SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

NOVEMBER 15, 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

HON. TRACEY A. BANNISTER, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

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CA 18-01948

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

JAYME A. MAST, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GERARD A. DESIMONE, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

JOSEPH E. DIETRICH, III, WILLIAMSVILLE, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF JOHN TROP, BUFFALO (TIFFANY D'ANGELO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered April 25, 2018. The order denied the motion of plaintiff to set aside a jury verdict.

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

Same memorandum as in *Mast v DeSimone* ([appeal No. 2] — AD3d — [Nov. 15, 2019] [4th Dept 2019]).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

804

CA 19-00030

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

JAYME A. MAST, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GERARD A. DESIMONE, DEFENDANT-RESPONDENT
(APPEAL NO. 2.)

JOSEPH E. DIETRICH, III, WILLIAMSVILLE, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF JOHN TROP, BUFFALO (TIFFANY D'ANGELO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered August 8, 2018. The judgment awarded plaintiff money damages upon a jury verdict.

It is hereby ORDERED that the judgment so appealed from is modified on the law by granting the posttrial motion in part and setting aside the verdict with respect to damages for future pain and suffering and for future economic loss, and as modified the judgment is affirmed without costs and a new trial is granted on those elements of damages only.

Memorandum: In appeal No. 1, plaintiff appeals from an order that denied her motion pursuant to, inter alia, CPLR 4404 (a) seeking to set aside a jury verdict on the issue of damages. In appeal No. 2, plaintiff appeals from a judgment that, after a jury trial, awarded plaintiff $120,000 plus interest for past pain and suffering and no damages for future pain and suffering or for future economic loss.

Inasmuch as the order in appeal No. 1 is subsumed in the subsequently entered judgment in appeal No. 2, we conclude that appeal No. 1 must be dismissed (*see Reid v Levy* [appeal No. 2], 148 AD3d 1800, 1801 [4th Dept 2017]; *see generally* CPLR 5501 [a] [2]; *Matter of Aho*, 39 NY2d 241, 248 [1976]).

Regarding the merits, plaintiff contends that Supreme Court erred in denying her posttrial motion inasmuch as the verdict on the issue of damages is against the weight of the evidence. We disagree with plaintiff that the court erred in denying that part of her motion with respect to the jury's award of $120,000 for past pain and suffering. We agree with her, however, that the jury's award of no damages for future pain and suffering and for future economic loss is against the

weight of the evidence (*see generally Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]; *Melnick v Chase*, 148 AD3d 1589, 1590 [4th Dept 2017]). We therefore modify the judgment by granting plaintiff's posttrial motion in part and setting aside the verdict with respect to the damages for future pain and suffering and for future economic loss, and we grant a new trial on those elements of damages.

Addressing first the verdict with respect to past pain and suffering, we note that a court may set aside a verdict awarding money damages where the verdict deviates materially from what is considered reasonable compensation (*see* CPLR 5501 [c]; *Lai Nguyen v Kiraly* [appeal No. 2], 82 AD3d 1579, 1580 [4th Dept 2011]). Because monetary awards for a plaintiff's pain and suffering "are not subject to precise quantification," a court must "look to comparable cases to determine at which point an award deviates materially from what is considered reasonable compensation" (*Huff v Rodriguez*, 45 AD3d 1430, 1433 [4th Dept 2007] [internal quotation marks omitted]; *see Lai Nguyen*, 82 AD3d at 1579-1580).

Here, plaintiff, who was 30 years old at the time of the accident, presented evidence at trial that she sustained a disc herniation at L5-S1, which necessitated a discectomy and lumbar fusion surgery. Further, both parties' experts opined that plaintiff's lumbar spine injury was caused by the accident, and the jury necessarily concluded that the accident caused injury to only plaintiff's lumbar spine because, at trial, plaintiff expressly limited her request for damages to recovery for that injury. Thus, under these circumstances, "[b]ecause it awarded damages for past pain and suffering, the jury must have concluded that plaintiff . . . injured [her lumbar spine] as a result of the accident" (*Pares v LaPrade* [appeal No. 2], 266 AD2d 852, 852 [4th Dept 1999] [internal quotation marks omitted]; *see also Thompson v Hickey*, 283 AD2d 939, 939 [4th Dept 2001]; *Corsaro v Mt. Calvary Cemetery*, 258 AD2d 969, 969 [4th Dept 1999]).

Nonetheless, we conclude that the jury's award of $120,000 for past pain and suffering does not deviate materially from what would be reasonable compensation when compared to similar cases involving comparable injuries to the lumbar spine. Therefore, that component of the jury's verdict is not against the weight of the evidence (*see e.g. Swatland v Kyle*, 130 AD3d 1453, 1454-1455 [4th Dept 2015]; *Kmiotek v Chaba*, 60 AD3d 1295, 1296-1297 [4th Dept 2009]; *Ellis v Emerson*, 57 AD3d 1435, 1436-1437 [4th Dept 2008]).

We agree with plaintiff, however, that the jury's failure to award any damages for future pain and suffering is " 'contrary to a fair interpretation of the evidence and deviates materially from what would be reasonable compensation' " (*Thompson v Hickey*, 283 AD2d 939, 940 [4th Dept 2001]). Although the evidence at trial established that plaintiff was permitted to return to work with no restrictions, the evidence also established that the injuries she sustained in the accident severely affected her ability to perform the same sorts of tasks that she had performed with ease prior to the accident.

Moreover, as noted, the parties' experts agreed that the injury to plaintiff's lumbar spine was caused by the accident, and plaintiff presented uncontroverted medical testimony at trial establishing that she continues to experience pain as a result of that injury (*see Lamphron-Read v Montgomery*, 148 AD3d 1595, 1597 [4th Dept 2017]; *Fenocchi v City of Syracuse*, 216 AD2d 864, 865 [4th Dept 1995]).

We also agree with plaintiff that the jury's failure to award damages for future economic loss is against the weight of the evidence. Initially, we disagree with our dissenting colleagues that the contention was abandoned on appeal (*cf. Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]) and conclude that plaintiff adequately raised that specific contention in her brief (*see Carlson v Porter* [appeal No. 2], 53 AD3d 1129, 1133 [4th Dept 2008], *lv denied* 11 NY3d 708 [2008]; *cf. Hargis v Sayers* [appeal No. 2], 38 AD3d 1228, 1229 [4th Dept 2007]). We also note that, in his brief, defendant has not argued that plaintiff abandoned that contention on appeal.

With respect to the merits, we note that the uncontroverted expert testimony at trial established that plaintiff would suffer a reduction in work-life expectancy following the accident, which would eventually cause her to suffer economic loss. That testimony was consistent with the medical evidence, which established that the nature of plaintiff's injuries makes it likely that the condition of her spine will degenerate over time, impeding her ability to work (*see Walsh v State of New York*, 232 AD2d 939, 941 [3d Dept 1996]). Thus, in sum, we conclude that the court erred in denying those parts of the posttrial motion with respect to damages for future pain and suffering and future economic loss.

We have considered plaintiff's remaining contentions and conclude that they do not warrant reversal or further modification of the judgment in appeal No. 2.

All concur except SMITH, J.P., and CARNI, J., who dissent in part and vote to modify in accordance with the following memorandum: We dissent in part because, although we agree with the majority's decision to grant a new trial on the issue of future pain and suffering, we believe that plaintiff abandoned her contention that the jury's award for future economic loss is against the weight of the evidence by failing to pursue that issue on appeal (*see Hargis v Sayers* [appeal No. 2], 38 AD3d 1228, 1229 [4th Dept 2007]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). We would therefore modify the judgment by granting the posttrial motion in part and setting aside the verdict with respect to damages for future pain and suffering, and we would award a new trial on that element of damages only.

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

819

KA 16-02164

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT D. LEWIS, SR., DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST 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 (Frederick G. Reed, A.J.), rendered October 26, 2016. The judgment convicted defendant, upon a jury verdict, of assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of assault in the first degree (Penal Law § 120.10 [1]). The conviction arises from an incident on May 21, 2014 in Geneva, New York, in which defendant struck the victim repeatedly with a metal pipe. Defendant fled the scene, and ensuing efforts by members of law enforcement to find him proved unsuccessful. A warrant was issued for defendant's arrest, and he was eventually located in September 2015 in Detroit, Michigan. Defendant was then arrested and extradited to New York for prosecution.

Contrary to defendant's contention, County Court properly determined that his statutory right to a speedy trial was not violated. Where, as here, a defendant is charged with a felony, the People must announce readiness for trial within six months of the commencement of the action (*see* CPL 30.30 [1] [a]; *People v Cortes*, 80 NY2d 201, 207 n 3 [1992]). It is undisputed that the criminal action was commenced on May 22, 2014 with the filing of the felony complaint (*see* CPL 1.20 [17]; *People v Osgood*, 52 NY2d 37, 43 [1980]). Almost two years later, on February 5, 2016, an indictment was filed, at which time the People announced their readiness for trial. At the hearing on defendant's speedy trial motion, however, the People established that most of the prereadiness delay was excludable (*see generally People v Berkowitz*, 50 NY2d 333, 348-349 [1980]; *People v Gushlaw* [appeal No. 2], 112 AD2d 792, 793 [4th Dept 1985], *lv denied* 66 NY2d 919 [1985]).

The evidence presented at the hearing established that, following the assault, members of law enforcement exhausted all investigative leads and made extensive efforts to find defendant prior to his apprehension in Michigan. The police searched for defendant at his last known address and other associated addresses in Ontario County, New York; Rochester, New York; Illinois; and Indiana. They also interviewed defendant's family members, friends and acquaintances; engaged fellow members of law enforcement from other jurisdictions to assist in the search; maintained periodic contact with defendant's children; searched local and national databases periodically for updated information on defendant's whereabouts; and monitored Facebook pages of defendant's family members and associates in an effort to find him. Meanwhile, defendant, who had been released from parole supervision a few months prior to the assault, was admittedly aware that the police were looking for him.

" 'The police are not required to search for a defendant indefinitely' " (*People v Williams*, 137 AD3d 1709, 1710 [4th Dept 2016]; *see People v Butler*, 148 AD3d 1540, 1541 [4th Dept 2017], *lv denied* 29 NY3d 1090 [2017]) and, even assuming, arguendo, that the People failed to establish due diligence in locating defendant, the law does not impose a due diligence obligation where, as here, the People establish that a defendant's "location is unknown and he is attempting to avoid apprehension or prosecution" (CPL 30.30 [4] [c] [i]; *see People v Torres*, 88 NY2d 928, 931 [1996]; *People v Devore*, 65 AD3d 695, 696 [2d Dept 2009]). Thus, the period of time from May 22, 2014 to September 1, 2015, the day before defendant's arrest in Michigan, was properly excluded by the court from the speedy trial calculation (*see generally People v Luperon*, 85 NY2d 71, 77 [1995]).

In addition, the time from defendant's refusal to waive extradition until the time when he was returned to New York, i.e., September 2, 2015 to December 15, 2015, was properly charged to defendant (*see* CPL 30.30 [4] [e]). Furthermore, the period from January 19, 2016 through January 28, 2016, was properly charged to defendant because he waived his speedy trial rights pursuant to CPL 30.30 with respect to that period, in exchange for which the People agreed to postpone their grand jury presentation in order to accommodate defendant's request to testify before the grand jury (*see People v Waldron*, 6 NY3d 463, 467-468 [2006]; *People v Wheeler*, 159 AD3d 1138, 1141 [3d Dept 2018], *lv denied* 31 NY3d 1123 [2018]). Thus, after taking into consideration excludable periods of time, we conclude that the People announced readiness for trial well within the statutory six-month time frame (*see People v Harrison*, 171 AD3d 1481, 1482 [4th Dept 2019]).

