correct and appropriate" under the circumstances and did not cause or contribute to plaintiff's injuries.

We agree with plaintiffs, however, that the court nonetheless erred in granting Carlin's motion with respect to the second and seventh causes of action. Although we reject plaintiffs' contention that the court made an improper credibility determination as to the length of time that Carlin was involved in the surgery inasmuch as the evidence submitted by plaintiffs on that issue was speculative and conclusory (*see generally Beverage Mktg. USA, Inc. v South Beach Beverage Co., Inc.*, 58 AD3d 657, 658 [2d Dept 2009]; *D'Ambra v New York City Tr. Auth.*, 16 AD3d 101, 101 [1st Dept 2005]), we nonetheless conclude that the length of time is ultimately irrelevant. The record

establishes that Carlin's " 'level of participation' "–though brief–was sufficient to create a duty of care that Carlin owed to plaintiff (*Gedon v Bry-Lin Hosps.*, 286 AD2d 892, 894 [4th Dept 2001], *lv denied* 98 NY2d 601 [2002]), as well as an opportunity to breach that duty of care, and we agree with plaintiffs that, by submitting the affidavit of their expert, they raised an issue of fact sufficient to defeat summary judgment on the issue whether a breach of duty by Carlin caused plaintiff's injuries. Plaintiffs' expert did not point to any specific deposition testimony in support of the conclusion that Carlin deviated from the standard of care by being too rough during retraction, manipulation, and attempted repair of the blood vessels, but instead inferred the deviation in that regard based on hospital records showing that plaintiff lost a significant amount of blood and suffered decreased mean arterial pressure in the period immediately after Carlin's involvement (*see generally Black v State of New York*, 125 AD3d 1523, 1525-1526 [4th Dept 2015]). The expert affidavits submitted by plaintiffs and Carlin thus " 'present[ ] a credibility battle between the parties' experts' " with respect to whether Carlin deviated from the accepted standard of medical care and whether any such deviation caused plaintiff's injuries (*Selmensberger v Kaleida Health*, 45 AD3d 1435, 1436 [4th Dept 2007]; *see Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623, 624 [2d Dept 2003]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

347

CA 18-01280

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

JAMES HATCH AND PATRICIA HATCH,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ST. JOSEPH'S HOSPITAL HEALTH CENTER,
ET AL., DEFENDANTS,
AND ROBERT E. CARLIN, M.D.,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

SIDNEY P. COMINSKY, LLC, SYRACUSE (SIDNEY P. COMINSKY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered April 26, 2018. The order granted the motion of defendant Robert E. Carlin, M.D., for summary judgment and dismissed the amended complaint against him.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the second and seventh causes of action against defendant Robert E. Carlin, M.D., and as modified the order is affirmed without costs.

Same memorandum as in *Hatch v St. Joseph's Hosp. Health Ctr.* ([appeal No. 1] — AD3d — [July 31, 2019] [4th Dept 2019]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

348

CA 18-01400

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

ROBERT FRANK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

METALICO ROCHESTER, INC., FORMERLY KNOWN AS METALLICO LYELL ACQUISITIONS, INC., DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (KATHERINE S. MCCLUNG OF COUNSEL), FOR DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Daniel J. Doyle, J.), dated July 6, 2018. The order and judgment, inter alia, granted the motion of plaintiff for partial summary judgment on his second cause of action.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying plaintiff's motion, vacating the third ordering paragraph and the decretal paragraph, striking the words "is denied" from the second ordering paragraph and substituting therefor the words "is granted," granting that part of defendant's motion with respect to the third cause of action, and granting judgment in favor of defendant as follows:

> It is ADJUDGED and DECLARED that the restrictive covenant in the 2004 Non-Competition Agreement as amended in 2005 and 2009 was not superseded by the 2009 Employment Agreement, neither agreement has lapsed, and neither agreement would be rendered unenforceable solely because plaintiff was terminated without cause,

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

Memorandum: Plaintiff commenced this declaratory judgment action, which arises from his sale of a metal recycling business to defendant and plaintiff's ensuing employment by defendant, seeking a judgment declaring that he is not bound by certain restrictive covenants in the agreements that the parties entered into concerning the sale and employment. Defendant answered, and contemporaneously moved to dismiss the first and third causes of action pursuant to CPLR 3211 (a) (1) and (7). Plaintiff moved for, among other relief,

partial summary judgment on the second cause of action. Supreme Court issued an order and judgment in which it, inter alia, converted that part of defendant's motion seeking to dismiss the first cause of action into a motion pursuant to CPLR 3212 for summary judgment on that cause of action, denied the converted motion, searched the record, and granted summary judgment in favor of plaintiff on that cause of action, albeit with a typographical error regarding the cause of action at issue. The court also granted that part of plaintiff's motion seeking partial summary judgment on the second cause of action, and declared the rights of the parties in favor of plaintiff. Defendant appeals from the order and judgment.

Contrary to defendant's initial contention, the court did not err in converting that part of defendant's motion seeking to dismiss the first cause of action pursuant to CPLR 3211 into a motion for summary judgment on that cause of action. The statute provides that, "[w]hether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment" (CPLR 3211 [c]). Additionally, although the court is normally required to give notice to the parties before converting a motion to dismiss to one for summary judgment (*see Carcone v D'Angelo Ins. Agency*, 302 AD2d 963, 963 [4th Dept 2003]), the court properly dispensed with the statutory notice here inasmuch as the issue presented "rested entirely upon the construction and interpretation of an unambiguous contractual provision . . . [that] 'exclusively involve[d] issues of law which were fully appreciated and argued by the parties' " (*F&T Mgt. & Parking Corp. v Flushing Plumbing Supply Co., Inc.*, 68 AD3d 920, 923 [2d Dept 2009], *lv denied* 15 NY3d 702 [2010]; *see Hendrickson v Philbor Motors, Inc.*, 102 AD3d 251, 258 [2d Dept 2012]; *see generally Mihlovan v Grozavu*, 72 NY2d 506, 508 [1988]).

Here, the first cause of action sought a declaration of the rights of the parties with respect to the interplay among a series of written agreements, specifically whether certain restrictive covenants in the parties' 2004 Employment Agreement and 2004 Non-Competition Agreement were superseded by their 2009 Employment Agreement. The arguments of the parties were devoted solely to the legal impact of those contractual provisions, therefore, the court was not required to give notice before converting that part of the motion (*see F&T Mgt. & Parking Corp.*, 68 AD3d at 923).

We agree with defendant, however, that the court, after converting that part of the motion seeking to dismiss the first cause of action pursuant to CPLR 3211 into a motion for summary judgment, erred in denying that part of the motion and in searching the record and granting summary judgment in favor of plaintiff on the first cause of action. This litigation arises from several written agreements that the parties executed in 2004, 2005 and 2009. The initial set of documents, all of which were executed on the same day in 2004, include the 2004 Stock Purchase Agreement, by which plaintiff transferred ownership of his business to defendant, the 2004 Employment Agreement, which set the terms, conditions, and compensation for plaintiff's employment by defendant during the ensuing five-year period, and the

2004 Non-Competition Agreement, which provided that plaintiff would not compete against defendant during that term of employment and during the "Post-Employment Period," which extends for five years after the "Termination Date," which "means the last day of [plaintiff's] employment by" defendant or any of its affiliates. The 2004 Employment Agreement also contained restrictive covenants concerning plaintiff's activities during, inter alia, his term of employment. Each of those three documents references the other two, and they were all signed on the same date. Furthermore, each of the documents reflects that plaintiff was provided separate consideration in return for it, to wit, salary plus bonuses and other consideration in return for the 2004 Employment Agreement, cash plus stock and other consideration for the 2004 Stock Purchase Agreement, and additional monetary consideration for the 2004 Non-Competition Agreement.

In 2005, the parties executed an amendment to the 2004 Non-Competition Agreement, which provided that plaintiff's compensation under that agreement would be paid to a trust, rather than to his estate, if he died during the five-year term of those payments. The parties further modified the 2004 Non-Competition Agreement in 2009 and, on the same day that such modification was executed, they also executed another employment agreement, the 2009 Employment Agreement. In deciding the motions of the parties, the court concluded that "the 2009 [E]mployment [A]greement constituted the entire agreement between the parties and the stand-alone restrictive covenants necessarily merged with the 2009 [E]mployment [A]greement," based on, inter alia, an integration clause inserted in that document. The court further concluded that the restrictive covenants in the 2009 Employment Agreement expired in 2012 at the conclusion of the three-year duration of that agreement, regardless of the fact that plaintiff continued to be employed by defendant for an additional five years. We agree with defendant that the court erred in reaching those conclusions.

First, the integration clause in the 2009 Employment Agreement expressly states that it supersedes the 2004 Employment Agreement, but it does not include any language purporting to supersede the 2004 Non-Competition Agreement. Thus, employing the maxim of contract interpretation stating that "*inclusio unius est exclusio alterius* (the inclusion of one is the exclusion of another)" (*Uribe v Merchants Bank of N.Y.*, 91 NY2d 336, 340 [1998]; *see Matter of Avella v City of New York*, 29 NY3d 425, 436 n 5 [2017]; *Niagara Frontier Transp. Auth. v Euro-United Corp.*, 303 AD2d 920, 921 [4th Dept 2003]), we conclude that the integration clause does not require a determination that the 2009 Employment Agreement supersedes the 2004 Non-Competition Agreement.

Moreover, the parties included a term in the 2009 Employment Agreement that was not included in the 2004 version, to wit, the 2009 version also defines the post-employment period as "the period of three (3) years from the last day of the [plaintiff's] employment by [defendant] or any affiliate of" defendant. The restrictive covenant in the 2009 Employment Agreement states that plaintiff will abide by the specified restrictions "during the Employment Period and the Post-Employment Period."

In addition, on the same day in 2009 the parties also amended the 2004 Non-Competition Agreement by changing the post-employment period during which plaintiff would still be bound by the Restrictive Covenants in the 2004 Non-Competition Agreement, so that the restrictions were operative for a period of three years commencing on the "Termination Date." That date, as defined in the 2004 Non-Competition Agreement and explicitly incorporated into the 2009 amendment, was defined as "that last day of [plaintiff's] employment by [defendant] or any affiliate of" defendant.

"It is well settled that a contract must be read as a whole to give effect and meaning to every term . . . Indeed, [a] contract should be interpreted in a way [that] reconciles all [of] its provisions, if possible" (*O'Brien & Gere, Inc. of N. Am. v G.M. McCrossin, Inc.*, 148 AD3d 1804, 1805 [4th Dept 2017] [internal quotation marks omitted]; *see Spellane v Natarajan*, 169 AD3d 1406, 1407 [4th Dept 2019]; *Maven Tech., LLC v Vasile*, 147 AD3d 1377, 1378 [4th Dept 2017]). Thus, "[a]ll parts of the contract must be read in harmony to determine its meaning . . . One portion of [a contract] should not be read so as to negate another portion" (*Matter of Bombay Realty Corp. v Magna Carta*, 100 NY2d 124, 127 [2003]). Here, the court interpreted the 2009 Employment Agreement so that it superseded the 2004 Non-Competition Agreement and so that it expired in 2012 despite plaintiff's continued employment by defendant. That interpretation nullified the newly-inserted provision in the 2009 Employment Agreement regarding the post-employment period, and also nullified the 2009 amendment to the Non-Competition Agreement, which was executed on the same day as the 2009 Employment Agreement. By including those terms in their agreement, however, the parties clearly expressed their intent that plaintiff continue to be bound by the restrictive covenants in the 2009 Employment Agreement and the 2004 Non-Competition Agreement as amended for the entire time that plaintiff was employed by defendant and for a three-year period after that employment ended. Consequently, we conclude that the court erred in its interpretation of the agreements and in determining the motions. Therefore, we modify the order and judgment by vacating that part granting summary judgment to plaintiff on the first cause of action, and by granting summary judgment to defendant with respect to that cause of action.

We also agree with defendant that the court erred in granting plaintiff's motion for partial summary judgment on the second cause of action, which sought a declaration that the restrictive covenants in the 2009 Employment Agreement and the 2004 Non-Competition Agreement as amended in 2005 and 2009 were overbroad, unreasonable in temporal and geographic scope, and not necessary to protect defendant's legitimate interests. Because plaintiff sold his business to defendant, including the goodwill of that business, the enforceability of the restrictive covenants must be evaluated pursuant to the standard applicable to the sale of a business rather than the "stricter standard of reasonableness" applicable to employment contracts (*Reed, Roberts Assoc. v Strauman*, 40 NY2d 303, 307 [1976], *rearg denied* 40 NY2d 918 [1976]; *see Weiser LLP v Coopersmith*, 51 AD3d 583, 583-584 [1st Dept 2008]; *Kraft Agency v Delmonico*, 110 AD2d 177,

182-183 [4th Dept 1985]). It is well settled that a covenant restricting the right of a seller of a business to compete with the buyer is enforceable if its duration and scope are "reasonably necessary to protect the buyer's legitimate interest in the purchased asset" (*Hadari v Leshchinsky*, 242 AD2d 557, 558 [2d Dept 1997]; *see Mohawk Maintenance Co. v Kessler*, 52 NY2d 276, 283-284 [1981]; *Purchasing Assoc. v Weitz*, 13 NY2d 267, 271-272 [1963], *rearg denied* 14 NY2d 584 [1964]).

Consequently, inasmuch as plaintiff was the party seeking partial summary judgment on that cause of action, he had the initial burden of establishing as a matter of law that the restrictive covenants at issue here were unreasonable, which in turn required that the court "consider, among other things, such factors as the size and location of the market areas to be served by the parties and the length of time needed to provide [defendant] with a reasonable period in which to secure [its] ownership in the good will of" the business (*Kraft Agency*, 110 AD2d at 185; *see e.g. Genesee Val. Trust Co. v Waterford Group, LLC*, 130 AD3d 1555, 1557 [4th Dept 2015]; *see generally Karpinski v Ingrasci*, 28 NY2d 45, 49-50 [1971]). We conclude that plaintiff failed to proffer sufficient evidence in admissible form to meet that burden (*cf. Natural Organics, Inc. v Kirkendall*, 52 AD3d 488, 489 [2d Dept 2008], *lv denied* 11 NY3d 707 [2008]), and his " '[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers' " (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384 [2005], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). We therefore further modify the order and judgment accordingly.

We also agree with the further contention of defendant that the court erred in denying that part of its motion with respect to the third cause of action. In that cause of action, plaintiff sought a judgment declaring that the restrictive covenants in all of the parties' agreements are unenforceable because his employment with defendant was terminated without cause. Nothing in the agreements signed by the parties provides that the restrictive covenants are impacted by such a termination, and under similar circumstances we concluded that, "[e]ven assuming, arguendo, that [the employee] was terminated without cause, . . . such termination would not render the restrictive covenants in the agreement unenforceable" (*Brown & Brown, Inc. v Johnson*, 115 AD3d 162, 170 [4th Dept 2014], *revd on other grounds* 25 NY3d 364 [2015]). Consequently, inasmuch as the sole basis for the third cause of action cannot support a judgment in plaintiff's favor, the court erred in denying defendant's motion with respect to that cause of action. We therefore further modify the order and judgment accordingly.

Finally, plaintiff contends that the court properly denied defendant's motion with respect to the third cause of action because it contains additional allegations and is not based solely on the allegation that plaintiff was terminated without cause. We reject that contention. The only other allegations in that cause of action are duplicated in the second cause of action, and thus those parts of

the third cause of action must be dismissed as duplicative of the allegations in the second cause of action (*see generally Board of Trustees of IBEW Local 43 Elec. Contrs. Health & Welfare, Annuity & Pension Funds v D'Arcangelo & Co., LLP*, 124 AD3d 1358, 1360 [4th Dept 2015]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

368

CA 18-01139

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

IN THE MATTER OF JOHN SCHMIDT, PETITIONER,
AND TERRENCE A. ROBINSON, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO PLANNING BOARD, CITY OF BUFFALO PRESERVATION BOARD AND NORSTAR DEVELOPMENT USA, L.P., RESPONDENTS-RESPONDENTS.

TERRENCE A. ROBINSON, PETITIONER-APPELLANT PRO SE.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (ROBERT E. QUINN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS CITY OF BUFFALO PLANNING BOARD AND CITY OF BUFFALO PRESERVATION BOARD.

HODGSON RUSS LLP, BUFFALO (CHARLES W. MALCOMB OF COUNSEL), FOR RESPONDENT-RESPONDENT NORSTAR DEVELOPMENT USA, L.P.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered March 14, 2018 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking, inter alia, to annul the negative declaration issued by respondent City of Buffalo Planning Board (Planning Board) under the State Environmental Quality Review Act ([SEQRA] ECL art 8) with respect to the demolition and reconstruction of an apartment complex in the City of Buffalo. Respondents moved to dismiss the petition on the ground that, among other things, Terrence A. Robinson (petitioner) lacked standing. Supreme Court granted respondents' motions and dismissed the petition. Petitioner appeals, and we affirm.

As an initial matter, we note that petitioner does not raise any contention on appeal regarding the determination of respondent City of Buffalo Preservation Board's (Preservation Board) 2017 approval of the demolition application of respondent Norstar Development USA, L.P. Accordingly, petitioner has abandoned any challenge to that determination (*see generally Jones v Town of Carroll*, 158 AD3d 1325, 1327 [4th Dept 2018], *lv dismissed* 31 NY3d 1064 [2018]; *Zazzaro v HSBC*

Bank USA, N.A., 151 AD3d 1631, 1632 [4th Dept 2017]).

We further conclude that petitioner, who alone perfected the appeal in this case (*see Matter of Ten Towns to Preserve Main St. v Planning Bd. of Town of N.E.*, 139 AD3d 740, 740 [2d Dept 2016]), lacks standing to challenge the Planning Board's SEQRA determination. "Despite the responsibility of every citizen to contribute to the preservation and enhancement of the quality of the environment, there is a limit on those who may raise environmental challenges to governmental actions . . . Those seeking to raise SEQRA challenges must establish both 'an *environmental* injury that is in some way different from that of the public at large, and . . . that the alleged injury falls within the zone of interests sought to be protected or promoted by SEQRA' " (*Matter of Turner v County of Erie*, 136 AD3d 1297, 1297 [4th Dept 2016], *lv denied* 27 NY3d 906 [2016]; *see Matter of Sierra Club v Village of Painted Post*, 26 NY3d 301, 310-311 [2015]).

Contrary to petitioner's contention, he does not have standing arising from his interest in historic preservation, his interest in photographing the apartment complex, or his visits to the complex. "[I]nterest and injury are not synonymous . . . A general—or even special—interest in the subject matter is insufficient to confer standing, absent an injury distinct from the public in the particular circumstances of the case" (*Matter of Niagara Preserv. Coalition, Inc. v New York Power Auth.*, 121 AD3d 1507, 1510 [4th Dept 2014], *lv denied* 25 NY3d 902 [2015] [internal quotation marks omitted]). Here, petitioner's "[a]ppreciation for historical and architectural [sites] does not rise to the level of injury different from that of the public at large for standing purposes" (*id.* [internal quotation marks omitted]). Petitioner likewise does not have standing to challenge the Planning Board's determination on behalf of those who reside in or have been displaced from the apartments (*see generally Lyman Rice, Inc. v Albion Mobile Homes, Inc.*, 89 AD3d 1488, 1488-1489 [4th Dept 2011]). We further reject petitioner's contention that he has standing as a result of his position on the Preservation Board. In that respect, petitioner alleged at most a political impact of the alleged SEQRA violation, which does not establish environmental harm (*see Turner*, 136 AD3d at 1297-1298). Petitioner's contention that he has standing as a member of a protected class is raised for the first time on appeal and thus is not properly before us (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

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

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

369

CA 18-01441

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

PIXLEY DEVELOPMENT CORP., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ERIE INSURANCE COMPANY AND CANDY APPLE CAFÉ,
DEFENDANTS-RESPONDENTS.

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

HURWITZ & FINE, P.C., BUFFALO (JENNIFER A. EHMAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered January 23, 2018. The order denied the motion of plaintiff for a declaratory judgment and granted the cross motion of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the cross motion in part and reinstating the complaint against defendant Erie Insurance Company, granting the motion of plaintiff in part and granting judgment in favor of plaintiff as follows:

> It is ADJUDGED AND DECLARED that defendant Erie Insurance Company is obligated to defend plaintiff in the underlying personal injury action,

and as modified the order is affirmed without costs.

Memorandum: Plaintiff, Pixley Development Corp. (Pixley), commenced this action seeking, inter alia, a declaration that defendant Erie Insurance Company (Erie) is obligated to provide a defense and indemnification for Pixley, as an additional insured, in an underlying personal injury action (*Johnson v Pixley Dev. Corp.*, 169 AD3d 1516 [4th Dept 2019]). Pixley also demanded judgment against defendant Candy Apple Café (Café) for contractual indemnity "and on each of its causes of action against [the Café and Erie]." The plaintiff in the underlying action (tort plaintiff) alleged that he sustained injuries when he slipped and fell on ice in the delivery driveway behind a plaza owned by Pixley while delivering supplies to the Café, a tenant of the plaza.

Pixley moved for summary judgment declaring, inter alia, that

Erie is obligated to defend and indemnify it, and defendants cross-moved for summary judgment dismissing the complaint. Supreme Court denied Pixley's motion and granted defendants' cross motion. We agree with Pixley that the court erred in granting defendants' cross motion insofar as it sought summary judgment dismissing the complaint against Erie and in denying Pixley's motion insofar as it sought a declaration that Erie is obligated to defend Pixley in the underlying personal injury action. We therefore modify the order accordingly.

"[I]t is well settled that an insurer's duty to defend [its insured] is exceedingly broad and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest . . . a reasonable possibility of coverage . . . The duty to defend [an] insured[] . . . is derived from the allegations of the complaint and the terms of the policy. If [a] complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend" (*BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007] [internal quotation marks omitted]; *see Worth Constr. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411, 415 [2008]). Here, the allegations of the personal injury complaint and the terms of the policy create a reasonable possibility that the tort plaintiff's claims are covered under the terms of the policy.

Pursuant to the provisions of the lease, the premises leased to the Café was defined as "a ground floor store approximately 5600 square feet, (the 'Premises'), together with . . . the right to use the driveway designated for delivery purposes in common with other tenants." Although the delivery driveway was deemed a common area under the terms of the lease, the Café was required to pay its proportionate share of common area maintenance charges and was further obligated to provide "for the benefit of [Pixley], a comprehensive liability policy of insurance protecting [Pixley] against any liability whatsoever, occasioned by accident, on or about the Premises, *or any appurtenances thereto*" (emphasis added).

The Café obtained the requisite insurance policy, which named Pixley as an additional insured, but that additional insured endorsement insured Pixley "only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to [the Café] and shown in the Schedule." The supplemental declarations to the policy identified the leased premises only by its address. We conclude that the allegations in the complaint suggest a reasonable possibility of coverage inasmuch as the tort plaintiff's claims arguably "*arise out of*" the Café's maintenance or use of that part of the premises leased to it (*see generally Maroney v New York Cent. Mut. Fire Ins. Co.*, 5 NY3d 467, 472 [2005] [emphasis added]).

Pixley established on its motion that "the use of the [delivery driveway] was included in the scope of the demised premises" (*Tower Ins. Co. of N.Y. v Leading Ins. Group Ins. Co., Ltd.*, 134 AD3d 510, 510 [1st Dept 2015]), and there are triable issues of fact whether the Café " 'assumed some responsibility for maintenance of [that area], including snow removal' " (*Johnson*, 169 AD3d at 1518; *cf. Atlantic*

Ave. Sixteen AD, Inc. v Valley Forge Ins. Co., 150 AD3d 1182, 1183-1184 [2d Dept 2017]; *Chappaqua Cent. Sch. Dist. v Philadelphia Indem. Ins. Co.*, 148 AD3d 980, 982-983 [2d Dept 2017], *lv denied* 29 NY3d 913 [2017]; *Christ the King Regional High School v Zurich Ins. Co. of N. Am.*, 91 AD3d 806, 809 [2d Dept 2012]). In addition, the delivery driveway "was necessarily used for access in and out of [the Café] and was thus, by implication, 'part of the . . . premises' that [the Café] was licensed to use under the [lease]" (*ZKZ Assoc. v CNA Ins. Co.*, 89 NY2d 990, 991 [1997]; *see Tower Ins. Co. of N.Y.*, 134 AD3d at 510; *Mack-Cali Realty Corp. v NGM Ins. Co.*, 119 AD3d 905, 907 [2d Dept 2014]; *cf. Chappaqua Cent. Sch. Dist.*, 148 AD3d at 982-983). Other factors relevant to our determination that the claims arguably arise out of that part of the premises leased to the Café are that the lease required the Café to procure insurance against any liabilities " 'on or about the demised premises or *any appurtenances thereto*' " (*1515 Broadway Fee Owner, LLC v Seneca Ins. Co., Inc.*, 90 AD3d 436, 437 [1st Dept 2011] [emphasis added]) and required the Café "to pay its proportional share of the 'common area costs' incurred in operating and maintaining the subject property" (*One Reason Rd., LLC v Seneca Ins. Co., Inc.*, 163 AD3d 974, 977 [2d Dept 2018]). We thus conclude that Pixley established as a matter of law that Erie is obligated to defend Pixley in the underlying personal injury action, and defendants failed to raise an issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, the court erred in denying Pixley's motion insofar as it sought a declaration to that effect and, for the same reasons, erred in granting that part of defendants' cross motion for summary judgment dismissing the complaint against Erie insofar as it sought that relief.

We further conclude, however, that Pixley failed to establish as a matter of law that it will ultimately be entitled to indemnification from Erie under the insurance policy, and the court therefore properly denied Pixley's motion insofar as it sought a declaration to that effect. We note, however, that to the extent that the court relied on General Obligations Law § 5-322.1 in determining that Pixley must establish its freedom from negligence to "open the door to indemnification," we agree with Pixley that such a determination was in error. That section applies to construction contracts. The provision relevant to leases is section 5-321, and the record here is insufficient to determine whether that section precludes Pixley's ultimate indemnification (*see generally Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 419 [2006]; *Berger v 292 Pater Inc.*, 84 AD3d 461, 462 [1st Dept 2011]). We also conclude that Erie failed to establish as a matter of law that it is not required to indemnify Pixley under the insurance policy, and thus the court erred in granting the cross motion to that extent.

Contrary to Pixley's contention, we conclude that the court properly granted the cross motion insofar as it sought summary judgment dismissing the complaint against the Café, i.e., the second and fourth causes of action, although for reasons different from those expressed by the court. Those causes of action are "predicated upon the same factual allegations as the [indemnification cross claims in

the personal injury action], and seek[] damages which may be recovered" in that separate action (*Mecca v Shang*, 258 AD2d 569, 570 [2d Dept 1999], *lv dismissed* 95 NY2d 791 [2000]; *see generally* CPLR 3211 [a] [4]; *Bostany v Trump Org. LLC*, 88 AD3d 553, 554 [1st Dept 2011]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

385

CA 18-01444

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

BAYVIEW LOAN SERVICING, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GERARD A. STRAUSS, ET AL., DEFENDANTS.

DARYL R. FOX, NONPARTY RESPONDENT.

BERKMAN, HENOCH, PETERSON, PEDDY & FENCHEL, P.C., GARDEN CITY (HILARY PRADA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ATTEA & ATTEA, P.C., HAMBURG (NICHOLAS P. DEMARCO OF COUNSEL), FOR NONPARTY RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Haendiges, J.), entered August 15, 2017. The order, among other things, directed that title of the subject premises be transferred to nonparty respondent.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the fourth 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 following memorandum: Plaintiff commenced this action to foreclose on a residential mortgage and obtained an order and judgment directing the sale of the subject premises. Nonparty Daryl R. Fox placed the highest bid at the foreclosure auction, provided the required deposit, and signed the "Terms of Sale" agreement. The matter was scheduled for a closing date on which the referee's deed was to be provided. Approximately a week before that date, plaintiff informed Fox that the sale was for an insufficient amount and that plaintiff would not complete the sale unless Fox agreed to pay an increased price for the property. When Fox declined, plaintiff moved by order to show cause to set aside the sale based on a violation of RPAPL 1351 (1), upon which Supreme Court (Grisanti, A.J.) also issued a temporary restraining order staying the referee's sale of the property. In a bench decision, the court (Haendiges, J.) denied plaintiff's motion and directed that the sale of the property go forward and, by an order from which no appeal was taken, the court granted that relief. After receiving the proposed order but before it was entered, plaintiff moved by a second order to show cause to set aside the sale of the subject property, direct a new sale, and direct the Referee to give Fox's deposit to plaintiff, all on the ground that Fox failed to comply with the time is of the

essence clause in the memorandum of sale. Plaintiff now appeals from a further order that, inter alia, denied that motion, again directed the sale of the subject property, and awarded Fox $5,000 for costs and attorney's fees as a sanction against plaintiff based on the court's finding that plaintiff engaged in frivolous conduct.

We reject plaintiff's contention that the court erred in determining that Fox did not breach the time is of the essence clause. It is well settled that "[a] party may waive timely performance even where the parties have agreed that time is of the essence" (*Allen v Kowalewski*, 239 AD2d 879, 879 [4th Dept 1997], *lv denied* 90 NY2d 806 [1997]; *see Stefanelli v Vitale*, 223 AD2d 361, 362 [1st Dept 1996]), and that such a waiver may be accomplished by the conduct of a party (*see Chaves v Kornfeld*, 83 AD3d 522, 523 [1st Dept 2011]). Here, we agree with the court that plaintiff's relentless attempts to prevent the sale from going forward constituted a waiver of the time is of the essence clause.

We also reject plaintiff's further contention that the court erred in determining that plaintiff engaged in frivolous conduct and in imposing sanctions for such conduct. We conclude that plaintiff's conduct was "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law[, and was] undertaken primarily to delay or prolong the resolution of the litigation" (22 NYCRR 130-1.1 [c] [1], [2]; *see Eshaghian v Eshaghian*, 146 AD3d 529, 529 [1st Dept 2017], *lv dismissed* 29 NY3d 980 [2017]; *cf. Adirondack Bank v Midstate Foam & Equip., Inc.*, 159 AD3d 1354, 1357 [4th Dept 2018]). Nevertheless, we conclude that the court erred in failing to comply with 22 NYCRR 130-1.2 because "it failed to set forth in a written decision 'the conduct on which . . . the imposition [of sanctions] is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount . . . imposed to be appropriate' " (*Fraccola v 1st Choice Realty, Inc.*, 124 AD3d 1360, 1361 [4th Dept 2015]; *see Leisten v Leisten*, 309 AD2d 1202, 1203 [4th Dept 2003]). We therefore modify the order by vacating the fourth ordering paragraph and we remit the matter to Supreme Court for compliance with 22 NYCRR 130-1.2 (*see Fraccola*, 124 AD3d at 1361).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

394

CA 18-01771

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

ISKALO ELECTRIC TOWER LLC AND DOWNTOWN CBD INVESTORS LLC, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

STANTEC CONSULTING SERVICES, INC., DEFENDANT-RESPONDENT.

THE GARAS LAW FIRM, LLP, WILLIAMSVILLE (JOHN C. GARAS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HARTER SECREST & EMERY LLP, ROCHESTER (F. PAUL GREENE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered March 21, 2018. The order and judgment, among other things, denied in part plaintiffs' motion for summary judgment and granted in part defendant's motion for partial summary judgment.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying those parts of defendant's motion with respect to the tenth affirmative defense/seventh counterclaim insofar as it sought an offset for rent that plaintiff Iskalo Electric Tower LLC failed to collect from nonparty Iskalo 65 LB LLC (uncollected rent) and with respect to the eleventh affirmative defense/eighth counterclaim and the twelfth affirmative defense/ninth counterclaim, and granting plaintiffs' motion with respect to those affirmative defenses/counterclaims to that extent and dismissing the tenth affirmative defense/seventh counterclaim insofar as it sought an offset for uncollected rent and the eleventh affirmative defense/eighth counterclaim and twelfth affirmative defense/ninth counterclaim in their entirety, and as modified the order and judgment is affirmed without costs.

Memorandum: In this action to, inter alia, recover damages for defendant's breach of a commercial lease with plaintiff Iskalo Electric Tower LLC (IET), plaintiffs appeal, as limited by their brief, from an order and judgment insofar as it granted those parts of defendant's motion for partial summary judgment on defendant's "tenth affirmative defense/seventh counterclaim," "eleventh affirmative defense/eighth counterclaim," and "twelfth affirmative defense/ninth counterclaim" and denied those parts of plaintiffs' motion for summary judgment seeking dismissal of the same.

In 2005, IET and defendant entered into a commercial lease whereby IET would lease office space to defendant in plaintiffs' Electric Tower building (Electric Tower lease). For reasons not at issue on this appeal, defendant terminated the Electric Tower lease and vacated the premises. Supreme Court subsequently determined that defendant's termination was a breach of the Electric Tower lease.

During that time, IET had an outstanding loan that was secured by the Electric Tower lease. After defendant vacated the premises, the lender required that IET provide additional security. In order to satisfy that requirement, IET entered into an agreement, entitled "lease agreement," with nonparty Iskalo 65 LB LLC (65 LB) for the same premises formerly leased to defendant under the Electric Tower lease. The lease between IET and 65 LB (65 LB agreement) contained substantially similar terms to those contained in the Electric Tower lease, provided for the payment of rent, and contained numerous provisions that were consistent with the creation of a landlord/tenant relationship between IET and 65 LB. Nevertheless, 65 LB, which was solely owned by the same person who was the sole owner of IET, never physically possessed the premises described in the 65 LB agreement, and it appears that the 65 LB agreement was created as additional security for IET's loan, rather than to secure commercial space for 65 LB. Although 65 LB paid some rent under the terms of the 65 LB agreement when required by IET's lender, IET did not collect rent from 65 LB for the majority of the term of the 65 LB agreement.

After plaintiffs commenced this action alleging, among other things, that defendant breached the Electric Tower lease, defendant answered, asserting numerous affirmative defenses, several of which were also labeled counterclaims. As relevant to this appeal, defendant's tenth affirmative defense/seventh counterclaim alleged that defendant's liability for its breach of the Electric Tower lease must be offset by the amount of rent IET collected from 65 LB and, because IET breached the lease by unreasonably failing to collect the full rent due from 65 LB, that defendant's liability must also be offset by the amount of rent that IET failed to collect under the 65 LB agreement. Defendant's eleventh affirmative defense/eighth counterclaim similarly alleged that IET breached the Electric Tower lease by failing to collect rent from 65 LB and to relet the premises. Defendant's twelfth affirmative defense/ninth counterclaim alleged that IET acted in bad faith and breached the covenant of good faith and fair dealing by failing to collect rent from 65 LB. As noted, the court granted defendant's motion and denied plaintiffs' motion with respect to each of those affirmative defenses/counterclaims.

Initially, we reject defendant's contention that plaintiffs' instant appeal is barred by plaintiffs' prior appeal from an order granting defendant leave to amend its answer, a prior appeal that we dismissed due to plaintiffs' failure to timely perfect it. Although a party's failure to timely perfect an appeal " 'acts as a bar to a subsequent appeal as to all questions that were presented on the earlier appeal' " (*Chiappone v William Penn Life Ins. Co. of N.Y.*, 96 AD3d 1627, 1628 [4th Dept 2012], quoting *Bray v Cox*, 38 NY2d 350, 353 [1976]), the questions at issue on the appeal from the prior order

granting leave to amend the answer pursuant to CPLR 3025 (b) are not the same as those at issue on this appeal from the order and judgment determining the parties' respective summary judgment motions pursuant to CPLR 3212.

Addressing the merits, we reject plaintiffs' contention that the 65 LB agreement was not an enforceable lease pursuant to which defendant would be entitled to an offset of its liability. The 65 LB agreement contains terms substantially similar to the Electric Tower lease and on its face creates and describes a landlord/tenant relationship between IET and 65 LB. Reading the 65 LB agreement according to its clear and complete terms (*see Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]), we conclude that it is an enforceable lease between IET and 65 LB. Contrary to plaintiffs' contention, the mere fact that the 65 LB agreement was also used as security for a loan does not render that agreement unenforceable. Indeed, the Electric Tower lease had been security for that same loan and was still, as plaintiffs do not dispute, an enforceable lease.

With respect to the affirmative defenses/counterclaims at issue, the facts are undisputed and the parties agree that section 28.2 of the Electric Tower lease controls. That section provides, in relevant part: "Should Landlord elect to reenter as provided in subsection (b), or should Landlord take possession pursuant to legal proceedings or pursuant to any notice provided by law, Landlord may, from time to time, without terminating this Lease, relet the Premises or any part of the Premises in Landlord's or Tenant's name, but for the account of Tenant, for such term or terms (which may be greater or less than the period which would otherwise have constituted the balance of the Term) and on such conditions and upon such other terms (which may include concessions of free rent and alteration and repair of the Premises) as Landlord, in its reasonable discretion, may determine, and Landlord may collect and receive the rent. Landlord will in no way be responsible or liable for any failure to relet the Premises, or any part of the Premises, or for any failure to collect any rent due upon such reletting." Contrary to plaintiffs' contention, we conclude that IET reentered the premises by reletting the same office space described in the Electric Tower lease to 65 LB pursuant to the 65 LB agreement (*see generally Holy Props. v Cole Prods.*, 87 NY2d 130, 134 [1995]), thus triggering section 28.2. Under that section, IET relet the premises "for the account of [defendant]," and thus defendant is entitled to an offset against any damages arising from its breach of the Electric Tower lease equal to the amount of rent actually collected by IET from 65 LB.

However, we agree with plaintiffs that, under section 28.2, IET is not responsible for any failure to collect rent from 65 LB. Although section 28.2 provides that IET is to use its "reasonable discretion," that pertains to IET's discretion to include "such term or terms" and "such conditions" in a new lease when reletting the premises; it does not refer to the collection of rent. Instead, section 28.2 states that "[IET] ***may*** collect and receive the rent" and explicitly provides that "[IET] will in no way be responsible or

liable for ***any*** failure to . . . collect rent due upon such releting" (emphasis added). Although defendant contends that we must apply a general contractual requirement of good faith to section 28.2, "[t]he implied covenant of good faith and fair dealing, upon which [defendant] relies, will not impose an obligation that would be inconsistent with the terms of the contract" (*Adams v Washington Group, LLC*, 42 AD3d 475, 476 [2d Dept 2007]; *see HSBC Bank USA, N.A. v Prime, L.L.C.*, 125 AD3d 1307, 1308 [4th Dept 2015]; *Marine Midland Bank v Yoruk*, 242 AD2d 932, 933 [4th Dept 1997]).