Contrary to defendant's additional contention, viewing the evidence in the light most favorable to the People, we conclude that "there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 349 [2007] [internal quotation marks omitted]). The trial evidence was legally sufficient to establish that the victim suffered serious physical injury inasmuch as he lost consciousness and sustained a

large laceration to his head with heavy bleeding and a skull fracture, which resulted in a permanent skull depression and years of debilitating headaches (*see People v Robinson*, 121 AD3d 1405, 1407 [3d Dept 2014], *lv denied* 24 NY3d 1221 [2015]; *People v Casey*, 61 AD3d 1011, 1012-1013 [3d Dept 2009], *lv denied* 12 NY3d 913 [2009]; *People v Romer*, 163 AD2d 880, 880 [4th Dept 1990], *lv denied* 76 NY2d 896 [1990]). Furthermore, defendant's intent to cause serious physical injury to the victim may be inferred from defendant's conduct in striking the victim's head with a metal pipe (*see People v Pine*, 82 AD3d 1498, 1500 [3d Dept 2011], *lv denied* 17 NY3d 820 [2011], *reconsideration denied* 17 NY3d 904 [2011]).

Contrary to defendant's further contention, viewing the evidence in light of the elements of the crime as charged to the jury (*see Danielson*, 9 NY3d at 349), and according deference to the jury's credibility determinations (*see People v Romero*, 7 NY3d 633, 644 [2006]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Haynes*, 39 AD3d 562, 563 [2d Dept 2007], *lv denied* 9 NY3d 845 [2007]). Even assuming, arguendo, that a different verdict would not have been unreasonable, we cannot say that "the jury failed to give the evidence the weight it should be accorded" (*People v Jackson*, 162 AD3d 1567, 1567 [4th Dept 2018], *lv denied* 32 NY3d 938 [2018]; *see generally Bleakley*, 69 NY2d at 495).

Defendant also contends that the verdict is repugnant inasmuch as the jury acquitted him of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]) and convicted him of assault in the first degree (§ 120.10 [1]). We reject that contention. A repugnancy claim must be "[e]xamined against the elements of the crimes as charged by the trial court and without regard to the particular facts of the case" (*People v Johnson*, 70 NY2d 819, 820 [1987]; *see People v Muhammad*, 17 NY3d 532, 539 [2011]). "[A] conviction will be reversed [as repugnant] only in those instances where acquittal on one crime as charged to the jury is conclusive as to a necessary element of the other crime, as charged, for which the guilty verdict was rendered" (*People v Tucker*, 55 NY2d 1, 7 [1981], *rearg denied* 55 NY2d 1039 [1982]). Here, defendant's acquittal on the weapon charge did not necessarily negate an essential element of the assault charge of which he was convicted (*see generally People v Colsrud*, 144 AD3d 1639, 1639 [4th Dept 2016], *lv denied* 29 NY3d 1030 [2017]; *People v Smith*, 140 AD3d 1774, 1775 [4th Dept 2016], *lv denied* 28 NY3d 1127 [2016]).

Defendant's contention that he was deprived of a fair trial due to prosecutorial misconduct is for the most part unpreserved for our review (*see* CPL 470.05 [2]; *see generally People v Alligood*, 115 AD3d 1346, 1347-1348 [4th Dept 2014], *lv denied* 23 NY3d 1017 [2014]). In any event, "[r]eversal on grounds of prosecutorial misconduct 'is mandated only when the conduct has caused such substantial prejudice to the defendant that he [or she] has been denied due process of law' " (*People v Rubin*, 101 AD2d 71, 77 [4th Dept 1984], *lv denied* 63 NY2d 711 [1984]) and, here, we conclude that any improprieties were " 'not so egregious as to deprive defendant of a fair trial' " (*People v*

Graham, 125 AD3d 1496, 1498 [4th Dept 2015], *lv denied* 20 NY3d 1008 [2015]).

Finally, the sentence is not unduly harsh or severe.

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

829

CA 19-00573

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

WILMINGTON SAVINGS FUND SOCIETY, FSB, DOING BUSINESS AS CHRISTIANA TRUST, NOT INDIVIDUALLY BUT AS TRUSTEE FOR HILLDALE TRUST, PLAINTIFF-RESPONDENT,

V OPINION AND ORDER

JULIAN M. FERNANDEZ, ALSO KNOWN AS JULIAN MARTIN FERNANDEZ, DEFENDANT-APPELLANT.

JULIAN M. FERNANDEZ, DEFENDANT-APPELLANT PRO SE.

FRIEDMAN VARTOLO LLP, NEW YORK CITY (ZACHARY GOLD OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered November 21, 2018. The order, among other things, granted plaintiff's motion for leave to reargue its opposition to defendant's motion to dismiss the complaint and, upon reargument, reversed its prior decision and denied defendant's motion to dismiss the complaint.

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

Opinion by CARNI, J.:

On August 17, 2007, defendant executed a note in favor of a lender in the amount of $94,400 plus interest, payable in successive monthly installments with the final payment to be made on January 4, 2031. Defendant secured payment of the note with a mortgage encumbering certain real property. On December 8, 2009, defendant filed a petition for chapter 7 bankruptcy in Bankruptcy Court. Defendant received a discharge in bankruptcy on March 15, 2010, and obtained a final bankruptcy decree on April 1, 2010. On May 26, 2017, plaintiff, the successor to the lender, sent defendant notice that he was in default and that defendant had 90 days to cure the default. After receiving no payment during the following 90 days, plaintiff accelerated the remaining balance due under the note and, on November 1, 2017, plaintiff commenced an action seeking to foreclose on the mortgage. In his answer, defendant raised, inter alia, the statute of limitations as an affirmative defense.

Defendant thereafter moved to dismiss the complaint pursuant to

CPLR 213 (4) and 3211 (a) (5). Supreme Court initially granted defendant's motion, reasoning that defendant's March 15, 2010 discharge in bankruptcy triggered the six-year statute of limitations (*see* CPLR 213 [4]), and that plaintiff failed to commence its foreclosure action within that period. Plaintiff then moved for leave to reargue, and defendant cross-moved to quiet title. The court granted plaintiff's motion for leave to reargue, and ultimately held that defendant's discharge in bankruptcy did not extinguish plaintiff's right to commence an in rem foreclosure proceeding against defendant, that the statute of limitations began to run from the date each unpaid installment became due unless plaintiff accelerated the debt, and that plaintiff's action was therefore timely because the debt had not been accelerated prior to 2017. Thus, on reargument, the court reversed its prior determination, denied defendant's motion to dismiss the complaint, reinstated the complaint, and denied defendant's cross motion to quiet title. We affirm.

"With respect to a mortgage payable in installments, separate causes of action accrue[] for each installment that is not paid, and the statute of limitations begins to run, on the date each installment becomes due" (*Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 982 [2d Dept 2012]; *see Ditech Fin., LLC v Corbett*, 166 AD3d 1568, 1568 [4th Dept 2018]). Nevertheless, "even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt" (*EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2d Dept 2001]; *see Ditech Fin., LLC*, 166 AD3d at 1568). "Where the acceleration . . . is made optional with the holder of the note and mortgage, some affirmative action must be taken evidencing the holder's election to take advantage of the accelerating provision, and until such action has been taken the provision has no operation" (*Wells Fargo Bank, N.A.*, 94 AD3d at 982-983). Here, the mortgage provided plaintiff the option to accelerate the debt under certain circumstances, but did not state that the debt would be automatically accelerated if defendant obtained a discharge in bankruptcy.

We reject defendant's contention that the discharge in bankruptcy automatically accelerated the debt and thus triggered the statute of limitations with respect to the entire debt. In the event of a default, a creditor in an action for a mortgage foreclosure is entitled to pursue both an action against a debtor for in personam liability against the debtor's assets, or for in rem liability seeking foreclosure of the specific real property that secured the creditor's right to repayment (*see Johnson v Home State Bank*, 501 US 78, 82 [1991]). Thus, a "defaulting debtor can protect himself [or herself] from personal liability by obtaining a discharge in a Chapter 7 liquidation" (*id.*), but "a creditor's right to foreclose on the mortgage survives or passes through the bankruptcy" (*id.* at 83). "[A] bankruptcy discharge extinguishes only one mode of enforcing a claim – namely, an action against the debtor *in personam* – while leaving intact another – namely, an action against the debtor *in rem*" (*id.* at 84; *see Citimortgage, Inc. v Chouen*, 154 AD3d 914, 916 [2d Dept 2017]; *McArdle v McGregor*, 261 AD2d 591, 592 [2d Dept 1999]). "[E]ven after the debtor's personal obligations have been extinguished [by chapter 7

discharge], the mortgage holder still retains a right to payment in the form of its right to the proceeds from the sale of the debtor's property," and a bankruptcy proceeding does not "impair [the mortgage holder's] right to commence an action against [the debtor] in rem to seek payment from the proceeds of a foreclosure sale" (*Deutsche Bank Trust Co. Ams. v Vitellas*, 131 AD3d 52, 63 [2d Dept 2015] [internal quotation marks omitted]). In other words, as established by the above, chapter 7 discharge removes the "mode of enforc[ement]" against the debtor in personam, but the obligation otherwise remains intact and does not impact an action in rem (*Johnson*, 501 US at 84).

Although this Court has not previously addressed the specific impact a discharge in bankruptcy has on the ability to commence a foreclosure proceeding over six years after a discharge in bankruptcy, the application of the above rules regarding the survival of in rem actions suggests that, absent terms in the mortgage to the contrary, a discharge in bankruptcy does not automatically accelerate the debt and that the terms of the mortgage survive bankruptcy. Because the terms of the mortgage survive, causes of action would thus continue to accrue with respect to each installment payment as the payments become due, although a note holder would only be able to commence an action in rem. Other jurisdictions have reached a similar conclusion (*see generally Can Fin., LLC v Krazmien*, 253 So 3d 8, 10-12 [Fla Dist Ct App 2018]; *McIntosh v Federal Natl. Mtge. Assn.*, 2016 WL 4083434, *4-5 [SD NY, July 25, 2016, No. 15 CV 8073 (VB)]; *Alvarez v Bank of Am. Corp.*, 2015 WL 12670510, *2-4 [SD Fla, Apr. 17, 2015, No. 14-CV-60009-KAM]; *Kabler v HSBC Bank USA, N.A.*, 2018 WL 1384551, *4-6 [Kan Dist Ct 2018]). Thus, contrary to defendant's contention, we conclude that the discharge in bankruptcy did not automatically accelerate the debt, plaintiff's complaint is not time-barred because separate causes of action accrued for each installment payment that was not made, and therefore, upon reargument, the court properly denied defendant's motion to dismiss the complaint. For the same reasons, the court also properly denied defendant's cross motion seeking to quiet title.

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

837

CA 18-02138

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

YOLANDA JACKSON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOYCE RUMPF, DEFENDANT-APPELLANT.

TREVETT CRISTO, P.C., ROCHESTER (ALAN J. DEPETERS OF COUNSEL), FOR DEFENDANT-APPELLANT.

PULLANO & FARROW, ROCHESTER (CHRISTIAN VALENTINO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered June 1, 2018. The order granted those parts of the motion of plaintiff seeking summary judgment on the issues of negligence and sole proximate cause and seeking summary judgment dismissing the first, third, fifth through seventh, ninth and tenth affirmative defenses.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of the motion seeking summary judgment on the issues of negligence and sole proximate cause of the accident and seeking summary judgment dismissing the first affirmative defense and reinstating that affirmative defense, and as modified the order is affirmed without costs.

Memorandum: Plaintiff, a tenant in a property owned by defendant, commenced this premises liability action seeking damages for injuries she sustained when she fell outside her apartment after she allegedly stepped on a loose piece of asphalt from the driveway. Supreme Court, inter alia, granted those parts of plaintiff's motion seeking summary judgment on the issues of defendant's negligence and whether defendant's negligence was the sole proximate cause of the accident. The court also granted those parts of plaintiff's motion seeking summary judgment dismissing defendant's first affirmative defense, that the accident was caused by the culpable conduct of plaintiff, the seventh affirmative defense, that plaintiff failed to state a cause of action, and the tenth affirmative defense, that defendant lacked notice of the alleged dangerous condition.

We agree with defendant that the court erred in granting those parts of plaintiff's motion seeking summary judgment on the issues of negligence and sole proximate cause of the accident, and we therefore

modify the order accordingly. " 'A landowner must act as a reasonable [person] in maintaining his [or her] property in a reasonably safe condition' " (*Basso v Miller*, 40 NY2d 233, 241 [1976]). "[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" (*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]), and the existence of a defect or dangerous condition " 'is generally a question of fact for the jury' " (*Trincere*, 90 NY2d at 977; *see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 77 [2015]; *Tesak v Marine Midland Bank,* 254 AD2d 717, 717-718 [4th Dept 1998]).

Viewing the evidence in the light most favorable to defendant, the nonmoving party (*see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), we conclude that plaintiff failed to meet her prima facie burden on the motion of establishing as a matter of law that defendant was negligent in permitting a dangerous or defective condition to exist on the premises (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also* CPLR 3212 [b]). Plaintiff testified at her deposition that she "stepped on a piece of the driveway" that was "maybe the size of a tennis ball if you were to cut it in half and it was flat." Plaintiff did not photograph or preserve the piece of asphalt that allegedly caused her to fall, however, and we conclude that her testimony created an issue of fact whether the alleged defect on the property was "trivial and nonactionable as a matter of law" (*Brumm v St. Paul's Evangelical Lutheran Church*, 143 AD3d 1224, 1226 [3d Dept 2016]; *see generally Hahn v Wilhelm*, 54 AD3d 896, 898 [2d Dept 2008]). Inasmuch as plaintiff failed to establish that defendant was negligent in permitting a dangerous or defective condition to exist on the premises, she also "failed to establish as a matter of law that [defendant's negligence] was the sole proximate cause of the accident" (*Stone v Neustradter*, 129 AD3d 1615, 1616 [4th Dept 2015]).

Furthermore, even assuming, arguendo, that plaintiff's submissions were sufficient to establish the existence of a dangerous or defective condition, we conclude that defendant raised a triable issue of fact by submitting evidence that the driveway was not in a dangerous or defective condition at the time of the accident. Specifically, defendant submitted photographs of the driveway showing that it was in a reasonably safe condition, and she submitted United States Department of Housing and Urban Development (HUD) inspection reports for the property that established that the property had passed annual HUD inspections from 2012 through 2015, which included the date of plaintiff's accident in August 2014 (*see generally Hutchinson*, 26 NY3d at 82; *Grefrath v DeFelice*, 144 AD3d 1652, 1653-1654 [4th Dept 2016]).

We also agree with defendant that the court erred in granting that part of the motion seeking summary judgment dismissing her first affirmative defense, that the accident was caused by the culpable

conduct of plaintiff, and we therefore further modify the order accordingly. Plaintiff had the initial burden of establishing that the defense "is without merit as a matter of law" (*Humphreys v 201 Mar. Ave., LLC*, 17 AD3d 532, 533 [2d Dept 2005]; *see generally Skibinski v Salvation Army*, 307 AD2d 427, 428 [3d Dept 2003]). Here, plaintiff failed to meet that burden because her own deposition testimony that she "didn't really pay attention" to the driveway or the surrounding area prior to the accident raised an issue of fact whether plaintiff's conduct was a proximate cause of the accident inasmuch as she walked down the porch stairway onto uneven ground in the middle of the night without using due care (*see generally Skibinski*, 307 AD2d at 428).

We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

868

KA 17-00654

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUTHER ADAIR, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE, DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (DARIENN P. BALIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered February 24, 2017. The judgment convicted defendant, upon a jury verdict, of criminal contempt in the first degree, obstructing governmental administration 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, upon a jury verdict, of criminal contempt in the first degree (Penal Law § 215.51 [b] [v]), obstructing governmental administration in the second degree (§ 195.05), and resisting arrest (§ 205.30). We affirm.

Viewing the evidence in light of the elements of criminal contempt in the first degree as charged to the jury, we reject defendant's contention that the verdict convicting him of that crime is against the weight of the evidence with respect to the element of intent (*see generally People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant's own trial testimony concerning the incident was largely consistent with the victim's account, and the jury was entitled to infer the requisite intent from that testimony.

We reject defendant's further contention that his conviction of obstructing governmental administration in the second degree is unsupported by legally sufficient evidence, and we are not bound by the People's incorrect concession to the contrary (*see People v Berrios*, 28 NY2d 361, 366-367 [1971]; *People v Colsrud*, 144 AD3d 1639, 1640 [4th Dept 2016], *lv denied* 29 NY3d 1030 [2017]). At trial, two police officers testified that defendant "pull[ed] away" from them after they first apprehended him during a domestic disturbance, and defendant himself testified that he "struggle[d]" with the officers

because he was "trying to get away." Inasmuch as the officers were justified in forcibly detaining defendant in order to quickly confirm or dispel their reasonable suspicion of his alleged involvement in the domestic disturbance (*see People v McKee*, 174 AD3d 1444, 1445 [4th Dept 2019]), the testimony of the officers and defendant himself is legally sufficient to support the jury's finding that defendant "attempt[ed] to prevent a public servant from performing an official function [i.e., investigating the domestic incident] by means of . . . *physical . . . interference*" (Penal Law § 195.05 [emphasis added]; *see Matter of Thomas L.*, 4 AD3d 295, 295 [1st Dept 2004]; *People v Tarver*, 188 AD2d 938, 938 [3d Dept 1992], *lv denied* 81 NY2d 893 [1993]). Moreover, viewing the evidence in light of the elements of obstructing governmental administration in the second degree as charged to the jury, we conclude that the verdict with respect to that crime is not against the weight of the evidence (*see Danielson*, 9 NY3d at 348-349). Given our determination, we necessarily reject defendant's challenges to the legal sufficiency and weight of the evidence underlying his conviction of resisting arrest inasmuch as those contentions " 'depend[] on the success of' " his challenges to his conviction of obstructing governmental administration (*People v Simpson*, 173 AD3d 1617, 1618 [4th Dept 2019], *lv denied* — NY3d — [Sept. 5, 2019]; *see generally People v Alejandro*, 70 NY2d 133, 135 [1987]; *People v Graves*, 163 AD3d 16, 23 [4th Dept 2018]).

Finally, to the extent that defendant remains subject to the sentence imposed in this case, we conclude that the sentence is not unduly harsh or severe.

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

880

CA 18-01743

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

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

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

GLORIA M. BORRELLI, AND TINA GAMBINO AND
KELLY JO THOMAS, AS SUCCESSORS TO THE
INTEREST OF JOSEPH M. THOMAS,
PETITIONERS-APPELLANTS,

V

TOM J. THOMAS, RESPONDENT-RESPONDENT.

OPINION AND ORDER

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

ADAMS BELL ADAMS, P.C., ROCHESTER (ANTHONY J. ADAMS, JR., OF COUNSEL), AND BARCLAY DAMON LLP, FOR RESPONDENT-RESPONDENT.

Appeal from a decree (denominated order) of the Surrogate's Court, Monroe County (John M. Owens, S.), entered August 21, 2018. The decree denied the petition and supplemental petition and denied petitioners' claim that Anthony J. Thomas held any ownership interest in New York State Fence Company at the time of his death.

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

Opinion by DEJOSEPH, J.:

Petitioner Gloria M. Borrelli, respondent, and nonparties Joseph M. Thomas and Daniel J. Thomas are the four children of Anthony J. Thomas and Dorothy Thomas (collectively, decedents), who died in April 2012 and August 2012, respectively (*see Matter of Thomas*, 148 AD3d 1764, 1764 [4th Dept 2017]). Petitioners Tina Gambino and Kelly Jo Thomas, as successors to the interest of their father Joseph, are decedents' granddaughters and were substituted as petitioners upon their father's death. Respondent was the named executor under decedents' respective wills and was appointed trustee to numerous trusts created by the wills (*see id.*). In a prior appeal, we remitted the matter to Surrogate's Court for further proceedings on the issue of ownership of certain stock in New York State Fence Company (NYSFC)

after concluding that "[w]here, as here, an asset is not included in the inventory of the estate based upon respondent fiduciary's assertion that he is the owner of the asset, it is respondent's burden to 'show a legal and sufficient reason for withholding' the asset from the estate" (*id*. at 1765). Upon remittal, the Surrogate held a nonjury trial during which respondent, in his capacity as executor, waived decedents' attorney-client privilege, and decedents' former counsel thereafter testified that she did not include a specific bequest with respect to Anthony's NYSFC shares in his most recent will because Anthony had already transferred those shares to respondent. After the trial, the Surrogate concluded that respondent had in fact satisfied his burden and specifically established that the shares of NYSFC were sold and transferred to respondent prior to Anthony's death. Petitioners appeal, and we affirm.

The primary issue on appeal is one of first impression in this Department and requires us to determine whether an executor has the authority to waive a decedent's attorney-client privilege. The Second and Third Departments have answered that question in the affirmative, and we agree.

In *Mayorga v Tate* (302 AD2d 11 [2d Dept 2002]), the assignee of the executor of the decedent's estate brought a legal malpractice action against the decedent's attorney and sought to obtain pretrial disclosure "of the file that [the attorney] maintained in connection with" his representation of the decedent (*id.* at 12). The attorney refused to disclose the file, claiming that it was protected by the attorney-client privilege (*id.*). The trial court held that the assignee could waive the privilege and that the attorney could not invoke the privilege to avoid producing the requested discovery (*id.*). The Second Department affirmed, stating:

> "We conclude by returning to the basic thesis that it makes no sense to prohibit an executor from waiving the attorney-client privilege of his or her decedent, where such prohibition operates to the detriment of the decedent's estate, and to the benefit of an alleged tortfeasor against whom the estate possesses a cause of action . . . That an executor . . . may exercise authority over all the interests of the estate left by the [decedent], and yet may not incidentally have the right, in the interest of that estate, to waive the [attorney client] privilege . . . would seem too inconsistent to be maintained under any system of law . . . We therefore conclude that, under the terms of CPLR 4503, just as under the common law, an executor may waive the attorney-client privilege of his or her decedent" (*id*. at 18-19 [internal quotation marks omitted]).

The Third Department endorsed that same view in *Matter of Johnson* (7 AD3d 959, 960-961 [3d Dept 2004], *lv denied* 3 NY3d 606 [2004]).

On appeal, petitioners contend that *Mayorga* and *Johnson* support waiver of the attorney-client privilege by an executor only if the waiver benefits the estate. Petitioners assert that excluding an

asset from the estate would not benefit the estate or its beneficiaries and that those cases therefore do not support a waiver of the attorney-client privilege here inasmuch as any waiver would only benefit the executor respondent. The Second Department, however, has permitted the waiver of the attorney-client privilege under circumstances similar to those presented here (*see Matter of Bassin*, 28 AD3d 549, 550 [2d Dept 2006]).