Defendant's tenth affirmative defense/seventh counterclaim alleged both that defendant was entitled to an offset based on rent IET failed to collect from 65 LB, as well as the limited rent that IET actually collected. Because IET's releting of the premises to 65 LB triggered section 28.2 under the Electric Tower lease, defendant is entitled to an offset equal to the rent collected, and thus the court properly granted defendant's motion and denied plaintiffs' motion with respect to the tenth affirmative defense/seventh counterclaim insofar as it sought an offset for rent actually collected from 65 LB. Because IET is not responsible for rent it failed to collect from 65 LB, however, the court erred in granting defendant's motion and denying plaintiffs' motion with respect to the tenth affirmative defense/seventh counterclaim insofar as it sought an offset for rent IET failed to collect from 65 LB, and we therefore modify the order and judgment accordingly.

Defendant's eleventh affirmative defense/eighth counterclaim likewise seeks to hold plaintiffs responsible for IET's failure to collect rent from 65 LB, but does not seek an offset based on rent actually collected from 65 LB. For the reasons stated above, we therefore conclude that the court erred in granting defendant's motion and denying plaintiffs' motion with respect to that affirmative defense/counterclaim, and thus we further modify the order and judgment accordingly.

Defendant's twelfth affirmative defense/ninth counterclaim similarly alleges damages caused by IET's failure to collect rent from 65 LB, although on the basis of IET's purported breach of the covenant of good faith and fair dealing. We agree with plaintiffs that "[a] cause of action to recover damages for breach of the implied covenant of good faith and fair dealing cannot be maintained where the alleged breach is 'intrinsically tied to the damages allegedly resulting from a breach of the contract' " (*Deer Park Enters., LLC v Ail Sys., Inc.*, 57 AD3d 711, 712 [2d Dept 2008]; *see also Utility Servs. Contr., Inc. v Monroe County Water Auth.*, 90 AD3d 1661, 1662 [4th Dept 2011], *lv denied* 19 NY3d 803 [2012]). The court therefore erred in granting defendant's motion and denying plaintiffs' motion with respect to that affirmative defense/counterclaim, and we further modify the order and judgment accordingly.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

407

CAF 17-02163

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

IN THE MATTER OF NYJEEM D.

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

MEMORANDUM AND ORDER

SHAINA D., RESPONDENT,
AND JOHN D., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DANIELLE K. BLACKABY OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

RICHARD T. WARD, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered November 9, 2017 in a proceeding pursuant to Family Court Act article 10. The order, among other things, temporarily placed the subject child with petitioner.

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

Memorandum: In these proceedings pursuant to Family Court Act article 10, petitioner filed an amended petition seeking to modify prior dispositional orders, entered after the subject children were adjudicated to be neglected, by directing that the children be removed from the care of respondent mother and father and placed in the custody of petitioner. In appeal Nos. 1 and 2, the father appeals from two temporary orders that, inter alia, removed the subject children from respondents' care and placed them in the care and custody of petitioner pending the completion of a hearing on the amended petition. In appeal Nos. 3 and 4, respondents appeal from final orders that, inter alia, granted the amended petition and continued placement of the subject children with petitioner until the completion of the next permanency hearing in June 2018. We conclude that the appeals must be dismissed as moot. In each appeal, respondents challenge only the disposition, and those challenges are moot inasmuch as it is undisputed that superseding permanency orders have since been entered, in which respondents stipulated that it would be in the best interests of the children to continue their placement with petitioner (*see Matter of Victoria B. [Jonathan M.]*, 164 AD3d

578, 580 [2d Dept 2018]; *Matter of Anthony L. [Lisa P.]*, 144 AD3d 1690, 1691 [4th Dept 2016], *lv denied* 28 NY3d 914 [2017]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

408

CAF 17-02164

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

IN THE MATTER OF JOHN D., JR.

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

MEMORANDUM AND ORDER

SHAINA B., RESPONDENT,
AND JOHN D., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DANIELLE K. BLACKABY OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

RICHARD T. WARD, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered November 9, 2017 in a proceeding pursuant to Family Court Act article 10. The order, among other things, temporarily placed the subject child with petitioner.

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

Same memorandum as in *Matter of Nyjeem D.* ([appeal No. 1] — AD3d — [July 31, 2019] [4th Dept 2019]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

409

CAF 18-00582

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

IN THE MATTER OF NYJEEM D.

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

MEMORANDUM AND ORDER

SHAINA D. AND JOHN D., RESPONDENTS-APPELLANTS. (APPEAL NO. 3.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DANIELLE K. BLACKABY OF COUNSEL), FOR RESPONDENT-APPELLANT JOHN D.

BELLETIER LAW OFFICE, SYRACUSE (ANTHONY BELLETIER OF COUNSEL), FOR RESPONDENT-APPELLANT SHAINA D.

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

RICHARD T. WARD, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeals from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered February 16, 2018 in a proceeding pursuant to Family Court Act article 10. The order, among other things, modified a prior order by vacating the release of the subject child to respondents and placing the subject child in the custody of petitioner pending a permanency hearing.

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

Same memorandum as in *Matter of Nyjeem D.* ([appeal No. 1] — AD3d — [July 31, 2019] [4th Dept 2019]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

410

CAF 18-00583

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

IN THE MATTER OF JOHN D., JR.

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

MEMORANDUM AND ORDER

SHAINA B. AND JOHN D., RESPONDENTS-APPELLANTS.
(APPEAL NO. 4.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DANIELLE K. BLACKABY OF COUNSEL), FOR RESPONDENT-APPELLANT JOHN D.

BELLETIER LAW OFFICE, SYRACUSE (ANTHONY BELLETIER OF COUNSEL), FOR RESPONDENT-APPELLANT SHAINA B.

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

RICHARD T. WARD, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeals from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered February 16, 2018 in a proceeding pursuant to Family Court Act article 10. The order, among other things, modified a prior order by placing the subject child in the custody of petitioner pending a permanency hearing.

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

Same memorandum as in *Matter of Nyjeem D.* ([appeal No. 1] — AD3d — [July 31, 2019] [4th Dept 2019]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

422

KA 16-01344

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYRON HUGGINS, DEFENDANT-APPELLANT.

DANIEL J. DUBOIS, BUFFALO, FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MEREDITH M. MOHUN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered May 11, 2016. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the first degree, criminal possession of a weapon in the third degree and criminal possession of a weapon in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]), criminal possession of a weapon in the third degree (§ 265.02 [3]), and criminal possession of a weapon in the fourth degree (§ 265.01 [4]). The charges arose after the police executed a search warrant at a residence owned by defendant and seized from the upstairs apartment four kilograms of cocaine, a defaced shotgun, and a rifle. The defense was based on, inter alia, the theory that defendant had leased the upstairs apartment to another individual.

Defendant contends that the evidence is legally insufficient to support the conviction inasmuch as the People did not establish that he had constructive possession of the contraband, i.e., that he exercised dominion and control over the area where the cocaine and firearms were found. We reject that contention and conclude that, "viewing the facts in a light most favorable to the People, 'there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime[s] proved beyond a reasonable doubt' " (*People v Danielson*, 9 NY3d 342, 349 [2007]; *see People v Contes*, 60 NY2d 620, 621 [1983]). The evidence of defendant's dominion and control over the upstairs apartment included the undisputed facts that he possessed a key to the

apartment, and that the police had seized, from an open drawer of a metal cabinet situated in a bedroom closet, a photographic identification card of defendant. The police also found in that drawer defendant's wallet, which contained, inter alia, defendant's birth certificate and a benefits card, a bank card, and a medical card, all issued in defendant's name. In the same metal cabinet drawer, the police discovered shotgun shells, which matched the defaced operable shotgun that the police found in the adjacent bedroom, sticking out from under the bed and thus partially in plain view. In a lower drawer of the same metal cabinet, police discovered two wrapped packages of cocaine, weighing one kilogram each. In a smaller storage area next to the metal cabinet, the police found two additional kilograms of cocaine, one still wrapped and one that had been opened, stored above a heating duct near the ceiling. Next to the bed under which the police had found the defaced shotgun was a chest of drawers, the top drawer of which contained mail addressed to defendant's girlfriend, which defendant's girlfriend testified that she had placed there herself. Next to the chest of drawers, propped up in the corner of the room in plain view, was an operable rifle. We conclude that the above evidence is legally sufficient to support the conviction with respect to the issue of defendant's constructive possession of the contraband found in the upstairs apartment (*see People v Hines*, 278 AD2d 849, 849-850 [4th Dept 2000], *affd* 97 NY2d 56 [2001], *rearg denied* 97 NY2d 678 [2001]; *People v Fuller*, 168 AD2d 972, 973-974 [4th Dept 1990], *lv denied* 78 NY2d 922 [1991]; *see also People v Slade*, 133 AD3d 1203, 1205 [4th Dept 2015], *lv denied* 26 NY3d 1150 [2016]).

Even assuming, arguendo, that another individual rented the upstairs apartment from defendant, we note that the fact that another individual had access to the apartment is insufficient to defeat an inference of defendant's constructive possession (*see Fuller*, 168 AD2d at 973; *see also People v Farmer*, 136 AD3d 1410, 1411-1412 [4th Dept 2016], *lv denied* 28 NY3d 1027 [2016]; *People v Archie*, 78 AD3d 1560, 1561 [4th Dept 2010], *lv denied* 16 NY3d 856 [2011]). To the extent that defendant's legal sufficiency contention is based on an attempt to differentiate between constructive possession of the contents of the upstairs apartment and knowledge of the contraband, we conclude that the contention is without merit inasmuch as, "[w]here contraband is found on premises under a defendant's control, it may be inferred that he has both knowledge and control of it" (*People v Sacco*, 64 AD2d 324, 327 [4th Dept 1978]; *see People v Sierra*, 45 NY2d 56, 60 [1978]).

Viewing the evidence in light of the elements of these possessory crimes as charged to the jury (*see Danielson*, 9 NY3d at 349), we further conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Defendant's girlfriend testified that she and defendant had never lived in the upstairs apartment. She also testified that defendant had rented the upstairs apartment to an individual named "J-Roc" since at least 2013, but she was unable to give the individual's legal name, and she did not think that the individual's name appeared on the mailbox. She also testified that the metal cabinet and the chest of drawers had formerly been located in the downstairs apartment, but

that they had been moved upstairs, at some time not specified, after some construction work had begun on the downstairs apartment. Sitting as a theoretical "thirteenth juror" (*Danielson*, 9 NY3d at 348), we conclude that the testimony of defendant's girlfriend contains several factual gaps that make it difficult for us to credit her account of how personal items belonging to her and defendant became commingled with the possessions of an unidentified person living in the upstairs apartment. We therefore cannot conclude that the jury, in returning a guilty verdict, failed to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495; *People v Barnes*, 158 AD3d 1072, 1073 [4th Dept 2018], *lv denied* 31 NY3d 1011 [2018]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

425

KA 16-00639

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN GERENA, 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 (Sheila A. DiTullio, J.), entered March 28, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (two counts), criminal possession of a controlled substance in the third degree (three counts), 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: On appeal 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]), defendant contends that County Court erred in denying his motion to withdraw his plea without conducting a hearing and that his plea was not knowingly, intelligently, and voluntarily entered. We reject those contentions.

Addressing first defendant's contention that the court erred in denying the motion without conducting a hearing, we conclude that defendant's contention lacks merit. "Only in the rare instance will a defendant be entitled to an evidentiary hearing; often a limited interrogation by the court will suffice. The defendant should be afforded [a] reasonable opportunity to present his contentions and the court should be enabled to make an informed determination" (*People v Tinsley*, 35 NY2d 926, 927 [1974]), and that is what occurred here (*see People v Zimmerman*, 100 AD3d 1360, 1362 [4th Dept 2012], *lv denied* 20 NY3d 1015 [2013]; *People v Sparcino*, 78 AD3d 1508, 1509 [4th Dept 2010], *lv denied* 16 NY3d 746 [2011]; *People v Dozier*, 12 AD3d 1176, 1176-1177 [4th Dept 2004]).

With respect to defendant's contention that the court should have

granted his motion to withdraw his plea, it is well settled that " '[p]ermission to withdraw a guilty plea rests solely within the court's discretion . . . , and refusal to permit withdrawal does not constitute an abuse of that discretion unless there is some evidence of innocence, fraud, or mistake in inducing the plea' " (*People v Leach*, 119 AD3d 1429, 1430 [4th Dept 2014], *lv denied* 24 NY3d 962 [2014]), which is lacking here. " 'The court was presented with a credibility determination when defendant moved to withdraw his plea and advanced his belated claims of innocence and coercion, and it did not abuse its discretion in discrediting those claims' " (*People v Colon*, 122 AD3d 1309, 1310 [4th Dept 2014], *lv denied* 25 NY3d 1200 [2015]). Indeed, we conclude that defendant's belated claims of innocence, duress, and coercion are unsupported by the record and belied by his statements during the plea colloquy (*see People v Dames*, 122 AD3d 1336, 1336 [4th Dept 2014], *lv denied* 25 NY3d 1162 [2015]; *Dozier*, 12 AD3d at 1177).

To the extent that defendant contends that his plea was not voluntary because it was coerced by defense counsel, that contention is preserved for our review by defendant's motion to withdraw his plea (*see People v Lopez*, 71 NY2d 662, 665 [1988]). Nevertheless, we reject that contention inasmuch as it is belied by the record (*see People v Strasser*, 83 AD3d 1411, 1411 [4th Dept 2011]; *People v Toliver*, 82 AD3d 1581, 1582 [4th Dept 2011], *lv denied* 17 NY3d 802 [2011], *reconsideration denied* 17 NY3d 862 [2011]). During the thorough plea colloquy, defendant stated that he was satisfied with the services of defense counsel, that he had enough time to discuss his plea with defense counsel, that no one was forcing him to plead guilty, and that he was pleading guilty voluntarily (*see Strasser*, 83 AD3d at 1411; *Toliver*, 82 AD3d at 1582). We therefore conclude that "[t]he record establishes that defendant knowingly and intelligently, with neither confusion nor coercion present . . . , and with a full opportunity to assess the advantages and disadvantages of a plea versus a trial . . . , made his election" (*People v Johnson*, 122 AD3d 1324, 1325 [4th Dept 2014] [internal quotation marks omitted]). Contrary to defendant's further contention, "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 Mason*, 56 AD3d 1201, 1202 [4th Dept 2008], *lv denied* 11 NY3d 927 [2009] [internal quotation marks omitted]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

427

KA 18-02153

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BILL A. THOMAS, DEFENDANT-APPELLANT.

LAW OFFICE OF MAURICE J. VERRILLO, P.C., ROCHESTER (MAURICE J. VERRILLO 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 M. Mohun, A.J.), rendered July 13, 2017. The judgment convicted defendant, upon a jury verdict, of menacing a police officer or peace officer 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 a jury verdict of menacing a police officer or peace officer (Penal Law § 120.18) and criminal possession of a weapon in the third degree (§ 265.02 [1]). The evidence at trial established that a police officer was dispatched, in response to a 911 call, to respond to a verbal altercation between defendant and his brother. As defendant's brother allowed the officer to enter the residence, the brother turned to defendant and said, "the police are here to talk to you." At that point, defendant approached the officer from 10 to 15 feet away "in a very fast, quick manner" while holding a kitchen knife with an eight-inch blade in his hand, and defendant ignored the command of the officer to drop the knife. Given the proximity of the knife-bearing defendant, the officer decided to retreat from the residence with defendant's brother instead of attempting to engage defendant. After the officer and the brother exited, defendant slammed the door and locked the deadbolt. Outside, immediately after the incident, the officer asked the brother whether anyone else was still in the house, and the brother replied that his mother was in her bedroom. The officer directed the brother to telephone the mother to tell her to lock her door. The brother did so, telling the mother over the telephone, "[defendant] came at us with a knife; lock your door." Law enforcement personnel eventually regained access to the residence and arrested defendant.

We reject defendant's contention that the evidence is legally

insufficient to support the conviction of criminal possession of a weapon in the third degree. Contrary to defendant's contention, "the fact that the knife held by defendant during the incident was not recovered does not render the evidence legally insufficient" (*People v Cohens*, 81 AD3d 1442, 1444 [4th Dept 2011], *lv denied* 16 NY3d 894 [2011]). Furthermore, defendant's intent to use the knife unlawfully can be inferred from his disobedience of the officer's order to drop the knife and his approach of the officer with the knife "in a very fast, quick manner" (*see generally People v Burkett*, 101 AD3d 1468, 1469 [3d Dept 2012], *lv denied* 20 NY3d 1096 [2013]). Defendant also challenges the conviction of menacing a police officer or peace officer on the ground that there is legally insufficient evidence to establish that he "knew or reasonably should have known that [the] victim was a police officer" (Penal Law § 120.18). That challenge is without merit. There is a valid line of reasoning and permissible inferences from which a rational jury could have found that element of the crime proved beyond a reasonable doubt (*see People v Bleakley*, 69 NY2d 490, 495 [1987]), including evidence that defendant's brother announced the arrival of the officer to defendant, that the officer was in uniform, that at least half of the officer's body and uniform in the doorway was visible to defendant, and that the officer commanded defendant to drop the knife while simultaneously drawing his service firearm. Defendant's remaining challenges to the legal sufficiency of the evidence have not been preserved for our review (*see People v Gray*, 86 NY2d 10, 19 [1995]). 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 Bleakley*, 69 NY2d at 495).

Contrary to defendant's contention, County Court properly determined that the testimony from the police officer that defendant's brother said to defendant, "the police are here to talk to you," was not inadmissible hearsay inasmuch as it was not offered for the truth of its content (*see generally People v Davis*, 58 NY2d 1102, 1103 [1983]). Rather, the statement was "offered 'as the basis of an inference for another relevant fact' " (*People v Howard*, 261 AD2d 841, 841 [4th Dept 1999], *lv denied* 93 NY2d 1020 [1999]; *see People v Mallo*, 165 AD3d 495, 496 [1st Dept 2018], *lv denied* 32 NY3d 1175 [2019]), i.e., that defendant was aware of the police officer's presence (*see generally* Penal Law § 120.18). Contrary to defendant's further contention, the court likewise properly determined that the police officer's testimony that defendant's brother said that "[defendant] came at us with a knife" was admissible in evidence under the present sense impression exception to the rule against hearsay (*see generally People v Vasquez*, 88 NY2d 561, 574 [1996]). That statement was made by defendant's brother "immediately after the event" it describes (*People v Jones*, 28 NY3d 1037, 1039 [2016]), and it had the requisite "corroboration to bolster . . . assurances of [its] reliability" (*Vasquez*, 88 NY2d at 574). Defendant's contention that the court admitted the two disputed statements in evidence in violation of his constitutional rights to confront his accusers is raised for the first time on appeal, and thus it is not properly

before us (*see People v Woods*, 202 AD2d 1043, 1043 [4th Dept 1994]; *see also People v Kello*, 96 NY2d 740, 743 [2001]; *People v Vaughn*, 48 AD3d 1069, 1069-1070 [4th Dept 2008], *lv denied* 10 NY3d 845 [2008], *cert denied* 555 US 910 [2008]).

Finally, defendant contends that he was not afforded effective assistance of counsel. Defendant has failed, however, to demonstrate the absence of strategic or other legitimate explanations for his counsel's alleged deficiencies (*see People v Caban*, 5 NY3d 143, 154 [2005]). In any event, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Mark W. Bennett

Entered: July 31, 2019

Clerk of the Court

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

435

CA 18-02394

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

JERON THOMPSON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

M AND M FORWARDING OF BUFFALO, NEW YORK, INC.,
DEFENDANT-APPELLANT,
AND TBT CORPORATION, DEFENDANT-RESPONDENT.

LIPPMAN O'CONNOR, BUFFALO (MATTHEW J. DUGGAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

NASH CONNORS, P.C., BUFFALO (PHILIP M. GULISANO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered June 4, 2018. The order, among other things, denied the cross motion of defendant M and M Forwarding of Buffalo, New York, Inc. for summary judgment dismissing the complaint and cross claim against it.

It is hereby ORDERED that said appeal from the order insofar as it reserved decision on the cross motion of defendant TBT Corporation is unanimously dismissed, and the order is modified on the law by granting the cross motion of defendant M and M Forwarding of Buffalo, New York, Inc. in part and dismissing the cross claim against it, and as modified the order is affirmed without costs.

Memorandum: Defendant TBT Corporation (TBT) owns a warehouse that it leased to defendant M and M Forwarding of Buffalo, New York, Inc. (M and M). M and M subleased a portion of the warehouse to plaintiff's employer, which is not a party to this action. Plaintiff was injured at the warehouse in the course of his work, and he commenced this action against defendants and asserted theories of liability under, inter alia, Labor Law §§ 240 (1) and 241 (6). Defendants cross-claimed against each other for indemnification.

As limited by its brief and its representation at oral argument before us, M and M now appeals from those parts of an order that denied its cross motion to the extent that it sought summary judgment dismissing TBT's cross claim against it and that reserved decision on TBT's cross motion to the extent that it sought summary judgment dismissing M and M's cross claim against it. At the outset, we note that "[t]o the extent that the order reserved decision, it is not appealable" (*Cobb v Kittinger*, 168 AD2d 923, 923 [4th Dept 1990]; *see*

CPLR 5701 [a] [2]), and we therefore dismiss the appeal from the order insofar as it reserved decision on TBT's cross motion.

On appeal, M and M asserts that it was not an "owner" of the warehouse for purposes of the Labor Law, and that TBT, which M and M contends is the true "owner" of the warehouse for purposes of the Labor Law, therefore cannot be entitled to indemnification from M and M. We agree with M and M. For purposes of Labor Law §§ 240 (1) and 241 (6) liability, "the term 'owner' is not limited to the titleholder of the property where the accident occurred and encompasses a [party] 'who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for [its] benefit' " (*Scaparo v Village of Ilion*, 13 NY3d 864, 866 [2009]). " '[The owner] is the party who, as a practical matter, has the right to hire or fire subcontractors and to insist that proper safety practices are followed' " (*Guryev v Tomchinsky*, 87 AD3d 612, 614 [2d Dept 2011], *affd* 20 NY3d 194 [2012]; *see Sweeting v Board of Coop. Educ. Servs.*, 83 AD2d 103, 114 [4th Dept 1981], *lv denied* 56 NY2d 503 [1982]). "The key factor in determining whether a non-titleholder is an 'owner' is the 'right to insist that proper safety practices were followed and it is the right to control the work that is significant, not the actual exercise or nonexercise of control' " (*Ryba v Almeida*, 27 AD3d 718, 719 [2d Dept 2006]; *see Guryev*, 87 AD3d at 614; *Sweeting*, 83 AD2d at 114).

Here, M and M met its initial burden of establishing that it was not an owner for purposes of Labor Law §§ 240 (1) and 241 (6) because its submissions established that "it was 'an out-of-possession lessee of the property [that] neither contracted for nor supervised the work that brought about the injury, and had no authority to exercise any control over the specific work area that gave rise to plaintiff's injuries' " (*Crespo v Triad, Inc.*, 294 AD2d 145, 146 [1st Dept 2002]; *see Ritter v Fort Schuyler Mgt. Corp.*, 169 AD3d 1419, 1420 [4th Dept 2019]). Inasmuch as TBT failed to raise a material issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), Supreme Court erred in denying M and M's cross motion to the extent that it sought summary judgment dismissing TBT's cross claim against M and M. We therefore modify the order by granting M and M's cross motion in part and dismissing TBT's cross claim against it.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

436

TP 18-02163

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

IN THE MATTER OF SUNANDA KERN, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE CENTRAL REGISTER OF CHILD ABUSE AND MALTREATMENT AND ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES CPS UNIT, RESPONDENTS.

SUNANDA KERN, PETITIONER PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (WILLIAM E. STORRS OF COUNSEL), FOR RESPONDENT NEW YORK STATE CENTRAL REGISTER OF CHILD ABUSE AND MALTREATMENT.

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 F. O'Donnell, J.], entered November 20, 2018) to review a determination of New York State Office of Children and Family Services. The determination denied petitioner's request that a report maintained in the New York State Central Register of Child Abuse and Maltreatment, indicating petitioner for maltreatment, be amended to unfounded.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul a determination made after a fair hearing that denied her request to amend an indicated report of maltreatment with respect to the subject child to an unfounded report, and to seal it. She contends that the determination that she committed acts of maltreatment, and that such maltreatment was relevant and reasonably related to childcare, is not supported by substantial evidence. We reject that contention. "It is well established that our review is limited to whether the determination to deny the request to amend and seal the [indicated] report is supported by substantial evidence in the record" (*Matter of Lauren v New York State Off. of Children & Family Servs.*, 147 AD3d 1322, 1322 [4th Dept 2017] [internal quotation marks omitted]). "Substantial evidence is such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact . . . [,] [and] hearsay evidence . . . [,] if it is sufficiently reliable and probative, may constitute sufficient evidence to support a determination" (*Matter of Dawn M. v New York State Cent. Register of Child Abuse & Maltreatment*, 138 AD3d 1492,

1493 [4th Dept 2016] [internal quotation marks omitted]). "To establish maltreatment, the agency was required to show by a fair preponderance of the evidence that the physical, mental or emotional condition of the child[ ] had been impaired or was in imminent danger of becoming impaired because of a failure by petitioner to exercise a minimum degree of care in providing the child[ ] with appropriate supervision or guardianship" (*id.* [internal quotation marks omitted]).

The evidence at the hearing, including petitioner's own admission and the records of caseworkers, established that she repeatedly and falsely accused the child's father of sexual abuse, which caused the child to be subjected to repeated unnecessary professional examinations and interviews, harming the child's physical, mental, or emotional well-being. We thus conclude that, on the record before us, substantial evidence supports the determination of the Administrative Law Judge (ALJ) that it was established by a preponderance of the evidence that petitioner maltreated the child (*see Matter of Daniel D.*, 57 AD3d 444, 444 [1st Dept 2008], *lv dismissed* 12 NY3d 906 [2009]; *see generally Matter of Salvatore M. [Nicole M.]*, 104 AD3d 769, 769 [2d Dept 2013], *lv denied* 21 NY3d 858 [2013]; *Matter of Morgan P.*, 60 AD3d 1362, 1362 [4th Dept 2009]).

Moreover, the evidence at the hearing established that petitioner failed to acknowledge that her false reports of child sexual abuse were harmful to the child and failed to appreciate the seriousness of her conduct, and we therefore conclude that substantial evidence supports the ALJ's determination that petitioner's maltreatment of the subject child was likely to recur (*see Matter of Warren v New York State Cent. Register of Child Abuse & Maltreatment*, 164 AD3d 1615, 1617 [4th Dept 2018]) and was reasonably related to employment in childcare (*see id.*; *Matter of Garzon v New York State Off. of Children & Family Servs.*, 85 AD3d 1603, 1604 [4th Dept 2011]; *Matter of Castilloux v New York State Off. of Children & Family Servs.*, 16 AD3d 1061, 1062 [4th Dept 2005], *lv denied* 5 NY3d 702 [2005]).

Finally, we do not consider those arguments made or materials submitted by petitioner for the first time in this proceeding, inasmuch as she did not present such arguments or submit such materials to the ALJ (*see Matter of Levine v New York State Liq. Auth.*, 23 NY2d 863, 864 [1969]; *Matter of Kahn v Planning Bd. of City of Buffalo*, 60 AD3d 1451, 1451-1452 [4th Dept 2009], *lv denied* 13 NY3d 711 [2009]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

439

CA 18-02225

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

IN THE MATTER OF CHRISTOPHER FIELDS AND
DEBRA STROBELE, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, RESPONDENT-APPELLANT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (MAEVE E. HUGGINS OF COUNSEL), FOR RESPONDENT-APPELLANT.

CREIGHTON, JOHNSEN & GIROUX, BUFFALO (IAN HAYES OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Emilio L. Colaiacovo, J.), entered July 10, 2018 in a CPLR article 78 proceeding. The judgment denied the motion of respondent to dismiss the petition, granted the petition and ordered respondent to provide petitioners with a defense and indemnification in an underlying action.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating that part of the judgment granting the petition as to petitioner Christopher Fields and granting the motion in part and dismissing the petition as to that petitioner, and by vacating that part of the judgment granting the petition as to petitioner Debra Strobele insofar as she seeks indemnification in the underlying action, and as modified the judgment is affirmed without costs.

Memorandum: Respondent appeals from a judgment denying its motion to dismiss the petition of two police officers seeking a defense and indemnification in an underlying action brought against them by a nonparty to this proceeding (*see generally* General Municipal Law § 50-j [1]), and granting the petition in its entirety. Petitioners commenced this CPLR article 78 proceeding after respondent determined that it would not provide them with a defense or indemnification in the underlying action.

We agree with respondent that Supreme Court erred in granting the petition as to petitioner Christopher Fields and in denying that part of the motion seeking to dismiss the petition as to Fields on the ground that he failed to timely commence this proceeding, and we therefore modify the judgment accordingly. As the party seeking to establish the statute of limitations as a defense, respondent had the

burden of establishing that, more than four months before the proceeding was commenced, it provided notice to Fields that it would not provide him with a defense or indemnification in the underlying action (*see Matter of Village of Westbury v Department of Transp. of State of N.Y.*, 75 NY2d 62, 73 [1989]; *Matter of Silvestri v Hubert*, 106 AD3d 924, 925 [2d Dept 2013]). Respondent met that burden by submitting evidence establishing that it contacted Fields on December 29, 2017 via telephone conversation, voicemail message, and certified mail correspondence, and that the instant proceeding was not commenced until May 15, 2018.

Furthermore, we reject petitioners' contention that the time for Fields to commence the CPLR article 78 proceeding was extended by the decision of the plaintiff in the underlying action to file an amended complaint. The case cited by petitioners in support of that proposition—*Perez v Paramount Communications* (92 NY2d 749 [1999])—is inapplicable. *Perez* holds that, when a plaintiff seeks leave to amend a complaint, the statute of limitations in that action is tolled until the date of entry of the order granting the plaintiff leave to amend the complaint (*id.* at 754-756; *see Rogers v Dunkirk Aviation Sales & Serv., Inc.*, 31 AD3d 1119, 1119-1120 [4th Dept 2006]). We decline to extend the holding of *Perez* to the proposition that a plaintiff seeking leave to amend a complaint to add other defendants extends the time that an original defendant in the first action has to commence a separate proceeding.

We likewise reject petitioners' contention that the language set forth in the letter to Fields dated December 29, 2017 is ambiguous. The letter states in relevant part: "Please allow this letter to follow up on our earlier telephone conversation today. As you know, the above-referenced civil lawsuit has been commenced. The Corporation Counsel's Office is representing the City of Buffalo and Buffalo Police Department. There is no legal basis for this Office to represent and indemnify you in this matter." The statements in the letter are not equivocal such that Fields had to infer or guess at the nature of the determination (*see Nickerson v City of Jamestown*, 178 AD2d 1003, 1003 [4th Dept 1991]). There is no language in the letter creating any ambiguity whether the determination was nonfinal, nonbinding (*see Matter of Carter v State of N.Y., Exec. Dept., Div. of Parole*, 95 NY2d 267, 270 [2000]; *cf. Mahoney v Pataki*, 261 AD2d 898, 899 [4th Dept 1999]), temporary, or conditional (*cf. Catskill Regional Off-Track Betting Corp. v New York State Racing & Wagering Bd.*, 56 AD3d 1027, 1029 [3d Dept 2008]). Moreover, the record does not reflect any subsequent action by the Corporation Counsel's Office inconsistent with its determination not to provide Fields with a defense or indemnification (*cf. City of Buffalo City Sch. Dist. v LPCiminelli, Inc.*, 159 AD3d 1468, 1475 [4th Dept 2018]). Thus, in our view, there is no ambiguity in the letter that permits Fields to interpret it "as anything other than final and binding" (*Matter of Briarwood Manor Prop. LLC v County of Niagara*, 133 AD3d 1284, 1287 [4th Dept 2015]).

The court properly determined, however, that respondent's determination not to provide petitioner Debra Strobele with a defense

was arbitrary and capricious (*see* CPLR 7803 [3]). Respondent's determination was based on its conclusion that Strobele was acting outside the scope of her employment at the time of the incidents concerning the plaintiff in the underlying action, but we conclude that respondent cannot establish, as it must, that Strobele's actions were "wholly personal" in nature (*Matter of Krug v City of Buffalo*, 162 AD3d 1463, 1464-1465 [4th Dept 2018]; *see Matter of Schenectady Police Benevolent Assn. v City of Schenectady*, 299 AD2d 717, 719 [3d Dept 2002]; *see generally* General Municipal Law § 50-j [1]). Here, "it is undisputed that [Strobele] was on duty and working as a police officer when the alleged conduct occurred" (*Krug*, 162 AD3d at 1464). That result is unaffected by the facts that Strobele pleaded guilty to a disciplinary charge in connection with her conduct that gave rise to the underlying action and that she was issued a reprimand (*see* General Municipal Law § 50-j [1]).

Finally, we conclude that the court's determination that Strobele is entitled to indemnification is premature at this time, and we therefore further modify the judgment accordingly (*see generally Krug*, 162 AD3d at 1463).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

441

CA 18-00955

PRESENT: WHALEN, P.J., PERADOTTO, NEMOYER, AND CURRAN, JJ.

NICHOLAS L. VASSENELLI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, STEPHANIE A. MINER, IN HER INDIVIDUAL AND OFFICIAL CAPACITY AS MAYOR OF CITY OF SYRACUSE, FRANK L. FOWLER, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS CHIEF OF POLICE FOR CITY OF SYRACUSE, JUDY CULETON, IN HER INDIVIDUAL AND OFFICIAL CAPACITY AS DIRECTOR OF HUMAN RESOURCES DIVISION OF SYRACUSE POLICE DEPARTMENT, MATTHEW DRISCOLL, IN HIS INDIVIDUAL CAPACITY AS FORMER MAYOR OF CITY OF SYRACUSE, GARY MIGUEL, IN HIS INDIVIDUAL CAPACITY AS FORMER CHIEF OF POLICE OF CITY OF SYRACUSE, SERGEANT RICHARD PERRIN, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, DAVID BARRETTE, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS DEPUTY CHIEF OF SYRACUSE POLICE DEPARTMENT, SERGEANT MICHAEL MOUREY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS EMPLOYEE IN CHARGE OF THE MEDICAL SECTION OF CITY OF SYRACUSE POLICE DEPARTMENT, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.
(ACTION NO. 1.)

NICHOLAS L. VASSENELLI, PLAINTIFF-APPELLANT,

V

CITY OF SYRACUSE, STEPHANIE A. MINER, IN HER INDIVIDUAL AND OFFICIAL CAPACITY AS MAYOR OF CITY OF SYRACUSE, FRANK L. FOWLER, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS CHIEF OF POLICE FOR CITY OF SYRACUSE, SERGEANT MICHAEL MOUREY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS EMPLOYEE IN CHARGE OF THE MEDICAL SECTION OF CITY OF SYRACUSE POLICE DEPARTMENT, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.
(ACTION NO. 2.)
(APPEAL NO. 1.)

BOSMAN LAW FIRM, LLC, ROME (A.J. BOSMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COUGHLIN & GERHART, LLP, BINGHAMTON (MARY LOUISE CONROW OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CITY OF SYRACUSE, FRANK L. FOWLER, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS CHIEF OF POLICE FOR CITY OF SYRACUSE, JUDY CULETON, IN HER INDIVIDUAL AND OFFICIAL CAPACITY AS DIRECTOR OF HUMAN RESOURCES DIVISION OF SYRACUSE POLICE DEPARTMENT, MATTHEW DRISCOLL, IN HIS INDIVIDUAL CAPACITY AS FORMER MAYOR OF CITY OF SYRACUSE, GARY MIGUEL, IN HIS INDIVIDUAL CAPACITY AS FORMER CHIEF OF POLICE OF CITY OF SYRACUSE, SERGEANT RICHARD PERRIN, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, DAVID BARRETTE, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS DEPUTY CHIEF OF SYRACUSE POLICE DEPARTMENT, AND SERGEANT MICHAEL MOUREY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS EMPLOYEE IN CHARGE OF THE MEDICAL SECTION OF CITY OF SYRACUSE POLICE DEPARTMENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered February 20, 2018. The order and judgment, inter alia, granted the motion of defendants City of Syracuse, Stephanie A. Miner, Frank L. Fowler, Judy Culeton, Matthew Driscoll, Gary Miguel, Sergeant Richard Perrin, David Barrette, and Sergeant Michael Mourey for summary judgment and dismissed the amended complaint in action No. 1 against them and dismissed the complaint in action No. 2.

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

Memorandum: Plaintiff, a disabled and retired police officer, commenced these actions seeking damages for injuries he allegedly sustained in connection with defendants' management of plaintiff's health care benefits pursuant to General Municipal Law § 207-c. In appeal Nos. 1 through 4, plaintiff appeals from one order and judgment and three judgments that granted defendants' respective motions for summary judgment and dismissed plaintiff's amended complaint in action No. 1 and complaint in action No. 2. The order and judgment in appeal No. 1 concerns the motion of defendant City of Syracuse (City) and current and former city officials and employees Stephanie A. Miner, Frank L. Fowler, Judy Culeton, Matthew Driscoll, Gary Miguel, Richard Perrin, David Barrette and Michael Mourey (collectively, City defendants); the judgment in appeal No. 2 concerns the motion of defendant Sharon Eriksson; the judgment in appeal No. 3 concerns the motion of defendant POMCO Group, also known as POMCO, Inc., and its employee, defendant Sharon Miller (collectively, POMCO defendants); and the judgment in appeal No. 4 concerns the motion of defendant PMA Management Corp. (PMA) and its employee, defendant Carol Wahl (collectively, PMA defendants).