In *Bassin*, the decedent died intestate and was survived by her son and daughter (*id.*). Several months before her death, the decedent executed a deed conveying certain real property to her son (*id.*). After the decedent's death, her daughter commenced a discovery proceeding pursuant to SCPA article 21, and the Surrogate's Court determined that the inter vivos gift of the subject real property was valid (*Bassin*, 28 AD3d at 550). The Second Department affirmed and held that

> "The Surrogate's Court correctly allowed [the son], as administrator of the decedent's estate, to waive the attorney-client privilege and properly admitted the testimony of . . . the attorney who advised the decedent with respect to the deed transferring ownership of the subject real property to [the son]. [The attorney's] testimony provided the best evidence of the decedent's intent in executing the deed" (*id.*).

We find *Bassin* to be persuasive, and we therefore reject petitioners' contention that respondent should not have been allowed to waive the attorney-client privilege on decedents' behalf as executor due to his own self-interest in the testimony of the decedents' former counsel. Thus, we hereby join the Second and Third Departments in concluding that the attorney-client privilege may be waived by an executor.

Contrary to petitioners' further contentions, the Surrogate properly determined that respondent met his burden of demonstrating a legal and sufficient reason for withholding the NYSFC stock from the estate and the nature of the purported transaction between Anthony and respondent with respect to that stock. We note that, "inasmuch as this is a determination after a nonjury trial, '[o]ur scope of review is as broad as that of the trial court' " (*Cianchetti v Burgio*, 145 AD3d 1539, 1540 [4th Dept 2016], *lv denied* 29 NY3d 908 [2017]). The decision of a court following a nonjury trial, however, "should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially [where, as here,] the findings of fact rest in large measure on considerations relating to the credibility of witnesses" (*Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992], *rearg denied* 81 NY2d 835 [1993] [internal quotation marks omitted]). Further, "when conducting such a review, we must view the record 'in the light most favorable to sustain the judgment' " (*Cianchetti*, 145 AD3d at 1541).

Here, although respondent was "unable to produce" any stock

certificates, the stock transfer ledger, or the corporate book for NYSFC, the absence of those records does not preclude a determination that a stock transfer to respondent occurred prior to Anthony's death. While "the books of a corporation are prima facie evidence of stock ownership, they are not conclusive, and testimony may be taken to aid in the determination as to who is the owner of the stock" (*Matter of Steward*, 229 AD2d 500, 500-501 [2d Dept 1996]). Similarly, in the absence of stock certificates, a court must examine other available evidence to determine stock ownership (*see Zwarycz v Marnia Constr., Inc.*, 130 AD3d 922, 923 [2d Dept 2015], *lv denied* 26 NY3d 917 [2016]; *Hunt v Hunt*, 222 AD2d 759, 760 [3d Dept 1995]; *Rocha Toussier y Asociados, S.C. v Rivero*, 184 AD2d 397, 397-398 [1st Dept 1992]). Such evidence may include "corporate tax forms, or any other indicia of shareholder status" (*Kun v Fulop*, 71 AD3d 832, 834 [2d Dept 2010], *lv denied* 15 NY3d 701 [2010]; *see Matter of Capizola v Vantage Intl.*, 2 AD3d 843, 845 [2d Dept 2003]).

We conclude that a fair interpretation of the evidence supports the Surrogate's determination that respondent met his burden of demonstrating a legal and sufficient reason for withholding the NYSFC stock from the estate. Respondent presented, inter alia, the testimony and evidentiary submissions of decedents' former counsel and a certified public accountant who had performed accounting work for NYSFC for 35 years as of the time of trial, which established that Anthony's shares of NYSFC had been transferred to respondent well before Anthony's death.

We further conclude that there is a fair interpretation of the evidence supporting the Surrogate's determination that the transaction was in the nature of a sale of the NYSFC stock. Indeed, there is no dispute that the subject shares were not transferred as a gift, and the evidence at trial established that Anthony transferred the NYSFC stocks to respondent in exchange for the continued payment of a salary to decedents after that sale and their retirement from NYSFC.

We also reject petitioners' related contention that any sale of the shares was void pursuant to the statute of frauds because the underlying agreement was not reduced to writing. In a prior order, the Surrogate denied that part of petitioners' cross application seeking such a determination. On the prior appeal from that order, petitioners never addressed that issue in their briefs, and we therefore deemed that issue abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). Inasmuch as petitioners abandoned the statute of frauds issue on the prior appeal, they are effectively precluded from raising that issue now (*see generally Rubeo v National Grange Mut. Ins. Co.*, 93 NY2d 750, 754 [1999]).

We further reject petitioners' contention that an adverse inference was warranted in this case because of respondent's failure to produce the corporate records. The party seeking sanctions for spoliation of evidence has the burden of demonstrating

> "that the party having control over the evidence had possessed an obligation to preserve it at the time of its

> destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense" (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [2015] [internal quotation marks omitted]).

While it is undisputed that respondent had a duty to maintain the corporate records, we agree with the Surrogate that petitioners' evidence failed to demonstrate that respondent destroyed the corporate book or that respondent had exclusive access to that book. Thus, we conclude that petitioners did not meet their "burden of establishing that [respondent] negligently lost or intentionally destroyed evidence" (*Helm v Sung-Hoon Yang*, 169 AD3d 1458, 1458-1459 [4th Dept 2019]). Under the circumstances and on the current record, " 'it cannot be presumed that [respondent is] responsible for the disappearance of the [corporate book]' " (*id*. at 1459), and therefore the Surrogate did not abuse his discretion in denying petitioners' request for an adverse inference (*see generally id.*).

We have considered petitioners' remaining contentions and conclude that none warrants modification or reversal of the decree.

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

881

CA 18-01785

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

DONNA M. BUBAR, INDIVIDUALLY, AND AS EXECUTRIX
OF THE ESTATE OF RAYMOND BUBAR, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD BRODMAN, M.D., ET AL., DEFENDANTS,
AND DOROTHY URSCHEL, ANCP-C, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

RICHARD P. VALENTINE, ESQ., P.C., BUFFALO (RICHARD P. VALENTINE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered July 17, 2018. The order denied the motion of defendant Dorothy Urschel, ANCP-C for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted and the complaint is dismissed against defendant Dorothy Urschel, ANCP-C.

Memorandum: This medical malpractice action arises from a coronary artery bypass and aortic valve replacement surgery performed on plaintiff's decedent (decedent) by defendant Richard Brodman, M.D. and decedent's post-operative care by all defendants. In appeal No. 1, defendant Dorothy Urschel, ANCP-C appeals from an order denying her motion for summary judgment dismissing the complaint against her. In appeal No. 2, defendants Michael Cellino, M.D. and Buffalo Medical Group, P.C. (collectively, Cellino defendants) appeal from an order that, inter alia, denied that part of their motion seeking summary judgment dismissing the complaint against them. In appeal No. 3, Brodman and defendant Buffalo Cardiothoracic Surgical, PLLC (collectively, Brodman defendants) appeal from an order that, inter alia, denied in part their motion for summary judgment dismissing the complaint against them.

We note at the outset that the facts of this case provide the opportunity for this Court to review the appropriate standard for burden-shifting in medical malpractice cases. It is well settled that a defendant moving for summary judgment in a medical malpractice

action " 'has the burden of establishing the absence of any departure from good and accepted medical practice *or* that the plaintiff was not injured thereby' " (*O'Shea v Buffalo Med. Group, P.C.*, 64 AD3d 1140, 1140 [4th Dept 2009], *appeal dismissed* 13 NY3d 834 [2009] [emphasis added]; *see Bagley v Rochester Gen. Hosp.*, 124 AD3d 1272, 1273 [4th Dept 2015]). As stated in *O'Shea*, once a defendant meets that prima facie burden, "[t]he burden then shift[s] to [the] plaintiff[] to raise triable issues of fact by submitting a physician's affidavit *both* attesting to a departure from accepted practice *and* containing the attesting [physician's] opinion that the defendant's omissions or departures were a competent producing cause of the injury" (64 AD3d at 1141 [internal quotation marks omitted and emphasis added]).

Upon review, we conclude that the burden that *O'Shea* places on a plaintiff opposing a summary judgment motion with respect to a medical malpractice claim is inconsistent with the law applicable to summary judgment motions in general (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Mills v Niagara Frontier Transp. Auth.*, 163 AD3d 1435, 1437, 1439 [4th Dept 2018]). We therefore conclude that, when a defendant moves for summary judgment dismissing a medical malpractice claim, "[t]he burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact only after the defendant physician meets the initial burden . . . , and only as to the elements on which the defendant met the prima facie burden" (*Bhim v Dourmashkin*, 123 AD3d 862, 864 [2d Dept 2014]; *see Stukas v Streiter*, 83 AD3d 18, 24-26 [2d Dept 2011]). To the extent that *O'Shea* and its progeny state otherwise, those cases should no longer be followed.

We now consider the merits of these appeals in light of that conclusion. In appeal No. 1, we agree with Urschel that Supreme Court erred in denying her motion, and we therefore reverse the order in that appeal. Urschel met her initial burden on the motion by presenting factual evidence that she complied with the applicable standard of care for a registered nurse practitioner, including deposition testimony and her own detailed affidavit that "address[ed] each of the specific factual claims of negligence in . . . plaintiff's bill of particulars" (*Wulbrecht v Jehle*, 89 AD3d 1470, 1471 [4th Dept 2011] [internal quotation marks omitted]; *see Webb v Scanlon*, 133 AD3d 1385, 1386 [4th Dept 2015]). We further agree with Urschel that she established that any duty on her part for decedent's anticoagulation therapy regime ended when management of that aspect of decedent's care was transferred to his primary care physician, Cellino (*see Pigut v Leary*, 64 AD3d 1182, 1183 [4th Dept 2009]; *see also Parrilla v Buccellato*, 95 AD3d 1091, 1093 [2d Dept 2012]; *Dombroski v Samaritan Hosp.*, 47 AD3d 80, 86 [3d Dept 2007]).

The affidavit of plaintiff's expert nurse practitioner failed to raise a triable issue of fact in opposition. Contrary to the expert's contention, Urschel's review of laboratory reports relevant to decedent's anticoagulation therapy regime on which Urschel's office had been copied subsequent to decedent's hospital discharge does not raise a triable issue of fact whether she retained any authority to

manage the anticoagulation therapy regime (*see generally Donnelly v Parikh*, 150 AD3d 820, 822-823 [2d Dept 2017]). Further, the opinion of plaintiff's expert that Urschel failed to properly respond to signs and symptoms of infection in decedent is improperly based on speculation that an active infection existed at a surgical site within days of decedent's discharge from the hospital (*see generally Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *Occhino v Fan*, 151 AD3d 1870, 1871 [4th Dept 2017]) and thus does not raise a triable issue of fact with respect thereto (*see Simmons v Brooklyn Hosp. Ctr.*, 74 AD3d 1174, 1178 [2d Dept 2010], *lv denied* 16 NY3d 707 [2011]). In opposition to Urschel's motion, plaintiff disputed Urschel's entitlement to summary judgment only with respect to the claims related to an alleged mismanagement of signs and symptoms of infection and decedent's post-operative anticoagulation therapy regime. Therefore, any other claims are deemed abandoned (*see Donna Prince L. v Waters*, 48 AD3d 1137, 1138 [4th Dept 2008]).