On a prior appeal, we modified the orders appealed from by denying in part defendants' respective motions to dismiss the amended complaint in action No. 1, reinstating the causes of action for negligence and gross negligence against all defendants, and reinstating the causes of action for promissory estoppel, breach of contract, retaliation and discrimination under the Americans with Disabilities Act (ADA) (42 USC § 12101 *et seq.*) and the Rehabilitation

Act of 1973 (29 USC § 701 *et seq.*), and retaliation under 42 USC § 1983 against the City defendants (*Vassenelli v City of Syracuse*, 138 AD3d 1471 [4th Dept 2016]). While the prior appeal was pending, plaintiff commenced action No. 2 against certain City defendants, asserting additional causes of action for promissory estoppel, negligence and gross negligence, and violations of the ADA and the Rehabilitation Act. Supreme Court consolidated the two actions. Subsequently, following discovery, the court granted defendants' respective motions for summary judgment dismissing the complaint and amended complaint. We affirm.

With respect to the City defendants, in appeal No. 1 we conclude that the court properly dismissed the negligence and gross negligence causes of action against them inasmuch as they were entitled to governmental function immunity based on the discretion they are afforded in administering payments of General Municipal Law § 207-c benefits (*see generally Turturro v City of New York*, 28 NY3d 469, 478-479 [2016]; *Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 425 [2013]). Although plaintiff's negligence and gross negligence causes of action involved the health care services that he was receiving, the City defendants were engaged in a governmental function because they were merely administering the payment of General Municipal Law § 207-c benefits, i.e., they did not actually provide plaintiff with health care services (*see Brown v Speed*, 302 AD2d 915, 916 [4th Dept 2003], *lv denied* 100 NY2d 501 [2003]; *see generally Applewhite*, 21 NY3d at 426). Moreover, the City defendants were entitled to immunity inasmuch as the administration of section 207-c benefits involved the exercise of their discretion and the record establishes that the City defendants denied payment of the disputed claims for benefits after actually exercising this discretion (*see Connolly v Long Is. Power Auth.*, 30 NY3d 719, 728 [2018]; *see generally Matter of De Poalo v County of Schenectady*, 85 NY2d 527, 532 [1995]).

With respect to the remaining defendants, in appeal Nos. 2 through 4 we conclude that the court properly granted the respective motions with respect to the negligence and gross negligence causes of action. Plaintiff was not a party to the contracts between those defendants and City defendants, and therefore liability may be established where, inter alia, "the contracting party, in failing to exercise reasonable care in the performance of [its] duties, launches a force or instrument of harm" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). Here, the undisputed evidence established that the POMCO defendants, the PMA defendants, and Eriksson did not have authority to deny payment of plaintiff's claims for General Municipal Law § 207-c benefits. That authority rested, at all relevant times, with the City defendants. Thus, it cannot be said that these defendants launched any "instrument of harm" because they never made the decision to deny any of plaintiff's claims for payment of medical care and treatment.

With respect to the breach of contract cause of action asserted against the City defendants, we conclude in appeal No. 1 that the court properly granted that part of the City defendants' motion seeking to dismiss that cause of action inasmuch as the provision of

the collective bargaining agreement that plaintiff purports was breached concerned only the reduction of plaintiff's group health benefits, and did not involve section 207-c benefits in any way. In addition, the court properly granted the City defendants' motion with respect to the promissory estoppel cause of action because plaintiff acknowledged in his own deposition testimony that he knew he is only entitled to payment of section 207-c benefits where they are causally-related to his on-the-job accident, rendering unreasonable any reliance on the purported promise that the City would cover all of his health care costs (*see generally Zuley v Elizabeth Wende Breast Care, LLC*, 126 AD3d 1460, 1461 [4th Dept 2015], *amended on rearg* 129 AD3d 1558 [4th Dept 2015]). This is not one of those unusual circumstances where estoppel against a municipality is warranted because doing otherwise would "result in a manifest injustice" (*Agress v Clarkstown Cent. School Dist.*, 69 AD3d 769, 771 [2d Dept 2010] [internal quotation marks omitted]; *see Landmark Colony at Oyster Bay v Board of Supervisors of County of Nassau*, 113 AD2d 741, 744 [2d Dept 1985]).

The court also did not err in granting the City defendants' motion with respect to the ADA, Rehabilitation Act, and retaliation causes of action. Initially, we note that plaintiff, as a public employee, may not sue his employer under Title II of the ADA and the Rehabilitation Act, as plaintiff has done here (*see Brumfield v City of Chicago*, 735 F3d 619, 626-627 [7th Cir 2013]; *Mary Jo C. v New York State & Local Retirement Sys.*, 707 F3d 144, 171 [2d Cir 2013], *cert dismissed* 569 US 1040 [2013]; *Moore v City of New York*, 2017 WL 35450, *18-20 [SD NY, Jan. 3, 2017, No. 15-CV-6600 (GBD) (JLC)]). Where, as here, plaintiff's causes of action are "related to the terms, conditions and privileges of his employment[, i.e., his entitlement to benefits under General Municipal Law § 207-c, they] are covered by Title I" and not Title II of the ADA or the Rehabilitation Act (*Klaes v Jamestown Bd. of Pub. Util.*, 2013 WL 1337188, *13 [WD NY, Mar. 29 2013, No. 11-CV-606]). Dismissal of those causes of action also requires dismissal of the retaliation causes of action predicated thereon. Furthermore, we note that plaintiff abandoned his retaliation cause of action predicated on 42 USC § 1983 by not raising any contentions with respect thereto in his appellate brief (*see Calhoun v County of Herkimer*, 114 AD3d 1304, 1305-1306 [4th Dept 2014]). In any event, that cause of action was properly dismissed because plaintiff made no showing that City defendants' allegedly adverse action—refusing to pay certain General Municipal Law § 207-c claims—was causally related to his protected First Amendment activity (*see generally Calhoun*, 114 AD3d at 1306).

Mark W. Bennett

Entered: July 31, 2019

Clerk of the Court

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

442

CA 18-00985

PRESENT: WHALEN, P.J., PERADOTTO, NEMOYER, AND CURRAN, JJ.

NICHOLAS L. VASSENELLI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, ET AL., DEFENDANTS,
AND SHARON ERIKSSON, IN HER INDIVIDUAL CAPACITY
AS A FORMER AGENT OF THE CITY OF SYRACUSE,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

BOSMAN LAW FIRM, LLC, ROME (A.J. BOSMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered February 28, 2018. The judgment awarded costs and disbursements to defendant Sharon Eriksson.

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

Same memorandum as in *Vassenelli v City of Syracuse* ([appeal No. 1] — AD3d — [July 31, 2019] [4th Dept 2019]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

443

CA 18-01031

PRESENT: WHALEN, P.J., PERADOTTO, NEMOYER, AND CURRAN, JJ.

NICHOLAS L. VASSENELLI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, ET AL., DEFENDANTS,
POMCO GROUP, ALSO KNOWN AS POMCO, INC.,
INDIVIDUALLY AND AS AN AGENT FOR CITY OF
SYRACUSE, AND SHARON MILLER, IN HER
INDIVIDUAL CAPACITY AS A FORMER AGENT OF
CITY OF SYRACUSE, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 3.)

BOSMAN LAW FIRM, LLC, ROME (A.J. BOSMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARCLAY DAMON, LLP, SYRACUSE (ROBERT A. BARRER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered February 21, 2018. The judgment awarded costs and disbursements to defendants Pomco Group, also known as Pomco, Inc., and Sharon Miller.

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

Same memorandum as in *Vassenelli v City of Syracuse* ([appeal No. 1] — AD3d — [July 31, 2019] [4th Dept 2019]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

444

CA 18-01074

PRESENT: WHALEN, P.J., PERADOTTO, NEMOYER, AND CURRAN, JJ.

NICHOLAS L. VASSENELLI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, ET AL., DEFENDANTS,
PMA MANAGEMENT CORP. AND CAROL WAHL,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 4.)

BOSMAN LAW FIRM, LLC, ROME (A.J. BOSMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH MAZURE DIRECTOR WILKINS YOUNG & YAGERMAN, P.C., NEW YORK CITY (DANIEL Y. SOHNEN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered February 28, 2018. The judgment dismissed the amended complaint against defendants PMA Management Corp. and Carol Wahl.

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

Same memorandum as in *Vassenelli v City of Syracuse* ([appeal No. 1] — AD3d — [July 31, 2019] [4th Dept 2019]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

445

CA 18-01081

PRESENT: WHALEN, P.J., PERADOTTO, NEMOYER, AND CURRAN, JJ.

NICHOLAS L. VASSENELLI, PLAINTIFF-APPELLANT,

V ORDER

CITY OF SYRACUSE, ET AL., DEFENDANTS,
POMCO GROUP, ALSO KNOWN AS POMCO, INC.,
INDIVIDUALLY AND AS AGENT FOR CITY OF
SYRACUSE AND SHARON MILLER, IN HER
INDIVIDUAL CAPACITY AS A FORMER AGENT OF
CITY OF SYRACUSE, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 5.)

BOSMAN LAW FIRM, LLC, ROME (A.J. BOSMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARCLAY DAMON, LLP, SYRACUSE (ROBERT A. BARRER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered February 20, 2018. The order granted the motion of defendants Pomco Group, also known as Pomco, Inc., and Sharon Miller 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: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

446

CA 18-01082

PRESENT: WHALEN, P.J., PERADOTTO, NEMOYER, AND CURRAN, JJ.

NICHOLAS L. VASSENELLI, PLAINTIFF-APPELLANT,

V ORDER

CITY OF SYRACUSE, ET AL., DEFENDANTS,
AND SHARON ERIKSSON, IN HER INDIVIDUAL CAPACITY
AS A FORMER AGENT OF THE CITY OF SYRACUSE,
DEFENDANT-RESPONDENT.
(APPEAL NO. 6.)

BOSMAN LAW FIRM, LLC, ROME (A.J. BOSMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered February 20, 2018. The order granted the motion of defendant Sharon Eriksson 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: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

447

CA 18-01083

PRESENT: WHALEN, P.J., PERADOTTO, NEMOYER, AND CURRAN, JJ.

NICHOLAS L. VASSENELLI, PLAINTIFF-APPELLANT,

V ORDER

CITY OF SYRACUSE, ET AL., DEFENDANTS,
PMA MANAGEMENT CORP. AND CAROL WAHL,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 7.)

BOSMAN LAW FIRM, LLC, ROME (A.J. BOSMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH MAZURE DIRECTOR WILKINS YOUNG & YAGERMAN, P.C., NEW YORK CITY (DANIEL Y. SOHNEN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered February 20, 2018. The order granted the motion of defendants PMA Management Corp. and Carol Wahl 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: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

456

KA 17-00648

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE MCKEE, 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 (Anthony F. Aloi, J.), rendered December 9, 2016. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree, assault in the first degree, criminal possession of stolen property in the fourth degree, assault in the second degree and resisting arrest.

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of robbery in the first degree (Penal Law § 160.15 [1]), assault in the first degree (§ 120.10 [4]), assault in the second degree (§ 120.05 [12]), criminal possession of stolen property in the fourth degree (§ 165.45 [2]), and resisting arrest (§ 205.30). We reject defendant's contention that the court erred in refusing to suppress, as the product of an unlawful stop, physical evidence recovered from defendant's person and defendant's statements to the police, among other things. We conclude that, "[b]ased upon the totality of the circumstances, including the short period of time between the [police dispatch] reporting [the incident] and the arrival of the police officer at the reported location, defendant's presence at that location, and the officer's observations that defendant's physical characteristics and clothing matched the description of the suspect, the officer was justified in forcibly detaining defendant in order to quickly confirm or dispel [his] reasonable suspicion of defendant's [involvement in the reported incident]" (*People v Pruitt*, 158 AD3d 1138, 1139 [4th Dept 2018], *lv denied* 31 NY3d 1120 [2018] [internal quotation marks omitted]; *see People v Carson*, 122 AD3d 1391, 1392 [4th Dept 2014], *lv denied* 25 NY3d 1161 [2015]; *People v Evans*, 34 AD3d 1301, 1302 [4th Dept 2006], *lv denied* 8 NY3d 845 [2007]). Contrary to defendant's contention, the fact that the officer physically restrained defendant before placing him in

handcuffs did not elevate the forcible detention into an arrest; rather, the officer's conduct was justified under the circumstances based on defendant's failure to obey the officer's requests that he stop walking away, the officer's reasonable suspicion that defendant had just been involved in a violent physical altercation, and the officer's concern that defendant was armed (*see People v Arce*, 150 AD3d 1403, 1404-1405 [3d Dept 2017], *lv denied* 29 NY3d 1090 [2017]; *People v Boyd*, 272 AD2d 898, 899 [4th Dept 2000], *lv denied* 95 NY2d 850 [2000]; *see generally People v Balkum*, 71 AD3d 1594, 1595 [4th Dept 2010], *lv denied* 14 NY3d 885 [2010]).

Assuming, arguendo, that the photo array used to identify defendant was unduly suggestive, we conclude that any error in receiving that identification in evidence was harmless (*see generally People v Owens*, 74 NY2d 677, 678 [1989]).

We likewise reject defendant's contention that he was deprived of a fair trial based on prosecutorial misconduct during summation. Many of the comments in question "were within the broad bounds of rhetorical comment permissible during summations . . . , and they were either a fair response to defense counsel's summation or fair comment on the evidence" (*People v Ali*, 89 AD3d 1412, 1414 [4th Dept 2011], *lv denied* 18 NY3d 881 [2012] [internal quotation marks omitted]). To the extent that certain comments may have exceeded those bounds, we conclude that the comments "were not so egregious as to deprive defendant of a fair trial" (*id.* [internal quotation marks omitted]). We further conclude that defense counsel's failure to object to certain of those statements did not constitute ineffective assistance of counsel (*see People v Lyon*, 77 AD3d 1338, 1339 [4th Dept 2010], *lv denied* 15 NY3d 954 [2010]).

In light of the circumstances of the offense, which involved a violent attack on an elderly citizen, and considering defendant's criminal history, we conclude that the sentence is not unduly harsh or severe (*see People v Whitlatch*, 294 AD2d 909, 910 [4th Dept 2002], *lv denied* 98 NY2d 703 [2002]). We have considered defendant's remaining contention and conclude that it does not require reversal or modification of the judgment.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

460

CA 18-02141

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

SEAN P. WILCZAK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF NIAGARA FALLS, DEFENDANT-RESPONDENT.

LAW OFFICES OF JOHN P. BARTOLOMEI & ASSOCIATES, NIAGARA FALLS (MATTHEW J. BIRD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CRAIG H. JOHNSON, CORPORATION COUNSEL, NIAGARA FALLS (THOMAS M. O'DONNELL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Niagara County (Daniel Furlong, J.), entered May 18, 2018. The order and judgment granted the motion of defendant to dismiss the complaint and dismissed the complaint.

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

Memorandum: In June 2015, defendant commenced an in rem tax foreclosure proceeding on various properties, including two properties owned by plaintiff (subject properties). Defendant thereafter obtained a default judgment of foreclosure directing that the subject properties be transferred to defendant, and the deeds were recorded on January 20, 2016. In December 2017, plaintiff commenced this action pursuant to RPTL 1137 seeking, inter alia, to set aside those deeds and to recover monetary damages. Defendant moved to dismiss the complaint pursuant to various provisions of the CPLR, the Niagara Falls City Charter, and the General Municipal Law. Supreme Court granted the motion, and plaintiff appeals. We note that, inasmuch as the court failed to set forth its reasons for granting the motion, the parties do not know whether the court granted the motion based on some or all of the grounds raised by defendant (*see O'Hara v Holiday Farm*, 147 AD3d 1454, 1454 [4th Dept 2017]).

We reject plaintiff's contention that the court erred in dismissing the first and fourth causes of action, which alleged that plaintiff did not owe any delinquent taxes on the subject properties and that defendant failed to comply with the notice provisions of RPTL 1125. Defendant established that these causes of action should be dismissed for failure to state a cause of action pursuant to CPLR 3211 (a) (7). "When ruling on a motion to dismiss pursuant to CPLR 3211 (a) (7), it is well settled that 'the criterion is whether the

proponent of the pleading has a cause of action, not whether he [or she] has stated one' " (*Lin v County of Sullivan*, 100 AD3d 1076, 1076-1077 [3d Dept 2012], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). "Thus, [a]ffidavits and other evidentiary material may be considered to establish conclusively that [the] plaintiff has no cause of action" (*Lin*, 100 AD3d at 1077; *see Liberty Affordable Hous., Inc. v Maple Ct. Apts.*, 125 AD3d 85, 91 [4th Dept 2015]).

First, defendant established through documentary evidence that plaintiff's properties were delinquent on taxes. RPTL 1123 (1) provides that a petition for foreclosure is permissible for properties that are tax delinquent for 21 months. Defendant submitted evidence that, as of the date of the filing of the tax foreclosure proceeding on June 22, 2015, plaintiff was delinquent on the subject properties inasmuch as he owed taxes from 2012.

Second, defendant established that it complied with the notice provisions of RPTL 1125. " 'Under both the federal and state constitutions, the State may not deprive a person of property without due process of law' " (*Matter of County of Seneca [Maxim Dev. Group]*, 151 AD3d 1611, 1611 [4th Dept 2017], quoting *Matter of Harner v County of Tioga*, 5 NY3d 136, 140 [2005]). "Due process does not require that a property owner receive actual notice before the government may take his [or her] property" (*Maxim Dev. Group*, 151 AD3d at 1611-1612 [internal quotation marks omitted]). "Rather, due process is satisfied by notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" (*id.* at 1612 [internal quotation marks omitted]).

Pursuant to RPTL 1125 (1) (a) (i) and (b) (i), defendant was required to send notice of the foreclosure proceeding by both certified and ordinary first class mail to the owner whose interest was a matter of public record on the date the list of delinquent taxes was filed (*see Maxim Dev. Group*, 151 AD3d at 1612; *Lin*, 100 AD3d at 1078). "The notice . . . shall consist of (a) a copy of the petition and, if not substantially the same as the petition, the public notice of foreclosure" (RPTL 1125 [2]). "An affidavit of mailing of such notice shall be executed" (RPTL 1125 [3] [a]). Such notice is "deemed received unless both the certified mailing and the ordinary first class mailing are returned by the United States postal service within forty-five days after being mailed" (RPTL 1125 [1] [b] [i]; *see Lin*, 100 AD3d at 1078).

Here, defendant's documentary submissions conclusively showed that plaintiff was provided with the proper notice pursuant to RPTL article 11 (*see Lin*, 100 AD3d at 1077). Defendant submitted the affidavit of mailing of its billing supervisor and a copy of the petition and notice of foreclosure. The billing supervisor averred that, on July 6, 2015, he deposited with the United States postal service one set of postage prepaid certified letters and one set of postage prepaid letters containing a copy of the petition and notice of foreclosure addressed to the last known address of each owner of

property appearing on the list of delinquent taxes as they appeared upon the records of the City Controller. Defendant submitted copies of the notices of tax foreclosure that were sent to plaintiff, informing him that the subject properties were part of the petition and notice of foreclosure. Both notices were addressed to plaintiff at an address that he does not dispute is his mailing address. Defendant also submitted its mailing book, which showed that the certified mail packet was mailed to plaintiff at that address, and defendant's deputy corporation counsel averred that neither the regular nor the certified mailings to plaintiff were returned.

" 'Where[, as here,] the proof exhibits an office practice and procedure followed in the regular course of business which shows that notices have been duly addressed and mailed, a presumption arises that those notices have been received by the party to whom they were sent' " (*Maxim Dev. Group*, 151 AD3d at 1612; *see Sendel v Diskin*, 277 AD2d 757, 758-759 [3d Dept 2000], *lv denied* 96 NY2d 707 [2001]). Although plaintiff averred in opposition to the motion that "at no time did he receive a letter or notice at his home address or at either property address notifying him of the foreclosure action[,]" we note that the "denial of receipt of such notice, alone, is insufficient to rebut [the] presumption" that plaintiff received such notice (*Lin*, 100 AD3d at 1079; *see Sendel*, 277 AD2d at 759).

We further reject plaintiff's contention that the court erred in dismissing the second cause of action, which sought equitable relief. We conclude that this cause of action was also properly dismissed pursuant to CPLR 3211 (a) (7). "A foreclosure action is equitable in nature and triggers the equitable powers of the court" (*Mortgage Elec. Registration Sys., Inc. v Horkan*, 68 AD3d 948, 948 [2d Dept 2009]; *see Meadowlands Portfolio, LLC v Manton*, 118 AD3d 1439, 1440 [4th Dept 2014]; *Thompson v Naish*, 93 AD3d 1203, 1204 [4th Dept 2012]). "Once equity is invoked, the court's power is as broad as equity and justice require" (*Norstar Bank v Morabito*, 201 AD2d 545, 546 [2d Dept 1994]). "Thus, a court may rely on 'its inherent authority to vacate [a judgment] in the interest of substantial justice, rather than its statutory authority . . .' as the 'statutory grounds are subsumed by the court's broader inherent authority' " (*U.S. Bank N.A. v Losner*, 145 AD3d 935, 938 [2d Dept 2016]). Here, however, plaintiff never sought to reopen the default judgment of foreclosure pursuant to RPTL 1131 and was therefore not entitled to consideration of equitable relief (*see Matter of County of Wayne [Schenk]*, 169 AD3d 1501, 1502-1503 [4th Dept 2019]).

Finally, we reject plaintiff's contention that the court erred in dismissing the third cause of action, which sought monetary damages of $10,000 for the loss of personal property that defendant removed from the subject properties. Assuming, arguendo, that defendant would be liable for the taking of the personal property (*see Matter of City of Utica [Suprunchik]*, 169 AD3d 179, 182 [4th Dept 2019]), we agree with defendant that this cause of action was properly dismissed pursuant to General Municipal Law § 50-e (1) (a) because plaintiff failed to file a notice of claim (*see* § 50-i [1] [a]) and pursuant to CPLR 3211 (a)

(5) because the cause of action was time-barred. A cause of action for conversion arose for the personal property contained within the subject properties on January 20, 2016, when defendant recorded the deed conveying the subject properties to it and placed locks on the subject properties (*see Della Pietra v State of New York*, 125 AD2d 936, 937-938 [4th Dept 1986], *affd* 71 NY2d 792 [1988]; *Matter of White v City of Mount Vernon*, 221 AD2d 345, 346 [2d Dept 1995]). Therefore, plaintiff was required to file a notice of claim against defendant within 90 days (*see* General Municipal Law § 50-e [1] [a]) and to commence this action within one year and 90 days (*see* CPLR 217-a), neither of which he did.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

461

CA 18-02262

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

IN THE MATTER OF AMY H. WITRYOL AND
THOMAS FRECK, PETITIONERS-PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CWM CHEMICAL SERVICES, L.L.C., WASTE
MANAGEMENT, INC., NEW YORK STATE DEPARTMENT
OF ENVIRONMENTAL CONSERVATION, MAUREEN BRADY,
NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION REGION 9 REGIONAL ATTORNEY,
DAVID STEVER, NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION REGION 9 ASSISTANT
REGIONAL ATTORNEY, AND PETER GRASSO, P.E.,
NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION REGION 9 MATERIALS MANAGEMENT
ENGINEER, RESPONDENTS-DEFENDANTS-RESPONDENTS.

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

BOND, SCHOENECK & KING, PLLC, SYRACUSE (THOMAS R. SMITH OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS CWM CHEMICAL SERVICES, L.L.C. AND WASTE MANAGEMENT, INC.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JOSHUA M. TALLENT OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, MAUREEN BRADY, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION REGION 9 REGIONAL ATTORNEY, DAVID STEVER, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION REGION 9 ASSISTANT REGIONAL ATTORNEY, AND PETER GRASSO, P.E., NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION REGION 9 MATERIALS MANAGEMENT ENGINEER.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Mark A. Montour, J.), entered May 8, 2018 in a CPLR article 78 proceeding and declaratory judgment action. The judgment, among other things, granted respondents-defendants' motions to dismiss the petition-complaint.

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

Memorandum: Petitioners-plaintiffs (petitioners) are owners of land near a waste management site owned and operated by respondent-

defendant CWM Chemical Services, L.L.C. (CWM) in Model City, New York (Model City facility). Petitioners commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, among other things, to annul certain "decisions" of respondent-defendant New York State Department of Environmental Conservation (DEC) and procure a declaration that, inter alia, CWM must "immediately cease" hazardous waste treatment and storage operations at the Model City facility. Petitioners alleged that the applicable siting certificate authorized CWM to engage in the disputed waste treatment and storage operations only while Residuals Management Unit No. 1 (RMU-1), a sub-facility within the larger Model City facility, remained active. According to petitioners, once CWM capped and closed RMU-1, waste treatment and storage operations became unauthorized at the Model City facility generally, and CWM was thus required to obtain a new siting certificate in order to continue waste treatment and storage operations at the Model City facility. On the motions of respondents-defendants (respondents), Supreme Court, inter alia, dismissed the petition-complaint (petition) against them on the grounds that, among other things, the "decisions" challenged by petitioners did not constitute final agency decisions. We affirm.

As a preliminary matter, we note that a "declaratory judgment action is not an appropriate procedural vehicle for challenging the . . . administrative determination[ ] [in question], and thus the proceeding/declaratory judgment action . . . is properly only a proceeding pursuant to CPLR article 78" (*Matter of Smoke v Planning Bd. of Town of Greig*, 138 AD3d 1437, 1438 [4th Dept 2016], *lv denied* 28 NY3d 901 [2016] [internal quotation marks omitted]; *see Matter of Custom Topsoil, Inc. v City of Buffalo*, 81 AD3d 1363, 1364 [4th Dept 2011], *lv denied* 17 NY3d 709 [2011]). Further, the relief requested in the declaratory judgment action, i.e., that CWM must "immediately cease" waste treatment and storage operations, is properly sought under CPLR article 78, as opposed to CPLR 3001 (*see generally Matter of Dandomar Co., LLC v Town of Pleasant Val. Town Bd.*, 86 AD3d 83, 89 [2d Dept 2011]).

Contrary to petitioners' contention, their challenge did not relate to a final agency decision. CPLR article 78 prohibits challenges to non-final determinations (*see* CPLR 7801 [1]; *Matter of Cor Rte. 5 Co., LLC v Village of Fayetteville*, 147 AD3d 1432, 1433 [4th Dept 2017]). A determination is final only where (1) "the agency must have reached a definitive position on the issue that inflicts actual, concrete injury" and (2) "the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party" (*Matter of Best Payphones, Inc. v Department of Info. Tech & Telecom. of City of N.Y.*, 5 NY3d 30, 34 [2005]; *see Matter of Essex County v Zagata*, 91 NY2d 447, 453 [1998]; *Cor Rte. 5 Co., LLC*, 147 AD3d at 1433). As limited by their initial and reply briefs, petitioners contend that a June 2017 letter from the DEC to CWM constitutes a final agency decision for the purpose of this article 78 proceeding. That letter, however, simply states that CWM fulfilled its obligations under its permit in capping RMU-1. At most, the letter reflects the DEC's determination that CWM had properly capped RMU-1 and that RMU-1 had ceased active

operations. Inasmuch as the letter does not mention waste treatment and storage operations and does not address whether the capping of RMU-1 impacts other Model City facility operations, it does not amount to a final agency decision implicating the injury alleged in the petition.

In light of our determination, petitioners' remaining contentions are academic.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

466

CA 18-02191

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

VIRGINIA F. KLEIST, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DANIEL STERN, DEFENDANT-RESPONDENT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (PAUL V. WEBB, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WRIGHT, WRIGHT AND HAMPTON, JAMESTOWN (EDWARD P. WRIGHT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered May 16, 2018. The order granted the motion of defendant for a directed verdict and dismissed the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the amended complaint to the extent it alleges violations of paragraphs four and five of the covenants and restrictions, and as modified the order is affirmed without costs and a new trial is granted on those claims.

Memorandum: Plaintiff and defendant own lakefront properties within the Chautauqua Shores subdivision. All property owners within the subdivision are subject to covenants and restrictions that were filed in 1962, when the subdivision was developed. The covenants and restrictions give "each and every owner of land in [the subdivision] . . . the right to enforce the same by appropriate court proceedings." In December 2014, defendant purchased his property with plans to demolish the existing house and build a much larger house on the property. When plaintiff saw the site plans for the new house, she notified defendant by letter in early August 2015 that the site plan showed that the home he was about to construct was in violation of paragraph five of the covenants and restrictions, which required a 100-foot setback from the lake line for any building. That same month, she commenced this action seeking to enjoin defendant from violating that covenant and restriction and to require him to remove any buildings that were in violation thereof. By her amended complaint filed a few months later, plaintiff alleged that the house would also violate the second and fourth paragraphs of the covenants and restrictions. Defendant, believing that he was in compliance with the covenants and restrictions, proceeded with the construction and

the house is now fully built. A nonjury trial was held and, at the close of plaintiff's proof, Supreme Court granted defendant's motion for a directed verdict and dismissed the amended complaint, and plaintiff now appeals.

Upon defendant's motion for a directed verdict, the court must accept plaintiff's evidence as true and afford plaintiff every favorable inference that may reasonably be drawn from the facts as presented at this nonjury trial, and grant the motion only if there is no rational process by which the court could have found in plaintiff's favor (*see Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]; *Bolin v Goodman*, 160 AD3d 1350, 1351 [4th Dept 2018]). We conclude that the court erred in granting the motion with respect to the claims in the amended complaint alleging violations of paragraphs four and five of the covenants and restrictions. We therefore modify the order by denying the motion in part and reinstating the amended complaint to the extent it alleges violations of those covenants and restrictions, and we grant a new trial on those claims before a different justice (*see generally Bolin*, 160 AD3d at 1350-1351; *Harris v Gupta*, 57 AD3d 1421, 1421-1422 [4th Dept 2008]).

"[T]he law has long favored free and unencumbered use of real property, and covenants restricting use are strictly construed against those seeking to enforce them" (*Witter v Taggart*, 78 NY2d 234, 237 [1991]; *see Huggins v Castle Estates*, 36 NY2d 427, 430 [1975]). "[A] party seeking to enforce a restriction on land use must prove, by clear and convincing evidence, the scope, as well as the existence, of the restriction" (*Greek Peak v Grodner*, 75 NY2d 981, 982 [1990]; *see Witter*, 78 NY2d at 238; *Huggins*, 36 NY2d at 430). "Restrictive covenants will be enforced when the intention of the parties is clear and the limitation is reasonable" (*Chambers v Old Stone Hill Rd. Assoc.*, 1 NY3d 424, 431 [2004]).

We disagree with plaintiff that she established by clear and convincing evidence that defendant's house violated the second paragraph of the covenants and restrictions, which provides that only single family dwellings "not more than one and one-half stories in height . . . shall be placed on any lot." That same covenant was at issue in *Ludwig v Chautauqua Shores Improvement Assn.* (5 AD3d 1119, 1120 [4th Dept 2004], *lv denied* 3 NY3d 601 [2004]), and we determined that the court there incorrectly accepted the interpretation of the covenant "as prohibiting property owners from building homes of more than 1½ stories in *design*, regardless of their *height*." We concluded that "[t]he words 'not more than one and one-half stories in height' are ambiguous in scope," and because the defendants, who were seeking to enforce the covenant, "failed to present . . . clear and convincing proof with respect to what number of feet constitutes a 'story in height,' the scope of the covenant 'is uncertain, doubtful, or debatable,' thus rendering it unenforceable as applied to plaintiff's residence" (*id.*). Here, plaintiff also failed to show by clear and convincing evidence the scope and meaning of the covenant in the second paragraph. Plaintiff's experts testified to three different interpretations of that covenant. One expert, who was familiar with

restrictive covenants written for subdivisions in the area, opined that, for the most part, height restrictions are usually delineated in feet, and the relevant covenant was not so delineated. Instead, it was delineated in terms of "stories," and there was no clear and convincing proof of what that meant.

We agree with plaintiff, however, that she established by clear and convincing evidence that defendant's house violated the fourth and fifth paragraphs of the covenants and restrictions. The fourth paragraph provides that "[n]o building shall be constructed on any lot so that any part thereof shall be closer than . . . ten (10) feet from the side . . . lot line." Plaintiff's expert testified that the building plans showed that the right side of the house was 8 feet 1 inch from the side, and the left side encroached on the setback by about a foot. The fifth paragraph provides that "[n]o building shall be constructed . . . closer than 100 feet from the lake line." Plaintiff's experts testified that the house had a covered porch within the setback and opined that it was part of the building and thus violated the setback. Defendant's reliance on the fact that there were other properties within the subdivision with attached decks located in the setbacks is misplaced. As the court stated, "[e]nforcement of the setback is different than whether there's been a violation of the setback."

Although the court determined that there was a violation of at least one of the covenants and restrictions here, it granted the motion on the ground that plaintiff could not seek equitable relief because she did not seek such relief against other property owners within the subdivision regarding their alleged violations of the same covenants and restrictions. That was error. Plaintiff is "entitled to ignore inoffensive violations of the restriction[s] without forfeiting [her] right to restrain others which [she] find[s] offensive" (*Gordon v Incorporated Vil. of Lawrence*, 84 AD2d 558, 559 [2d Dept 1981], *affd* 56 NY2d 1003 [1982]). Moreover, the court's reluctance to grant equitable relief where, as here, the house has already been built was not a valid basis for granting defendant's motion. Defendant "proceeded with construction of the [house] with knowledge of the restrictive covenants and of plaintiff[']s intention to enforce them" (*Chambers*, 1 NY3d at 434; *see Hidalgo v 4-34-68, Inc.*, 117 AD3d 798, 800 [2d Dept 2014], *lv denied* 24 NY3d 916 [2015]; *Westmoreland Assn. v West Cutter Estates*, 174 AD2d 144, 151-152 [2d Dept 1992]).

Finally, although both parties address whether the covenants and restrictions should be extinguished pursuant to RPAPL 1951, that issue is not properly before us (*see generally Shuknecht v Shuknecht*, 162 AD3d 1639, 1639 [4th Dept 2018]; *Artessa v City of Utica*, 23 AD3d 1148, 1149 [4th Dept 2005]). Defendant did not move for a directed verdict on that ground, and the court did not grant the motion on that ground.

Entered: July 31, 2019

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 18-01687

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

IN THE MATTER OF THE FORECLOSURE OF TAX LIENS BY PROCEEDING IN REM PURSUANT TO ARTICLE 11 OF THE REAL PROPERTY TAX LAW BY THE COUNTY OF NIAGARA.

---------- MEMORANDUM AND ORDER

COUNTY OF NIAGARA, PETITIONER-RESPONDENT;

COLLINGWOOD CONSTRUCTION CORP., CLAIMANT-APPELLANT.

HOGANWILLIG, PLLC, AMHERST (STEVEN M. COHEN OF COUNSEL), FOR CLAIMANT-APPELLANT.

CLAUDE A. JOERG, COUNTY ATTORNEY, LOCKPORT (JOHN J. OTTAVIANO OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered December 11, 2017. The order denied the application of claimant to collect surplus funds.

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

Memorandum: Following claimant's failure to pay taxes on certain commercial real property, the County of Niagara obtained that property by default judgment of foreclosure pursuant to RPTL article 11. The County sold the property at auction, and claimant, who never moved to vacate the default judgment, thereafter filed a notice of claim asserting entitlement to the surplus funds resulting from the foreclosure sale. Supreme Court denied the application, and we now affirm.

Claimant's application for surplus funds is improperly predicated upon provisions of RPAPL article 13 that apply to claims for surplus moneys arising from the sale of mortgaged premises in mortgage foreclosure proceedings (*see* RPAPL 1361). RPAPL article 13 does not apply to the sale of properties acquired by a tax district pursuant to an in rem foreclosure proceeding under RPTL article 11 (*see Matter of Hoge v Chautauqua County*, — AD3d —, 2019 NY Slip Op 04821 [4th Dept 2019]).

Moreover, claimant is not entitled to any surplus funds under RPTL article 11 because its failure to redeem the property or interpose an answer in the in rem foreclosure proceeding divested it

of any "right, title, and interest and equity of redemption in and to" the property and authorized the County, as the tax district, to seek a default judgment (RPTL 1131; *see* RPTL 1102 [6]). In this regard, RPTL 1136 (3) provides that a default judgment of foreclosure will direct "the enforcing officer of the tax district to prepare, execute and cause to be recorded a deed conveying to such tax district full and complete title to such parcel." Once the deed is executed, the tax district is "seized of an estate in fee simple absolute" in the property and anyone "who may have had any right, title, interest, claim, lien or equity of redemption in or upon such parcel shall be barred and forever foreclosed of all such right, title, interest, claim, lien or equity of redemption" (*id.*).

Thus, where, as here, the taxpayer "neither attempted to redeem [its] property nor interposed an answer, the [tax district] is entitled to a deed conveying an estate in fee simple absolute and the taxpayer is forever foreclosed of [its] interest in the property" (*Matter of Ellis v City of Rochester*, 227 AD2d 904, 904 [4th Dept 1996] [internal quotation marks omitted]). Claimant thus is not "entitled to any compensation upon the resale of the property" (*id.* at 905; *see also Nelson v New York City*, 352 US 103, 110 [1956]; *Matter of Scott*, 116 AD2d 1020, 1020 [4th Dept 1986], *lv denied* 67 NY2d 608 [1986]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

480

KA 17-01322

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KASSEEN ALLEN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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 (Kenneth F. Case, J.), rendered May 3, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree (two counts).

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of two counts of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of one count of attempted burglary in the second degree (§§ 110.00, 140.25 [2]).

Defendant contends in each appeal that his waiver of the right to appeal is invalid because he did not receive any consideration in exchange therefor. We reject that contention. The record establishes that defendant received consideration inasmuch as the plea agreements resulted in defendant pleading guilty to reduced charges that satisfied several pending charges (*see People v Frank*, 258 AD2d 900, 900 [4th Dept 1999], *lv denied* 93 NY2d 924 [1999]; *cf. People v Gramza*, 140 AD3d 1643, 1643-1644 [4th Dept 2016], *lv denied* 28 NY3d 930 [2016]).