In appeal No. 2, we agree with the Cellino defendants that, contrary to the conclusion of the court, the affidavit of Cellino submitted in support of their motion sufficiently "address[ed] each of the specific factual claims of negligence in . . . plaintiff's bill of particulars" (*Wulbrecht*, 89 AD3d at 1471 [internal quotation marks omitted]; *see Webb*, 133 AD3d at 1386). In opposition, plaintiff addressed only the claims related to the alleged deficiencies in Cellino's management of decedent's anticoagulation therapy regime. Therefore, the remaining claims are deemed abandoned, and the court erred in denying the Cellino defendants' motion with respect to those claims against them (*see Donna Prince L.*, 48 AD3d at 1138). Thus, we modify the order in appeal No. 2 accordingly.

With respect to the claims regarding decedent's anticoagulation therapy regime, we conclude that Cellino's affidavit was sufficiently " 'detailed, specific and factual in nature' " to establish that the Cellino defendants did not deviate from the standard of care applicable to that regime (*Webb*, 133 AD3d at 1386). The Cellino defendants failed, however, to establish the lack of a causal connection between any alleged deviation from the applicable standard of care on Cellino's part and decedent's injuries. In an opposing affidavit, plaintiff's expert physician opined that Cellino deviated from the applicable standard of care by failing to use enoxaparin injections to timely remedy decedent's subtherapeutic anticoagulation levels, which were indicated by his blood test results. On appeal, the Cellino defendants do not dispute that the opinion of plaintiff's expert raised a triable issue of fact regarding Cellino's deviation from the applicable standard of care and, instead, contend that it constituted a new theory of negligence improperly raised by plaintiff for the first time in opposition to their motion. We reject that contention inasmuch as the allegation that Cellino failed to timely administer enoxaparin injections is a theory encompassed in the allegations contained in plaintiff's bill of particulars that Cellino failed to properly manage decedent's anticoagulation therapy regime (*see Salvania v University of Rochester*, 137 AD3d 1607, 1608 [4th Dept 2016]; *cf. Hinson v Anderson*, 159 AD3d 494, 494 [1st Dept 2018]).

The Cellino defendants further contend that plaintiff failed to raise a triable issue of fact with respect to proximate cause. Inasmuch as plaintiff bears the burden of raising a triable issue of fact "only as to the elements on which the defendant met the prima facie burden" (*Bhim*, 123 AD3d at 864), as concluded above, the court properly denied the motion of the Cellino defendants with respect to the claims related to Cellino's alleged mismanagement of decedent's anticoagulation therapy regime.

In appeal No. 3, the Brodman defendants contend that the court erred in denying their motion in part. We agree, and we reverse the order in appeal No. 3 insofar as appealed from. We note at the outset that plaintiff's opposition to the motion of the Brodman defendants was limited to those claims related to Brodman's alleged failure to maintain hemostasis and control blood loss during decedent's initial surgery, to document the reopening of decedent during that surgery, to recognize and treat the signs and symptoms of decedent's infection, and to properly manage decedent's anticoagulation therapy regime. Plaintiff therefore abandoned her remaining claims against the Brodman defendants (*see Donna Prince L.*, 48 AD3d at 1138).

We agree with the Brodman defendants that they established that any duty on Brodman's part for decedent's anticoagulation therapy ended when management of that aspect of decedent's care was transferred to Cellino (*see Pigut*, 64 AD3d at 1183; *see also Parrilla*, 95 AD3d at 1093; *Dombroski*, 47 AD3d at 86). The opinion of plaintiff's expert physician to the contrary, like the affidavit of the expert nurse practitioner in appeal No. 1, is based on the continued receipt by Brodman's office of laboratory reports related to decedent's anticoagulation therapy and does not raise a triable issue of fact whether he retained any authority to manage the anticoagulation therapy regime (*see generally Donnelly*, 150 AD3d at 822-823). Further, the Brodman defendants met their initial burden of establishing that Brodman did not deviate from the applicable standard of care with respect to the management of decedent's signs and symptoms of infection. In opposition, plaintiff submitted the affidavit of her expert, wherein the expert speculates that an active infection existed at a surgical site during the days following decedent's hospital discharge. As concluded above, that assumption is not supported by the record (*see Diaz*, 99 NY2d at 544; *Simmons*, 74 AD3d at 1178).

With respect to Brodman's alleged failure to maintain hemostasis and control blood loss during decedent's initial surgery, the Brodman defendants met their initial burden by submitting factual evidence that Brodman complied with the applicable standard of care during the initial surgery and when he surgically reopened decedent to determine whether any surgical site bleeding was missed, including Brodman's own deposition testimony and the detailed affidavit of the Brodman defendants' expert physician (*see generally Webb*, 133 AD3d at 1386; *Wulbrecht*, 89 AD3d at 1471). In opposition, although plaintiff's expert physician opined that there was a causal connection between decedent's excessive transfusions during the operation and the infection that led to his claimed injuries, the expert did not specify

what deviation of the applicable standard of care on Brodman's part caused the excessive bleeding that necessitated those transfusions. Indeed, the expert neither disputes the necessity of reopening decedent to address the excessive bleeding nor challenges the appropriateness or sufficiency of Brodman's administration of dilutional coagulopathy treatment to reduce the bleeding rate.

Finally, although Brodman asserted in his deposition testimony that it was an "oversight" to not dictate an addendum to the operative report after surgically reopening decedent, the Brodman defendants' expert physician opined that this oversight was not a deviation from the applicable standard of care and that the existent operative report fully apprised subsequent healthcare professionals of all pertinent information regarding the procedure. The Brodman defendants therefore met their initial burden with respect to that claim by establishing that Brodman neither deviated from the applicable standard of care nor was the alleged deviation a proximate cause of decedent's injuries. In opposition, assuming, arguendo, that plaintiff's expert raised a triable issue of fact with respect to deviation, we conclude that the expert failed to raise a triable issue of fact with respect to proximate cause. The expert opined generally that Brodman's failure to dictate an addendum to the operative report "deprived medical providers who would later attempt to manage [decedent's] post-operative recovery of pertinent information which could have aided them in their efforts." The expert does not specify, however, what "pertinent information" should have been included or how decedent's post-operative care might have been affected had such information been documented. The court therefore erred in failing to grant the Brodman defendants' motion in its entirety.

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

882

CA 18-01786

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

DONNA M. BUBAR, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF RAYMOND BUBAR, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD BRODMAN, M.D., ET AL., DEFENDANTS, MICHAEL CELLINO, M.D., AND BUFFALO MEDICAL GROUP, P.C., DEFENDANTS-APPELLANTS. (APPEAL NO. 2.)

CONNORS LLP, BUFFALO (MICHAEL J. ROACH OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

RICHARD P. VALENTINE, ESQ., P.C., BUFFALO (RICHARD P. VALENTINE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered July 17, 2018. The order, among other things, denied that part of the motion of, among others, defendants Michael Cellino, M.D. and Buffalo Medical Group, P.C. seeking summary judgment dismissing the complaint against those defendants.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion of defendants Michael Cellino, M.D. and Buffalo Medical Group, P.C. seeking summary judgment dismissing the complaint against them except insofar as the complaint, as amplified by the bill of particulars, alleges that Cellino mismanaged decedent's anticoagulation therapy regime, and as modified the order is affirmed without costs.

Same memorandum as in *Bubar v Brodman* ([appeal No. 1] – AD3d – [Nov. 15, 2019] [4th Dept 2019]).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

883

CA 18-01787

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

DONNA M. BUBAR, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF RAYMOND BUBAR, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD BRODMAN, M.D., BUFFALO CARDIOTHORACIC SURGICAL, PLLC, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS. (APPEAL NO. 3.)

THE TARANTINO LAW FIRM, LLP, BUFFALO (ANN M. CAMPBELL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

RICHARD P. VALENTINE, ESQ., P.C., BUFFALO (RICHARD P. VALENTINE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered July 17, 2018. The order, insofar as appealed from, denied in part the motion of defendants Richard Brodman, M.D. and Buffalo Cardiothoracic Surgical, PLLC for summary judgment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion of defendants Richard Brodman, M.D. and Buffalo Cardiothoracic Surgical, PLLC is granted in its entirety and the complaint is dismissed against those defendants.

Same memorandum as in *Bubar v Brodman* ([appeal No. 1] – AD3d – [Nov. 15, 2019] [4th Dept 2019]).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

894

CAF 18-00355

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

IN THE MATTER OF CARMELLAH Z., JUDASIA V.,
RAMIERE V., AND ZACKERY V.
---------- ORDER
ONONDAGA COUNTY DEPARTMENT OF CHILDREN
AND FAMILY SERVICES, PETITIONER-RESPONDENT;

CASEY V., RESPONDENT-APPELLANT,
AND ISAIAH Z., RESPONDENT.
(APPEAL NO. 1.)

LINDA M. CAMPBELL, SYRACUSE, FOR RESPONDENT-APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (YVETTE VELASCO OF COUNSEL), FOR PETITIONER-RESPONDENT.

MICHAEL J. KERWIN, MANLIUS, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cecile, J.), entered January 23, 2018 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent Casey V. had neglected the subject children and placed her under the supervision of petitioner.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051, 1051 [4th Dept 1990]).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

895

CAF 18-02034

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

IN THE MATTER OF CARMELLAH Z., JUDASIA V.,
RAMIERE V., AND ZACKERY V.
---------- MEMORANDUM AND ORDER
ONONDAGA COUNTY DEPARTMENT OF CHILDREN
AND FAMILY SERVICES, PETITIONER-RESPONDENT;

CASEY V., RESPONDENT-APPELLANT,
AND ISAIAH Z., RESPONDENT.
(APPEAL NO. 2.)

LINDA M. CAMPBELL, SYRACUSE, FOR RESPONDENT-APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (YVETTE VELASCO OF COUNSEL), FOR PETITIONER-RESPONDENT.

MICHAEL J. KERWIN, MANLIUS, ATTORNEY FOR THE CHILDREN.

Appeal from a corrected order of the Family Court, Onondaga County (Julie A. Cecile, J.), entered September 24, 2018 in a proceeding pursuant to Family Court Act article 10. The corrected order, among other things, adjudged that respondent Casey V. had neglected the subject children and placed her under the supervision of petitioner.

It is hereby ORDERED that the corrected order so appealed from is unanimously reversed on the law without costs and the petition against respondent Casey V. is dismissed.

Memorandum: In this Family Court Act article 10 proceeding, respondent mother appeals from a corrected order that, as relevant to this appeal, determined that she neglected four of her five children.

We note at the outset that " '[e]ffective appellate review, whatever the case but especially in . . . neglect proceedings, requires that appropriate factual findings be made by the trial court—the court best able to measure the credibility of the witnesses' " (*Giordano v Giordano*, 93 AD2d 310, 312 [3d Dept 1983]; *see Matter of Langdon v Langdon*, 137 AD3d 1580, 1581 [4th Dept 2016]). Here, Family Court failed to satisfy its obligation " 'to set forth those facts essential to its decision' " with respect to both the mother's motion to dismiss the petition and the ultimate determinations of neglect and the best interests of the children (*Matter of Rocco v Rocco*, 78 AD3d 1670, 1671 [4th Dept 2010]; *see* CPLR 4213 [b]; Family Ct Act § 165 [a]; *Matter of Graci v Graci*, 187 AD2d

970, 971 [4th Dept 1992]). The verbatim repetition of allegations contained in the petition in the spaces provided on the preprinted order of fact-finding and disposition is insufficient to fulfill that obligation. We nonetheless conclude that the record is sufficient for this Court to resolve the mother's appeal on the merits (*see Matter of Yaddow v Bianco*, 115 AD3d 1338, 1339 [4th Dept 2014]; *see generally Rocco*, 78 AD3d at 1671).