Contrary to defendant's further contention, the record establishes in each appeal that County Court engaged him in "an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice . . . and informed him that the waiver was a condition of the plea agreement" (*People v Krouth*, 115 AD3d 1354, 1354-1355 [4th Dept 2014], *lv denied* 23 NY3d 1064 [2014]

[internal quotation marks omitted]; *see People v Miller*, 161 AD3d 1579, 1579 [4th Dept 2018], *lv denied* 31 NY3d 1119 [2018]). In addition, the record establishes that defendant "read and understood the contents of the written waiver that he executed during [each] proceeding" (*Miller*, 161 AD3d at 1579; *cf. People v Bradshaw*, 18 NY3d 257, 265 [2011]). We thus conclude that " '[t]he plea colloqu[ies], together with the written waiver[s] of the right to appeal executed by defendant, establish[ ] that defendant's waiver[s] of the right to appeal [were] knowingly, intelligently, and voluntarily entered' " (*Miller*, 161 AD3d at 1579; *see People v Lopez*, 6 NY3d 248, 256 [2006]). Contrary to defendant's contention, "there is no indication in the record that [his] age, experience, or background . . . rendered his waiver[s] of the right to appeal invalid" (*People v Ruffins*, 78 AD3d 1627, 1628 [4th Dept 2010]; *see People v Scott*, 144 AD3d 1597, 1598 [4th Dept 2016], *lv denied* 28 NY3d 1150 [2017]; *see generally People v Sanders*, 25 NY3d 337, 340-342 [2015]). Moreover, defendant's " 'monosyllabic affirmative responses to questioning by [the court] do not render his [waivers of the right to appeal] unknowing and involuntary' " (*People v Harris*, 94 AD3d 1484, 1485 [4th Dept 2012], *lv denied* 19 NY3d 961 [2012]; *see People v Hand*, 147 AD3d 1326, 1326-1327 [4th Dept 2017], *lv denied* 29 NY3d 998 [2017]).

Defendant's challenge in each appeal to the court's denial of youthful offender status does not survive his valid waiver of the right to appeal. "[W]hen a sentencing court has entirely abrogated its responsibility to determine whether an eligible youth (*see* CPL 720.10 [1], [2]) is entitled to youthful offender status, an appeal waiver [does] not foreclose [appellate] review of the court's failure to make that determination" (*People v Pacherille*, 25 NY3d 1021, 1023 [2015]; *see People v Rudolph*, 21 NY3d 497, 499 [2013]; *People v Simmons*, 159 AD3d 1270, 1271 [3d Dept 2018]). Here, however, defendant's contention that the court, in effect, entirely abrogated its responsibility to determine whether he was entitled to youthful offender status is belied by the record (*see People v Cardona*, 144 AD3d 936, 936 [2d Dept 2016]). The court properly treated defendant as an eligible youth (*see* CPL 720.10 [1], [2]; *cf. People v Crimm*, 140 AD3d 1672, 1673-1674 [4th Dept 2016]), but denied him youthful offender status upon consideration of "the gravity of the crime[s] and manner in which [they were] committed, mitigating circumstances, . . . defendant's attitude toward society and respect for the law," and the contents of the presentence reports (*People v Cruickshank*, 105 AD2d 325, 334 [3d Dept 1985], *affd* 67 NY2d 625 [1986]; *see Cardona*, 144 AD3d at 936). Thus, in each appeal, defendant's "valid waiver of the right to appeal . . . forecloses appellate review of [the] sentencing court's discretionary decision to deny youthful offender status" (*Pacherille*, 25 NY3d at 1024). The valid waiver of the right to appeal in each appeal also forecloses review of defendant's request that we exercise our interest of justice jurisdiction to adjudicate him a youthful offender (*see People v Torres*, 110 AD3d 1119, 1119 [3d Dept 2013], *lv denied* 22 NY3d 1044 [2013]; *see generally Lopez*, 6 NY3d at 255).

Finally, defendant's further challenge to the severity of the

sentence in each appeal is foreclosed by his valid waiver of the right to appeal (*see Lopez*, 6 NY3d at 256).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

481

KA 17-01323

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KASSEEN ALLEN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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 (Kenneth F. Case, J.), rendered May 3, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Same memorandum as in *People v Allen* ([appeal No. 1] — AD3d — [July 31, 2019] [4th Dept 2019]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

483

CAF 17-01475

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

IN THE MATTER OF SHAUNA L. GILROY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BRANDYN L. BACKUS, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

DAVID K. ETTMAN, SENECA FALLS, FOR PETITIONER-RESPONDENT.

DONNA M. CATHY, WATERLOO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Seneca County (Stephen D. Aronson, A.J.), entered April 12, 2017 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, modified respondent's visitation schedule with the subject child.

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

Memorandum: Petitioners, the mothers of the two subject children, commenced these proceedings pursuant to Family Court Act article 6 seeking to modify prior visitation orders that, inter alia, granted respondent father overnight visits with the respective children on alternating weekends. In these consolidated appeals, the father appeals from two orders entered following a joint hearing and in camera interviews with the children that, inter alia, eliminated overnight visitation between the father and the children. We affirm in both appeals.

Initially, we note that, in both appeals, "[t]here is no dispute that there was a sufficient change in circumstances since the prior order[s], and thus the issue before us is whether [Family C]ourt properly determined that the best interests of the children would be served by a change in visitation" (*Matter of Golda v Radtke*, 112 AD3d 1378, 1378 [4th Dept 2013]). Moreover, "[t]he propriety of visitation is generally left to the sound discretion of Family Court, whose findings are accorded deference by this Court and will remain undisturbed unless lacking a sound basis in the record" (*id.* [internal quotation marks omitted]).

The father contends in both appeals that the court's

determination regarding overnight visitation is not in the children's best interests inasmuch as petitioners attempted to alienate the children from him. We reject that contention. Here, the court found that petitioners acted with genuine concern for the emotional well-being of the children, and that finding has a sound and substantial basis in the record (*see Matter of Jillian EE. v Kane FF.*, 165 AD3d 1407, 1409-1410 [3d Dept 2018], *lv denied* 32 NY3d 912 [2019]; *Matter of Clary v McIntosh*, 117 AD3d 1285, 1286 [3d Dept 2014]; *Matter of Klee v Schill*, 95 AD3d 1599, 1600-1601 [3d Dept 2012]). Moreover, the record amply supports the court's determination that eliminating overnight visitation between the father and the children is in the children's best interests. In particular, the record establishes that the children were anxious and fearful of spending nights with the father because of his inattention to them, lack of suitable accommodations for them, and frequent arguments with his girlfriend (*see Golda*, 112 AD3d at 1378-1379; *Matter of Consilio v Terrigino*, 96 AD3d 1424, 1425 [4th Dept 2012]; *Matter of Troy SS. v Judy UU.*, 69 AD3d 1128, 1133 [3d Dept 2010], *lv denied in part and dismissed in part* 14 NY3d 912 [2010]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

484

CAF 17-01478

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

IN THE MATTER OF CIARA C. FASCIANA-MASTELLAR,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BRANDYN L. BACKUS, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

DAVID K. ETTMAN, SENECA FALLS, FOR PETITIONER-RESPONDENT.

DONNA M. CATHY, WATERLOO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Seneca County (Stephen D. Aronson, A.J.), entered April 12, 2017 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, modified respondent's visitation schedule with the subject child.

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

Same memorandum as in *Matter of Gilroy v Backus* (— AD3d — [July 31, 2019] [4th Dept 2019]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

487

CA 18-02145

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

CHRISTOPHER P. AND AMBER M., AS PARENTS AND NATURAL GUARDIANS OF ADRIANNA M.P., AN INFANT, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

KATHLEEN M.B., DEFENDANT-APPELLANT.

BURGIO, CURVIN & BANKER, BUFFALO (JAMES P. BURGIO OF COUNSEL), FOR DEFENDANT-APPELLANT.

DOLCE PANEPINTO, P.C., BUFFALO (EDWARD L. SMITH, III, OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered August 21, 2018. The order granted the motion of plaintiffs for partial summary judgment on the issue of liability.

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

Memorandum: Plaintiffs Christopher P. and Amber M., as parents and natural guardians of Adrianna M.P., their daughter, commenced actions that were thereafter consolidated seeking to recover damages for injuries that the daughter sustained during an interaction with defendant's dogs. Supreme Court granted plaintiffs' motion for partial summary judgment on the issue of liability. We reverse.

It is well established that "the owner of a domestic animal who either knows or should have known of that animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities" (*Collier v Zambito*, 1 NY3d 444, 446 [2004]). Such knowledge "may . . . be established by proof of prior acts of a similar kind of which the owner had notice" (*id.*). "Vicious propensities include the 'propensity to do any act that might endanger the safety of the persons and property of others in a given situation' " (*id.*, quoting *Dickson v McCoy*, 39 NY 400, 403 [1868]; *see Meka v Pufpaff*, 167 AD3d 1547, 1547-1548 [4th Dept 2018]; *Marquardt v Milewski*, 288 AD2d 928, 928 [4th Dept 2001]). Thus, "an animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensities—albeit only when such proclivity results in the injury

giving rise to the lawsuit" (*Collier*, 1 NY3d at 447; *see Long v Hess*, 162 AD3d 1646, 1647 [4th Dept 2018]). "Evidence tending to demonstrate a dog's vicious propensities includes evidence of a prior attack, the dog's tendency to growl or snap or bare its teeth, the manner in which the dog was restrained, the fact that the dog was kept as a guard dog, and a proclivity to act in a way that puts others at risk of harm" (*Ioveno v Schwartz*, 139 AD3d 1012, 1012 [2d Dept 2016], *lv denied* 28 NY3d 905 [2016]; *see Bard v Jahnke*, 6 NY3d 592, 597 [2006]; *Collier*, 1 NY3d at 447). "In contrast, 'normal canine behavior' such as 'barking and running around' does not amount to vicious propensities" (*Brady v Contangelo*, 148 AD3d 1544, 1546 [4th Dept 2017], quoting *Collier*, 1 NY3d at 447; *see Long*, 162 AD3d at 1647; *Bloom v Van Lenten*, 106 AD3d 1319, 1321 [3d Dept 2013]).

Contrary to defendant's initial contention, we agree with plaintiffs that, if they established as a matter of law that defendant knew that both dogs, or the dogs in concert, had vicious propensities that resulted in the daughter's injuries, then defendant's liability would not be dependent upon plaintiffs' identification of the particular dog that bit the daughter (*see O'Brien v Amman*, 21 Misc 3d 1118[A], 2008 NY Slip Op 52096[U], *2-3 [Sup Ct, Allegany County 2008]; *see generally Beck v Morse*, 271 AD2d 916, 916-917 [3d Dept 2000]). The implication of defendant's contention to the contrary is that a bite is necessary to establish a vicious propensity; however, it is well established that "[a] vicious propensity is not limited to a bite or other attack, but 'includes a propensity to act in a manner that may endanger the safety of another, whether playful or not' " (*Marquardt*, 288 AD2d at 928). Here, it is undisputed that both of defendant's dogs were involved in an interaction on the couch upon which the daughter was sitting and, during that ultimately dangerous interaction of fighting or aggressive playing, the dogs caused the daughter's injuries when at least one of them bit her (*see generally* PJI 2:220).

The question thus becomes whether plaintiffs met their burden of establishing as a matter of law that the dogs had vicious propensities that resulted in the daughter's injuries and that defendant knew or should have known of those vicious propensities (*see Collier*, 1 NY3d at 446-447; *Ioveno*, 139 AD3d at 1012; *Smith v Farner*, 229 AD2d 1017, 1017-1018 [4th Dept 1996]; *see also* PJI 2:220). We agree with defendant for the reasons that follow that plaintiffs failed to establish as a matter of law that the dogs had vicious propensities that resulted in the daughter's injuries.

Inasmuch as "summary judgment is the procedural equivalent of a trial . . . [, t]he moving party must sufficiently demonstrate entitlement to judgment, as a matter of law, by tender of evidentiary proof in admissible form" (*LaGrega v Farrell Lines*, 156 AD2d 205, 205 [1st Dept 1989]; *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Here, plaintiffs attempted to meet their burden by referencing a purported incident that occurred prior to the subject interaction involving the daughter in which a young boy was "nipped" by one of the dogs during an interaction with them. Plaintiffs failed, however, to submit evidence in admissible form regarding the

purported prior incident allegedly establishing the existence of the dogs' vicious propensities. Instead, plaintiffs relied on defendant's inadmissible hearsay testimony during her deposition about what she had heard from others regarding the purported prior incident, for which she was not present and about which she had no firsthand knowledge (*see generally Ciliotta v Ranieri*, 149 AD3d 1032, 1033 [2d Dept 2017]). Such evidence is insufficient to meet plaintiffs' burden on their motion for summary judgment (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

It is true that, "[i]f a party makes an admission, it is receivable even though knowledge of the fact was derived wholly from hearsay" (Jerome Prince, Richardson on Evidence § 8-206 [Farrell 11th ed 1995], citing *Reed v McCord*, 160 NY 330 [1899]). If, however, the party merely admits that he or she heard that an event occurred in the manner stated, the party's statement is "inadmissible as then it would only . . . amount[ ] to an admission that he [or she] had heard the statement which he [or she] repeated and not to an admission of the facts included in it" (*Reed*, 160 NY at 341; *see Cox v State of New York*, 3 NY2d 693, 698 [1958]). Here, defendant merely admitted that she had heard that the purported prior incident occurred in the manner stated by others, which is "in no sense an admission of any fact pertinent to the issue, but a mere admission of what [she] had heard without adoption or indorsement. Such evidence is clearly inadmissible" (*Reed*, 160 NY at 341; *see Cox*, 3 NY2d at 698; *Matter of Aaron v Burnham & Co.*, 2 AD2d 93, 95 [3d Dept 1956]).

Plaintiffs' remaining submissions likewise constituted inadmissible hearsay and, even assuming, arguendo, that those submissions constituted competent evidence, we conclude that they failed to establish as a matter of law that the dogs had vicious propensities that resulted in the daughter's injuries (*see generally Collier*, 1 NY3d at 447; *Earl v Piowaty*, 42 AD3d 865, 866 [3d Dept 2007]).

Based on the foregoing, plaintiffs' failure to make the required prima facie showing of entitlement to judgment as a matter of law mandates the denial of their motion regardless of the sufficiency of defendant's opposing papers (*see generally Winegrad*, 64 NY2d at 853).

Entered: July 31, 2019

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 18-02195

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

IN THE MATTER OF BUFFALO COUNCIL OF SUPERVISORS AND ADMINISTRATORS, LOCAL #10, BY ITS PRESIDENT CRYSTAL BARTON, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DR. KRINER CASH, AS SUPERINTENDENT OF CITY SCHOOL DISTRICT OF BUFFALO AND BOARD OF EDUCATION OF CITY SCHOOL DISTRICT OF BUFFALO, RESPONDENTS-RESPONDENTS.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (PATRICK J. MACKEY OF COUNSEL), FOR PETITIONER-APPELLANT.

NATHANIEL J. KUZMA, GENERAL COUNSEL, BUFFALO PUBLIC SCHOOLS, BUFFALO (JOEL C. MOORE OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered March 9, 2018 in a proceeding pursuant to CPLR article 78. The judgment, insofar as appealed from, granted respondents' motion to dismiss the petition insofar as it sought relief on behalf of Crystal Barton.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in part, the petition is reinstated insofar as it seeks relief on behalf of Crystal Barton, and respondents are granted 20 days from service of the order of this Court with notice of entry to serve and file an answer.

Memorandum: In this CPLR article 78 proceeding, petitioner appeals, as limited by its brief, from that part of a judgment that, in effect, granted respondents' motion to dismiss the petition insofar as it sought relief on behalf of Crystal Barton. We reverse the judgment insofar as appealed from.

Initially, we agree with petitioner that the petition was not defective as a result of being verified by petitioner's counsel, rather than by petitioner. Although the verification requirement of CPLR 7804 (d) must ordinarily be completed by a party, a verification "may be made by [a party's] attorney '[where, as here,] all the material allegations of the pleading are within the personal knowledge of . . . [that] attorney' " (*Matter of O'Neil v Kasler*, 53 AD2d 310, 314 [4th Dept 1976], quoting CPLR 3020 [d] [3]). Moreover, a party challenging the sufficiency of a verification is required "to give

'notice with due diligence to the attorney of the adverse party that he [or she] elect[ed]' to treat the petition as a nullity" (*Matter of Colon v Vacco*, 242 AD2d 973, 974 [4th Dept 1997], *lv denied* 91 NY2d 804 [1997], quoting CPLR 3022). Thus, even assuming, arguendo, that the verification by petitioner's attorney was insufficient, we conclude that respondents waived any challenge to the petition on that ground by failing to make the requisite diligent efforts and instead waiting a month before seeking dismissal of the petition on that basis (*see O'Neil*, 53 AD2d at 315; *see also Rozz v Law Offs. of Saul Kobrick, P.C.*, 134 AD3d 920, 921-922 [2d Dept 2015]; *see generally Lepkowski v State of New York*, 1 NY3d 201, 210 [2003]; *Matter of Giambra v Commissioner of Motor Vehs. of State of N.Y.*, 46 NY2d 743, 745 [1978]).

We also agree with petitioner that dismissal of the petition was not warranted under the doctrines of res judicata or collateral estoppel. In support of their motion, respondents contended that this proceeding was barred by res judicata and collateral estoppel as a result of prior arbitration between the parties. The arbitration resolved whether "the placement of [an employee] on paid administrative leave pending an investigation into allegations of misconduct [was] in violation of Article 4A of the collective bargaining agreement, which provides that no administrator shall be disciplined, reprimanded, reduced in rank or compensation or deprived of any professional advantage without cause." In contrast, the present petition alleges that respondents violated Education Law § 2566 (6), which provides a superintendent with the limited authority "to suspend a[] . . . principal . . . until the next regular meeting of the board, when all facts relating to the case shall be submitted to the board for its consideration and action." Specifically, petitioner alleges that the respondent Board of Education of the City School District of Buffalo (School Board) never ratified or approved the suspension of petitioner's president, a high school principal (principal), at "the next regular meeting of the board," and therefore there was no authority for the continued suspension of the principal. Thus, because the issues raised here are not identical to those raised during the prior arbitration, res judicata and collateral estoppel do not apply (*see generally M. Kaminsky & M. Friedberger v Wilson*, 150 AD3d 1094, 1096 [2d Dept 2017]; *Plumley v Erie Blvd. Hydropower, L.P.*, 114 AD3d 1249, 1249 [4th Dept 2014]).

Additionally, petitioner correctly contends that it was not required to exhaust administrative remedies prior to commencing this proceeding. First, the exhaustion of administrative remedies provided by a collective bargaining agreement is not necessary where, as here, the petitioner alleges violations of the Education Law, not violations of the agreement (*see Matter of Barhite v Town of Dewitt*, 144 AD3d 1645, 1647 [4th Dept 2016], *lv denied* 29 NY3d 902 [2017]; *Matter of Kaufmann v Board of Educ.*, 275 AD2d 890, 890 [4th Dept 2000]). The fact that petitioner also commenced a grievance proceeding based on an alleged violation of a collective bargaining agreement is of no moment because "[t]he issues presented and the remedies sought in each forum were separate and distinct" (*Barhite*, 144 AD3d at 1647 [internal

quotation marks omitted]).

Second, although Education Law § 310 provides in relevant part that any party aggrieved by an official act or decision of school authorities "may appeal by petition to the [C]ommissioner of [E]ducation," the Commissioner exercises primary jurisdiction only where the matter involves an issue requiring his or her specialized knowledge and expertise (*see generally Staatsburg Water Co. v Staatsburg Fire Dist.*, 72 NY2d 147, 156 [1988]; *Matter of Alden Cent. Sch. Dist. [Alden Cent. Schs. Administrators' Assn.]*, 115 AD3d 1340, 1341 [4th Dept 2014]; *Matter of Hessney v Board of Educ. of Pub. Schools of Tarrytowns*, 228 AD2d 954, 955 [3d Dept 1996], *lv denied* 89 NY2d 801 [1996]). Petitioner's contention regarding section 2566, however, requires no more than the interpretation and application of the plain language of that statute for which no deference to the Department of Education is required (*see Matter of Madison-Oneida Bd. of Coop. Educ. Servs. v Mills*, 4 NY3d 51, 59 [2004]; *see generally International Union of Painters & Allied Trades, Dist. Council No. 4 v New York State Dept. of Labor*, 32 NY3d 198, 209 [2018]; *Seittelman v Sabol*, 91 NY2d 618, 625 [1998]).

We further agree with petitioner that the petition has not been rendered moot by a subsequent investigation into additional alleged improprieties by the principal. Respondents neither alleged nor submitted evidence that the School Board, as opposed to the superintendent, has suspended the principal in compliance with Education Law § 2566 (6) in connection with those new allegations.

We decline petitioner's requests on appeal that, should we reverse the judgment appealed from, this Court remit the matter to Supreme Court with instructions to award, inter alia, compensatory relief in petitioner's favor (*see generally Parker v Town of Alexandria*, 138 AD3d 1467, 1468 [4th Dept 2016]; *Matter of Rosenberg v New York State Off. of Parks, Recreation, & Historic Preserv.*, 94 AD3d 1006, 1008 [2d Dept 2012]). Further, we note that where a motion to dismiss a petition is denied, " 'the court shall permit the respondent to answer, upon such terms as may be just' (CPLR 7804 [f]), and 'leave to serve [and file] an answer should be refused only if it clearly appear[s] that no issue exist[s] which might be raised by answer concerning the merits of the petitioner's application' " (*Matter of Julicher v Town of Tonawanda*, 34 AD3d 1217, 1217 [4th Dept 2006]), which is not the case here. We therefore reverse the judgment insofar as appealed from, deny the motion in part, reinstate the petition insofar as it seeks relief on behalf of Crystal Barton, and grant respondents 20 days from service of the order of this Court with notice of entry to serve and file an answer.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

503

KA 17-02024

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KRISTA M. WEIR, DEFENDANT-APPELLANT.

CARA A. WALDMAN, FAIRPORT, 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 November 4, 2016. The judgment convicted defendant, upon her plea of guilty, of kidnapping in the second 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 kidnapping in the second degree (Penal Law § 135.20). The victim of the kidnapping was defendant's biological child, who had been removed from defendant's care more than eight years earlier following allegations of abuse concerning the victim's sibling. Defendant surrendered her parental rights to both the victim and the victim's sibling, and the children were adopted by a family. The victim and the victim's sibling had no contact with defendant until March 16, 2016, when defendant's brother contacted the victim through Facebook. Thereafter, defendant, the victim, and the victim's sibling formulated a plan for defendant to travel to New York from her home in Georgia and pick up the children. On March 17, 2016, defendant, defendant's brother, and a third codefendant picked up the victim and the victim's sibling in Jefferson County and transported them to Georgia. Defendant was eventually apprehended in Georgia with the children. On the basis of her conviction of kidnapping in the second degree, defendant was ordered to register under the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*).

Initially, we agree with defendant that her waiver of the right to appeal is not valid. A waiver of the right to appeal is not effective where, as here, it "was not mentioned until after defendant pleaded guilty" (*People v Blackwell*, 129 AD3d 1690, 1690 [4th Dept 2015], *lv denied* 26 NY3d 926 [2015]; *see People v Willis*, 161 AD3d 1584, 1584 [4th Dept 2018]; *People v Mason*, 144 AD3d 1589, 1589 [4th Dept 2016], *lv denied* 28 NY3d 1186 [2017]). Furthermore, the record

fails 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" (*People v Lopez*, 6 NY3d 248, 256 [2006]; *see People v Ware*, 159 AD3d 1401, 1401 [4th Dept 2018], *lv denied* 31 NY3d 1122 [2018]), and the existence of a signed written waiver failed to cure those defects inasmuch as County Court " 'did not inquire of defendant whether [she] understood the written waiver or whether [she] had even read the waiver before signing it' " (*People v Mobayed*, 158 AD3d 1221, 1222 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018], quoting *People v Bradshaw*, 18 NY3d 257, 262 [2011]).

Nevertheless, we reject defendant's contention that she is exempt from SORA registration because she is a parent of the victim. "SORA defines 'sex offender' to include 'any person who is convicted of' any of a number of crimes listed in the statute . . . SORA requires all people included in this definition to register as sex offenders" (*People v Knox*, 12 NY3d 60, 65 [2009], *cert denied* 558 US 1011 [2009]). The list of offenses provided in the statute includes "section 135.05, 135.10, 135.20 or 135.25 of [the Penal Law] relating to kidnapping offenses, provided the victim of such kidnapping . . . is less than seventeen years old *and the offender is not the parent of the victim*" (§ 168-a [2] [a] [i] [emphasis added]). Although we have not yet had the occasion to address whether a biological parent who has surrendered his or her parental rights and whose child has been adopted is entitled to the benefit of the parent exemption set forth in the SORA statute, in *People v Brown* (264 AD2d 12 [4th Dept 2000]), this Court determined that, in a prosecution for kidnapping, such a person could not assert as an affirmative defense that he or she was a relative of the victim (*see* Penal Law §§ 135.00 [3]; 135.30) inasmuch as a biological parent's status as a "parent" with respect to an adopted child was terminated " 'in all respects' " by an order of adoption (*Brown*, 264 AD2d at 13-14, quoting Domestic Relations Law § 114 [1]). Applying that same reasoning here, we conclude that defendant, the biological mother of an adopted child who she kidnapped, is not a parent of the victim for the purposes of SORA, and thus defendant is not exempt from SORA registration.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

507

CA 18-02396

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

JAMES C. SUTTON, INDIVIDUALLY, AND AS ADMINISTRATOR OF THE ESTATE OF PAUL SUTTON, SR., DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WILLIAMSVILLE SUBURBAN, LLC, GOLDEN LIVING CENTERS, LLC, SAFIRE REHABILITATION OF AMHERST, LLC, DEFENDANTS-RESPONDENTS, LEGACY HEALTH CARE, LLC, AND INFINITY MEDICAL OF WNY, P.C., DEFENDANTS.

FLYNN WIRKUS YOUNG, P.C., BUFFALO (SCOTT R. ORNDOFF OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CAITLIN ROBIN & ASSOCIATES, PLLC, BUFFALO (REBECCA CRONAUER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered May 15, 2018. The order denied the motion of plaintiff for a default judgment and granted the cross motion of defendants Williamsville Suburban, LLC, Golden Living Centers, LLC and Safire Rehabilitation of Amherst, LLC for an extension of time to file an answer.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the cross motion of defendants Williamsville Suburban, LLC, Golden Living Centers, LLC and Safire Rehabilitation of Amherst, LLC is denied and the motion is granted.

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries allegedly sustained by the decedent while he was a resident in a nursing home that was allegedly operated by defendants. When defendants failed to answer the complaint within the required time, plaintiff moved for a default judgment pursuant to CPLR 3215. Williamsville Suburban, LLC, Golden Living Centers, LLC and Safire Rehabilitation of Amherst, LLC (collectively, Williamsville defendants) opposed plaintiff's motion and cross-moved for an extension of time to file an answer pursuant to CPLR 2004. Supreme Court denied plaintiff's motion and granted the Williamsville defendants' cross motion. Plaintiff appeals, and we now reverse.

Plaintiff established his entitlement to default judgment against

all defendants by submitting "proof of service of the summons and the complaint, the facts constituting the claim, and . . . defendant[s'] default" (*Diederich v Wetzel*, 112 AD3d 883, 883 [2d Dept 2013]; *see PNC Bank, N.A. v Harmonson*, 154 AD3d 1347, 1348 [4th Dept 2017]). We note that defendant Legacy Health Care, LLC and defendant Infinity Medical of WNY, P.C. did not submit opposition to plaintiff's motion, and we therefore conclude that the court erred in denying the motion with respect to those two defendants.

To successfully oppose plaintiff's motion, the Williamsville defendants had the burden of proving that they had a reasonable excuse for the default and a meritorious defense to the action (*see Citimortgage, Inc. v Jameson*, 140 AD3d 1493, 1494 [3d Dept 2016]; *Smolinski v Smolinski*, 13 AD3d 1188, 1189 [4th Dept 2004]). "It is well-settled law that this burden require[s] defendants to put forth nonspeculative evidence that constitutes a prima facie defense" (*Citimortgage, Inc.*, 140 AD3d at 1494). The Williamsville defendants, however, failed to submit admissible evidence sufficient to demonstrate the existence of a potentially meritorious defense, and their proposed answer was not verified by anyone with personal knowledge of the facts. The court thus erred in denying plaintiff's motion with respect to the Williamsville defendants (*see id.* at 1494-1495). Inasmuch as the Williamsville defendants' cross motion for an extension of time to answer pursuant to CPLR 2004 also required a showing of a meritorious defense, we conclude that the court erred in granting the cross motion (*see US Bank N.A. v Louis*, 148 AD3d 758, 759 [2d Dept 2017]; *cf. Constable v Matie*, 145 AD2d 987, 987 [4th Dept 1988]; *General Acc. Group v Scott*, 96 AD2d 759, 760 [4th Dept 1983], *appeal dismissed* 60 NY2d 651 [1983]).

Plaintiff's remaining contention is academic in light of our determination.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

509

CA 18-01363

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

PAUL MICHAEL LEEDER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DAVID P. ANTONUCCI, DEFENDANT-RESPONDENT.

NEIL M. GINGOLD, FAYETTEVILLE, FOR PLAINTIFF-APPELLANT.

ANTONUCCI LAW FIRM LLP, WATERTOWN (DAVID P. ANTONUCCI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Jefferson County (James P. Murphy, J.), entered February 26, 2018. The order and judgment granted the cross motion of defendant for summary judgment and dismissed the complaint.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying the cross motion in part and reinstating the second cause of action, and as modified the order and judgment is affirmed without costs, and the matter is remitted to Supreme Court, Jefferson County, for further proceedings in accordance with the following memorandum: Plaintiff commenced this action seeking damages arising from two instances in which defendant allegedly committed legal malpractice in his representation of plaintiff. In his first cause of action, plaintiff alleged that defendant committed malpractice during proceedings arising from plaintiff's operation of a biofuel business (biofuel cause of action), and in his second cause of action, plaintiff alleged that defendant committed malpractice during a separate estate accounting proceeding (estate cause of action). Plaintiff now appeals from an order and judgment that granted defendant's cross motion for summary judgment and dismissed the complaint.

We reject plaintiff's contention that Supreme Court erred in granting the cross motion with respect to the biofuel cause of action. It is well settled that "a necessary element of a cause of action for legal malpractice is that the attorney's negligence caused 'a loss that resulted in actual and ascertainable damages' " (*New Kayak Pool Corp. v Kavinoky Cook LLP*, 125 AD3d 1346, 1348 [4th Dept 2015]), and that " '[c]onclusory allegations of damages or injuries predicated on speculation cannot suffice for a malpractice action' " (*id.*). With respect to the biofuel cause of action, defendant met his initial burden on the cross motion by establishing that plaintiff's allegations of damages are entirely speculative (*see Lincoln Trust v*

Spaziano, 118 AD3d 1399, 1401 [4th Dept 2014]; *Bua v Purcell & Ingrao, P.C.*, 99 AD3d 843, 848 [2d Dept 2012], *lv denied* 20 NY3d 857 [2013]), and thus plaintiff is "unable to prove at least one of the essential elements of [his] legal malpractice cause of action" (*Boglia v Greenberg*, 63 AD3d 973, 974 [2d Dept 2009]; *see Grace v Law*, 108 AD3d 1173, 1174-1175 [4th Dept 2013], *affd* 24 NY3d 203 [2014]). Plaintiff failed to raise an issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). We are unable to review plaintiff's contention that he raised a triable issue of fact with respect to those damages by submitting an expert report inasmuch as plaintiff failed to include that document in the record on appeal. Thus plaintiff, as the party raising this issue on his appeal, "submitted this appeal on an incomplete record and must suffer the consequences" (*Matter of Santoshia L.*, 202 AD2d 1027, 1028 [4th Dept 1994]; *see Resetarits Constr. Corp. v City of Niagara Falls*, 133 AD3d 1229, 1229 [4th Dept 2015]).

We agree with plaintiff, however, that the court erred in granting the cross motion with respect to the estate cause of action, and we therefore modify the order and judgment accordingly. In that cause of action, plaintiff alleged that defendant committed malpractice by failing to timely file objections to the proposed accounting. It is well settled that "[a] cause of action for legal malpractice accrues when the malpractice is committed" (*Elstein v Phillips Lytle, LLP*, 108 AD3d 1073, 1073 [4th Dept 2013] [internal quotation marks omitted]), and that, "[w]hat is important [in determining the accrual date] is when the malpractice was committed, not when the client discovered it" (*Glamm v Allen*, 57 NY2d 87, 95 [1982]; *see Town of Amherst v Weiss*, 120 AD3d 1550, 1551 [4th Dept 2014]). Defendant met his burden on that part of the cross motion by establishing that the statute of limitations for legal malpractice is three years (*see* CPLR 214 [6]), that the estate cause of action accrued on November 1, 2010, the last date on which to file objections to the accounting (*see generally International Electron Devices [USA] LLC v Menter, Rudin & Trivelpiece, P.C.*, 71 AD3d 1512, 1512 [4th Dept 2010]), and that the estate cause of action was therefore untimely when this malpractice action was commenced on November 15, 2013. "The burden then shifted to plaintiff[] to raise a triable issue of fact whether the statute of limitations was tolled by the continuous representation doctrine" (*id.* at 1512; *see Mahran v Berger*, 137 AD3d 1643, 1644 [4th Dept 2016]; *Weiss*, 120 AD3d at 1551).

We agree with plaintiff that the court erred in determining that plaintiff failed to do so. It is well settled that, in order for the continuous representation doctrine to apply, "there must be clear indicia of an ongoing, continuous, developing, and dependant relationship between the client and the attorney which often includes an attempt by the attorney to rectify an alleged act of malpractice" (*Luk Lamellen U. Kupplungbau GmbH v Lerner*, 166 AD2d 505, 506-507 [2d Dept 1990]; *see Dischiavi v Calli*, 125 AD3d 1435, 1437 [4th Dept 2015]; *Weiss*, 120 AD3d at 1551-1552). Here, plaintiff submitted evidence that defendant made several unsuccessful attempts to file the objections within the weeks after the deadline and that he made

preparations to appear at a scheduled conference on the objections on November 23, 2010. Those efforts could be viewed as "attempt[s] by the attorney to rectify an alleged act of malpractice" (*Luk Lamellen U. Kupplungbau GmbH*, 166 AD2d at 506-507), and thus plaintiff raised a triable issue of fact whether the statute of limitations was tolled by the continuous representation doctrine.

In light of our determination, we note that the court did not rule on that part of the cross motion in which defendant sought summary judgment dismissing the estate cause of action on the ground that plaintiff failed to sufficiently allege damages on that cause of action. We therefore remit the matter to Supreme Court for a determination of the merits of that part of the cross motion (*see Weiss v Zellar Homes, Ltd.*, 169 AD3d 1491, 1495 [4th Dept 2019]). Finally, we reject plaintiff's contention that the matter should be remitted to a different Supreme Court Justice.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

510

CA 18-01693

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

UPS CAPITAL CORPORATION, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WIRELESSJACK.COM, INC., A NEW YORK CORPORATION, KAYLA HAZAN, JACH HAZAN, ALSO KNOWN AS JACK HAZAN AND ISAAC MOSSERI, DEFENDANTS-APPELLANTS.

FRANK A. ALOI, ROCHESTER, AND OLSHAN FROME WOLOSKY LLP, NEW YORK CITY, FOR DEFENDANTS-APPELLANTS.

WOODS OVIATT GILMAN LLP, ROCHESTER (TIMOTHY P. LYSTER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (William K. Taylor, J.), entered March 28, 2018. The order, among other things, denied defendants' motion to vacate a default judgment.

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

Memorandum: The instant appeal arises from a cargo and finance agreement between plaintiff and defendant Wirelessjack.com, Inc. (Wirelessjack). As alleged in the complaint, the agreement provided that plaintiff would advance certain funds to Wirelessjack, which would later be repayed by Wirelessjack. Plaintiff alleged that Wirelessjack defaulted under the agreement, leaving a balance of $277,261.60 immediately due. Plaintiff then sought to recover the outstanding balance by commencing this action against Wirelessjack, as well as defendants Kayla Hazan, Jach Hazan, also known as Jack Hazan, and Isaac Mosseri (individual defendants), who plaintiff alleged had executed personal guarantees of Wirelessjack's obligations under the agreement. All defendants failed to appear and a default judgment was entered against them. Defendants now appeal from an order that denied their motion to vacate the default judgment. We affirm.

We reject defendants' contention that they established entitlement to vacatur of the default pursuant to CPLR 5015 (a) (1), which required defendants to proffer "a reasonable excuse for the default and . . . a meritorious defense" to the action (*Golf Glen Plaza Niles, Il. L.P. v Amcoid USA, LLC*, 160 AD3d 1375, 1376 [4th Dept 2018]; *see Calaci v Allied Interstate, Inc.* [appeal No. 2], 108 AD3d 1127, 1128 [4th Dept 2013]). Here, defendants failed to establish a reasonable excuse for default. Defendants offer no excuse for

Wirelessjack's default, and the individual defendants' "mere denial of receipt of the summons and complaint was insufficient to rebut the presumption of proper service created by the affidavit[s] of service," which reflected proper service on each defendant (*Commissioners of State Ins. Fund v Nobre, Inc.*, 29 AD3d 511, 511 [2d Dept 2006]). Defendants also failed to establish a meritorious defense. The individual defendants' conclusory statements that they did "not believe [they] ever gave . . . a guarantee" of the agreement are insufficient and indeed belied by the signed guarantees submitted by plaintiff in opposition to defendants' motion to vacate the default (*see generally Imovegreen, LLC v Frantic, LLC*, 139 AD3d 539, 540-541 [1st Dept 2016]; *Voss Dental Lab v Surgitex, Inc.*, 210 AD2d 985, 985 [4th Dept 1994]). Defendants' contention that the signatures on the guarantees submitted by plaintiff are not genuine is not properly before us inasmuch as that contention is raised for the first time on appeal (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). In any event, "defendant[s'] unsubstantiated claim that the signatures on the [guarantees] were forged fails to establish that [they have] a meritorious defense" (*Golf Glen Plaza Niles, Il. L.P.*, 160 AD3d at 1377; *see generally Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 383-384 [2004]). Defendants' contentions that the guarantees were not properly authenticated or witnessed, that the court's scheduling order deprived them of their ability to file reply papers, and that vacatur was also appropriate under CPLR 5015 (a) (3) are also raised for the first time on appeal and thus are not properly before us (*see Ciesinski*, 202 AD2d at 985).

Defendants failed to establish entitlement to vacatur of the default judgment under CPLR 317, which provides that if service occurs "other than by personal delivery," a defendant against whom a judgment has been entered based on a failure to appear may reopen the default "upon a finding of the court that [the defendant] did not personally receive notice of the summons in time to defend and has a meritorious defense." Although we agree with defendants that no defendant was served "by personal delivery" as defined for the purposes of CPLR 317 (*see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141-142 [1986]; *Fleetwood Park Corp. v Jerrick Waterproofing Co.*, 203 AD2d 238, 239 [2d Dept 1994]; *National Bank of N. N.Y. v Grasso*, 79 AD2d 871, 871 [4th Dept 1980]), defendants failed to establish either that they did not receive notice of the summons in time to defend the action (*see Pina v Jobar U.S.A. LLC*, 104 AD3d 544, 545 [1st Dept 2013]; *Commissioners of State Ins. Fund*, 29 AD3d at 511-512), or that they have a meritorious defense (*see* CPLR 317).

In light of our determination, we need not reach defendants' remaining contention.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

515

CA 18-01653

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

THE IDEAL YOU WEIGHT LOSS CENTER, LLC, PLAINTIFF,

V MEMORANDUM AND ORDER

SHERI ZILLIOUX, DOING BUSINESS AS IDEAL WEIGHT LOSS OF BUFFALO, DEFENDANT.

SHERI ZILLIOUX, DOING BUSINESS AS IDEAL WEIGHT LOSS OF BUFFALO, THIRD-PARTY PLAINTIFF-RESPONDENT,

V

THE IDEAL YOU WEIGHT LOSS CENTER, LLC, AND DONNA HERBERGER, THIRD-PARTY DEFENDANTS-APPELLANTS.

ROACH, LENNON & BROWN, PLLC, BUFFALO (J. MICHAEL LENNON OF COUNSEL), FOR THIRD-PARTY DEFENDANTS-APPELLANTS.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (JON F. MINEAR OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, Jr., J.), entered August 15, 2018. The order denied the motion of third-party defendants to dismiss the third-party complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the first and fourth causes of action in the third-party complaint, and as modified the order is affirmed without costs.

Memorandum: Plaintiff-third-party defendant, The Ideal You Weight Loss Center, LLC (Ideal You), and third-party defendant Donna Herberger (collectively, defendants) operate a website accessed at idealyou.com. In 2016, defendant-third-party plaintiff, Sheri Zillioux, doing business as Ideal Weight Loss of Buffalo (plaintiff), established a competing business that operates a website accessed at idealbuff.com. Both Ideal You and plaintiff sell products from Ideal Protein of America, Inc., from which they derive the “Ideal” used in the names of the businesses.

As alleged in the third-party complaint, on the day plaintiff opened her business, defendants purchased two domain names, idealbuf.com and idealbuffalo.com, and redirected all web traffic from those addresses to idealyou.com. Plaintiff commenced this third-party

action based on allegations that defendants' conduct was designed to deceptively misdirect business from plaintiff to defendants. Defendants responded with a pre-answer motion to dismiss the third-party complaint pursuant to CPLR 3211 (a) (7). Supreme Court denied the motion, and defendants appeal.

We reject defendants' contention that plaintiff failed to state a cause of action for unfair competition under 15 USC § 1125 (a), also known as the Lanham Act. As relevant to the cause of action for unfair competition, the statute prohibits using "any word, term, name, symbol, or device . . . or any false designation of origin . . . which . . . is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association . . . as to the origin, sponsorship, or approval of . . . goods, services, or commercial activities by another person" (§ 1125 [a] [1] [A]). We agree with plaintiff that, accepting the allegations in the third-party complaint as true, as we must on a motion to dismiss pursuant to CPLR 3211 (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), defendants' use of the idealbuf.com and idealbuffalo.com domain names could be misleading and thus constitute unfair competition under the statute (*see OBH, Inc. v Spotlight Magazine, Inc.*, 86 F Supp 2d 176, 180, 196 [WD NY 2000]).

We also reject defendants' contention that plaintiff failed to state a cause of action for "cybersquatting" under 15 USC § 1125 (d). "To successfully assert a claim [for cybersquatting], a plaintiff must demonstrate that[:] (1) its marks were distinctive at the time the domain name was registered; (2) the infringing domain names complained of are identical to or confusingly similar to the plaintiff's mark; and (3) that the defendant has a bad faith intent to profit from that mark" (*New York City Triathlon, LLC v NYC Triathlon Club, Inc.*, 704 F Supp 2d 305, 324 [SD NY 2010]; *see* § 1125 [d] [1] [A] [i], [ii] [I]). Accepting the allegations in the third-party complaint as true (*see Leon*, 84 NY2d at 87-88), we conclude that plaintiff has stated a cause of action for cybersquatting.

We agree with defendants, however, that plaintiff failed to state a cause of action for violation of General Business Law § 349 because "the gravamen of the complaint is not consumer injury or harm to the public interest but, rather, harm to plaintiff's business" caused by Ideal You's use of domain names (*Emergency Enclosures, Inc. v National Fire Adj. Co., Inc.*, 68 AD3d 1658, 1661 [4th Dept 2009]; *see H20 Swimwear v Lomas*, 164 AD2d 804, 806 [1st Dept 1990]). We note that, although the third-party complaint explicitly lists General Business Law § 349 as the sole basis for the first cause of action, plaintiff contended in Supreme Court, and the court agreed, that the first cause of action also stated a claim for violation of General Business Law § 350. We conclude that, to the extent that plaintiff attempts to state a claim for violation of General Business Law § 350, she failed to do so inasmuch as "[t]he standard for recovery under General Business Law § 350, while specific to false advertising, is otherwise identical to section 349" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 324 n 1 [2002]). We therefore modify the order by dismissing the first cause of action in the third-party complaint.

We also agree with defendants that plaintiff failed to state a cause of action for false advertising under 15 USC § 1125 (a) (1) (B), which prohibits false or misleading representations in connection with commercial advertising or promotion. Plaintiff failed to allege that the domain names at issue are "advertising" or "promotion" as required for that cause of action (*see generally Fashion Boutique of Short Hills, Inc. v Fendi USA, Inc.*, 314 F3d 48, 56 [2d Cir 2002]). Furthermore, plaintiff failed to sufficiently allege that the purported advertisement or promotion "involved an inherent or material quality of the product" (*Time Warner Cable, Inc. v DIRECTV, Inc.*, 497 F3d 144, 153 n 3 [2d Cir 2007]; *see National Basketball Association v Motorola, Inc.*, 105 F3d 841, 855 [2d Cir 1997]). We therefore further modify the order by dismissing the fourth cause of action in the third-party complaint.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

516

CA 18-02329

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

JENNIFER M. C.-Y., SADAT Y. AND
JENNIFER M. C.-Y., AS PARENT AND
NATURAL GUARDIAN OF MAKARI C., AN INFANT,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JENNA BORING, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

BOUVIER LAW LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Orleans County (Tracey A. Bannister, J.), entered June 7, 2018. The order denied the motion of defendant Jenna Boring for summary judgment dismissing the complaint against her.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained when a dog owned by Jenna Boring (defendant) bit plaintiff Jennifer M. C.-Y. and her infant daughter as they exited their vehicle. Supreme Court denied defendant's motion for summary judgment dismissing the complaint against her. We reverse.

As a preliminary matter, we reject defendant's contention that the court should have dismissed the complaint on the ground that plaintiffs failed to plead a cause of action for strict liability (*see generally Bard v Jahnke*, 6 NY3d 592, 596-597 [2006]; *Brady v Contangelo*, 148 AD3d 1544, 1545 [4th Dept 2017]). Our review of the complaint, as amplified by the bill of particulars, establishes that plaintiffs' allegations are "sufficient to state a potentially meritorious cause of action premised on strict liability" for the injuries caused by the dog (*Scoyni v Chabowski*, 72 AD3d 792, 793 [2d Dept 2010]; *see Reil v Chittenden*, 96 AD3d 1273, 1273-1274 [3d Dept 2012]).

We nevertheless conclude that defendant is entitled to summary judgment dismissing the complaint against her. Even assuming, arguendo, that the dog possessed the requisite vicious propensities, we conclude that defendant met her initial burden on the motion by submitting deposition testimony from herself, her son, and her then boyfriend, which established that defendant lacked actual or constructive knowledge that the dog had any vicious propensities, and plaintiffs failed to raise an issue of fact (*see S.K. v Kobee*, 158 AD3d 1219, 1220 [4th Dept 2018]; *Brady*, 148 AD3d at 1546; *Hargro v Ross*, 134 AD3d 1461, 1462 [4th Dept 2015]). In opposition to the motion, plaintiffs submitted the affidavit of one of defendant's neighbors, who averred that, on at least two prior occasions, she had seen the dog roaming the neighborhood, and that the dog entered into her backyard and started to bark at her in an aggressive and angry way, thereby putting her in fear that she would be bitten by the dog. The neighbor does not aver that she informed defendant of the two incidents, and thus the affidavit does not raise an issue of fact whether defendant had actual knowledge of the dog's vicious propensities. Furthermore, the neighbor's affidavit does not detail when the two prior incidents occurred, and thus the affidavit does not raise an issue of fact whether defendant had constructive knowledge of the dog's vicious propensities, i.e., that the vicious propensities had "existed for a sufficient period of time for a reasonable person to discover them" (*Velazquez v Carns*, 244 AD2d 620, 620 [3d Dept 1997]; *see Shaw v Burgess*, 303 AD2d 857, 858 [3d Dept 2003]; *see generally* PJI 2:220).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

517

CA 18-02236

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

DAROLYN A. KOCH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HELEN T. HEATHER, DEFENDANT-APPELLANT.

LAW OFFICE OF VICTOR M. WRIGHT, ORCHARD PARK (RACHEL A. EMMINGER OF COUNSEL), FOR DEFENDANT-APPELLANT.

COLLINS & COLLINS ATTORNEYS, LLC, BUFFALO (ALISON K. HASELEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered June 5, 2018. The order, insofar as appealed from, denied in part 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 allegedly sustained in a car accident with defendant. Defendant thereafter moved for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102 (d) that was causally related to the car accident. Supreme Court granted the motion in part, and denied the motion with respect to plaintiff's claim of serious injury to her shoulder. Defendant now appeals, contending that the court erred in refusing to grant the motion in its entirety. We affirm.

Defendant failed to meet her initial burden of demonstrating her entitlement to judgment as a matter of law dismissing plaintiff's claim that she suffered a serious injury to her shoulder under the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories in the car accident (*see James v Thomas*, 156 AD3d 1440, 1440-1441 [4th Dept 2017]; *Swartz v Kalson*, 78 AD3d 1553, 1553-1554 [4th Dept 2010]). Because defendant failed to meet her initial burden with regard to plaintiff's claimed shoulder injury, we need not consider the sufficiency of plaintiff's opposing papers on that issue (*see Cracchiola v Sausner*, 133 AD3d 1355,

1356-1357 [4th Dept 2015]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

521

KA 02-00941

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NICHOLAS OSMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THOMAS THEOPHILOS, BUFFALO, FOR DEFENDANT-APPELLANT.

PATRICK E. SWANSON, DISTRICT ATTORNEY, MAYVILLE (JOHN C. ZUROSKI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered December 3, 2001. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and robbery in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a 2001 judgment convicting him, following a jury trial, of murder in the second degree (Penal Law § 125.25 [1]) and robbery in the second degree (§ 160.10 [3]). In appeal No. 2, defendant appeals from an order settling the record in appeal No. 1. Finally, in appeal No. 3, defendant appeals from an order denying, without a hearing, his motion pursuant to CPL 440.10 seeking to vacate the judgment of conviction. At the outset, we dismiss appeal No. 2 because "[t]here is no statutory authorization for a defendant in a criminal action to appeal from" an order settling the record on appeal (*People v Gibson*, 266 AD2d 837, 838 [4th Dept 1999], *lv denied* 94 NY2d 919 [2000]; *see* CPL 450.10; *cf. People v Fetcho*, 91 NY2d 765, 769 [1998]; *People v Salce*, 124 AD3d 923, 927 [3d Dept 2015], *lv denied* 25 NY3d 1207 [2015]).

In appeal Nos. 1 and 3, defendant contends that County Court erred in refusing to sever the trial on the murder count from the trial on the robbery count after granting defendant's motion to sever defendant's trial from the trial of a codefendant. Although the codefendant moved for severance of the two counts, defendant's trial counsel failed to join in that motion. We thus conclude that defendant's contention is not preserved for our review (*see People v Shaw*, 249 AD2d 969, 970 [4th Dept 1998], *lv denied* 91 NY2d 1012 [1998]; *see also People v Barber-Montemayor*, 138 AD3d 1455, 1456 [4th Dept 2016], *lv denied* 28 NY3d 926 [2016]). Contrary to defendant's

further contention in appeal Nos. 1 and 3, trial counsel was not ineffective in failing to move for severance inasmuch as the counts were properly joined under CPL 200.20 (2) (a) and (b) and, therefore, "the court had no discretion to sever them" (*People v Van Duser* [appeal No. 2], 277 AD2d 1034, 1035 [4th Dept 2000], *lv denied* 96 NY2d 739 [2001]; *see* CPL 200.20 [3]; *People v Bongarzone*, 69 NY2d 892, 895 [1987]; *People v Lee*, 275 AD2d 995, 997 [4th Dept 2000], *lv denied* 95 NY2d 966 [2000]).

Before trial, the court conducted a *Cardona* hearing (*see People v Cardona*, 41 NY2d 333 [1977]), during which the court closed the courtroom for a portion of an informant's testimony. Although defendant contends in appeal Nos. 1 and 3 that the court erred in closing the courtroom without " 'mak[ing] findings adequate to support the closure' " (*People v Echevarria*, 21 NY3d 1, 11 [2013], quoting *Waller v Georgia*, 467 US 39, 48 [1984]), defendant failed to preserve that contention for our review (*see People v Alvarez*, 20 NY3d 75, 81 [2012], *cert denied* 569 US 947 [2013]; *People v Hinojoso-Soto*, 161 AD3d 1541, 1544-1545 [4th Dept 2018], *lv denied* 32 NY3d 938 [2018]). 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]), and we further conclude that defendant was not denied meaningful representation when trial counsel failed to object to the closure inasmuch as "the prosecution established on the record adequate reasons for the closure even if defense counsel had challenged it" (*People v Torres*, 300 AD2d 221, 222 [1st Dept 2002], *lv denied* 99 NY2d 659 [2003]; *see also People v Simmons*, 220 AD2d 629, 630 [2d Dept 1995], *lv denied* 87 NY2d 907 [1995]).

Over defendant's objection, the court granted the application of a news station to place a single camera in the courtroom for the entirety of the trial proceedings. Defendant contends, in appeal No. 1, that he was denied his right to due process by the presence of the camera. We reject that contention. In our view, defendant failed to establish any "actual prejudice resulting from the presence of the camera[] during trial" (*People v Odell*, 26 AD3d 527, 529 [3d Dept 2006], *lv denied* 7 NY3d 760 [2006]; *see People v Nance*, 2 AD3d 1473, 1474 [4th Dept 2003], *lv denied* 2 NY3d 764 [2004]).

Defendant further contends, in appeal No. 3, that he was improperly compelled to wear a stun belt during his trial inasmuch as the court did not place on the record its findings showing that defendant needed such a restraint. Assuming, arguendo, that defendant was forced to wear a stun belt, we need not reverse the court's order denying defendant's CPL 440.10 motion because defendant failed to object to the use of a stun belt, and the improper use of a stun belt is not a mode of proceedings error (*see People v Cooke*, 24 NY3d 1196, 1197 [2015], *cert denied* 577 US —, 136 S Ct 542 [2015]). Thus, the failure to object to the stun belt's use means that "reversal would not have been *required*" on a direct appeal (*People v Schrock*, 108 AD3d 1221, 1224 [4th Dept 2013], *lv denied* 22 NY3d 998 [2013], *reconsideration denied* 23 NY3d 1025 [2014]). As a result, even on the merits, there is no basis upon which to vacate the judgment of

conviction (*see* CPL 440.10 [1] [f]). Defendant further contends that trial counsel was ineffective in failing to object to the use of a stun belt. We disagree. The seminal case requiring that a court place findings of fact on the record before requiring a defendant to wear a stun belt is *People v Buchanan* (13 NY3d 1, 4 [2009]), which was decided eight years *after* the judgment in this case. Although the Court's decision in *Buchanan* "did not announce ' "new" rules of law' " (*People v Hall*, 156 AD3d 1475, 1476 [4th Dept 2017], quoting *People v Vasquez*, 88 NY2d 561, 573 [1996]), we nevertheless conclude that trial counsel was not ineffective in failing to anticipate the procedural requirements established by the Court's decision in *Buchanan* (*see People v Lewis*, 102 AD3d 505, 506 [1st Dept 2013], *affd* 23 NY3d 179 [2014]).

We reject defendant's further contention in appeal Nos. 1 and 3 that he is entitled to a new trial due to alleged errors during jury selection. In particular, defendant contends that the court erred in denying his challenge for cause to a first prospective juror and in seating on the jury a second prospective juror who allegedly demonstrated actual bias. Defendant does not dispute that he did not peremptorily challenge the second prospective juror, but he contends that the court should have obtained from that prospective juror an unequivocal assurance of her impartiality. "By failing to raise that challenge in the trial court . . . , defendant failed to preserve it for our review" (*People v Boykins*, 134 AD3d 1542, 1542 [4th Dept 2015], *lv denied* 27 NY3d 1066 [2016] [internal quotation marks omitted]; *see People v Simmons*, 119 AD3d 1343, 1344 [4th Dept 2014], *lv denied* 24 NY3d 964 [2014], *reconsideration denied* 24 NY3d 1088 [2014]).

Even if we were to assume, arguendo, that the court erred in failing to excuse the second prospective juror sua sponte, such an error would not constitute reversible error "unless . . . defendant ha[d] exhausted his peremptory challenges at the time or, if he ha[d] not, he peremptorily challenge[d] such prospective juror and his peremptory challenges [were] exhausted before the selection of the jury [was] complete" (CPL 270.20 [2]; *see Boykins*, 134 AD3d at 1542; *Simmons*, 119 AD3d at 1344). Moreover, even if we were to assume, arguendo, that the court erred in failing to excuse the first prospective juror for cause, that error would likewise require reversal only if defendant, who used a peremptory challenge to strike the prospective juror, exhausted his peremptory challenges before the selection of the jury was complete (*see* CPL 270.20 [2]; *People v Torpey*, 63 NY2d 361, 365 [1984], *rearg denied* 64 NY2d 885 [1985]; *People v Thorn*, 269 AD2d 756, 756-757 [4th Dept 2000]).

The problem in these appeals is that the records in appeal Nos. 1 and 3 do not reflect whether defendant exhausted his peremptory challenges. In his CPL 440.10 motion in appeal No. 3, defendant submitted evidence establishing that, at the time of this trial, the trial judge had a practice of having attorneys write their challenges on slips of paper, which would then be placed in the court's file. In 2015, i.e., 14 years after the judgment was entered, defendant's current appellate counsel sought to review those slips of paper only

to discover that they were not in the court's file and could not be located despite great effort. Defendant thus contends in appeal Nos. 1 and 3 that the loss of such vital court exhibits mandates that a new trial be granted or, in the alternative, that the matter be remitted for a reconstruction hearing. We reject those contentions.

The Court of Appeals has stated that the loss of a transcript or exhibit "is rarely sufficient reason in itself for reversing a conviction" (*People v Parris*, 4 NY3d 41, 44 [2004], *rearg denied* 4 NY3d 847 [2005]). Where, as here, a transcript or exhibit is missing from the record on an appeal following a trial, a reconstruction hearing may be ordered, but only "if the defendant has acted with reasonable diligence to mitigate the harm done by the mishap" (*Parris*, 4 NY3d at 44; *see People v Marquez*, 4 NY3d 734, 735 [2004]). If the defendant did not act with reasonable diligence, then the "conviction should be affirmed" (*Marquez*, 4 NY3d at 735). Thus, to be entitled to a reversal due to a missing transcript or exhibit, a defendant must overcome the presumption of regularity and "show not only that minutes [or exhibits] are missing, but also 'that there [are] inadequate means from which it could be determined whether appealable and reviewable issues [are] present' " (*Parris*, 4 NY3d at 46, quoting *People v Glass*, 43 NY2d 283, 287 [1977]). Courts look to whether there is any " 'active fault on the part of the People' " because defendants are not guaranteed a " 'perfect appeal' " but, rather, only a " 'fair appeal' " (*id.* at 46, quoting *People v Rivera*, 39 NY2d 519, 523 [1976]).

It is incumbent on a defendant seeking a reconstruction hearing to "be diligent in maximizing the possibility that such a hearing can accomplish its purpose. That means, as a minimum, that [a] defendant should move for a reconstruction hearing promptly after learning that the minutes [or exhibits] have been lost. A defendant should also pursue promptly whatever other means are available to increase the likelihood that proceedings can effectively be reconstructed . . . A defendant who does not proceed diligently is open to the suspicion that he [or she] thinks the likelihood of really finding significant appellate issues remote—and would prefer failure in reconstructing the proceedings to success, hoping to claim prejudice when reconstruction proves impossible" (*id.* at 48).

Here, the slips of paper indicating who made what challenges to which prospective jurors are missing, and none of the relevant parties, i.e., the judge, both prosecutors, trial counsel, the court reporter or the court clerk, could recall, 14 years after the judgment, if defendant had exhausted his peremptory challenges. Due to faded memories, the record in appeal No. 3 establishes that a reconstruction hearing would be futile, and the question becomes whether the 14-year delay in seeking such evidence should be held against defendant. We believe that it should.

There can be no dispute that, once the current appellate counsel was assigned to the case, he acted diligently in seeking other means to increase the possibility of reconstruction, i.e., his actions "evidence[d] a good faith purpose to obtain prompt and effective

reconstruction" (*id.* at 49). Nevertheless, defendant has provided no explanation for the 14-year delay between the judgment and direct appeal, and "there was nothing to prevent [defendant] from pursuing his appeal" (*People v Williams*, 164 AD3d 1145, 1147 [1st Dept 2018], *lv denied* 32 NY3d 1179 [2019]). Moreover, defendant "has not shown that, if he had acted diligently, an adequate reconstruction of those proceedings could not have been achieved" (*Parris*, 4 NY3d at 47). Had defendant, through his former, privately retained appellate counsel, perfected his appeal in a timely manner, it is possible that the slips of paper might still have been with the file, and it is highly probable that the relevant parties would have been able to recall whether defendant exhausted his peremptory challenges. Where, as here, the lengthy delay is attributable to a defendant's action or inaction, the weight of appellate authority holds that the absence of the relevant transcripts or exhibits should be held against the defendant and the judgment affirmed (*see id*. at 49; *Williams*, 164 AD3d at 1146-1147; *People v Carter*, 91 AD3d 967, 967-968 [2d Dept 2012], *lv denied* 18 NY3d 992 [2012]; *People v Quinones*, 36 AD3d 459, 460 [1st Dept 2007], *lv denied* 8 NY3d 926 [2007]; *see also People v Brightley*, 56 AD3d 314, 315 [1st Dept 2008], *lv denied* 12 NY3d 756 [2009]; *cf. Rivera*, 39 NY2d at 523-524; *People v Hill*, 43 AD2d 563, 564 [2d Dept 1973]).

Inasmuch as the record does not establish that defendant exhausted his peremptory challenges, he is not entitled to reversal based on the alleged errors during jury selection (*see* CPL 270.20 [2]).

In appeal Nos. 1 and 3, defendant contends that the court erred in permitting the prosecution to introduce evidence of alleged threats made to the robbery victim by defendant and/or his codefendant after the robbery was completed but before the murder of a different person occurred. According to defendant, the threats to kill the robbery victim should not have been admitted on the robbery count because the robbery was fully completed and there was no force needed to retain the stolen property (*cf. People v Carrel*, 99 NY2d 546, 547 [2002]; *People v Washington*, 148 AD2d 559, 560 [2d Dept 1989], *lv denied* 74 NY2d 670 [1989]). With respect to the murder count, defendant contends that the threats to kill the robbery victim constituted propensity evidence whose prejudice outweighed its probative value. We reject defendant's contentions. In our view, the evidence was relevant to the crimes, and its probative value was not "substantially outweighed by the danger that it [would] unfairly prejudice the other side or mislead the jury" (*People v Scarola*, 71 NY2d 769, 777 [1988]).

The court admitted the evidence, but invited trial counsel to submit a limiting instruction. Contrary to defendant's contention in appeal Nos. 1 and 3, trial counsel's failure to submit such an instruction does not constitute ineffective assistance of counsel where, as here, trial counsel "may well have made a strategic decision in this regard, reasoning that such [an instruction] would only call further attention to the [threats] and, hence, would not be in his [or her] client's best interest" (*People v Buchanan*, 95 AD3d 1433, 1436-1437 [3d Dept 2012], *lv denied* 22 NY3d 1039 [2013]; *see People v*

Bernard, 115 AD3d 1214, 1215 [4th Dept 2014], *lv denied* 23 NY3d 1018 [2014]; *cf. People v McCallum*, 162 AD3d 1740, 1742 [4th Dept 2018]). In any event, "the failure to request limiting instructions may constitute ineffective assistance of counsel [only] if the error [is] so serious that defendant did not receive a fair trial" (*People v Carey*, 244 AD2d 952, 953 [4th Dept 1997], *lv denied* 92 NY2d 849 [1998]). In our view, any error by trial counsel did not deprive defendant of a fair trial.

Defendant raises three contentions related to a jailhouse informant in appeal No. 1. None warrants reversal. First, the court correctly concluded, following the *Cardona* hearing, that the informant was not an agent of law enforcement (*see People v Davis*, 38 AD3d 1170, 1171 [4th Dept 2007], *lv denied* 9 NY3d 842 [2007], *cert denied* 552 US 1065 [2007]; *see generally Cardona*, 41 NY2d at 335) and, as a result, the informant's "conversations with defendant did not violate defendant's right to counsel" (*People v Seymour*, 255 AD2d 866, 866 [4th Dept 1998], *lv denied* 93 NY2d 902 [1999]; *see generally Cardona*, 41 NY2d at 335). Second, even assuming, arguendo, that the court erred in failing to charge the jury that it should consider any specific benefit conferred upon the informant, we conclude that the court's "failure . . . does not mandate reversal under the circumstances of this case . . . [inasmuch as] the [informant was] cross-examined thoroughly as to [his] potential motives for giving false testimony" (*People v Jamison*, 188 AD2d 551, 552 [2d Dept 1992], *lv denied* 81 NY2d 841 [1993]). With respect to defendant's third and final contention regarding the informant, we conclude that the court did not abuse its "broad discretion" in precluding trial counsel from inquiring into the informant's prior bad acts (*People v Smith*, 27 NY3d 652, 660 [2016], *rearg denied* 28 NY3d 1112 [2016]), and the court's ruling did not violate defendant's right of confrontation inasmuch as "the alleged prior bad acts were collateral to the direct evidence" (*People v Gugino* [appeal No. 1], 229 AD2d 968, 968 [4th Dept 1996], *lv denied* 89 NY2d 864 [1996]).

Defendant contends in appeal Nos. 1 and 3 that the prosecutor committed misconduct during his summation. Having reviewed each alleged instance of misconduct, we conclude that many of defendant's contentions are not preserved for our review (*see* CPL 470.05 [2]; *People v Romero*, 7 NY3d 911, 912 [2006]). In any event, any improprieties in the prosecutor's remarks were not so egregious as to deprive defendant of a fair trial and, as a result, trial counsel was not ineffective in failing to object to those allegedly improper comments (*see People v Grant*, 160 AD3d 1406, 1407 [4th Dept 2018], *lv denied* 31 NY3d 1148 [2018]; *People v Edwards*, 159 AD3d 1425, 1426 [4th Dept 2018], *lv denied* 31 NY3d 1116 [2018]).

During deliberations, the jury sent two notes, requesting an "[e]vidence [l]ist" and certain pieces of evidence, respectively. Contrary to defendant's contention in appeal No. 1, the notes did not represent "a substantive jury inquiry" (*People v Nealon*, 26 NY3d 152, 155-156 [2015]) and, therefore, "it was not error for the court to provide [the list and evidence] to [the jury] without further input

from the parties" (*People v Gelling*, 163 AD3d 1489, 1491 [4th Dept 2018], *amended on rearg on other grounds* 164 AD3d 1673 [4th Dept 2018], *lv denied* 32 NY3d 1003 [2018]).

Finally, we have reviewed defendant's remaining contentions in appeal No. 1 concerning alleged evidentiary errors and allegedly improper denials of certain jury instructions, and we conclude that they are either unpreserved or lack merit.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

522

KA 18-01708

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NICHOLAS OSMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THOMAS THEOPHILOS, BUFFALO, FOR DEFENDANT-APPELLANT.

PATRICK E. SWANSON, DISTRICT ATTORNEY, MAYVILLE (JOHN C. ZUROSKI OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Chautauqua County Court (James F. Bargnesi, A.J.), dated June 14, 2016. The order settled the record on appeal from a judgment of conviction rendered December 3, 2001.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Osman* ([appeal No. 1] — AD3d — [July 31, 2019] [4th Dept 2019]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

523

KA 18-02206

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES VERNAY, DEFENDANT-APPELLANT.

STEWART L. WEISMAN, MANLIUS, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Rory McMahon, A.J.), rendered June 29, 2017. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated, a class E felony, refusal to submit to a breath test and harassment 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, inter alia, driving while intoxicated as a class E felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i] [A]). The case arose from an incident in which defendant drove his vehicle off the side of a highway while striking and threatening to kill his passenger. Immediately after the vehicle came to a stop in a field, the passenger fled on foot and called 911. During the 911 call, the passenger stated, inter alia, that she and defendant were both intoxicated. After defendant failed field sobriety tests, he was transported to the police station, where he refused a chemical test.

We reject defendant's contention that County Court abused its discretion in allowing the 911 operator's testimony because it violated the best evidence rule and the rule against hearsay. Because the People introduced the operator's testimony to prove the content of her conversation with the passenger, a fact existing independently of the 911 recording, "the best evidence rule was inapplicable and the conversation could be testified to by anyone who heard it" (*People v Torres*, 118 AD2d 821, 822 [2d Dept 1986], *lv denied* 68 NY2d 672 [1986]; *see People v Lofton*, 226 AD2d 1082, 1082 [4th Dept 1996], *lv denied* 88 NY2d 938 [1996], *reconsideration denied* 88 NY2d 1022 [1996]). Furthermore, the admission of the testimony as an excited utterance was not an abuse of discretion in light of "the nature of the startling event, the amount of time between the event and the

statement, and the activities of the declarant in the interim" (*People v Hernandez*, 28 NY3d 1056, 1057 [2016]; *see People v Carrasquillo-Fuentes*, 142 AD3d 1335, 1337 [4th Dept 2016], *lv denied* 28 NY3d 1143 [2017]).

Contrary to defendant's further contention, the court properly assigned counsel to represent the passenger. Here, "the prosecutor's 'obligation to warn potential witnesses of their possible liability for false statements under oath . . . [was not] emphasized to the point' where it became an 'instrumen[t] of intimidation' " (*People v Buszak* [appeal No. 2], 185 AD2d 621, 621 [4th Dept 1992], quoting *People v Shapiro*, 50 NY2d 747, 761-762 [1980]).

Defendant next contends that the court violated his constitutional rights by initially declining to charge the jury with respect to consciousness of guilt (*see* CJI2d[NY] Consciousness of Guilt) because that ruling forced him to testify in order to provide a basis for the charge (*see generally* US Const 5th Amend). Even assuming, arguendo, that the court's ruling was error, that error was harmless (*see generally People v Crimmins*, 36 NY2d 230, 237 [1975]).

Finally, we have considered defendant's remaining contentions and conclude that none warrants reversal or modification of the judgment.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

525

KA 16-00756

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ISIAH GRAHAM, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, BUFFALO (BRITTNEY CLARK OF COUNSEL), FOR DEFENDANT-APPELLANT.

ISIAH GRAHAM, DEFENDANT-APPELLANT PRO SE.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered December 18, 2015. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, criminal possession of a weapon in the second degree (two counts) and petit larceny.

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, murder in the second degree (Penal Law § 125.25 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). Defendant's conviction stems from his conduct in shooting the victim in the back of the head while walking with him and two others down a street during daylight hours. The man walking next to defendant testified at trial and identified him as the shooter. A week after the murder, defendant was arrested after being chased by police officers responding to a report of shots fired. The police recovered a revolver and a pistol that were lying in a yard through which defendant had run during the chase. In his statements to the police, defendant admitted to possessing the pistol, and forensic evidence established that he was the source of the major component of DNA obtained from that pistol, which the victim had in his possession at the time of the murder and which defendant allegedly stole immediately after shooting him.

We reject defendant's contention in his main and pro se supplemental briefs that County Court erred in allowing in evidence two photographs, taken from his cell phone, that depicted guns. One photograph showed a hand holding what appeared to be the revolver

recovered at the time of defendant's arrest, which was the alleged murder weapon, and the other showed defendant holding what appeared to be the pistol also recovered at the time of defendant's arrest. The court properly determined that the photographs were admissible because they were relevant to establish defendant's identity as the shooter, and the probative value outweighed any prejudicial impact (*see People v Alexander*, 169 AD3d 571, 571 [1st Dept 2019]; *People v Bailey*, 14 AD3d 362, 363 [1st Dept 2005], *lv denied* 4 NY3d 851 [2005]; *see also People v Moore* [appeal No. 2], 78 AD3d 1658, 1659 [4th Dept 2010], *lv denied* 17 NY3d 798 [2011]).

Defendant further contends in his main brief that the court erred in allowing an officer to identify him in a surveillance video. We agree. "A lay witness may give an opinion concerning the identity of a person depicted in a surveillance [video] if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the [video] than is the jury" (*People v Russell*, 165 AD2d 327, 333 [2d Dept 1991], *affd* 79 NY2d 1024 [1992]). Here, "there was no basis for concluding that the [officer] was more likely than the jury to correctly determine whether the defendant was depicted in the video" (*People v Reddick*, 164 AD3d 526, 527 [2d Dept 2018], *lv denied* 32 NY3d 1114 [2018]; *see People v Oquendo*, 152 AD3d 1220, 1221 [4th Dept 2017], *lv denied* 30 NY3d 982 [2017]). The officer was not familiar with defendant, and there was no evidence showing that defendant had changed his appearance prior to trial (*see Reddick*, 164 AD3d at 527; *cf. People v Sanchez*, 21 NY3d 216, 225 [2013]; *People v Jones*, 161 AD3d 1103, 1103 [2d Dept 2018], *lv denied* 32 NY3d 938 [2018]). We conclude, however, that the error was harmless. The evidence was overwhelming, and there was no significant probability that the error might have contributed to the conviction (*see Reddick*, 164 AD3d at 527; *see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Contrary to defendant's additional contention in his main brief, the court properly admitted in evidence certain text messages sent from defendant's cell phone the day before the murder and the following week inasmuch as they had probative value (*see Alexander*, 169 AD3d at 572), and the admission of the evidence did not unfairly prejudice defendant (*see generally People v Jones*, 147 AD3d 1521, 1522 [4th Dept 2017], *lv denied* 29 NY3d 1033 [2017]). Defendant's contention in his main brief that the court erred in allowing an officer to testify regarding his interpretation of the slang used in the messages is unpreserved for our review (*see People v Shire*, 77 AD3d 1358, 1359 [4th Dept 2010], *lv denied* 15 NY3d 955 [2010]) and, in any event, is without merit (*see People v Barksdale*, 129 AD3d 1497, 1497-1498 [4th Dept 2015], *lv denied* 26 NY3d 926 [2015], *reconsideration denied* 26 NY3d 1007 [2015]).

Defendant's contention in his pro se supplemental brief that his statement to the police on the day of his arrest should have been suppressed because the police did not have probable cause to arrest him is not preserved for our review because defendant moved to suppress that statement only on the ground that it was involuntarily

made (*see People v Watson*, 90 AD3d 1666, 1667 [4th Dept 2011], *lv denied* 19 NY3d 868 [2012]; *People v Crouch*, 70 AD3d 1369, 1370 [4th Dept 2010], *lv denied* 15 NY3d 773 [2010]). 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]; *People v Johnson*, 52 AD3d 1286, 1287 [4th Dept 2008], *lv denied* 11 NY3d 738 [2008]).

Defendant contends in his main brief that the prosecutor engaged in misconduct during summation by improperly vouching for the credibility of a witness. That contention is not preserved for our review (*see People v Fick*, 167 AD3d 1484, 1485 [4th Dept 2018], *lv denied* 33 NY3d 948 [2019]), and it is without merit in any event. The prosecutor's comments were fair response to defense counsel's summation, in which defense counsel argued that the witness was not credible (*see id.*; *People v Ielfield*, 132 AD3d 1298, 1299 [4th Dept 2015], *lv denied* 27 NY3d 1152 [2016]). " 'An argument by counsel that his [or her] witnesses have testified truthfully is not vouching for their credibility' " (*People v Roman*, 85 AD3d 1630, 1632 [4th Dept 2011], *lv denied* 17 NY3d 821 [2011]).