The mother contends that the court erred in denying her motion to dismiss the petition at the close of petitioner's proof on the ground that petitioner failed to establish a prima facie case that the children were neglected. We agree, and we therefore reverse the corrected order and dismiss the petition against the mother.

"While the burden of proving abuse or neglect always rests with petitioner, upon a motion . . . to dismiss a Family Court Act article 10 petition at the close of petitioner's case, 'the proper inquiry [is] whether petitioner [has] made out a prima facie case, thereby shifting the burden to respondent[] to rebut the evidence of parental culpability' " (*Matter of Camara R.*, 263 AD2d 710, 712 [3d Dept 1999]; *see Matter of Mary R.F. [Angela I.]*, 144 AD3d 1493, 1493 [4th Dept 2016], *lv denied* 28 NY3d 915 [2017]). "[A] party seeking to establish neglect must show, by a preponderance of the evidence . . . , first, that a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004], citing Family Ct Act § 1046 [b] [i]). "In each case, additionally, there must be a link or causal connection between the basis for the neglect petition and the circumstances that allegedly produce the child's impairment or imminent danger of impairment" (*id.* at 369). "A child may be found to be neglected when the parent knew or should have known of circumstances requiring action to avoid harm or the risk of harm to the child and failed to act accordingly" (*Matter of Brian P. [April C.]*, 89 AD3d 1530, 1530 [4th Dept 2011]).

Here, petitioner alleged in its petition, inter alia, that the mother neglected the subject children because there had been incidents of age-inappropriate sexual conduct between the three youngest children and an additional sibling not named in the petition, that the youngest child also engaged in an age-inappropriate sexual act with a non-family member, and that the mother knew of the latter incident and failed to take appropriate action. Notably, petitioner conceded that it was alleging that the mother was aware of only the single incident between the youngest child and the non-family member and that the mother did not have firsthand knowledge of that incident.

To establish that the incident between the youngest child and the non-family member in fact occurred, a prerequisite to the neglect finding sought here (*see Matter of Lebraun H. [Brenda H.]*, 111 AD3d 1439, 1440 [4th Dept 2013]), petitioner submitted only the testimony of two caseworkers who described the disclosure made by the youngest

child regarding that incident. " 'A child's out-of-court statements may form the basis for a finding of [neglect] as long as they are sufficiently corroborated by [any] other evidence tending to support their reliability' " (*Matter of Nicholas J.R. [Jamie L.R.]*, 83 AD3d 1490, 1490 [4th Dept 2011], *lv denied* 17 NY3d 708 [2011]; *see* Family Ct Act § 1046 [a] [vi]). Corroboration is required not "because statements of children are generally unreliable but because the out-of-court statements are hearsay and the statute requires some further evidence to establish their reliability" (*Matter of Nicole V.*, 71 NY2d 112, 118 [1987]). "Although the degree of corroboration [required] is low, a threshold of reliability must be met" (*Matter of East v Giles*, 134 AD3d 1409, 1411 [4th Dept 2015] [internal quotation marks omitted]; *see Matter of Zukowski v Zukowski*, 106 AD3d 1293, 1294 [3d Dept 2013]). "The 'repetition of an accusation does not corroborate a child's prior statement' . . . , although the reliability threshold may be satisfied by the testimony of an expert" (*Zukowski*, 106 AD3d at 1294; *see East*, 134 AD3d at 1411).

We agree with the mother that petitioner failed to offer sufficient evidence to corroborate the out-of-court disclosure of the youngest child, who was five years old at the time of the interviews. Although the testimony of the two caseworkers established that the disclosure reflected age-inappropriate knowledge of sexual matters, petitioner failed to submit "[a]ny *other* evidence tending to support" the reliability of the youngest child's statements apart from the disclosure itself (Family Ct Act § 1046 [a] [vi] [emphasis added]; *see Nicole V.*, 71 NY2d at 118; *cf. Matter of Brooke T. [Justin T.]*, 156 AD3d 1410, 1411 [4th Dept 2017]; *see also Matter of Liam M.J. [Cyril M.J.]*, 170 AD3d 1623, 1624 [4th Dept 2019], *lv denied* 33 NY3d 911 [2019]; *Matter of Janiece B. [James D.B.]*, 93 AD3d 1335, 1335-1336 [4th Dept 2012]). For example, the disclosure was not independently substantiated by any of the other involved children (*cf. Matter of Annarae I. [Jennifer K.]*, 148 AD3d 1243, 1245 [3d Dept 2017], *lv denied* 29 NY3d 909 [2017]), the eldest of whom was apparently not even interviewed during petitioner's investigation.

Further, although expert validation testimony may also constitute sufficient evidence to corroborate a child's out-of-court statement, no such expert testimony was submitted by petitioner. The two caseworkers who testified on behalf of petitioner asserted that they utilized forensic interviewing techniques to avoid leading the youngest child during their interviews, but petitioner failed to offer any evidence establishing that either caseworker was qualified to give expert validation testimony in such matters (*see Matter of Melissa K.*, 254 AD2d 770, 770-771 [4th Dept 1998]; *cf. Matter of Jaclyn P.*, 86 NY2d 875, 878 n [1995], *cert denied* 516 US 1093 [1996]).

The mother's purported admission to the caseworkers also fails to corroborate the youngest child's disclosure. Although the caseworkers both testified that the mother indicated an awareness of the incident between the youngest child and the non-family member prior to the caseworkers disclosing any details of the youngest child's disclosure, petitioner conceded that the mother did not have firsthand knowledge

of the incident. An admission by the mother "that she had heard that the purported prior incident occurred in the manner stated by others . . . 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' " (*Christopher P. v Kathleen M.B.*, 174 AD3d 1460, 1462 [4th Dept 2019]).

In addition to the failure to sufficiently corroborate the youngest child's disclosure, petitioner further failed to present sufficient evidence that the mother became aware of the incident between the youngest child and the non-family member at a time when she could have acted "to avoid harm or the risk of harm to the child[ren but] failed to act accordingly" (*Brian P.*, 89 AD3d at 1530). Specifically, petitioner offered no admissible evidence regarding the time frame when the mother became aware of that incident. Absent such evidence, we cannot conclude that the mother had sufficient time to act but failed to appropriately do so.

Moreover, one of the caseworkers testified that, although she did not "believe" that the mother ever expressed concerns regarding the sexual behavior of the children, she could not be sure that the mother had not done so. Notably, an inability to remember details infected the testimony of both caseworkers, petitioner's only witnesses, including an inability at times to recall names and ages of the involved children. We therefore conclude that petitioner failed to establish by a preponderance of the evidence that the mother neglected the subject children by failing to act as " 'a reasonable and prudent parent' " would have acted under the circumstances (*Matter of Afton C. [James C.]*, 17 NY3d 1, 9 [2011]; *see Matter of Kaylee D. [Kimberly D.]*, 154 AD3d 1343, 1344 [4th Dept 2017]).

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

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

936

CA 18-01467

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

PROLINE CONCRETE OF WNY, INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

G.M. CRISALLI & ASSOCIATES, INC.,
INTERNATIONAL FIDELITY INSURANCE COMPANY,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

SHEATS & BAILEY, PLLC, LIVERPOOL (EDWARD J. SHEATS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (GEFFREY GISMONDI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered August 10, 2018. The order, among other things, granted in part plaintiff's motion for summary judgment and awarded plaintiff a money judgment.

It is hereby ORDERED that said appeal is unanimously dismissed insofar as it concerns that part of plaintiff's motion with respect to the counterclaim for willful exaggeration of the mechanic's lien, and the order is modified on the law by denying those parts of the motion seeking summary judgment against defendant G.M. Crisalli & Associates, Inc. on the breach of contract cause of action in the amount of $312,389.29 plus interest and against defendant International Fidelity Insurance Company on the claim for foreclosure of the mechanic's lien in the amount of $312,389.29 plus interest and vacating the award of damages, and denying that part of the motion seeking summary judgment dismissing the counterclaim for breach of contract, and as modified the order is affirmed without costs.

Memorandum: Defendant G.M. Crisalli & Associates, Inc. (Crisalli), a general contractor, entered into a subcontract with plaintiff pursuant to which plaintiff agreed to perform certain concrete work in connection with the construction of a Wal-Mart Supercenter. Following a disagreement regarding the subcontract, plaintiff commenced an action against Crisalli seeking damages in the amount of $422,123.04 plus statutory interest for, inter alia, breach of contract. Shortly thereafter, plaintiff filed a mechanic's lien for the claimed unpaid amount. Crisalli then issued a bond discharging the mechanic's lien through its surety, defendant

International Fidelity Insurance Company (Fidelity). As a result, plaintiff commenced a second action against, inter alia, Crisalli and Fidelity (collectively, defendants) seeking, among other things, foreclosure of the mechanic's lien. Crisalli filed counterclaims for breach of contract and exaggeration of the mechanic's lien.

After the two actions were consolidated, plaintiff moved for summary judgment against Crisalli on the cause of action for breach of contract and against Fidelity on the claim for foreclosure of the mechanic's lien, as well as dismissal of Crisalli's counterclaims. Defendants now appeal from an order that, inter alia, granted plaintiff's motion to the extent of awarding judgment against Crisalli in the amount of $312,389.29 plus interest on the breach of contract cause of action and against Fidelity in the same amount plus interest on the claim for foreclosure of the mechanic's lien and dismissing Crisalli's counterclaims.

On appeal, defendants contend that Supreme Court erred in granting the motion to the extent of awarding judgment to plaintiff against Crisalli in the amount of $312,389.29 on the breach of contract cause of action and dismissing Crisalli's counterclaim for breach of contract. We agree, and we therefore modify the order accordingly. Even assuming, arguendo, that plaintiff met its initial burden on those parts of the motion, we conclude that defendants raised triable issues of fact in opposition (*see generally Auburn Custom Millwork, Inc. v Schmidt & Schmidt, Inc.*, 148 AD3d 1527, 1531 [4th Dept 2017]). Defendants submitted, inter alia, an affidavit of Crisalli's president, which raised issues of fact whether plaintiff breached the subcontract by failing to complete its work in a timely and satisfactory manner and whether the total subcontract price was reduced based upon the payment made by Crisalli directly to one of plaintiff's suppliers. We agree with defendants that the affidavit is based upon personal knowledge (*see Dunham v Ketco, Inc.*, 135 AD3d 1032, 1035 [3d Dept 2016]) and is not conclusively contradicted by the record (*cf. Dasent v Schechter*, 95 AD3d 693, 693 [1st Dept 2012]) or by any prior deposition testimony of the affiant (*cf. Ward v New Century Home Care, Inc.*, 172 AD3d 1434, 1436 [2d Dept 2019]; *Melnick v Farrell*, 128 AD3d 1371, 1375 [4th Dept 2015]).

Based upon the foregoing, we also agree with defendants that the court erred in granting that part of plaintiff's motion with respect to its claim against Fidelity for foreclosure of the mechanic's lien, and we therefore further modify the order accordingly. "Because the record raises triable issues as to whether plaintiff breached the [sub]contract, and the extent of unpaid work performed by plaintiff, plaintiff is not entitled to summary judgment on its lien foreclosure . . . claim[]" (*Ferro Fabricators, Inc. v 1807-1811 Park Ave. Dev. Corp.*, 165 AD3d 572, 573-574 [1st Dept 2018]; *see Peri Formwork Sys., Inc. v Lumbermens Mut. Cas. Co.*, 65 AD3d 533, 535 [2d Dept 2009]).