We reject defendant's contention in his main brief that he was denied effective assistance of counsel. Inasmuch as the prosecutor did not engage in any misconduct during summation, defendant was not denied effective assistance of counsel by defense counsel's failure to object to the prosecutor's comments (*see People v Eckerd*, 161 AD3d 1508, 1509 [4th Dept 2018], *lv denied* 31 NY3d 1116 [2018]; *People v Keels*, 128 AD3d 1444, 1446 [4th Dept 2015], *lv denied* 26 NY3d 969 [2015]). Defendant also contends in his main brief that defense counsel was ineffective in failing to object to certain hearsay testimony that disproved defendant's statement during his second interview with the police that he was at a certain location later on the day of the murder. We conclude that defense counsel's failure to object did not constitute ineffective assistance inasmuch as there was other evidence disproving defendant's statement. Viewing the evidence, the law, and the circumstances of this case in totality and as of the time of representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). In his pro se supplemental brief, defendant contends that he received ineffective assistance of counsel based on defense counsel's failure to move to suppress his statement to the police on the day of his arrest and other evidence on the ground that he was arrested without probable cause. That contention must be raised by way of a motion pursuant to CPL article 440 (*cf. Crouch*, 70 AD3d at 1370-1371) inasmuch as " 'the record on appeal is inadequate to enable us to determine whether such a motion would have been successful and whether defense counsel was ineffective for failing to make that motion' " (*People v Cooper*, 151 AD3d 1831, 1831 [4th Dept 2017], *lv denied* 29 NY3d 1125 [2017]).

We reject defendant's contention in his pro se supplemental brief that the evidence is legally insufficient to establish his intent with respect to the murder count and his identity as the shooter. The testimony of the witness who was with defendant at the time of the shooting constituted legally sufficient evidence that defendant was

the perpetrator, and defendant's intent to kill may be inferred from his conduct in shooting the victim in the back of the head (*see People v Chase*, 158 AD3d 1233, 1234-1235 [4th Dept 2018], *lv denied* 31 NY3d 1080 [2018]; *People v Holmes*, 260 AD2d 942, 943 [3d Dept 1999], *lv denied* 93 NY2d 1020 [1999]). Defendant's further contention in his pro se supplemental brief that the evidence is legally insufficient because that witness was incredible as a matter of law is not preserved for our review inasmuch as defendant did not raise that ground in support of his motion for a trial order of dismissal (*see People v Washington*, 160 AD3d 1451, 1451 [4th Dept 2018]; *People v Wilcher*, 158 AD3d 1267, 1267-1268 [4th Dept 2018], *lv denied* 31 NY3d 1089 [2018]). In any event, we reject that contention (*see Wilcher*, 158 AD3d at 1267-1268). Defendant also challenges the weight of the evidence in both his main and pro se supplemental briefs. 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]).

Contrary to defendant's contention in his main brief, the court did not err in imposing consecutive sentences on the count of murder in the second degree and the count of criminal possession of a weapon in the second degree under Penal Law § 265.03 (3) (*see People v Malloy*, — NY3d —, —, 2019 NY Slip Op 05061, *1 [June 25, 2019]; *People v Brown*, 21 NY3d 739, 751 [2013]; *People v Lozada*, 164 AD3d 1626, 1627 [4th Dept 2018], *lv denied* 32 NY3d 1174 [2019]). Finally, we reject defendant's contention in his main and pro se supplemental briefs that the sentence is unduly harsh and severe.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

526

KA 16-02335

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AL-SHARIYFA ROBINSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), entered December 23, 2016. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts) and arson in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of two counts of murder in the second degree (Penal Law § 125.25 [3]) and one count of arson in the second degree (§ 150.15). We reject defendant's contention that Supreme Court erred in refusing to suppress statements that she made to fire marshals admitting that she started the subject fire. Defendant was not in custody when she made her initial statement inasmuch as, under the circumstances here, "a reasonable person innocent of any crime would not have believed that he or she was in custody at that time" (*People v Ellis*, 73 AD3d 1433, 1434 [4th Dept 2010], *lv denied* 15 NY3d 851 [2010]; *see generally People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]). Contrary to defendant's contention, " '[t]he mere fact that the [fire marshals] may have suspected defendant of having [been involved in a crime] prior to questioning [her] . . . does not compel a finding that defendant was in custody' " (*People v Clark*, 136 AD3d 1367, 1368 [4th Dept 2016], *lv denied* 27 NY3d 1130 [2016]). "Because the initial statement was not the product of pre-*Miranda* custodial interrogation, the post-*Miranda* [statement] given by defendant cannot be considered the fruit of the poisonous tree" (*People v Flecha*, 195 AD2d 1052, 1053 [4th Dept 1993]; *see People v Thomas*, 166 AD3d 1499, 1500 [4th Dept 2018], *lv denied* 32 NY3d 1178 [2019]). Contrary to defendant's further contention, her statements were not rendered involuntary by any alleged deception inasmuch as there was "no showing that deception on the part of the

[fire marshals], if any, 'was so fundamentally unfair as to deny [her] due process . . . or that a promise or threat was made that could induce a false confession' " (*People v Brockway*, 35 AD3d 1229, 1230 [4th Dept 2006], quoting *People v Tarsia*, 50 NY2d 1, 11 [1980]; *see People v Deitz*, 148 AD3d 1653, 1654 [4th Dept 2017], *lv denied* 29 NY3d 1125 [2017]).

We also reject defendant's challenges to the sufficiency of the evidence. Contrary to defendant's contention, viewing the evidence in the light most favorable to the People (*see People v Brown*, 111 AD3d 1385, 1386 [4th Dept 2013], *lv denied* 22 NY3d 1155 [2014]), we conclude that her statements were sufficiently corroborated (*see* CPL 60.50; *People v Krug*, 282 AD2d 874, 879 [3d Dept 2001], *lv denied* 98 NY2d 652 [2002]; *People v Barrows*, 251 AD2d 711, 712 [3d Dept 1998], *lv denied* 92 NY2d 878 [1998]). Contrary to defendant's further contention, the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to establish the requisite logical nexus between the murders and the arson to support the conviction of both counts of murder in the second degree under Penal Law § 125.25 (3) (*see People v Henderson*, 25 NY3d 534, 541 [2015]).

Contrary to defendant's additional 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 a different verdict would have been unreasonable and thus that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Finally, we reject defendant's contention that the period of postrelease supervision imposed by the court for the conviction of arson in the second degree is unduly harsh and severe.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

527

KA 16-01536

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NICHOLAS OSMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

THOMAS THEOPHILOS, BUFFALO, FOR DEFENDANT-APPELLANT.

PATRICK E. SWANSON, DISTRICT ATTORNEY, MAYVILLE (JOHN C. ZUROSKI 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 Chautauqua County Court (James F. Bargnesi, A.J.), dated August 12, 2016. 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.

Same memorandum as in *People v Osman* ([appeal No. 1] — AD3d — [July 31, 2019] [4th Dept 2019]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

538

CA 18-01502

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

JABR A. ALMUGANAHI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CANDIDO GONZALEZ, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

CELLINO & BARNES, P.C., BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BOUVIER LAW, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered July 16, 2018. The judgment dismissed the complaint upon a verdict of no cause of action.

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

Memorandum: Plaintiff commenced this negligence action seeking damages for injuries that he allegedly sustained when he was riding his bicycle and was involved in an accident with a vehicle operated by defendant. In appeal No. 1, plaintiff appeals from a judgment dismissing the complaint upon a jury verdict determining that, although defendant was negligent, his negligence was not a proximate cause of the accident. In appeal No. 2, plaintiff appeals from an order denying his posttrial motion pursuant to CPLR 4404 (a) to set aside the verdict and direct judgment in his favor or, in the alternative, order a new trial on the ground that the verdict is inconsistent and against the weight of the evidence. Initially, we note that the appeal from the judgment in appeal No. 1 brings up for review the propriety of the order in appeal No. 2, and thus the appeal from the order in appeal No. 2 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]).

Contrary to plaintiff's contention, we conclude that he is not entitled to a directed verdict inasmuch as "there is a valid line of reasoning and permissible inferences based upon the evidence at trial that could lead rational persons to the conclusion that [defendant's] negligence was not a proximate cause of the accident" (*Hollamon v Vinson*, 38 AD3d 1159, 1160 [4th Dept 2007]).

Although plaintiff did not preserve his contention that the verdict is inconsistent by raising it before the jury was discharged when Supreme Court could have taken corrective action (*see Barry v Manglass*, 55 NY2d 803, 806 [1981], *rearg denied* 55 NY2d 1039 [1982]; *Berner v Little*, 137 AD3d 1675, 1676 [4th Dept 2016]), we nevertheless address that contention in the context of plaintiff's challenge to the weight of the evidence, which is preserved inasmuch as he moved to set aside the verdict on that ground (*see Skowronski v Mordino*, 4 AD3d 782, 782 [4th Dept 2004]; *see also Berner*, 137 AD3d at 1676; *Schreiber v University of Rochester Med. Ctr.*, 88 AD3d 1262, 1263 [4th Dept 2011]). We conclude, however, that plaintiff's contention lacks merit. "A jury finding that a party was negligent but that such negligence was not a proximate cause of the accident is inconsistent and against the weight of the evidence only when the issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause" (*Skowronski*, 4 AD3d at 783 [internal quotation marks omitted]). Further, "[w]here . . . an apparently inconsistent or illogical verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view" (*id.* [internal quotation marks omitted]). Here, the jury could have reasonably found from the evidence that, although defendant was negligent in looking to the right just once at the intersection and failing to observe plaintiff approaching from that direction on the sidewalk while riding a bicycle, his negligence was not a proximate cause of the accident inasmuch as plaintiff rode down the steep sidewalk at an imprudent speed, failed to see defendant's vehicle that was already stopped at the intersection while awaiting to enter the flow of traffic, and then struck the side of it (*see Berner*, 137 AD3d at 1676; *Amorosi v Hubbard*, 124 AD3d 1354, 1356 [4th Dept 2015]; *Skowronski*, 4 AD3d at 783). We thus conclude that " 'the finding of proximate cause did not inevitably flow from the finding of culpable conduct' " and, therefore, that the verdict is neither inconsistent nor against the weight of the evidence (*Skowronski*, 4 AD3d at 783).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

539

CA 18-01503

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

JABR A. ALMUGANAHI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CANDIDO GONZALEZ, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

CELLINO & BARNES, P.C., BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BOUVIER LAW, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered August 7, 2018. The order denied the motion of plaintiff to set aside the verdict or for a new trial.

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

Same memorandum as in *Almuganahi v Gonzalez* ([appeal No. 1] — AD3d — [July 31, 2019] [4th Dept 2019]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

551

KA 11-02002

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICO D. MCGEE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered July 14, 2011. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the seventh 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 criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03), defendant contends that County Court erred in refusing to suppress cocaine seized by police officers after a search of the vehicle in which he was a passenger. We affirm.

As an initial matter, we note that defendant's notice of appeal contains an inaccurate description of the judgment appealed from. Defendant's notice of appeal recites the correct indictment number and states the correct date on which the judgment was rendered, however, and thus we treat the notice of appeal as valid, in the exercise of our discretion in the interest of justice (*see* CPL 460.10 [6]; *People v Daniqua S.D.*, 92 AD3d 1226, 1227 [4th Dept 2012]).

With respect to the merits, defendant does not challenge the lawfulness of the initial stop of the vehicle but contends instead that the court erred in determining that the officers had probable cause to search the vehicle. We reject that contention. At the suppression hearing, one of the two officers who completed the traffic stop testified that he detected the odor of marihuana emanating from the vehicle upon his approach. The officers then had the driver and two passengers, including defendant, exit the vehicle. The officers searched defendant's person and thereafter handcuffed defendant and placed him in the rear of their patrol car. A search of the vehicle revealed a portion of a marihuana cigarette in an ashtray in the front

seat and a tied-off plastic bag containing 16 individually packaged bags of cocaine in the rear, near where defendant had been seated. "[I]t is well established that the odor of marihuana emanating from a vehicle, when detected by an officer qualified by training and experience to recognize it, is sufficient to constitute probable cause to search a vehicle and its occupants" (*People v Cuffie*, 109 AD3d 1200, 1201 [4th Dept 2013], *lv denied* 22 NY3d 1087 [2014] [internal quotation marks omitted]). Here, we conclude that the testimony at the suppression hearing established that the officers had probable cause to search the vehicle and its occupants, and there is no basis in the record to disturb the court's decision to credit that testimony in denying defendant's motion to suppress (*see People v Jemison*, 158 AD3d 1310, 1311 [4th Dept 2018], *lv denied* 31 NY3d 1083 [2018]; *People v Grimes*, 133 AD3d 1201, 1202-1203 [4th Dept 2015]). We also reject defendant's contention that the cocaine should have been suppressed because he was illegally detained. Defendant's allegedly unlawful detention does not provide a basis for suppressing the evidence obtained from the search of the vehicle inasmuch as the officers were authorized to remove defendant from the vehicle and obtained probable cause to search the vehicle before they detained him (*see generally People v Holmes*, 63 AD3d 1649, 1650 [4th Dept 2009], *lv denied* 12 NY3d 926 [2009]; *People v Laws*, 208 AD2d 317, 322 [1st Dept 1995]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

552

KA 17-00364

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BONNIE R. TOMION, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Stephen D. Aronson, A.J.), rendered November 3, 2016. The judgment convicted defendant, upon a nonjury verdict, of driving while ability impaired by drugs and aggravated driving while intoxicated (two counts).

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

Memorandum: Defendant appeals from a judgment convicting her, after a nonjury trial, of felony driving while ability impaired by drugs ([DWAI] Vehicle and Traffic Law §§ 1192 [4]; 1193 [1] [c] [i]) and two counts of felony aggravated driving while intoxicated ([DWI] §§ 1192 [2-a] [b]; 1193 [1] [c] [i]). Contrary to defendant's contention, we conclude that County Court properly denied defendant's motion to suppress the statement she made immediately following her arrest. The record supports the court's determination that defendant's statement was genuinely spontaneous and was not the product of interrogation or its functional equivalent (*see generally People v Rivers*, 56 NY2d 476, 479 [1982], *rearg denied* 57 NY2d 775 [1982]; *People v Ibarrondo*, 150 AD3d 1644, 1645 [4th Dept 2017]). Although defendant made the inculpatory statement immediately after police told her that she was under arrest for DWAI, merely informing a defendant that he or she is under arrest does not undermine the spontaneity of a statement (*see People v Cosgrove*, 102 AD2d 947, 947-948 [3d Dept 1984]). In essence, defendant's statement was "a blurted out admission, . . . which [wa]s in effect forced upon the officer" (*People v Grimaldi*, 52 NY2d 611, 617 [1981]).

Defendant's contention that her conviction of aggravated DWI is not supported by legally sufficient evidence because there was no competent proof of the ages of the children in her vehicle is not preserved for our review inasmuch as defendant's motion to dismiss was

not specifically directed at the ground advanced on appeal (*see generally People v Gray*, 86 NY2d 10, 19 [1995]).

Although defendant preserved her contention that her DWAI conviction is not supported by legally sufficient evidence because the People did not establish that she was impaired by a "drug" within the meaning of the Public Health Law (*see* Vehicle and Traffic Law § 114-a), we reject that contention. Viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence was sufficient to establish that defendant was impaired by Clonazepam, a "drug" listed in Public Health Law § 3306 (Schedule IV [c] [9]). The arresting officer testified that defendant's appearance after the motor vehicle accident and her performance on several field sobriety tests led her to conclude that defendant was impaired by a drug. There was also evidence of Clonazepam in defendant's blood, and a toxicologist testified that even therapeutic amounts of the drug could cause her to exhibit signs of impairment. Taken collectively, this evidence was legally sufficient to support the DWAI conviction (*see e.g. People v Drouin*, 115 AD3d 1153, 1154 [4th Dept 2014], *lv denied* 23 NY3d 1019 [2014]; *People v Gonzalez*, 90 AD3d 1668, 1669 [4th Dept 2011]).

Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

564

CA 18-01598

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

IN THE MATTER OF LEVEL 3 COMMUNICATIONS, LLC, BROADWING COMMUNICATIONS, LLC, GLOBAL CROSSING NORTH AMERICA, INC., AND GLOBAL CROSSING TELECOMMUNICATIONS, INC., PETITIONERS-PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

ERIE COUNTY, CITY OF BUFFALO, CITY OF LACKAWANNA, VILLAGE OF NORTH COLLINS, LAKE SHORE CENTRAL SCHOOL DISTRICT, NORTH COLLINS CENTRAL SCHOOL DISTRICT, RESPONDENTS-DEFENDANTS-APPELLANTS-RESPONDENTS, CITY OF LACKAWANNA SCHOOL DISTRICT, AND EDEN CENTRAL SCHOOL DISTRICT, RESPONDENTS-DEFENDANTS-RESPONDENTS.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (JENNIFER C. PERSICO OF COUNSEL), FOR RESPONDENT-DEFENDANT-APPELLANT-RESPONDENT ERIE COUNTY.

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

RICHARD S. JUDA, JR., CITY ATTORNEY, LACKAWANNA (ANTONIO M. SAVAGLIO OF COUNSEL), FOR RESPONDENT-DEFENDANT-APPELLANT-RESPONDENT CITY OF LACKAWANNA.

HARRIS BEACH PLLC, BUFFALO (MEGHANN N. ROEHL OF COUNSEL), FOR RESPONDENT-DEFENDANT-APPELLANT-RESPONDENT LAKE SHORE CENTRAL SCHOOL DISTRICT.

HODGSON RUSS LLP, BUFFALO (MICHAEL B. RISMAN OF COUNSEL), FOR RESPONDENT-DEFENDANT-APPELLANT-RESPONDENT NORTH COLLINS CENTRAL SCHOOL DISTRICT.

SCHAUS & SCHAUS, BUFFALO (RICHARD M. SCHAUS OF COUNSEL), FOR RESPONDENT-DEFENDANT-APPELLANT-RESPONDENT VILLAGE OF NORTH COLLINS.

INGRAM YUZEK GAINEN CARROLL & BERTOLOTTI, LLP, NEW YORK CITY (JOHN G. NICOLICH OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeals and cross appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered

March 5, 2018 in a CPLR article 78 proceeding and a declaratory judgment action. The order and judgment, inter alia, determined that petitioners' fiber optic cables and inclosures in Erie County are not taxable under RPTL 102 (12) (i) because they fall under the exception contained in RPTL 102 (12) (i) (D).

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by striking the words "would be taxable as real property under RPTL Section 102 (12) (i), barring any exception" from the first decretal paragraph and by inserting in its place the words "are taxable as real property under RPTL 102 (12) (i)," vacating the second through twelfth decretal paragraphs and the included table A, and dismissing the amended consolidated petition, and as modified the order and judgment is affirmed without costs.

Memorandum: Petitioners-plaintiffs (petitioners) commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, a determination that the subject properties, which include fiber optic cables and accompanying equipment (hereafter, fiber optic installations), are not taxable and to compel respondents-defendants Erie County, City of Buffalo, City of Lackawanna, Village of North Collins, Lake Shore Central School District and North Collins Central School District (collectively, respondents) and respondents-defendants City of Lackawanna School District and Eden Central School District (School Districts) to issue refunds of the taxes petitioners paid on the fiber optic installations in certain tax years. Petitioners had submitted applications pursuant to RPTL 556-b to respondents and the School Districts, seeking a refund of the taxes that petitioners paid on the subject properties in the tax years 2010 through 2012, which respondents and the School Districts either denied on procedural grounds or failed to consider. Petitioners then commenced this proceeding/action and, in a prior judgment, Supreme Court (Walker, A.J.) concluded that the properties were taxable pursuant to RPTL 102 (12) (f), which applies, inter alia, to equipment for the distribution of light. On a prior appeal, this Court reversed that determination, concluding that the court had relied on different grounds than those stated by respondents in rejecting the applications (*Matter of Level 3 Communications, LLC v Erie County*, 132 AD3d 1271, 1273-1274 [4th Dept 2015], *lv denied* 26 NY3d 918 [2016]). We remitted the matter to respondents and the School Districts for consideration of the remaining issues, including issues relating to the taxability of the properties.

On remittal, respondents and the School Districts again denied the RPTL 556-b applications on the grounds, inter alia, that the fiber optic installations constitute taxable real property within the meaning of RPTL 102 (12) (i), and that the exception in subdivision (D) of that statute did not apply. In addition, petitioners submitted additional RPTL 556-b applications concerning the same fiber optic installations for other tax years, which respondents and the School Districts also denied or declined to consider. Petitioners then filed a "verified consolidated amended petition[-complaint]" (amended petition). The parties stipulated that the amended petition would include challenges to the tax assessments for all of the tax years

from the original petition-complaint and also for the tax years for which RPTL 556-b applications were submitted after we remitted to respondents and the School Districts, and that all of the RPTL 556-b applications had been denied on grounds including that the fiber optic installations were taxable property pursuant to RPTL 102 (12) (b), (f) and (i), and that the exception in RPTL 102 (12) (i) (D) did not apply.

Respondents appeal and petitioners cross-appeal from an order and judgment in which Supreme Court (Chimes, J.), among other things, determined that the fiber optic installations constituted taxable property under RPTL 102 (12) (i), but were not taxable under the circumstances presented here pursuant to the exception in subdivision (D). We agree with respondents that the court erred in applying that exception, and we therefore modify the order and judgment accordingly and dismiss the amended petition.

As a preliminary matter, we note that this is properly only a CPLR article 78 proceeding inasmuch as "the relief sought by petitioner[s], i.e., review of respondents' administrative determinations that the subject propert[ies] constitute[] taxable real property, is available under CPLR article 78 without the necessity of a declaration" (*Matter of Level 3 Communications, LLC v Chautauqua County*, 148 AD3d 1702, 1703 [4th Dept 2017], *lv denied* 30 NY3d 913 [2018]).

With respect to the issues raised in respondents' appeals, petitioners correctly concede that, after the prior appeal, the Court of Appeals has conclusively determined that "fiber-optic cables are taxable as 'lines' under [RPTL 102 (12) (i)] despite the fact that they do not conduct electricity" (*Matter of T-Mobile Northeast, LLC v DeBellis*, 32 NY3d 594, 608 [2018], *rearg denied* 32 NY3d 1197 [2019]). Thus, we affirm the order and judgment insofar as it comports with that determination.

We agree with respondents, however, that the court erred in determining that the fiber optic installations are not taxable pursuant to the exception set forth in RPTL 102 (12) (i) (D). In pertinent part, that exception provides that otherwise taxable lines, i.e., fiber optic installations (*see T-Mobile Northeast, LLC*, 32 NY3d at 608), are not taxable property where they are "used in the transmission of news or entertainment radio, television or cable television signals for immediate, delayed or ultimate exhibition to the public" (RPTL 102 [12] [i] [D]). Respondents concluded that the exception does not apply to petitioners' fiber optic installations. In reaching that conclusion, respondents relied on several factors, including a 2007 opinion by counsel for the State Board of Real Property Services (SBRPS) (11 Ops Counsel SBRPS No. 103 [2007]). There, counsel for SBRPS concluded that the exception applied only to cables that were exclusively or primarily used for the enumerated exempt purposes, and that fiber optic installations such as the ones at issue here constituted taxable property because they were primarily used as part of a cell phone system.

We disagree with respondents that we must defer to the opinion of counsel for SBRPS. In general, " 'an agency's interpretation of the statutes it administers must be upheld absent demonstrated irrationality or unreasonableness,' but where 'the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency' " (*Lorillard Tobacco Co. v Roth*, 99 NY2d 316, 322 [2003]; *see Matter of DeVera v Elia*, 32 NY3d 423, 434 [2018]; *Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270, 285 [2009]). Here, we conclude that, inasmuch "[a]s the issue is one of pure statutory interpretation, agency deference is unwarranted" (*DeVera*, 32 NY3d at 434; *see International Union of Painters & Allied Trades, Dist. Council No. 4 v New York State Dept. of Labor*, 32 NY3d 198, 215 [2018]). Nevertheless, we reach the same conclusion as respondents with respect to the merits.

Contrary to petitioners' contention, they had the burden of establishing that the subject properties are excluded from taxation. Petitioners contend that subdivision (D) of RPTL 102 (12) (i) is part of the definition of the taxable property, and thus respondents had the burden of establishing that petitioners' properties are taxable property pursuant to the statute. We disagree. As noted above, the Court of Appeals has conclusively stated that "fiber-optic cables are taxable as 'lines' under" RPTL 102 (12) (i) (*T-Mobile Northeast, LLC*, 32 NY3d at 609), therefore, the properties at issue are taxable unless one of the statutory exceptions applies. The Court of Appeals has also "held that '[t]ax exclusions are never presumed or preferred and before [a] petitioner may have the benefit of them, the burden rests on it to establish that the item comes within the language of the exclusion.' Moreover, a statute authorizing a tax exemption will be construed against the taxpayer unless the taxpayer identifies a provision of law plainly creating the exemption . . . Thus, the taxpayer's interpretation of the statute must not simply be plausible, it must be 'the only reasonable construction' " (*Matter of Charter Dev. Co., L.L.C. v City of Buffalo*, 6 NY3d 578, 582 [2006]; *see Matter of Moran Towing & Transp. Co. v New York State Tax Commn.*, 72 NY2d 166, 172-173 [1988]; *Matter of Purcell v New York State Tax Appeals Trib.*, 167 AD3d 1101, 1103 [3d Dept 2018], *appeal dismissed* 33 NY3d 999 [2019]). We reject petitioners' contention that a different result is required on the ground that RPTL 102 (12) (i) (D) sets forth an exclusion from the tax rather than an exemption (*see generally Matter of Wegmans Food Mkts., Inc. v Tax Appeals Trib. of the State of N.Y.*, — NY3d —, —, 2019 NY Slip Op 05184, *3 [2019]).

Here, petitioners contend that their fiber optic installations are not taxable property pursuant to RPTL 102 (12) (i) (D) because, inter alia, petitioners use those properties to some unspecified extent to transmit "news or entertainment radio, television or cable television signals for immediate, delayed or ultimate exhibition to the public" (*id.*). We reject that contention. In light of petitioners' failure to establish the percentage of their fiber optic installations that are used for those purposes, we may accept their contention only if we conclude that any such usage of fiber optic

installations, no matter how slight, is sufficient to exclude the properties from the tax. That is not " 'the only reasonable construction' " of the statute (*Charter Dev. Co., L.L.C.*, 6 NY3d at 582), indeed, it is "simply [not] plausible" (*id.*). If we accept that interpretation, based on the proliferation of uses of cell phones to stream video, television, and other programming, all fiber optic cables will be excluded from taxation. That, however, conflicts with the Court of Appeals' determination in *T-Mobile Northeast, LLC* that such property is taxable (32 NY3d at 608). Moreover, RPTL 102 (12) (i) provides that taxable property includes all "wires, poles, supports and inclosures for electrical conductors upon, above and underground used in connection with the transmission or switching of electromagnetic voice, video and data signals between different entities." Petitioners' interpretation of subdivision (D) will result in all of those items being non-taxable because they all can be used to some minuscule degree to transmit television signals, which would render section 102 (12) (i) meaningless. Therefore, petitioners' interpretation "would . . . violate the well-settled rule of statutory construction that '[a] construction rendering statutory language superfluous is to be avoided' " (*Matter of Stateway Plaza Shopping Ctr. v Assessor of City of Watertown*, 87 AD3d 1359, 1361 [4th Dept 2011], quoting *Matter of Branford House v Michetti*, 81 NY2d 681, 688 [1993]; *see Matter of Monroe County Public School Dists. v Zyra*, 51 AD3d 125, 131-132 [4th Dept 2008]). Thus, " 'the only reasonable construction' " of the statute is that proposed by respondents (*Charter Dev. Co., L.L.C.*, 6 NY3d at 582), to wit, that the fiber optic installations are non-taxable only where they are primarily or exclusively used for one of the exempt purposes in RPTL 102 (12) (i) (A) - (D). Petitioners failed to establish such usage, thus the court erred in concluding that the statutory exception applies.

With respect to the cross appeal, petitioners' "constitutional challenge to RPTL [102 (12) (i)] was not raised in the amended petition, and therefore is not preserved for our review" (*Matter of Town of Rye v New York State Bd. of Real Prop. Servs.*, 10 NY3d 793, 795 [2008]; *see Matter of Goldstein v Tax Appeals Trib. of the State of N.Y.*, 111 AD3d 986, 987 [3d Dept 2013], *appeal dismissed* 23 NY3d 985 [2014], *lv denied* 24 NY3d 904 [2014]; *Matter of Murtaugh v New York State Dept. of Envtl. Conservation*, 42 AD3d 986, 988 [4th Dept 2007], *lv dismissed* 9 NY3d 971 [2007]). Petitioners' further contention, that the properties at issue are not taxable within the meaning of RPTL 102 (12) (i) because they are enclosures for fiber optic cables that do not conduct electricity, is without merit. That statute "encompasses (when not owned by a local utility) lines, wires, poles, and supports, regardless of whether they are related to the conduction of electricity, as well as 'inclosures for electrical conductors,' when those items are used in the transmission of data signals across public domain. Thus, [petitioners'] fiber-optic cables are taxable as 'lines' under the statute despite the fact that they do not conduct electricity" (*T-Mobile Northeast, LLC*, 32 NY3d at 608). We have reviewed petitioners' remaining contentions on the cross appeal, and we conclude that they are without merit, or are moot in light of our determination.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

568

CA 18-01575

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

IN THE MATTER OF LEVEL 3 COMMUNICATIONS, LLC,
PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CHAUTAUQUA COUNTY, CITY OF DUNKIRK, TOWN OF DUNKIRK, TOWN OF PORTLAND, TOWN OF RIPLEY, TOWN OF WESTFIELD, VILLAGE OF BROCTON, VILLAGE OF WESTFIELD, DUNKIRK CITY SCHOOL DISTRICT, BROCTON CENTRAL SCHOOL DISTRICT, FREDONIA CENTRAL SCHOOL DISTRICT, RIPLEY CENTRAL SCHOOL DISTRICT, AND WESTFIELD CENTRAL SCHOOL DISTRICT,
RESPONDENTS-DEFENDANTS-RESPONDENTS,

INGRAM YUZEK GAINEN CARROLL & BERTOLOTTI, LLP, NEW YORK CITY (JOHN G. NICOLICH OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

HODGSON RUSS LLP, BUFFALO (MICHAEL B. RISMAN OF COUNSEL), AND STEPHEN M. ABDELLA, COUNTY ATTORNEY, MAYVILLE, FOR RESPONDENTS-DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Chautauqua County (Joseph Gerace, J.H.O.), entered March 24, 2018 in a CPLR article 78 proceeding and a declaratory judgment action. The judgment dismissed the amended petition-complaint.

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

Memorandum: Petitioner-plaintiff (petitioner) commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, to annul respondents-defendants' determinations that its fiber optic installations are taxable real property pursuant to RPTL 102 (12) (i). Petitioner appeals from a judgment dismissing its amended petition-complaint. We affirm. Initially, we note that this is properly only a CPLR article 78 proceeding, not a declaratory judgment action (*see Matter of Level 3 Communications, LLC v Chautauqua County*, 148 AD3d 1702, 1703 [4th Dept 2017], *lv denied* 30 NY3d 913 [2018]). Furthermore, petitioner correctly concedes that its fiber optic installations "are taxable as 'lines' under [RPTL 102 (12) (i)] despite the fact that they do not conduct electricity" (*Matter of T-Mobile Northeast, LLC v DeBellis*, 32 NY3d 594, 608 [2018], *rearg denied* 32 NY3d 1197 [2019]). Petitioner nevertheless contends that those installations are exempt from taxation as "property used in the

transmission of news or entertainment radio, television or cable television signals for immediate, delayed or ultimate exhibition to the public" (RPTL 102 [12] [i] [D]). We reject that contention. Petitioner failed to establish that its fiber optic installations are "primarily or exclusively used for one of the exempt purposes in RPTL 102 (12) (i) (A) - (D)" (*Matter of Level 3 Communications, LLC v Erie County*, — AD3d —, — [July 31, 2019] [4th Dept 2019]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

584

KA 16-00003

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AYOTUNJI A., 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 an adjudication of the Monroe County Court (James J. Piampiano, J.), rendered October 31, 2013. The adjudication revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that the adjudication so appealed from is unanimously reversed on the law and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: Defendant was adjudicated a youthful offender upon his plea of guilty to robbery in the third degree (Penal Law § 160.05) and sentenced, inter alia, to a term of probation. Defendant now appeals from an adjudication that revoked his probation and sentenced him to an indeterminate term of 1⅓ to 4 years' imprisonment.

Defendant contends that County Court erred in determining that he violated the conditions of his probation without holding a hearing or securing an admission. We agree. "A court may not revoke a sentence of probation without finding that the defendant has violated a condition [there]of . . . and affording [him or her] an opportunity to be heard (*see* CPL 410.70 [1]). The statutory requirements may be satisfied either by conducting a revocation hearing pursuant to CPL 410.70 (3) . . . , or through an admission by the defendant of the violation, coupled with a proper waiver of [his or her] right to a hearing" (*People v Montenegro*, 153 AD3d 553, 554 [2d Dept 2017]). Here, as the People correctly concede, defendant never admitted to violating his probation and the court never conducted a revocation hearing. Thus, we reverse the adjudication and remit the matter to County Court for proceedings pursuant to CPL 410.70 (1) (*see id.*; *People v Harris*, 171 AD2d 1083, 1083 [4th Dept 1991]; *People v Lora*, 162 AD2d 719, 719 [2d Dept 1990]).

In light of our determination, defendant's challenge to the

severity of his sentence is academic.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

603

KA 15-02178

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY BLUNT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered September 16, 2014. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, conspiracy in the second degree and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [1]) and conspiracy in the second degree (§ 105.15). Defendant contends that County Court erred when, following its declaration of a mistrial in defendant's initial trial, it granted the application of the People for an order for the conditional examination of a witness (*see* CPL 660.10) who had been taken into custody on a material witness order to secure her attendance at the initial trial (*see* CPL 620.10). We agree with the People that defense counsel's general objection to the taking of the conditional examination was insufficient to preserve for our review defendant's present contention, i.e., that the court was statutorily prohibited from ordering the conditional examination because the court had the authority to make the witness amenable to legal process by continuing the material witness order instead of allowing her release, inasmuch as the objection lacked the requisite specificity (*see People v Robinson*, 88 NY2d 1001, 1001-1002 [1996], citing CPL 470.05 [2]; *see also People v Ponder*, 266 AD2d 826, 827 [4th Dept 1999], *lv denied* 94 NY2d 924 [2000], *reconsideration denied* 95 NY2d 856 [2000]). 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]; *Ponder*, 266 AD2d at 827).

Defendant further contends that the court erred in admitting in

evidence the witness's videotaped conditional examination because the People failed to exercise due diligence in attempting to locate her for the subject trial. We reject that contention. As relevant here, CPL 670.10 (1) permits the admission of a witness's testimony from a previous conditional examination at a subsequent proceeding when the witness cannot with due diligence be found or the witness is outside the state and cannot with due diligence be brought before the court (*see People v Diaz*, 97 NY2d 109, 112 [2001]; *People v Ayala*, 75 NY2d 422, 428 [1990], *rearg denied* 76 NY2d 773 [1990]; *People v Arroyo*, 54 NY2d 567, 569-570 [1982], *cert denied* 456 US 979 [1982]). Based on our review of the record, including the testimony of the investigator who described his ultimately unsuccessful efforts to locate the witness both shortly before and during the subject trial, we conclude that the court properly admitted in evidence the conditional examination upon concluding that the People had exercised the requisite due diligence (*see Arroyo*, 54 NY2d at 572-574; *People v Frederick*, 281 AD2d 963, 964 [4th Dept 2001], *lv denied* 96 NY2d 829 [2001]; *People v Nucci*, 162 AD2d 725, 726 [2d Dept 1990], *lv denied* 76 NY2d 862 [1990]; *cf. People v McDuffie*, 46 AD3d 1385, 1386 [4th Dept 2007], *lv denied* 10 NY3d 867 [2008]; *People v Combo*, 272 AD2d 992, 993 [4th Dept 2000]).

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

Defendant also contends that he was denied a fair trial by prosecutorial misconduct on summation. Defendant failed to preserve his contention for our review with respect to many of the instances of alleged misconduct (*see* CPL 470.05 [2]; *People v Gottsche*, 118 AD3d 1303, 1306 [4th Dept 2014], *lv denied* 24 NY3d 1084 [2014]) and, in any event, that contention lacks merit because the prosecutor's remarks were "either a fair response to defense counsel's summation or fair comment on the evidence" (*People v Goupil*, 104 AD3d 1215, 1216 [4th Dept 2013], *lv denied* 21 NY3d 943 [2013] [internal quotation marks omitted]).

We agree with defendant, however, that the court erred in summarily denying his motion to set aside the verdict pursuant to CPL 330.30 (2). The sworn allegations in support of defendant's motion, including those in the affidavit of his mother, indicated that a juror may have had an undisclosed, potentially strained relationship with the mother resulting from attending high school and working together, possibly knew about defendant's criminal history, and purportedly attempted to speak with the mother's husband during a lunch break at trial, and that the alleged misconduct was "not known to the defendant prior to rendition of the verdict" (CPL 330.30 [2]; *see People v Mosley*, 56 AD3d 1140, 1140 [4th Dept 2008]; *People v Paulick*, 206 AD2d 895, 896 [4th Dept 1994]; *People v Tokarski*, 178 AD2d 961, 961 [4th Dept 1991]). We conclude that the allegations " 'required a hearing on the issue whether the juror's alleged misconduct prejudiced a

substantial right of defendant' " (*Mosley*, 56 AD3d at 1140; *see Paulick*, 206 AD2d at 896; *Tokarski*, 178 AD2d at 961; *see generally People v Clark*, 81 NY2d 913, 914 [1993]). We therefore hold the case, reserve decision and remit the matter to County Court to conduct a hearing on defendant's CPL 330.30 motion.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

605

CAF 18-00374

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

IN THE MATTER OF ALICIA C. BIBBES-TURNER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DARRYL BIBBES, RESPONDENT-RESPONDENT.

NEIGHBORHOOD LEGAL SERVICES, INC., BUFFALO (THERESA J. FERRARA OF COUNSEL), FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered November 30, 2017 in a proceeding pursuant to Family Court Act article 4. The order denied petitioner's objections to an order of the Support Magistrate which dismissed the petition seeking spousal support.

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

Memorandum: In this proceeding pursuant to Family Court Act article 4, petitioner wife appeals from an order denying her objections to the order of the Support Magistrate dismissing her petition seeking spousal support from respondent husband. We affirm. The wife did not preserve her contention that gaps in the transcripts of two initial appearances caused by inaudible portions of the audio tape recordings precluded meaningful review of the order because she did not include this argument in her written objections to the Support Magistrate's order (*see Matter of Bow v Bow*, 117 AD3d 1542, 1543 [4th Dept 2014]). In any event, we conclude that the wife's contention is without merit because the inaudible portions of the audio tape recordings are not so significant as to preclude meaningful review of the order (*see Matter of Savage v Cota*, 66 AD3d 1491, 1492 [4th Dept 2009]). Indeed, there are no inaudible portions of the actual evidentiary hearing.

With respect to the merits, we reject the wife's contention that the Support Magistrate erred in deviating from the statutory spousal support guidelines. Although a married person "is chargeable with the support of his or her spouse" (Family Ct Act § 412 [1]), the Support Magistrate need not order the guideline amount of spousal support upon finding such amount to be unjust or inappropriate in light of several statutorily enumerated factors (*see* § 412 [6] [a]). Here, the evidence at the hearing before the Support Magistrate established that the parties married while the husband was incarcerated, had lived

apart for the 13 years preceding the commencement of the support proceeding, and had only sporadic contact upon the husband's release from prison. We therefore conclude that the record supports the Support Magistrate's determination that a deviation was warranted from the guideline amount of spousal support (*see* § 412 [6] [a] [6], [11], [14]), and that Family Court properly denied the wife's objections (*see Matter of Fanizzi v Delforte-Fanizzi*, 164 AD3d 1653, 1654 [4th Dept 2018]; *Matter of Nisita v Nisita*, 81 AD3d 832, 832 [2d Dept 2011]; *Matter of Zaky v Andil*, 81 AD3d 842, 843 [2d Dept 2011]).

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

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

609

CAF 19-00262

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

IN THE MATTER OF SHELLI A. WHEELER,
PETITIONER-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL S. WHEELER,
RESPONDENT-RESPONDENT-APPELLANT.

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

VAHEY GETZ LLP, ROCHESTER (GARY MULDOON OF COUNSEL), FOR RESPONDENT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Family Court, Monroe County (Joan S. Kohout, J.), entered July 24, 2018 in a proceeding pursuant to Family Court Act article 4. The order granted in part and denied in part the objections of respondent to an order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of respondent's third objection contained in the fourth and fifth bullet points, and reinstating the order of disposition of the Support Magistrate entered August 23, 2016 and as modified the order is affirmed without costs.

Memorandum: On a prior appeal in this proceeding pursuant to Family Court Act article 4, we concluded that Family Court erred in sustaining the second bullet point of respondent father's third objection to an order of the Support Magistrate wherein the father asserted that his obligation to contribute to his daughter's college expenses was not triggered because petitioner mother violated the parties' separation agreement by failing to consult with him regarding the college selection process (*Matter of Wheeler v Wheeler*, 162 AD3d 1517, 1518 [4th Dept 2018]). We therefore modified the court's order by denying that part of the father's third objection contained in the second bullet point, reinstating the mother's violation petition, and reinstating the Support Magistrate's order insofar as it determined that the father violated his obligation to contribute to the daughter's college expenses, and we remitted the matter to Family Court for consideration of the parties' objections to the calculation and amount of those expenses, which the court had not considered (*id.* at 1519). On remittal, the court, inter alia, granted in part father's objections to the Support Magistrate's order by reducing the amount of his contribution to the daughter's college expenses. The

mother appeals and the father cross-appeals, each contending that the court erred in calculating the father's contribution obligation.

Contrary to the father's contention on his cross appeal, we conclude that the separation agreement does not provide that the agreed-upon "SUNY cap" should be calculated by reducing the amount of such cap by the daughter's financial aid, grants, loans, and scholarships. "It is well established that a separation agreement that is incorporated but not merged into a judgment of divorce 'is a contract subject to the principles of contract construction and interpretation' " (*Anderson v Anderson*, 120 AD3d 1559, 1560 [4th Dept 2014], *lv denied* 24 NY3d 913 [2015], quoting *Matter of Meccico v Meccico*, 76 NY2d 822, 823-824 [1990], *rearg denied* 76 NY2d 889 [1990]). "The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent . . . [, and] [t]he best evidence of what the parties . . . intend is what they say in their writing" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002] [internal quotation marks omitted]; *see Colella v Colella*, 129 AD3d 1650, 1651 [4th Dept 2015]). "Where such an agreement is clear and unambiguous on its face, the intent of the parties must be gleaned from the four corners of the instrument and not from extrinsic evidence . . . , and the agreement in that instance must be enforced according to the plain meaning of its terms" (*Roche v Lorenzo-Roche*, 149 AD3d 1513, 1513-1514 [4th Dept 2017] [internal quotation marks omitted]; *see Greenfield*, 98 NY2d at 569; *Meccico*, 76 NY2d at 824). "When interpreting a contract . . . , the court should arrive at a construction that will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized" (*Sears v Sears*, 138 AD3d 1401, 1401 [4th Dept 2016] [internal quotation marks omitted]).

Here, the agreement provides in relevant part that the parties anticipated that their children would pursue college education and that they would "determine how to share such expenses at that time, based upon their facts and circumstances," but that neither party would be "obligated to contribute to expenses exceeding the cost of SUNY Geneseo." The agreement defines college "expenses" to which the parties would be obligated to contribute as including four years of tuition, fees, including those for standardized tests and applications, room and board, laboratory supplies, a computer, and travel between home and school, as well as "financial aid, grants, loans, and scholarships" (collectively, financial aid). Giving fair meaning to the language in the agreement "to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized" (*Sears*, 138 AD3d at 1401 [internal quotation marks omitted]), we conclude that the parties are obligated to contribute—on a pro rata basis as determined by the Support Magistrate (*see Matter of Dillon v Dillon*, 155 AD3d 1271, 1273 [3d Dept 2017])—to the daughter's net college expenses, i.e., the defined out-of-pocket expenses less financial aid, unless that amount exceeds the cost of SUNY Geneseo, in which case the parties' pro rata contributions would be calculated from the amount of the cap (*see Gorski v Hone*, 119 AD3d 863, 864 [2d Dept 2014]; *Matter of Rashidi v*

Rashidi, 102 AD3d 972, 973 [2d Dept 2013]). Contrary to the father's contention, there is nothing in the language of the separation agreement indicating that the parties intended that the "cost of SUNY Geneseo" would be calculated by first subtracting the amount of financial aid that the daughter received at the private university she was attending from the costs that would be incurred by a student attending SUNY Geneseo (*see generally Dillon*, 155 AD3d at 1273). If the parties had intended the cap to be calculated in such a manner, language to that effect could have been included in the agreement, but it was not. In addition, the father's interpretation would render the parental contribution obligation illusory inasmuch as the amount of financial aid that the daughter received at the private university exceeds "the cost of SUNY Geneseo" established at the hearing before the Support Magistrate (*see Springer v Springer*, 125 AD3d 842, 843 [2d Dept 2015]). Although the father proposed a method to resolve that absurd result in which the cap would be calculated by reducing "the cost of SUNY Geneseo" by the same percentage that the cost of the private university was reduced by financial aid, the agreement sets forth no such calculation and we "may not by construction add . . . terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Tallo v Tallo*, 120 AD3d 945, 946 [4th Dept 2014] [internal quotation marks omitted]; *see Sears*, 138 AD3d at 1402).

Based on our review of the record, including the evidence adduced at the hearing regarding expenses and financial aid, we agree with the mother on her appeal that the court erred in granting in part the father's objections by reducing the amount of his contribution inasmuch as the Support Magistrate properly concluded that the daughter's net college expenses were less than "the cost of SUNY Geneseo" and properly calculated the amount of the father's contribution obligation (*see generally Gorski*, 119 AD3d at 864). We therefore modify the order accordingly.

Finally, although we agree with the father that the court erred in determining that he failed to preserve his further contention that he is entitled to a credit against his child support obligation for his contribution to the daughter's room and board expenses while she is away at college (*see* Family Ct Act § 439 [e]), we nonetheless conclude that his contention lacks merit. "A credit against child support for college expenses is not mandatory but depends upon the facts and circumstances in the particular case, taking into account the needs of the custodial parent to maintain a household and provide certain necessaries" (*Matter of DelSignore v DelSignore*, 133 AD3d 1207, 1208 [4th Dept 2015] [internal quotation marks omitted]). Here, it cannot be said that the father was entitled to a credit for the daughter's room and board expenses inasmuch as the record establishes that the mother must maintain a household for the daughter during school breaks (*see DelSignore*, 133 AD3d at 1208; *Pistilli v Pistilli*, 53 AD3d 1138, 1140 [4th Dept 2008]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

623

KA 17-01080

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES JOHNSON, JR., DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (NICOLE K. INTSCHERT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered March 24, 2017. The judgment convicted defendant, upon a jury verdict, of 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, that part of the motion seeking to dismiss the superseding indictment pursuant to CPL 30.30 is granted, the superseding indictment is dismissed, and the matter is remitted to Supreme Court, Onondaga County, for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of criminal possession of a controlled substance (CPCS) in the fifth degree (Penal Law § 220.06 [5]), defendant contends that Supreme Court erred in denying that part of his motion seeking to dismiss the superseding indictment on statutory speedy trial grounds (*see generally* CPL 30.30). We agree.

The People should have been charged with 87 days of postreadiness delay between May 23, 2016, when they "implicitly requested" an adjournment to seek a superseding indictment (*Matter of Johnson v Andrews*, 179 AD2d 417, 418 [1st Dept 1992]), and August 18, 2016, when they finally secured a superseding indictment. As both the court and the People acknowledged at various points, that period of delay was "attributable to [the People's] inaction and directly implicate[d] their ability to proceed to trial" on a charge of CPCS in the fifth degree, i.e., the crime that the People sought to add by way of a superseding indictment and the sole crime for which defendant was ultimately convicted (*People v Carter*, 91 NY2d 795, 799 [1998]; *see generally* CPL 210.05; *People v McKenna*, 76 NY2d 59, 65 n [1990]). Contrary to the court's determination, the 87-day period was not

attributable to the court given that it was "the People's inaction [in securing a superseding indictment that] resulted in a delay in the court's [trial of the action]" (*People v Harris*, 82 NY2d 409, 412 [1993]). Contrary to the People's contention, it is well established that postreadiness delay may be assessed "notwithstanding that the People have answered ready for trial within the statutory time limit" (*People v Anderson*, 66 NY2d 529, 536 [1985]) and notwithstanding the absence of an explicit prosecutorial request for an adjournment (*see e.g. McKenna*, 76 NY2d at 64-65; *People v Jones*, 105 AD2d 179, 186 [2d Dept 1984], *affd sub nom People v Anderson*, 66 NY2d 529 [1985]). Although certain periods of time may be excluded from assessment as postreadiness delay where the People successfully invoke one of the exceptions enumerated in CPL 30.30 (4) (*see People v Cortes*, 80 NY2d 201, 208 [1992]; *see also* CPL 30.30 [3] [b]), the People have identified no exception that might excuse the 87-day delay at issue here (*see People v Miller*, 113 AD3d 885, 888 n [3d Dept 2014]).

When the 87 days of postreadiness delay are added to the 168 days of prereadiness delay for which the People admit they are chargeable, the resulting 255 days of chargeable time exceeds the 183 days authorized under these circumstances (*see generally* CPL 30.30 [1] [a]; *People v Brown*, 28 NY3d 392, 403-404 [2016]; *People v Sinistaj*, 67 NY2d 236, 241 [1986]; *People v Osgood*, 52 NY2d 37, 43 [1980]). The court thus erred in denying the motion to dismiss the superseding indictment on statutory speedy trial grounds. We therefore reverse the judgment, grant that part of defendant's motion seeking to dismiss the superseding indictment pursuant to CPL 30.30, and dismiss the superseding indictment (*see People v Harrison*, 171 AD3d 1481, 1484 [4th Dept 2019]; *Miller*, 113 AD3d at 887-888). Defendant's remaining contentions are academic.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

626

KA 17-01334

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE CRUZ-RIVERA, DEFENDANT-APPELLANT.

LINDA M. CAMPBELL, SYRACUSE, FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered June 22, 2017. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, attempted kidnapping in the second degree, gang assault in the first degree, assault in the first 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 a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [3]), attempted kidnapping in the second degree (§§ 110.00, 135.20), gang assault in the first degree (§ 120.07), and criminal possession of a weapon in the third degree (§ 265.02 [1]). Contrary to defendant's contention, County Court properly denied his motion to dismiss the indictment on the ground that two witnesses had committed perjury at the grand jury proceeding. A court may dismiss an indictment upon motion by a defendant if the grand jury proceeding was defective (*see* CPL 210.20 [1] [c]). A grand jury proceeding is defective when, inter alia, "[t]he proceeding otherwise fails to conform to the requirements of [CPL article 190] to such degree that the integrity thereof is impaired and prejudice to the defendant may result" (CPL 210.35 [5]; *see People v Huston*, 88 NY2d 400, 409 [1996]). "Dismissal of indictments under CPL 210.35 (5) should . . . be limited to those instances where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the Grand Jury" (*Huston*, 88 NY2d at 409). "The likelihood of prejudice turns on the particular facts of each case, including the weight and nature of the admissible proof adduced to support the indictment" (*id.*). Here, inasmuch as the prosecutor did not knowingly offer perjured testimony and there was sufficient evidence before the grand jury to support the charges without

considering the perjured testimony, dismissal of the indictment was not required (*see People v Lumnah*, 81 AD3d 1175, 1177 [3d Dept 2011], *lv denied* 16 NY3d 897 [2011]; *People v Bean*, 66 AD3d 1386, 1386 [4th Dept 2009], *lv denied* 14 NY3d 769 [2010]; *People v Mariani*, 203 AD2d 717, 719 [3d Dept 1994], *lv denied* 84 NY2d 869 [1994]).

Defendant next contends that the court erred in allowing defendant's probation officer to testify regarding the electronic data from defendant's ankle monitor because such testimony was hearsay. We conclude that defendant's contention is not preserved for our review. Although defense counsel initially sought to preclude such testimony, the court reserved decision after argument and indicated that it would "handle [the issue] as it unfolds." When the probation officer testified the following day, defense counsel requested a limiting instruction but made no further objection to the testimony, in all likelihood because she intended to, and in fact did, cross-examine the witness regarding other data obtained from the ankle monitor. In any event, we conclude that any error was harmless inasmuch as the evidence was overwhelming and there was no significant probability that the error affected the verdict (*see People v Brown*, 57 AD3d 1461, 1462 [4th Dept 2008], *lv denied* 12 NY3d 814 [2009], *reconsideration denied* 12 NY3d 923 [2009]; *see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Contrary to defendant's contention, the testimony of the accomplice was sufficiently corroborated by other evidence (*see People v Smith*, 150 AD3d 1664, 1665 [4th Dept 2017], *lv denied* 30 NY3d 953 [2017]; *People v Highsmith*, 124 AD3d 1363, 1364 [4th Dept 2015], *lv denied* 25 NY3d 1202 [2015]). 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 People v Bleakley*, 69 NY2d 490, 495 [1987]). We also reject defendant's contention that the court erred in denying his request for a missing witness charge. The People demonstrated that the witness was uncooperative with them and thus not under their control (*see People v Daniels*, 140 AD3d 1083, 1085 [2d Dept 2016], *lv denied* 28 NY3d 970 [2016]; *People v Bryant*, 11 AD3d 630, 631 [2d Dept 2004], *lv denied* 3 NY3d 755 [2004]; *People v Baker*, 174 AD2d 1019, 1020 [4th Dept 1991], *lv denied* 78 NY2d 1073 [1991]; *see generally People v Gonzalez*, 68 NY2d 424, 427-429 [1986]).

The sentence is not unduly harsh or severe. We agree with defendant, however, and the People correctly concede, that the certificate of conviction incorrectly reflects that defendant was convicted of murder in the second degree pursuant to Penal Law § 125.25 (1), and it must therefore be amended to reflect that he was convicted of murder in the second degree pursuant to section 125.25 (3) (*see People v Maloney*, 140 AD3d 1782, 1783 [4th Dept 2016]). We also note that the certificate of conviction incorrectly reflects that defendant was convicted of criminal possession of a weapon in the third degree pursuant to Penal Law § 265.03 (3), and it must therefore be amended to reflect that he was convicted of criminal possession of

a weapon in the third degree pursuant to section 265.02 (1). Finally, the certificate of conviction incorrectly reflects that defendant was sentenced to 3⅓ to 7 years for criminal possession of a weapon in the third degree, and it must therefore be amended to reflect that he was sentenced to 3½ to 7 years for that conviction (*see People v Armendariz*, 156 AD3d 1383, 1384 [4th Dept 2017], *lv denied* 31 NY3d 981 [2018]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

628

KA 15-01805

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERTO QUINONES, DEFENDANT-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, 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 (Alex R. Renzi, J.), rendered November 13, 2014. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts), robbery in the first degree, robbery 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: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of murder in the second degree (Penal Law § 125.25 [1], [3]). The conviction arose from defendant's intentional killing of a man in the course of robbing him. We now affirm.

Upon our independent review of the evidence in light of the elements of the crimes as charged to the jury (*see People v Kancharla*, 23 NY3d 294, 302-303 [2014]; *People v Danielson*, 9 NY3d 342, 349 [2007]; *see generally People v Sanchez*, 32 NY3d 1021, 1023 [2018]), we conclude that an acquittal on any count would have been unreasonable in light of defendant's detailed videotaped confession to police, his graphic audiotaped confession to a friend, the testimony of the getaway driver, the corroborating testimony of neighborhood residents who heard gunshots and thereafter saw two men matching the description of defendant and his accomplice running toward the getaway driver's car, and the consciousness of guilt reflected in defendant's recorded jailhouse calls. The verdict thus is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Wheeler*, 159 AD3d 1138, 1140 [3d Dept 2018], *lv denied* 31 NY3d 1123 [2018]).

Contrary to defendant's contention, Supreme Court properly refused to suppress his confession on *Payton* grounds. "Police

officers were in defendant's home pursuant to a valid search warrant and, 'since the requirements for a search warrant were satisfied,' " we conclude that " 'there was no constitutional infirmity in the failure of the police to also secure an arrest warrant' " (*People v Denis*, 91 AD3d 1301, 1301 [4th Dept 2012], *lv denied* 19 NY3d 959 [2012]; *see People v Barfield*, 21 AD3d 1396, 1396 [4th Dept 2005], *lv denied* 5 NY3d 881 [2005]; *People v Lee*, 205 AD2d 708, 709 [2d Dept 1994], *lv denied* 84 NY2d 828 [1994]). We note that defendant explicitly concedes the validity of the search warrant, and he does not dispute that the police had probable cause to arrest him.

Contrary to defendant's further contention, defense counsel was not ineffective in failing to move to suppress his confession on the ground that he invoked his right to silence during the interrogation. The governing law is unfavorable to a claim that defendant effectively invoked that right under the circumstances presented here (*see e.g. People v Howard*, 72 AD3d 1199, 1201 [3d Dept 2010], *lv denied* 15 NY3d 806 [2010]; *People v Cole*, 59 AD3d 302, 302 [1st Dept 2009], *lv denied* 12 NY3d 924 [2009]; *People v Allen*, 147 AD2d 968, 968 [4th Dept 1989], *lv denied* 73 NY2d 1010 [1989], *reconsideration denied* 74 NY2d 660 [1989]), and we thus cannot say that counsel's failure to seek suppression on that ground rendered her performance constitutionally deficient (*see People v Brunner*, 16 NY3d 820, 821 [2011]; *People v Bradford*, 118 AD3d 1254, 1255-1256 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014]). Moreover, because defendant identifies no statement that he made during the interrogation that could plausibly be construed as a request for an attorney (*cf. People v Howard*, 167 AD3d 1499, 1501 [4th Dept 2018], *lv denied* 32 NY3d 1205 [2019]), we reject his separate contention that defense counsel was ineffective in failing to seek suppression on that ground (*see Bradford*, 118 AD3d at 1255-1256).

Contrary to defendant's further contention, the court properly denied his motion for a mistrial based on alleged juror misconduct. The record of the court's *Buford* inquiry demonstrates that the alleged misconduct consisted only of a "totally innocuous" conversation between jurors during a recess, that such conversation had "nothing to do with the jury's evaluation of the evidence," and that the court's general instructions and inquiries of the relevant jurors "were sufficient to address any possibility of prejudice" (*People v Bosket*, 295 AD2d 202, 203 [1st Dept 2002], *lv denied* 98 NY2d 708 [2002], *lv denied* 99 NY2d 555 [2002]). We note that CPL 270.35 (1) is not implicated here because defendant never sought to discharge the subject jurors.

Defendant next argues that the fairness of his trial was compromised by prosecutorial misconduct on summation. We do not agree. Although the bulk of the challenged comments "would have been better left unsaid," the record as a whole "fails to disclose that the prosecutor engaged in a flagrant and pervasive pattern of prosecutorial misconduct so as to deprive defendant of a fair trial" (*People v Pitt*, 170 AD3d 1282, 1285 [3d Dept 2019] [internal quotation marks omitted]; *see People v Stanley*, 108 AD3d 1129, 1131 [4th Dept

2013], *lv denied* 22 NY3d 959 [2013]). Reversal is therefore unwarranted (*see generally People v Nunes*, 168 AD3d 1187, 1193 [3d Dept 2019], *lv denied* 33 NY3d 979 [2019]).

The sentence is not unduly harsh or severe. We have considered and rejected defendant's remaining contentions.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

635

CA 18-01829

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

CHARLES E. WASHINGTON, SR., AND CHARLES E. WASHINGTON, JR., PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, DEFENDANT-APPELLANT, DAYCIA P. MCCLAM, DEFENDANT-RESPONDENT, AND MASTERS EDGE, INC., DEFENDANT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (ROBERT E. QUINN OF COUNSEL), FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered March 19, 2018. The order, insofar as appealed from, denied the motion of defendant City of Buffalo for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the amended complaint insofar as it alleges that defendant City of Buffalo either created or had actual notice of the allegedly dangerous condition and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action to recover damages for injuries arising from a motor vehicle accident, alleging that the City of Buffalo (defendant) created and had both actual and constructive notice of an allegedly defective stop sign at the site of the accident. Supreme Court denied defendant's motion for, inter alia, summary judgment dismissing the amended complaint against it. Defendant now appeals.

We agree with defendant that it met its initial burden on the motion of showing that it neither created nor had actual notice of the allegedly dangerous condition and that plaintiffs failed to raise a triable issue of fact in opposition (*see King v Sam's E., Inc.*, 81 AD3d 1414, 1415 [4th Dept 2011]). The court thus erred in denying defendant's motion to that extent (*see Schoen v Tops Mkts., LLC*, 159 AD3d 1342, 1342 [4th Dept 2018]), and we modify the order accordingly. Contrary to defendant's further contention, however, it failed to meet its initial burden of showing that it "lacked constructive notice of

the allegedly dangerous condition" (*Griffith v JK Chopra Holding, LLC*, 111 AD3d 666, 666 [2d Dept 2013]). The court therefore properly denied defendant's motion to that extent.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

637

CA 18-01677

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

HAMILTON EQUITY GROUP, LLC, AS ASSIGNEE OF
HSBC BANK USA, NATIONAL ASSOCIATION,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HECTOR A. MARICHAL, P.C., HECTOR A. MARICHAL,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

CHARLES ZOLOT, JACKSON HEIGHTS, FOR DEFENDANTS-APPELLANTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (ADAM M. BRASKY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered March 14, 2018. The order denied the motion of defendants Hector A. Marichal, P.C., and Hector A. Marichal for leave to renew that part of their prior motion to dismiss the complaint against them and granted the cross motion of plaintiff for summary judgment against said defendants.

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

Memorandum: Defendants-appellants (defendants) appeal from an order that denied their motion for leave to renew that part of their prior motion to dismiss the complaint against them for lack of personal jurisdiction. The order also granted plaintiff's cross motion for summary judgment on the complaint. We conclude that Supreme Court did not abuse its discretion in denying defendants' motion for leave to renew (*see* CPLR 2221 [e] [2]; *Chiappone v William Penn Life Ins. Co. of N.Y.*, 96 AD3d 1627, 1627-1628 [4th Dept 2012]; *Kirby v Suburban Elec. Engrs. Contrs., Inc.*, 83 AD3d 1380, 1381 [4th Dept 2011], *lv dismissed* 17 NY3d 783 [2011]; *see generally Cassatt v Zimmer, Inc.*, 161 AD3d 1549, 1551 [4th Dept 2018]).

We further conclude that plaintiff met its initial burden on its cross motion of establishing its entitlement to judgment as a matter of law (*see* CPLR 3212 [b]) and that defendants failed to raise a triable issue of fact in opposition (*see Stonehill Capital Mgt. LLC v Bank of the W.*, 28 NY3d 439, 448 [2016]). In particular, we note that defendants' vague and general assertion that the prior debt-holder had discharged the debt is insufficient to defeat a motion for summary

judgment (*see Lodge II Hotel LLC v Joso Realty LLC*, 155 AD3d 1631, 1631 [4th Dept 2017]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

659

CA 18-02200

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

REVERSE MORTGAGE SOLUTIONS, INC.,
PLAINTIFF-APPELLANT,

V ORDER

C. DEWEY MCLEOD, AS EXECUTOR OF THE LAST WILL
AND TESTAMENT OF VIRGINIA C. MCLEOD, ALSO KNOWN
AS VIRGINIA MCLEOD, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

ALDRIDGE PITE LLP, MELVILLE (KENNETH SHEEHAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ROBERT A. SCHWARTZ, ROCHESTER, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (John M. Owens, A.J.), entered April 19, 2018. The order, among other things, granted the cross motion of defendant-respondent to dismiss the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 13 and July 13, 2019,

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

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

679

CA 18-01921

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

JASON ADOLF, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ERIE COUNTY INDUSTRIAL DEVELOPMENT AGENCY,
6238 GROUP, LLC, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.

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

VARVARO, COTTER & BENDER, WHITE PLAINS (ROB GOODWIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered April 20, 2018. The order, insofar as appealed from, granted that part of the motion of defendants Erie County Industrial Development Agency and 6238 Group, LLC, seeking summary judgment dismissing the amended complaint against defendant 6238 Group, LLC.

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

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries he sustained when he slipped and fell on snow and/or ice in the parking lot of property owned by 6238 Group, LLC (defendant). Defendant and defendant Erie County Industrial Development Agency moved for summary judgment dismissing the amended complaint against them. Plaintiff appeals from an order insofar as it granted the motion with respect to defendant, and we affirm.

Contrary to plaintiff's contention, defendant met its initial burden of establishing its entitlement to judgment as a matter of law, and plaintiff failed to raise a triable issue of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "It is well settled that 'an out-of-possession landlord who relinquishes control of the premises and is not contractually obligated to repair unsafe conditions is not liable . . . for personal injuries caused by an unsafe condition existing on the premises' " (*Balash v Melrod*, 167 AD3d 1442, 1442 [4th Dept 2018]). Here, the provisions of the lease between defendant and its tenant were sufficient to establish defendant's prima facie entitlement to judgment as a matter of law because that lease established that defendant was an out-of-possession

landlord with no duty to remove snow or ice (*see Lindquist v C & C Landscape Contrs., Inc*., 38 AD3d 616, 617 [2d Dept 2007]; *Scott v Bergstol*, 11 AD3d 525, 526 [2d Dept 2004]), and defendant's contractual right to re-enter the premises "did not create a situation where [defendant] retained control over the parking lot" (*Carvano v Morgan*, 270 AD2d 222, 223 [2d Dept 2000]; *see Ferro v Burton*, 45 AD3d 1454, 1455 [4th Dept 2007]). In opposition to the motion, plaintiff failed to raise a triable issue of fact. Contrary to plaintiff's contention, the agency lease agreement between defendant and the Erie County Industrial Development Agency does not raise an issue of fact whether defendant had a duty to remove snow or ice from the parking lot because that agreement is silent on snow and ice removal. Thus, "the tenant bore the sole contractual responsibility for clearing snow and ice from the premises" and Supreme Court properly granted the motion for summary judgment dismissing the amended complaint with respect to defendant (*Vijayan v Bally's Total Fitness*, 289 AD2d 224, 225 [2d Dept 2001]).

Plaintiff's remaining contentions either are without merit or have been rendered academic by our determination.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

680

CA 18-02072

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

HERBERT DEVAUL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ERIE INSURANCE COMPANY OF NEW YORK,
DEFENDANT-RESPONDENT.

LYNN LAW FIRM, LLP, SYRACUSE (KELSEY W. SHANNON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered September 17, 2018. The order, insofar as appealed from, denied the motion of plaintiff for summary judgment.

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

Memorandum: Plaintiff owned a home that defendant insured. After the home burned down under suspicious circumstances, defendant denied plaintiff's claim for coverage because, inter alia, defendant believed that plaintiff "intentionally caus[ed] the fire." Plaintiff thereafter commenced this breach of contract action to recover under the insurance policy, and Supreme Court denied plaintiff's motion for summary judgment on, inter alia, the issue of liability.

We affirm. Plaintiff's affidavit in support of his motion included only conclusory denials that he committed arson, which were insufficient to meet his initial burden on his motion for summary judgment (*see generally Pullman v Silverman*, 28 NY3d 1060, 1062 [2016]). The remaining submissions in support of plaintiff's motion merely highlighted gaps in defendant's affirmative defense of arson, and it is well established that "a party moving for summary judgment . . . does not meet its burden by noting gaps in its opponent's proof" (*Nick's Garage, Inc. v Geico Indem. Co.*, 165 AD3d 1621, 1622 [4th Dept 2018] [internal quotation marks omitted]; *see Morley Maples, Inc. v Dryden Mut. Ins. Co.*, 130 AD3d 1413, 1413-1415 [3d Dept 2015]). We have considered and rejected plaintiff's remaining contentions.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

681

CA 19-00231

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

CYNTHIA ISENSEE AND GARY ISENSEE,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

UPSTATE ORTHOPEDICS, LLP, ORTHOPEDIC MEDICAL SERVICE GROUP, AND RICHARD TALLARICO, M.D.,
DEFENDANTS-RESPONDENTS.

MANNION & COPANI, SYRACUSE (GABRIELLE MARDANY HOPE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GALE GALE & HUNT, LLC, FAYETTEVILLE (MAX D. GALE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered June 25, 2018. The order granted the motion of defendants for summary judgment and dismissed the amended complaint.

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

Memorandum: In this medical malpractice action, plaintiffs appeal from an order granting defendants' motion for summary judgment dismissing the amended complaint. We affirm.

"[T]o meet [their] initial burden on [their] summary judgment motion in this medical malpractice action, defendant[s] [were] required to 'present factual proof, generally consisting of affidavits, deposition testimony and medical records, to rebut the claim of malpractice by establishing that [they] complied with the accepted standard of care or did not cause any injury to the patient' " (*Webb v Scanlon*, 133 AD3d 1385, 1386 [4th Dept 2015]; *see Cole v Champlain Val. Physicians' Hosp. Med. Ctr.*, 116 AD3d 1283, 1285 [3d Dept 2014]). Affidavits submitted in support of such a motion must be "detailed, specific and factual in nature and [must] not assert in simple conclusory form that the physician acted within the accepted standards of medical care" (*Toomey v Adirondack Surgical Assoc.*, 280 AD2d 754, 755 [3d Dept 2001]). In addition, the expert affidavit must "address each of the specific factual claims of negligence raised in [the] plaintiff[s'] bill of particulars" (*Larsen v Banwar*, 70 AD3d 1337, 1338 [4th Dept 2010]; *see James v Wormuth*, 74 AD3d 1895, 1895 [4th Dept 2010]). "Failure to make such showing

requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Contrary to plaintiffs' contention, defendants submitted the affidavit of a qualified expert. In his affidavit, the expert established that he was "possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted [and his] opinion rendered is reliable" (*Matott v Ward*, 48 NY2d 455, 459 [1979]; *see Lopez v Gramuglia*, 133 AD3d 424, 424 [1st Dept 2015]). Contrary to plaintiffs' further contention, defendants' expert affidavit was not conclusory because it addressed each of the specific factual claims of negligence raised in plaintiffs' bill of particulars, and defendants therefore met their initial burden with respect to both whether they complied with the accepted standard of care and whether they caused any injury (*see Toomey*, 280 AD2d at 755; *cf. Winegrad*, 64 NY2d at 852-853; *James*, 74 AD3d at 1895; *Larsen*, 70 AD3d at 1338).

Thus, because defendants met their burden on both compliance with the accepted standard of care and proximate cause, the burden shifted to plaintiffs to raise triable issues of fact by submitting an expert's affidavit both attesting to a departure from the accepted standard of care and that defendants' departure from that standard of care was a proximate cause of the injury (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324-325 [1986]; *Groff v Kaleida Health*, 161 AD3d 1518, 1521 [4th Dept 2018]; *Webb*, 133 AD3d at 1386-1387). Plaintiffs, however, failed to submit an expert affidavit in opposition. Therefore, Supreme Court properly granted defendants' motion.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

690

KA 17-01495

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARC CZTERNASTEK, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered July 15, 2016. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, assault in the first degree, unlawful imprisonment in the first degree and criminal possession of a weapon 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 following a jury trial of, inter alia, murder in the second degree (Penal Law § 125.25 [1]), defendant contends that County Court erred in refusing to suppress statements that he made to the police after he purportedly invoked his right to remain silent. We reject that contention. The law in that area is well settled. If a suspect in custody "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease" (*Miranda v Arizona*, 384 US 436, 473-474 [1966]; *see People v Ferro*, 63 NY2d 316, 322 [1984], *cert denied* 472 US 1007 [1985]). The statements defendant made to a police detective—"I can't talk no more" and "I've told you everything"—"when taken in context, [were] not an unequivocal invocation of his right to remain silent or a direction that he wished the interview to end" (*People v Howard*, 72 AD3d 1199, 1201 [3d Dept 2010], *lv denied* 15 NY3d 806 [2010]; *see e.g. People v Cole*, 59 AD3d 302, 302 [1st Dept 2009], *lv denied* 12 NY3d 924 [2009]; *People v Allen*, 147 AD2d 968, 968 [4th Dept 1989], *lv denied* 73 NY2d 1010 [1989], *reconsideration denied* 74 NY2d 660 [1989]; *cf. People v Douglas*, 8 AD3d 980, 980-981 [4th Dept 2004], *lv denied* 3 NY3d 705 [2004]).

In any event, we conclude that any error by the court in refusing to suppress the statements made by defendant after he purportedly

invoked his right to remain silent is harmless beyond a reasonable doubt in light of the overwhelming evidence of defendant's guilt (*see People v Deas*, 102 AD3d 464, 464 [1st Dept 2013], *lv denied* 20 NY3d 1097 [2013]; *see generally People v Crimmins*, 36 NY2d 230, 237 [1975]). We note that defendant made no admissions to the detective during his prolonged interview, and the videotape of defendant's police interview was not admitted in evidence at trial. Moreover, defendant testified at trial and admitted to having stabbed the two victims; the only issue at trial related to defendant's intent, and his statements to the detective were not harmful to defendant on that issue.

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]). Contrary to defendant's final contention, the sentence is not unduly harsh and severe.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

698

CAF 18-00747

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

IN THE MATTER OF DESEAN T. KELLY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

LORREN BROWN, RESPONDENT-RESPONDENT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BENJAMIN L. NELSON OF COUNSEL), FOR PETITIONER-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR RESPONDENT-RESPONDENT.

MARK A. SCHLECHTER, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Thomas W. Polito, R.), entered March 15, 2018 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, denied petitioner's request for visitation.

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 appeals from an order that, inter alia, denied his request for in-person visitation with the subject child at the correctional facility in which he is currently incarcerated. Contrary to the father's contention, we conclude that the determination of Family Court, made after a hearing, is supported by a sound and substantial basis in the record (*see Matter of Rulinsky v West*, 107 AD3d 1507, 1509 [4th Dept 2013]).

Although " '[v]isitation with a noncustodial parent is presumed to be in a child's best interests even when the parent is incarcerated' " (*Matter of Fewell v Ratzel*, 121 AD3d 1542, 1542 [4th Dept 2014]), "the presumption may be rebutted when it is shown, 'by a preponderance of the evidence, that visitation would be harmful to the child' " (*id.*, quoting *Matter of Granger v Miscerola*, 21 NY3d 86, 92 [2013]; *see Rulinsky*, 107 AD3d at 1509). Here, respondent mother established by a preponderance of the evidence that, under all the circumstances, "visitation would be harmful to the child's welfare" (*Granger*, 21 NY3d at 91).

The mother established that the child, who was approximately 2½

years old at the time of the hearing, did not have a significant relationship with the father, who last saw the child when he was 15 months old (*see e.g. Matter of Carroll v Carroll*, 125 AD3d 1485, 1486 [4th Dept 2015], *lv denied* 25 NY3d 907 [2015]; *Matter of Butler v Ewers*, 78 AD3d 1667, 1668 [4th Dept 2010]; *Matter of McCullough v Brown*, 21 AD3d 1349, 1349 [4th Dept 2005]). The mother also established that the child had no relationship with the paternal relatives with whom he would have to travel more than two hours each way to visit the father in prison (*see Butler*, 78 AD3d at 1668; *see also Matter of Leary v McGowan*, 143 AD3d 1100, 1102 [3d Dept 2016]).