Finally, defendants' contention that the court erred in dismissing Crisalli's counterclaim for willful exaggeration has been rendered academic by the settlement agreement between the parties entered into while this appeal was pending. We therefore dismiss the

appeal to that extent (*see Butler v Stagecoach Group, PLC*, 72 AD3d 1581, 1582 [4th Dept 2010], *mod on other grounds sub nom. Edwards v Erie Coach Lines Co.*, 17 NY3d 306 [2011]).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

940

CA 18-01085

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

GARY E. WARREN AND MARY WARREN,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

E.J. MILITELLO CONCRETE, INC., ET AL.,
DEFENDANTS,
AND VERIZON NEW YORK, INC.,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

PAUL WILLIAM BELTZ, P.C., BUFFALO (CATHERINE B. FOLEY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

OBERMAYER REBMANN MAXWELL & HIPPEL LLP, NEW YORK CITY (JEFFREY T. WOLBER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered August 18, 2017. The order and judgment granted the motion of defendant Verizon New York, Inc., for summary judgment dismissing plaintiffs' complaint against it.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the complaint against defendant Verizon New York, Inc. is reinstated, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Plaintiffs commenced this negligence action to recover damages for injuries sustained by Gary E. Warren (plaintiff) on the sidewalk outside the offices of his employer, Verizon New York, Inc. (defendant). Plaintiffs appeal from an order and judgment granting defendant's motion for summary judgment dismissing the complaint against it on the ground that plaintiffs' exclusive remedy was workers' compensation benefits.

Although not raised by the parties, we conclude that Supreme Court erred in entertaining defendant's motion. "It is well settled that 'primary jurisdiction with respect to determinations as to the applicability of the Workers' Compensation Law has been vested in the Workers' Compensation Board [(Board)] . . . [I]t is therefore inappropriate for the courts to express views with respect thereto pending determination by' the Board" (*Brown v Hall*, 139 AD3d 1404, 1405 [4th Dept 2016], quoting *Botwinick v Ogden*, 59 NY2d 909, 911 [1983]; *see O'Rourke v Long*, 41 NY2d 219, 227-228 [1976]). Whether

plaintiff was injured within the scope of his employment "must in the first instance be determined by the [B]oard" (*O'Rourke*, 41 NY2d at 228), and the court thus should not have entertained defendant's motion at this juncture. Rather, the case should have been referred to the Board for a determination of plaintiffs' eligibility for workers' compensation benefits (*see Brown*, 139 AD3d at 1405). We therefore reverse the order and judgment, reinstate the complaint against defendant, and remit the matter to Supreme Court to determine the motion after final resolution of an application to the Board to determine plaintiffs' rights, if any, to workers' compensation benefits (*see id.* at 1405-1406).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

941

CA 18-01821

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

GARY E. WARREN AND MARY WARREN,
PLAINTIFFS-RESPONDENTS,

V ORDER

E.J. MILITELLO CONCRETE, INC., DESTRO &
BROTHERS CONCRETE COMPANY, INC., AND
HATCH MOTT MACDONALD NY, INC.,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (THOMAS J. SPEYER OF COUNSEL), FOR DEFENDANT-APPELLANT E.J. MILITELLO CONCRETE, INC.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, ROCHESTER (MATTHEW C. LENAHAN OF COUNSEL), FOR DEFENDANT-APPELLANT DESTRO & BROTHERS CONCRETE COMPANY, INC.

NASH CONNORS, P.C., BUFFALO (JAMES J. NASH OF COUNSEL), FOR DEFENDANT-APPELLANT HATCH MOTT MACDONALD NY, INC.

PAUL WILLIAM BELTZ, P.C., BUFFALO (CATHERINE B. FOLEY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered August 30, 2018. The order, among other things, denied the motions of defendants Hatch Mott MacDonald NY, Inc. and E.J. Militello Concrete, Inc., for summary judgment and denied the cross motion of defendant Destro & Brothers Concrete Company, Inc. for indemnification.

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

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

944

CA 19-00422

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

HECTOR A. HERNANDEZ,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

DENNY'S CORPORATION, DEFENDANT-RESPONDENT,
GILLS 04, INC., DOING BUSINESS AS DENNY'S,
ANTHONY STUCCHI, GREGORY JONES,
DEFENDANTS-APPELLANTS-RESPONDENTS,
ET AL., DEFENDANT.

THORN GERSHON TYMANN AND BONANNI, LLP, ALBANY (ERIN MEAD OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

NELSON S. TORRE, BUFFALO, FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered August 24, 2018. The order granted in part and denied in part the motion of plaintiff for summary judgment and granted in part and denied in part the cross motion of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in its entirety and granting that part of the cross motion seeking summary judgment dismissing the third cause of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he was arrested by defendants Anthony Stucchi and Gregory Jones, security guards at a Denny's restaurant (restaurant). Defendant Gills 04, Inc. (Gills), doing business as Denny's, was the franchisee of the restaurant and employed Stucchi and Jones, both peace officers, to provide security at the restaurant in the evening and early morning hours of the weekends. Plaintiff also named as a defendant Denny's Corporation (Denny's), the alleged franchisor of the restaurant. Plaintiff moved for, inter alia, summary judgment on the issue of liability with respect to his causes of action for malicious prosecution, false arrest, and assault and battery, and defendants cross-moved for summary judgment dismissing the complaint. Supreme Court, inter alia, granted the motion in part with respect to the causes of action for false arrest and assault and battery and granted the cross motion in part by dismissing the complaint against Denny's. Gills, Stucchi, and Jones (defendants) now

appeal, and plaintiff cross-appeals.

Contrary to plaintiff's contention on his cross appeal, the court properly denied that part of his motion with respect to the cause of action for malicious prosecution. In a cause of action for malicious prosecution, "a plaintiff must establish that a criminal proceeding was commenced, that it was terminated in favor of the accused, that it lacked probable cause, and that the proceeding was brought out of actual malice" (*Martinez v City of Schenectady*, 97 NY2d 78, 84 [2001]; *see Broughton v State of New York*, 37 NY2d 451, 457 [1975], *cert denied* 423 US 929 [1975]). Plaintiff was charged with trespass and disorderly conduct, but he was acquitted of the charges upon a nonjury verdict. Without considering the other elements of this cause of action, we conclude that the evidence submitted by plaintiff in support of his motion raised a triable issue of fact whether there was probable cause to arrest him for those charges and that he thus failed to establish his entitlement to judgment as a matter of law on the issue of liability with respect to the malicious prosecution cause of action (*see generally Gisondi v Town of Harrison*, 72 NY2d 280, 283 [1988]). "The existence or absence of probable cause becomes a question of law to be decided by the court 'only where there is no real dispute as to the facts or the proper inferences to be drawn therefrom' " (*Fortunato v City of New York*, 63 AD3d 880, 880 [2d Dept 2009]). "Where there is 'conflicting evidence, from which reasonable persons might draw different inferences[,] . . . the question [is] for the jury' " (*Parkin v Cornell Univ.*, 78 NY2d 523, 529 [1991]).

Plaintiff submitted the testimony of Stucchi from the criminal trial, wherein he testified that plaintiff was swearing, belligerent, and hostile when Stucchi approached him in the restaurant. Stucchi instructed plaintiff to leave the restaurant. Plaintiff also submitted surveillance videos from the restaurant, which have no sound, and a cell phone video of the arrest. The videos support Stucchi's testimony that plaintiff did not leave as directed but rather kept talking to the security officers, which would support the charge of trespass (*see* Penal Law § 140.05). To support a charge of disorderly conduct, the conduct must " 'extend[] beyond the exchange between the individual disputants to a point where it becomes a potential or immediate public problem' " (*People v Baker*, 20 NY3d 354, 359-360 [2013], quoting *People v Weaver*, 16 NY3d 123, 128 [2011] [internal quotation marks omitted]; *see* § 240.20 [3]). The surveillance videos depict a couple in the restaurant repeatedly looking in plaintiff's direction even before Stucchi and Jones first approached him, thus supporting the inference that plaintiff's conduct was loud and disruptive.

Even assuming, arguendo, that plaintiff met his initial burden of establishing that there was no probable cause for the arrest, we conclude that defendants raised a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Defendants submitted the deposition testimony of Jones and Stucchi, wherein they testified that plaintiff was swearing and was loud before they approached him. Defendants also submitted affidavits from a waitress and from a manager of the restaurant, each of whom was

working at the time of the incident and averred that plaintiff was swearing, speaking loudly, and acting belligerently. Each further averred that plaintiff was repeatedly directed to leave but refused to do so.

We agree with defendants on their appeal that the court erred in granting those parts of plaintiff's motion with respect to the false arrest and assault and battery causes of action, and we therefore modify the order by denying plaintiff's motion in its entirety. "The existence of probable cause serves as a legal justification for the arrest and an affirmative defense to the claim" for false arrest (*Martinez*, 97 NY2d at 85; *see Broughton*, 37 NY2d at 458). Inasmuch as there is a triable issue of fact whether there was probable cause for the arrest, plaintiff is not entitled to summary judgment on liability with respect to the false arrest cause of action (*see Gisondi*, 72 NY2d at 283; *Fortunato*, 63 AD3d at 880-881; *Iorio v City of New York*, 19 AD3d 452, 453 [2d Dept 2005]).

With respect to the cause of action for assault and battery, "[a] police officer or a peace officer, in the course of effecting or attempting to effect an arrest . . . of a person whom he or she reasonably believes to have committed an offense, may use physical force when and to the extent he or she reasonably believes such to be necessary to effect the arrest" (Penal Law § 35.30 [1]; *see* CPL 140.25 [1] [a]). " 'Claims that law enforcement personnel used excessive force in the course of an arrest are analyzed under the Fourth Amendment and its standard of objective reasonableness' " (*Bridenbaker v City of Buffalo*, 137 AD3d 1729, 1730 [4th Dept 2016]; *see Williams v City of New York*, 129 AD3d 1066, 1066 [2d Dept 2015]). "The reasonableness of a particular use of force . . . takes into account 'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether he [or she] is actively resisting arrest or attempting to evade arrest by flight' " (*Williams*, 129 AD3d at 1066).

We conclude that it is for a jury to determine whether the use of force here was reasonable (*see Wright v City of Buffalo*, 137 AD3d 1739, 1742 [4th Dept 2016]; *Harvey v Brandt*, 254 AD2d 718, 719 [4th Dept 1998]). In concluding that the actions of Stucchi and Jones were not reasonable under the circumstances, the court improperly considered only the videos and reviewed them only in the light most favorable to plaintiff instead of defendants, the nonmoving parties with respect to this cause of action (*see generally Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 340 [2011]). The court found that plaintiff met his initial burden on the motion because the videos conclusively demonstrated that plaintiff was cooperating with Stucchi and Jones, but we conclude that the videos, together with Stucchi's testimony from the criminal trial, support the contrary conclusion, and thus plaintiff failed to meet his initial burden. One surveillance video shows that plaintiff ignored Stucchi's initial attempt to address him; when plaintiff finally faced Stucchi, plaintiff did not move or attempt to leave the restaurant until an apparent friend or acquaintance encouraged him to go. Similarly, a woman to whom plaintiff was talking nudged plaintiff several times in

what can be interpreted as an attempt to get him to leave the restaurant. The court found that plaintiff was not "verbally abusive," but that conclusion ignores the testimony of Stucchi from the criminal trial. The court further found that plaintiff did not resist the efforts of Stucchi and Jones to remove him from the restaurant, but again the videos support a contrary conclusion. On the videos, plaintiff appeared to repeatedly engage Stucchi instead of simply handing his bill and money to the cashier and leaving the restaurant. With respect to the conduct that actually caused plaintiff's injuries, i.e., Stucchi pulling plaintiff's left arm behind his back in order to handcuff him, the court found that Stucchi's actions were unnecessary and not warranted under the circumstances, but the videos clearly show plaintiff holding his left hand by his face and refusing to give it to Stucchi to be handcuffed.