We are mindful that the age of a child is a significant factor to consider in determining the issue of visitation (*see Matter of Conklin v Hernandez*, 41 AD3d 908, 911 [3d Dept 2007]), and the court properly considered the effects that visitations in prison might have on the child in light of his young age. It has been recognized that "the best interests of a child, and particularly a young child, may not be served by imposing in-person visits to a correctional facility. The atmosphere and setting of such visits may be traumatic to the child and his or her view of the parent" (*Matter of Benjamin OO. v Latasha OO.*, 170 AD3d 1394, 1396 [3d Dept 2019], *lv denied* — NY3d — [June 25, 2019]). Based on a consideration of all the relevant factors, we conclude that "the court properly determined . . . that it was in the best interests of the child[ ] to delay visitation so that [he] could continue to grow and develop before commencing visitation with the[ ] father" (*McCullough*, 21 AD3d at 1349).

Contrary to the father's final contention, the court did not improperly delegate to the mother the court's authority to determine issues involving the child's best interests (*cf. Matter of Hameed v Alatawaneh*, 19 AD3d 1135, 1136 [4th Dept 2005]). The record demonstrates that the court "properly reserved the final decision to itself, and that it relied upon the record as a whole" in making a final determination to deny in-person visitation (*Matter of Hennelly v Viger*, 198 AD2d 224, 225 [2d Dept 1993]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

700

CA 18-00549

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

THOMAS H. O'NEILL, JR.,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

ROSE R. O'NEILL,
DEFENDANT-RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA, JAMES P. RENDA, BUFFALO, FOR PLAINTIFF-APPELLANT-RESPONDENT.

KENNEY SHELTON LIPTAK & NOWAK LLP, BUFFALO (SHARI JO REICH OF COUNSEL), AND SCHOEMAN UPDIKE KAUFMAN & GERBER LLP, NEW YORK CITY, FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.) entered August 4, 2017. The order, among other things, denied defendant's motion for leave to reargue a prior application and denied plaintiff's cross motion for a downward modification of his maintenance obligation.

It is hereby ORDERED that said cross appeal is unanimously dismissed and the order is affirmed without costs.

Same memorandum as in *O'Neill v O'Neill* ([appeal No. 4] — AD3d — [July 31, 2019] [4th Dept 2019]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

701

CA 18-00550

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

THOMAS H. O'NEILL, JR.,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

ROSE R. O'NEILL,
DEFENDANT-RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA, JAMES P. RENDA, BUFFALO, FOR PLAINTIFF-APPELLANT-RESPONDENT.

SCHOEMAN UPDIKE KAUFMAN & GERBER LLP, NEW YORK CITY (BETH L. KAUFMAN OF COUNSEL), AND KENNEY SHELTON LIPTAK & NOWAK LLP, BUFFALO, FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.) entered January 9, 2018. The order, among other things, granted defendant maintenance arrears and attorneys' fees.

It is hereby ORDERED that said appeal is unanimously dismissed, the cross appeal is dismissed insofar as it concerns plaintiff's motion to change the beneficiary on the subject life insurance policy and the denial of relief pursuant to CPLR 5019 (a), and the order is modified on the law by granting that part of defendant's application seeking to recover medical expenses in the amount of $5,412.01, plus 9% interest commencing August 1, 2016, and as modified the order is affirmed without costs.

Same memorandum as in *O'Neill v O'Neill* ([appeal No. 4] — AD3d — [July 31, 2019] [4th Dept 2019]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

702

CA 18-00552

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

THOMAS H. O'NEILL, JR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROSE R. O'NEILL, DEFENDANT-RESPONDENT.
(APPEAL NO. 3.)

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA, JAMES P. RENDA, BUFFALO, FOR PLAINTIFF-APPELLANT.

SCHOEMAN UPDIKE KAUFMAN & GERBER LLP, NEW YORK CITY (BETH L. KAUFMAN OF COUNSEL), AND KENNEY SHELTON LIPTAK & NOWAK LLP, BUFFALO, FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Timothy J. Walker, A.J.) entered February 13, 2018. The judgment awarded defendant maintenance arrears.

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

Same memorandum as in *O'Neill v O'Neill* ([appeal No. 4] — AD3d — [July 31, 2019] [4th Dept 2019]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

703

CA 18-00553

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

THOMAS H. O'NEILL, JR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROSE R. O'NEILL, DEFENDANT-RESPONDENT.
(APPEAL NO. 4.)

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA, JAMES P. RENDA, BUFFALO, FOR PLAINTIFF-APPELLANT.

SCHOEMAN UPDIKE KAUFMAN & GERBER LLP, NEW YORK CITY (BETH L. KAUFMAN OF COUNSEL), AND KENNEY SHELTON LIPTAK & NOWAK LLP, BUFFALO, FOR DEFENDANT-RESPONDENT.

Appeal from an amended judgment of the Supreme Court, Erie County (Timothy J. Walker, A.J.) entered March 15, 2018. The amended judgment awarded defendant's counsel the sum of $165,000 in attorneys' fees against plaintiff.

It is hereby ORDERED that the amended judgment so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: In 1984, before getting married, the parties entered into a prenuptial agreement (Agreement), which was incorporated but not merged into their judgment of divorce in 1993. An addendum to the Agreement shows that plaintiff had over $12 million in assets when he entered into it.

In appeal No. 1, plaintiff appeals from an order insofar as it denied his cross motion seeking a downward modification of his maintenance obligation, and defendant cross-appeals from the order insofar as it denied her motion for leave to reargue a prior application seeking, inter alia, maintenance arrears. In appeal No. 2, plaintiff appeals from an order insofar as it granted those parts of defendant's application seeking maintenance arrears and attorneys' fees, and denied his motion for leave to reargue his cross motion. Defendant cross-appeals from the order insofar as it denied those parts of her application to recover medical expenses and life insurance premiums, and granted plaintiff's motion to change the beneficiary on a life insurance policy. In appeal No. 3, plaintiff appeals from a judgment that awarded defendant maintenance arrears and, in appeal No. 4, he appeals from an amended judgment that awarded defendant attorneys' fees.

With respect to appeal No. 1, we reject plaintiff's contention on his appeal that he was entitled to an evidentiary hearing on his cross motion seeking a downward modification of his maintenance obligation. Plaintiff failed to disclose the total value of his then-current assets and thus failed to make the requisite showing of extreme financial hardship (*see Sonkin v Sonkin*, 137 AD3d 635, 636 [1st Dept 2016]; *see generally* Domestic Relations Law § 236 [B] [9] [b] [1]; *Leo v Leo*, 125 AD3d 1319, 1319 [4th Dept 2015]). We dismiss the cross appeal because no appeal lies from an order denying leave to reargue (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]).

With respect to appeal No. 2, we dismiss plaintiff's appeal because no appeal lies from an order denying leave to reargue (*see id.*) and, otherwise, plaintiff's right to appeal from the intermediate order terminated with the entry of the judgment in appeal No. 3 and the amended judgment in appeal No. 4 (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). We dismiss defendant's cross appeal insofar as she contends that Supreme Court erred in granting plaintiff's motion to change the beneficiary on the subject life insurance policy because "[t]he omission of [plaintiff's motion papers] from the record renders any meaningful appellate review of the . . . order [in appeal No. 2] virtually impossible" (*Deutsche Bank Natl. Trust Co. v Hounnou*, 147 AD3d 814, 815 [2d Dept 2017]; *see Mergl v Mergl*, 19 AD3d 1146, 1147 [4th Dept 2005]). Inasmuch as defendant was not entitled to beneficiary status, we reject her contention that the court should have granted that part of her application to recover the premiums that she paid. Furthermore, we dismiss defendant's cross appeal insofar as she contends that the court should have corrected a certain prior order pursuant to CPLR 5019 (a). Because defendant's notices of appeal in appeal Nos. 1 and 2 list specific parts of the orders from which she appealed and did not specify that she was appealing the court's implicit denial of CPLR 5019 (a) relief, she thereby waived her right to appeal from those parts of the orders (*see Levitt v Levitt*, 97 AD3d 543, 545 [2d Dept 2012]; *Sugar Cr. Stores v Pitts*, 198 AD2d 833, 833 [4th Dept 1993]; *see also* CPLR 5515 [1]).

Defendant's sole remaining contention on her cross appeal in appeal No. 2 is that the court erroneously denied that part of her application to recover medical expenses. We agree. When interpreting a contract, we give the words used by the parties their plain meaning (*see Brooke Group v JCH Syndicate 488*, 87 NY2d 530, 534 [1996]; *Fingerlakes Chiropractic v Maggio*, 269 AD2d 790, 792 [4th Dept 2000]). Plaintiff agreed to "provide, at his expense, uninterrupted hospital[and] medical . . . services to [defendant] during her lifetime." In her application, defendant itemized her medical expenses, and plaintiff conceded that defendant incurred the costs alleged. We therefore modify the order in appeal No. 2 by granting that part of defendant's application seeking to recover medical expenses in the amount of $5,412.01, plus 9% interest commencing August 1, 2016.

With respect to appeal No. 3, we reject plaintiff's contention that he was entitled to a hearing on maintenance for the same reasons that we rejected his related contention in appeal No. 1.

With respect to appeal No. 4, we agree with plaintiff that the court erroneously granted that part of defendant's application for attorneys' fees without an evidentiary hearing. "In the absence of a stipulation that an award of counsel fees can be made solely on the basis of the affirmations of counsel, an evidentiary hearing is required so that the court may test the claims of the [moving party's] attorney regarding the extent and value of [his or] her services" (*Nee v Nee*, 240 AD2d 478, 479 [2d Dept 1997]; *see Ott v Ott*, 266 AD2d 842, 842 [4th Dept 1999]). Here, plaintiff requested an evidentiary hearing, and thus "a hearing is required to determine the amount of reasonable counsel fees" (*Ferris v Ferris*, 121 AD3d 1544, 1545 [4th Dept 2014]; *cf. Beal v Beal*, 196 AD2d 471, 473 [2d Dept 1993]). We therefore reverse the amended judgment in appeal No. 4, and we remit the matter to Supreme Court to determine the amount of such fees following a hearing (*see Ferris*, 121 AD3d at 1545).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

704

CA 18-00682

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

THOMAS H. O'NEILL, JR., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROSE R. O'NEILL, DEFENDANT-APPELLANT.
(APPEAL NO. 5.)

SCHOEMAN UPDIKE KAUFMAN & GERBER LLP, NEW YORK CITY (BETH L. KAUFMAN OF COUNSEL), AND KENNEY SHELTON LIPTAK & NOWAK LLP, BUFFALO, FOR DEFENDANT-APPELLANT.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA, JAMES P. RENDA, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.) entered January 12, 2011. The order, among other things, denied defendant's application seeking maintenance arrears.

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

Memorandum: On appeal from an order that, inter alia, denied her application for maintenance arrears, among other things, we reject defendant's contention that her appeal is timely. Plaintiff served defendant's attorney with a copy of the order with notice of entry by mail on March 10, 2011. Defendant filed a notice of appeal on September 7, 2017, outside the time period prescribed by CPLR 5513. We recognize that a slightly different version of the order also existed, and a copy of that version was not served with notice of entry until much later. Although that version contained an additional ordering paragraph, the language in that paragraph "merely clarified" the original order, and therefore "the time to appeal must be measured from the original [order]" (*Matter of Kolasz v Levitt*, 63 AD2d 777, 779 [3d Dept 1978]). Inasmuch as the appeal from the original order was untimely, we dismiss the appeal (*see id.*).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

705

CA 19-00189

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

THOMAS H. O'NEILL, JR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROSE R. O'NEILL, DEFENDANT-RESPONDENT.
(APPEAL NO. 6.).

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA, JAMES P. RENDA, BUFFALO, FOR PLAINTIFF-APPELLANT.

SCHOEMAN UPDIKE KAUFMAN & GERBER LLP, NEW YORK CITY (BETH L. KAUFMAN OF COUNSEL), AND KENNEY SHELTON LIPTAK & NOWAK LLP, BUFFALO, FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Timothy J. Walker, A.J.) entered July 10, 2018. The order and judgment, among other things, awarded maintenance arrears to defendant.

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

Memorandum: Plaintiff appeals from an order and judgment that, inter alia, awarded maintenance arrears to defendant. The appeal must be dismissed because the order and judgment was entered on plaintiff's consent (*see Dumond v New York Cent. Mut. Fire Ins. Co.*, 166 AD3d 1554, 1555 [4th Dept 2018]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

707

CA 18-02029

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

SHERYL A. JANISH, AS EXECUTOR OF THE ESTATE OF NANCY RALSTON, DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

SHETOYA NISHAE SANCHEZ, ET AL., DEFENDANTS, AND VENTURE FORTHE, INC., DEFENDANT-APPELLANT.

LEWANDOWSKI & ASSOCIATES, WEST SENECA (KIMBERLY M. THRUN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.) dated April 10, 2018. The order, among other things, denied the motion of defendant Venture Forthe, Inc., seeking dismissal of the complaint against it.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on May 14, 2019, and filed in the Monroe County Clerk’s Office on July 2, 2019,

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

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

710

CA 18-01428

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

IN THE MATTER OF BRIAN HUNT,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT-RESPONDENT.

BRIAN HUNT, PETITIONER-APPELLANT PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Christopher J. Burns, J.), entered June 19, 2018 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner, a pro se prison inmate, commenced this CPLR article 78 proceeding seeking to annul the determination of respondent denying petitioner's request for disclosure pursuant to the Freedom of Information Law (Public Officers Law art 6) of parole records pertaining to another inmate, who testified against him at trial. Contrary to petitioner's contention, Supreme Court properly dismissed his petition. The records were exempt because their disclosure "would constitute an unwarranted invasion of personal privacy" (Public Officers Law § 87 [2] [b]; *see* 9 NYCRR 8000.5 [c] [2]) and "could endanger the life or safety" of the other inmate (§ 87 [2] [f]; *see Matter of Carty v New York State Div. of Parole*, 277 AD2d 633, 633-634 [3d Dept 2000]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

712

KA 17-01079

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRENDA E. ROTH, DEFENDANT-APPELLANT.

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

LEANNE K. MOSER, DISTRICT ATTORNEY, LOWVILLE, D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Lewis County Court (John H. Crandall, A.J.), rendered March 31, 2017. The judgment convicted defendant, after a nonjury trial, of manslaughter in the second degree, tampering with physical evidence and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting her following a nonjury trial of manslaughter in the second degree (Penal Law § 125.15 [1]), tampering with physical evidence (§ 215.40 [2]), and endangering the welfare of a child (§ 260.10 [1]), arising from the death of the 15-year-old victim of a drug overdose in defendant's home during a sleep over with defendant's daughter and several other teenagers.

In its initial verdict, County Court also found defendant guilty of a fourth charge, criminally negligent homicide ([CNH] Penal Law § 125.10). Following defendant's motion seeking, inter alia, to set aside the verdict with respect to manslaughter in the second degree and CNH as internally inconsistent, the court dismissed the CNH charge, pursuant to CPL 300.40, prior to sentencing. Defendant contends that, because the initial conviction on the manslaughter and CNH charges was internally inconsistent, the conviction for CNH functioned as an automatic acquittal of the manslaughter count or, in the alternative, that a new trial should be ordered. We reject that contention. CNH is a lesser included offense of manslaughter in the second degree (*see e.g. People v Collins*, 167 AD3d 1493, 1498 [4th Dept 2018], *lv denied* 32 NY3d 1202 [2019]; *People v Butcher*, 11 AD3d 956, 957-958 [4th Dept 2004], *lv denied* 3 NY3d 755 [2004]) and, as such, "should have been considered only in the alternative as an inclusory concurrent count" of manslaughter (*People v Flecha*, 43 AD3d

1385, 1386 [4th Dept 2007], *lv denied* 9 NY3d 990 [2007]; *see* CPL 300.30 [4]). The court, however, "as trier of the facts as well as the law, [was] available to correct repugnancies in the verdict" (*People v Alfaro*, 66 NY2d 985, 987 [1985]), as it did here, and there is therefore no basis for acquittal or a new trial (*see generally People v Finkelstein*, 144 AD2d 250, 250-251 [1st Dept 1988], *lv denied* 73 NY2d 921 [1989]).

Defendant further contends that the evidence is legally insufficient to support the conviction of manslaughter in the second degree and tampering with physical evidence. We reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). With respect to the charge of manslaughter in the second degree, the People established that defendant directly provided a significant quantity of prescription medication to her daughter to share with the victim. When defendant's daughter alerted defendant that the victim was unresponsive, was having difficulty breathing, and was foaming at the mouth, defendant directed her daughter and the other teens present not to call 911 and not to answer calls to the victim's cell phone from the victim's mother. The People also presented evidence that local first responders were equipped with Narcan, which reverses the effects of opiate narcotics such as those supplied by defendant. The evidence was sufficient to establish that defendant's conduct, both in supplying the drugs and in preventing the victim from receiving life-saving medical help, "contribute[d] to the victim's death . . . by 'set[ting] in motion' the events that result[ed] in the [death]" (*People v DaCosta*, 6 NY3d 181, 184 [2006]), and that the death was a " 'reasonably foreseeable' " result of those actions (*People v Davis*, 28 NY3d 294, 300 [2016]). Further, the evidence was sufficient to show that defendant consciously chose to ignore the risk of death (*see generally People v Garbarino*, 152 AD2d 254, 258 [3d Dept 1989], *lv denied* 75 NY2d 919 [1990]). With respect to the conviction of tampering with physical evidence, the evidence at trial showed that, after defendant knew the victim had died and before she permitted anyone to call the police, defendant directed the teens to remove trash containing the discarded packaging for drugs ingested by the victim. Contrary to defendant's contention, the fact that it was the teens and not the defendant who removed the trash is of no moment (*see People v Kowal*, 159 AD3d 1346, 1347 [4th Dept 2018]). Finally, viewing the evidence in light of the elements of these crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

713

KA 16-01256

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADRIAN JONES, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (DARIENN P. BALIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered June 29, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, that part of the omnibus motion seeking to suppress physical evidence is granted, the indictment is dismissed, and the matter is remitted to Supreme Court, Onondaga County, for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]), defendant contends that Supreme Court erred in refusing to suppress the handgun that he discarded while being pursued by the police. We agree.

The evidence at the suppression hearing established that a police officer in a marked patrol vehicle responded after midnight to a 911 call reporting shots fired near an apartment complex in the City of Syracuse. Upon his arrival in the area, the officer received a radio dispatch reporting that the suspect was among a group of eight men on a certain street; no further description of the suspect beyond his race was provided. The officer acknowledged that the apartment complex was large with hundreds of residents and that it was not unusual for black males to be walking around that area after midnight. As the officer drove toward the street identified in the dispatch, he saw a man later identified as defendant and a second man, both of whom were black, walking out from behind an apartment building. The officer did not see anything in the hands of either man. The men immediately turned around and ran away when they saw the officer in his patrol vehicle. The officer then relayed a description of the men

over the police radio, exited his vehicle, and pursued the men on foot. After initially losing sight of the men, the officer regained sight of the second man, who was then pursued and apprehended by other police officers. At that point, the officer stopped running, then looked to his right and saw defendant emerging from behind a building approximately 30 yards away. The officer noticed that defendant had a handgun and a sweatshirt in his hand, at which point the officer pointed his own gun at defendant, informed him that he was under arrest, and ordered him to drop the handgun. Defendant then threw the handgun and sweatshirt into a trash can and fled, and the officer gave chase. After another police officer joined the officer in the chase, the officer returned to the trash can and secured the discarded handgun. Defendant was arrested by other police officers.

It is well established that, "[i]n evaluating police conduct, the court must determine whether the action taken was justified in its inception and at every subsequent stage of the encounter" (*People v Nicodemus*, 247 AD2d 833, 835 [4th Dept 1998], *lv denied* 92 NY2d 858 [1998]; *see People v De Bour*, 40 NY2d 210, 222-223 [1976]). "[T]he police may pursue a fleeing defendant if they have a reasonable suspicion that defendant has committed or is about to commit a crime" (*People v Martinez*, 80 NY2d 444, 446 [1992]). "[A] defendant's flight in response to an approach by the police, combined with other specific circumstances indicating that the [defendant] may be engaged in criminal activity, may give rise to reasonable suspicion" (*People v Sierra*, 83 NY2d 928, 929 [1994]; *see People v Holmes*, 81 NY2d 1056, 1058 [1993]). "Flight alone, however, or even in conjunction with equivocal circumstances that might justify a police request for information . . . , is insufficient to justify pursuit because an individual has a right 'to be let alone' and refuse to respond to police inquiry" (*Holmes*, 81 NY2d at 1058).

Here, as the People correctly concede, the officer's action of pursuing defendant in response to his flight was not justified at its inception inasmuch as there were no specific circumstances indicating that defendant may have been engaged in criminal activity so as to give rise to reasonable suspicion (*see People v Nunez*, 111 AD3d 854, 856 [2d Dept 2013]; *see generally Holmes*, 81 NY2d at 1058). Although the officer observed defendant walking in the general vicinity of the reported gun shots, that observation does not provide the "requisite reasonable suspicion, in the absence of 'other objective indicia of criminality' " that would justify pursuit, and no such evidence was presented at the suppression hearing (*People v Riddick*, 70 AD3d 1421, 1423 [4th Dept 2010], *lv denied* 14 NY3d 844 [2010]; *see People v Cady*, 103 AD3d 1155, 1156 [4th Dept 2013]). In the absence of other identifying information, the fact that defendant may have matched the vague, generic description of the suspect as a black male, which could have applied to any number of individuals in the area of the large apartment complex with hundreds of residents, did not sufficiently indicate that defendant may have been engaged in criminal activity (*see Nunez*, 111 AD3d at 856; *People v Beckett*, 88 AD3d 898, 900 [2d Dept 2011]). Thus, the pursuit of defendant was unlawful.

We agree with defendant that, contrary to the court's

determination and the People's contention, the record does not establish that he abandoned the handgun. "It is well established that property seized as a result of an unlawful pursuit must be suppressed, unless that property was abandoned" (*People v Mueses*, 132 AD3d 1257, 1258 [4th Dept 2015]; *see People v Howard*, 50 NY2d 583, 592 [1980], *cert denied* 449 US 1023 [1980]). "Property which has in fact been abandoned is outside the protection of the constitutional provisions . . . There is a presumption against the waiver of constitutional rights . . . [and, thus,] [t]he proof supporting abandonment should 'reasonably beget the exclusive inference of . . . throwing away' " (*Howard*, 50 NY2d at 592-593). "The test to be applied is whether defendant's action . . . was spontaneous and precipitated by the illegality or whether it was a calculated act not provoked by the unlawful police activity and thus attenuated from it" (*People v Wilkerson*, 64 NY2d 749, 750 [1984]).

The court determined that defendant's act of discarding the handgun was a calculated act not provoked by the unlawful pursuit and was thus attenuated from it. That was error. Contrary to the court's determination, there is no basis on this record to conclude that the unlawful pursuit had stopped at the time that defendant discarded the handgun. Rather, the evidence establishes that there was an ongoing, continuous pursuit of defendant and the second man that began after the officer exited his vehicle. Although the officer stopped running when other police officers pursued and apprehended the second man, the officer then looked to his right and regained sight of defendant, who was emerging—and still moving with haste—from behind a nearby building. Between the time that the officer began the pursuit and the time that he saw defendant with a handgun—during which period the officer lost sight of the two men, regained sight of the second man, pursued him, and stopped when other police officers encountered him—only one minute had elapsed (*see Mueses*, 132 AD3d at 1257-1258). Moreover, the evidence establishes that the other police officers continued the pursuit based on the officer's report over the police radio. We thus conclude that defendant's act of discarding the handgun was "spontaneous and precipitated by the unlawful pursuit by the police" and, therefore, the handgun should have been suppressed (*Mueses*, 132 AD3d at 1258; *see Nunez*, 111 AD3d at 856; *People v Pirillo*, 78 AD3d 1424, 1426 [3d Dept 2010]).

In light of our determination that the court erred in refusing to suppress the handgun obtained as a result of the unlawful pursuit, defendant's guilty plea must be vacated (*see Cady*, 103 AD3d at 1157). Moreover, inasmuch as our determination results in the suppression of all evidence in support of the crime charged, the indictment must be dismissed (*see id.*). We therefore remit the matter to Supreme Court for proceedings pursuant to CPL 470.45.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

715

KA 16-01477

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JARVIS RICHARDSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered August 17, 2016. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of assault in the second degree (Penal Law § 120.05 [1]), defendant contends that County Court erred in denying his request to charge the jury on the defense of justification insofar as it applied to the use of force in defense of a third person. We reject that contention. Viewing the record in the light most favorable to defendant, as we must (*see People v Reynoso*, 73 NY2d 816, 818 [1988]), we conclude that there is no reasonable view of the evidence from which the jury could have found that defendant reasonably believed that the victim, a 59-year-old unarmed man, presented a risk of imminent harm to defendant's mother, who, at the time of the assault, was inside her residence, several blocks away from the scene of the assault (*see People v Adams*, 259 AD2d 299, 299 [1st Dept 1999], *lv denied* 93 NY2d 922 [1999]; *cf. People v Rivera*, 138 AD2d 169, 174 [1st Dept 1988], *lv denied* 72 NY2d 923 [1988], *amended on other grounds* 143 AD2d 601 [1st Dept 1988]; *People v Emick*, 103 AD2d 643, 656 [4th Dept 1984]). Although the victim had struck defendant's mother earlier that day, causing minor injuries, and then had allegedly called her on the telephone and threatened to kill her, there was no evidence that any " 'threatened harm [to defendant's mother was] *imminent*' " (*People v Jones*, 142 AD3d 1383, 1384 [4th Dept 2016], *lv denied* 28 NY3d 1073 [2016]), and "any conduct by the victim that might have been a basis for a justification defense [related to defendant's mother] had abated by the time defendant committed the assault" (*People v Sparks*, 132 AD3d 513, 514 [1st Dept 2015], *affd* 29 NY3d 932 [2017]).

We also reject defendant's further contention that his retained trial attorney was ineffective in failing to request a justification charge with respect to defense of self. In his statements to law enforcement and his testimony at trial, defendant asserted that, when he confronted the victim about the earlier assault of his mother, the victim assumed an "aggressive stance" and swung at defendant, who was a taller and much younger man with an "athletic build." Even assuming, arguendo, that such a charge, if requested, would have been warranted under these circumstances, we conclude that defendant has failed to establish "the absence of strategic or other legitimate explanations" for defense counsel's action (*People v Rivera*, 71 NY2d 705, 709 [1988]). Throughout the trial, defense counsel pursued a theory that defendant punched the victim twice, but left him responsive, conscious, and relatively uninjured in a high crime area where a second person then preyed upon the victim, causing the victim's significant injuries. That defense was buttressed by eyewitness testimony that the person seen "stomping" on the victim at least 19 or 20 times was wearing different clothing from defendant. We thus conclude that "defense counsel's decision to advance the misidentification defense was consistent with strategic decisions of a reasonably competent attorney" (*People v Ortiz,* 167 AD3d 1562, 1563 [4th Dept 2018], *lv denied* 33 NY3d 979 [2019] [internal quotation marks omitted], quoting *People v Benevento*, 91 NY2d 708, 712 [1998]) inasmuch as the justification in defense of self charge "would have been weak, at best, and . . . might have undermined a stronger defense" (*People v Rhodes*, 281 AD2d 225, 226 [1st Dept 2001], *lv denied* 96 NY2d 906 [2001]; *see People v Davis*, 293 AD2d 486, 486 [2d Dept 2002], *lv denied* 98 NY2d 674 [2002]).

To the extent that defendant contends that the court should have charged justification in defense of self even in the absence of a request, we conclude that the " 'court did not err in refraining from delivering such a charge sua sponte, as this would have improperly interfered with defense counsel's strategy' " (*People v Patterson*, 115 AD3d 1174, 1176-1177 [4th Dept 2014], *lv denied* 23 NY3d 1066 [2014]; *see People v Johnson*, 136 AD3d 1338, 1339 [4th Dept 2016], *lv denied* 27 NY3d 1134 [2016]).

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

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

744

KA 14-01316

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH R. ROGERS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, TREVETT CRISTO P.C. (ERIC M. DOLAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered June 30, 2014. 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: On appeal from a judgment convicting him following a jury trial of robbery in the second degree (Penal Law § 160.10 [1]), defendant contends that Supreme Court erred in refusing his request to charge robbery in the third degree (§ 160.05) as a lesser included offense. We reject that contention. It is undisputed that robbery in the third degree is a lesser included offense of robbery in the second degree as charged under Penal Law § 160.10 (1) (*see People v Bayard*, 32 AD3d 328, 329-330 [1st Dept 2006]; *People v Ceballos*, 98 AD2d 475, 476-477 [2d Dept 1984]). Nevertheless, when the evidence is viewed in the light most favorable to defendant (*see People v Johnson*, 45 NY2d 546, 549 [1978]), we conclude that "[t]here is no reasonable view of the evidence by which defendant was guilty of forcibly stealing property but that he was not aided by another person actually present" (*People v Bennett*, 147 AD2d 967, 968 [4th Dept 1989]; *see People v Gray*, 77 AD3d 766, 766-767 [2d Dept 2010], *lv denied* 16 NY3d 797 [2011]; *see generally People v Van Norstrand*, 85 NY2d 131, 135 [1995]). Based on this record, " '[i]n order to find that defendant robbed the victim but acted alone, the jury would have been required to speculate that the robbery was committed in some alternative manner not described in any testimony' " (*Gray*, 77 AD3d at 767).

Contrary to defendant's contention, this is not a case "where proof of guilt of the greater and lesser offenses is found essentially in the testimony of one witness" such that the jury could find the lesser upon rejecting a portion of the testimony of the witness

(*People v Negron*, 91 NY2d 788, 792 [1998]). Rather, this is a situation in which "no identifiable record basis exists upon which the jury might reasonably differentiate between segments of a witness' testimony" (*id.*).

Contrary to defendant's remaining contention, the sentence is not unduly harsh or severe.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

748

KA 15-00946

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEREMY M. DAVIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered July 30, 2014. The appeal was held by this Court by order entered March 23, 2018, decision was reserved and the matter was remitted to Supreme Court, Monroe County, for further proceedings (159 AD3d 1531 [4th Dept 2018]). The proceedings were held and completed.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [3]) arising from an incident in which a police officer and his partner approached and eventually searched a parked vehicle that was occupied by defendant, his codefendant, and two other people. When this appeal was previously before us, we concluded that Supreme Court erred in summarily denying defendant's motion to preclude the identification testimony of the officer and his partner in the absence of notice pursuant to CPL 710.30 (1) (b) (*People v Davis*, 159 AD3d 1531 [4th Dept 2018]). We held this case, reserved decision, and remitted the matter to Supreme Court "for a hearing to determine whether the officer and his partner engaged in identification procedures at the police station within the purview of CPL 710.30 and, if so, whether such identifications were merely confirmatory" (*id.* at 1534). Following the hearing on remittal, the court determined that the identifications of defendant at the police station by the officer and the partner were confirmatory.

We reject defendant's contention that the court erred in determining that the officer's identification of him at the police station was confirmatory. "Case-by-case analyses of the facts and

circumstances . . . remain necessary" (*People v Mato*, 83 NY2d 406, 411 [1994]) and "[c]omprehensive analysis, not superficial categorization, ultimately governs" whether a police identification is confirmatory (*People v Gordon*, 76 NY2d 595, 601 [1990]; *see People v Boyer*, 6 NY3d 427, 433 [2006]). Here, the officer's hearing testimony established that defendant was present at a residence at which the officer had assisted in performing a probation check of another individual two weeks prior to the subject incident. While he was in the residence, the officer spent approximately 20 to 25 minutes within an arm's length of defendant, conversed with defendant during that period of time, and had no other tasks to perform during the probation check that would have drawn his attention away from defendant. Thereafter, during the subject incident, the officer approached the driver's side of the vehicle and, upon leaning down to look into the vehicle, immediately recognized the front seat passenger as defendant based on their interaction at the residence two weeks earlier. The officer mentioned to defendant that they had just talked and, in response, defendant agreed and confirmed that he knew the officer. The officer was approximately six feet away from defendant, and the street lights provided sufficient light for the officer to see the faces of the occupants of the vehicle. When, in contravention of the officer's request, defendant kept moving his hands down from the dashboard, the officer began to walk around the front of the vehicle to continue his conversation with defendant. The officer could still see defendant's face at that time. Defendant then exited the vehicle, fled through nearby yards, and was unsuccessfully pursued by the officer. The officer directed a third officer to take defendant into custody at the residence at which the probation check had been performed.

The court credited the testimony of the officer and, contrary to defendant's contention, " '[t]here is no basis for disturbing the . . . court's credibility determinations, which are supported by the record' " (*People v Vernon*, 164 AD3d 1657, 1658 [4th Dept 2018], *lv denied* 32 NY3d 1179 [2019]; *see People v Brown*, 123 AD3d 938, 939 [2d Dept 2014], *lv denied* 25 NY3d 949 [2015]). Given the quality of the officer's viewing of defendant during the subject incident—as evinced by the officer's immediate recognition of the front seat passenger as defendant based on their prior face-to-face interaction and defendant's confirmation thereof and by the favorable viewing conditions, which included good lighting and close range—we conclude that the viewing "constitute[s] an 'observation of . . . defendant . . . so clear that the identification [at the police station] could not be mistaken' thereby obviating the risk of undue suggestiveness" (*People v Pacquette*, 25 NY3d 575, 580 [2015]; *see People v Turner*, 233 AD2d 932, 933 [4th Dept 1996], *lv denied* 89 NY2d 1102 [1997]; *cf. Boyer*, 6 NY3d at 432-433; *People v Newball*, 76 NY2d 587, 591-592 [1990]; *see generally People v Wharton*, 74 NY2d 921, 922-923 [1989]). Inasmuch as the officer's identification of defendant at the police station was merely confirmatory, defendant was not entitled to CPL 710.30 notice with respect to that identification and the court did not err in refusing to preclude the identification testimony of the officer (*see Boyer*, 6 NY3d at 432; *Wharton*, 74 NY2d at 922-923). We note that the totality of the interactions particular to the officer and defendant here differentiates this case from that of the

codefendant, i.e., the left rear seat passenger, in which the officer's initial viewing of the codefendant arose solely from the officer standing by the vehicle for approximately three minutes while engaged with all of the occupants (*cf. People v Clay*, 147 AD3d 1499, 1501 [4th Dept 2017], *lv denied* 29 NY3d 1030 [2017]).

We agree with defendant that the court erred in refusing to preclude the identification testimony of the partner based on the People's failure to provide a CPL 710.30 notice. Unlike the officer, the partner had only brief and fleeting, low-quality viewings of defendant that are insufficient to establish that, "as a matter of law, the identification at issue could not be the product of undue suggestiveness" (*Boyer*, 6 NY3d at 431; *see Pacquette*, 25 NY3d at 580; *Clay*, 147 AD3d at 1500-1501). Nevertheless, we conclude that the error is harmless (*see Pacquette*, 25 NY3d at 580). "Even in the absence of [the partner's] identification testimony, the evidence at trial overwhelmingly established that defendant was the [occupant of the front passenger seat under which a defaced handgun was discovered]" (*id.*). The officer—who was experienced, had prior familiarity with defendant, immediately recognized the front seat passenger as defendant, and was able to observe defendant at close range—"unequivocally identified defendant" at trial as the front seat passenger (*id.*). In addition, "defendant's flight from police officers evinced a consciousness of guilt" (*id.*), and the third officer's testimony that defendant had fresh scratches on his wrists when he took defendant into custody shortly thereafter is consistent with defendant having fled through nearby yards.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

749

KA 17-01857

PRESENT: SMITH, J.P., PERADOTTO, CARNI, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC M. WATSON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN C. MINISTERO 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 September 26, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the second degree and criminal possession of a weapon 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 sexual act in the second degree (Penal Law § 130.45 [2]) and criminal possession of a weapon in the fourth degree (§ 265.01 [1]), defendant contends that his waiver of the right to appeal is not valid. We reject that contention. County Court advised defendant of the maximum sentence that could be imposed (*see People v Lococo*, 92 NY2d 825, 827 [1998]), and the record, which includes an oral and written waiver of the right to appeal, establishes that defendant understood that he was waiving his right to appeal both the conviction and the sentence. We thus conclude that the waiver of the right to appeal was knowing, intelligent, and voluntary (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]), and that valid waiver encompasses defendant's contention concerning the severity of the sentence (*see id.* at 255; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

758

KA 15-00702

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

IRA T. WILLIS, ALSO KNOWN AS PEE WEE,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered July 3, 2012. The appeal was held by this Court by order entered May 4, 2018, decision was reserved and the matter was remitted to Supreme Court, Monroe County, for further proceedings (161 AD3d 1584 [4th Dept 2018]). 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 Supreme Court based on the court's failure to determine whether defendant should be afforded youthful offender status (*People v Willis*, 161 AD3d 1584, 1584 [4th Dept 2018]). We directed the court on remittal to "make and state for the record a determination whether defendant should be afforded youthful offender status" (*id.*). Upon remittal, the court declined to adjudicate defendant a youthful offender, and defendant now asks this Court to adjudicate him a youthful offender. We affirm. We decline to exercise our discretion in the interest of justice to adjudicate defendant a youthful offender (*see People v Lester*, 167 AD3d 1559, 1560 [4th Dept 2018], *lv denied* 32 NY3d 1206 [2019]; *People v Henderson*, 155 AD3d 1577, 1578 [4th Dept 2017], *lv denied* 30 NY3d 1105 [2018]). We further conclude that the sentence is not unduly harsh or severe.

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court

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

764

KA 17-01182

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL BRACKETT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered August 1, 2016. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [2]). While we agree with defendant that the written waiver of the right to appeal does not establish a valid waiver because Supreme Court "did not inquire of defendant whether he understood the written waiver or whether he had even read the waiver before signing it" (*People v Bradshaw*, 18 NY3d 257, 262 [2011]; *see People v Grucza*, 145 AD3d 1505, 1506 [4th Dept 2016]), we nonetheless conclude that defendant validly waived his right to appeal inasmuch as the record establishes 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 Rodriguez*, 93 AD3d 1334, 1335 [4th Dept 2012], *lv denied* 19 NY3d 966 [2012] [internal quotation marks omitted]; *see People v Lopez*, 6 NY3d 248, 256 [2006]). Contrary to defendant's contention, we conclude that the valid waiver encompasses his challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 255-256; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court