We further agree with defendants on their appeal that the court erred in denying that part of their cross motion seeking summary judgment dismissing the third cause of action, alleging negligent hiring, retention, supervision, and training, and we therefore further modify the order accordingly. There is no dispute here that Stucchi and Jones were acting within the scope of their employment, and thus a cause of action against Gills for negligent hiring, retention, supervision, and training does not lie; Gills's liability, if any, is pursuant to the theory of respondent superior (*see Owen v State of New York* [appeal No. 2], 160 AD3d 1410, 1411-1412 [4th Dept 2018]; *Watson v Strack*, 5 AD3d 1067, 1068 [4th Dept 2004]).

Finally, contrary to plaintiff's contention on his cross appeal, the court properly granted that part of the cross motion seeking summary judgment dismissing the complaint against Denny's. " 'The mere existence of a franchise agreement is insufficient to impose vicarious liability on the franchisor for the acts of its franchisee; there must be a showing that the franchisor exercised control over the day-to-day operations of its franchisee' " (*Niagara Foods, Inc. v Ferguson Elec. Serv. Co., Inc.*, 111 AD3d 1374, 1376 [4th Dept 2013], *lv denied* 22 NY3d 864 [2014]). Defendants established that Denny's did not exercise control over the day-to-day operations of its franchisee or specifically maintain control over the security of the restaurant, and plaintiff failed to raise a triable issue of fact with respect thereto (*see Maisano v McDonald's Corp.*, 110 AD3d 1476, 1476-1477 [4th Dept 2013]; *Martinez v Higher Powered Pizza, Inc.*, 43 AD3d 670, 671-672 [1st Dept 2007]).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

991

CA 19-00267

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

JANE FIXTER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF LIVINGSTON, ET AL., DEFENDANTS,
AND COUNCIL OF ALCOHOL AND SUBSTANCE ABUSE
OF LIVINGSTON COUNTY, DEFENDANT-RESPONDENT.

VAHEY GETZ, LLP, ROCHESTER (JON P. GETZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Livingston County (Evelyn Frazee, J.), entered August 1, 2018. The order granted the motion of defendant Council of Alcohol and Substance Abuse of Livingston County for summary judgment dismissing the complaint and cross claims against it.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries that she sustained as a result of being incarcerated following her violation of certain conditions of her probation, including by testing positive for the use of alcohol. In 2010, plaintiff was convicted of felony driving while intoxicated and sentenced to six months in jail followed by a five-year period of probation. While plaintiff was on probation, she was subject to testing by drug treatment court for use of alcohol. In addition, she received treatment from the Council of Alcohol and Substance Abuse of Livingston County (defendant). In April 2013, an employee of drug treatment court collected a urine specimen from plaintiff, sealed it, labeled it with plaintiff's identifying information, and left it with defendant to be picked up by the laboratory for testing. The test yielded a positive result, which plaintiff disputed. Plaintiff was jailed shortly thereafter, and was eventually sentenced to incarceration on her violation of probation.

Plaintiff contends on appeal that Supreme Court erred in granting defendant's motion for summary judgment dismissing the complaint against it because issues of fact exist whether defendant was negligent in its handling of plaintiff's urine specimen. We reject

that contention. "[A] duty of reasonable care owed by a tortfeasor to an injured party is elemental to any recovery in negligence" (*Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 584 [1994]). Although "a drug [or alcohol] testing laboratory can be liable to a test subject under the common law for negligent testing of a biological sample," that duty "does not encompass every step of the testing process" (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825-826 [2016], *rearg denied* 28 NY3d 956 [2016], citing, inter alia, *Landon v Kroll Lab. Specialists, Inc.*, 22 NY3d 1, 6-7 [2013], *rearg denied* 22 NY3d 1084 [2014]). Here, defendant did not owe plaintiff a duty because its allegedly negligent conduct was "unrelated to the actual performance of scientific testing of the biological sample" (*id.* at 826).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

998

KA 17-02096

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAURA RIDEOUT, DEFENDANT-APPELLANT.

WILLIAM CLAUSS, 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 (Thomas E. Moran, J.), rendered October 13, 2017. The judgment convicted defendant upon a jury verdict of murder in the second degree, tampering with physical evidence and 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 her upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [1]), arising from an incident in which her ex-husband was killed with a garrote and his body was found in a wooded area, with his facial features disfigured with drain cleaner. We affirm.

Contrary to defendant's contention, we conclude that the evidence, viewed in the light most favorable to the People (*see People v Delamota*, 18 NY3d 107, 113 [2011]), is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). "It is well settled that, even in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is 'whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the fact finder on the basis of the evidence at trial, viewed in the light most favorable to the People' " (*People v Hines*, 97 NY2d 56, 62 [2001], *rearg denied* 97 NY2d 678 [2001]; *see People v Rossey*, 89 NY2d 970, 971-972 [1997]; *People v Cabey*, 85 NY2d 417, 420-421 [1995]). Furthermore, "[i]ntent to kill may be inferred from defendant's conduct as well as the circumstances surrounding the crime" (*People v Price*, 35 AD3d 1230, 1231 [4th Dept 2006], *lv denied* 8 NY3d 926 [2007]).

Here, prior to the victim's death, defendant was captured on

video purchasing items that were later used in attempts to disfigure and dispose of his body, his blood was on her clothing, the keys to his car and other items connecting her to the crime were found in her home on her bed, and on the day after the killing she was found cleaning his house and attempting to dispose of the murder weapon. In addition, contrary to defendant's contention that she had no motive to kill the victim, the evidence established that she had rented a house in another state and planned to move there on the day after the killing with, inter alia, their two youngest children, but the victim had primary physical custody of those two children and refused to permit her to relocate with them. Indeed, defendant and the victim were engaged in litigation over the custody of those two children, which did not end until the victim's demise. Consequently, we conclude that the People presented legally sufficient evidence to establish beyond a reasonable doubt defendant's guilt of murder in the second degree and the remaining charges of which she was convicted. Furthermore, 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 further contention, we conclude that she was not deprived of a fair trial by Supreme Court's denial of her repeated motions for severance of her trial from that of her codefendants, who included two of her children. It is well settled that, even if charges against several defendants are properly joined for trial pursuant to CPL 200.40 (1) (a) through (d), "the court . . . may for good cause shown order in its discretion that any defendant be tried separately from . . . one or more or all of the others. Good cause shall include, but not be limited to, a finding that a defendant or the [P]eople will be unduly prejudiced by a joint trial" (CPL 200.40 [1]). Nevertheless, "[j]oint trials are preferred where, as here, the same evidence will be used and the defendant and codefendant[s] are charged with acting in concert" (*People v Thompson*, 59 AD3d 1115, 1115 [4th Dept 2009], *lv denied* 12 NY3d 860 [2009]), and "severance is not required solely because of hostility between the [defendants], differences in their trial strategies or inconsistencies in their defenses. It must appear that a joint trial necessarily will, or did, result in unfair prejudice to the moving party and substantially impair his [or her] defense" (*see People v Mahboubian*, 74 NY2d 174, 184 [1989] [internal quotation marks omitted]). Where, as here, "the proof of the charges against the defendant was premised on the same evidence used to establish her codefendants' guilt, only the most cogent reasons would warrant a severance" (*People v Fassino*, 169 AD3d 921, 923 [2d Dept 2019], *lv denied* 33 NY3d 975 [2019]; *see Mahboubian*, 74 NY2d at 183; *People v Bornholdt*, 33 NY2d 75, 87 [1973]).

Here, even assuming, arguendo, that the defenses presented by defendant and her codefendants were in conflict, we cannot conclude that "in retrospect . . . , there was 'a significant danger . . . that the conflict alone would lead the jury to infer defendant's guilt' " (*People v McGuire*, 148 AD3d 1578, 1579 [4th Dept 2017], quoting *Mahboubian*, 74 NY2d at 184; *cf. People v Nixon*, 77 AD3d 1443, 1444

[4th Dept 2010]). Contrary to defendant's contention, "the testimony elicited [and evidence introduced] during cross-examination of certain witnesses [by counsel for the codefendants] did not reveal any new information that was not already provided on direct examination of such witnesses" (*People v Murray*, 155 AD3d 1106, 1109 [3d Dept 2017], *lv denied* 31 NY3d 1015 [2018]; *cf. People v Warren*, 20 NY3d 393, 398 [2013]). Thus, even assuming, arguendo, that the court erred in denying defendant's motions for severance, applying the standard set forth in *People v Chestnut* (19 NY3d 606, 611-612 [2012]), we conclude that such error is harmless (*see People v Hilton*, 166 AD3d 567, 568 [1st Dept 2018], *lv denied* 32 NY3d 1173 [2019]; *cf. Nixon*, 77 AD3d at 1444).

Finally, the sentence is not unduly harsh or severe.

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1005

CAF 18-00622

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

IN THE MATTER OF AMANDA GREEN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JUSTIN ALLEN LAFLER, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

Appeal from an order of the Family Court, Cayuga County (Mark H. Fandrich, A.J.), entered December 20, 2017 in a proceeding pursuant to Family Court Act article 4. The order committed respondent to jail for a term of six months.

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

Same memorandum as in *Matter of Green v Lafler* ([appeal No. 2] — AD3d — [Nov. 15, 2019] [4th Dept 2019]).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1006

CAF 18-00623

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

IN THE MATTER OF AMANDA GREEN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JUSTIN LAFLER, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

Appeal from an order of the Family Court, Cayuga County (Mark H. Fandrich, A.J.), entered February 16, 2018 in a proceeding pursuant to Family Court Act article 4. The order, among other things, committed respondent to jail for a term of six months upon a determination that respondent willfully violated a prior order.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Cayuga Court, for further proceedings in accordance with the following memorandum: In appeal No. 1, respondent father appeals from an order of commitment that committed him to jail for a period of six months, and he purports to appeal from the findings of fact of the Support Magistrate. In appeal No. 2, the father appeals from an order that confirmed the Support Magistrate's finding of a willful violation of a prior order of child support and sentenced the father to six months in jail.

With respect to appeal No. 1, inasmuch as the father has finished serving his sentence, his appeal from the order of commitment must be dismissed as moot (*see Matter of Davis v Williams*, 133 AD3d 1354, 1355 [4th Dept 2015]). To the extent that in appeal No. 1 the father seeks to appeal from the findings of fact of the Support Magistrate, we conclude that his appeal must be dismissed because no appeal lies therefrom (*see Matter of Huard v Lugo*, 81 AD3d 1265, 1266 [4th Dept 2011], *lv denied* 16 NY3d 710 [2011]; *see also* Family Ct Act § 439 [a]). His sole remedy with respect to the findings of fact was to appeal from the final order of the Family Court (*see Huard*, 81 AD3d at 1266), and we note that he does appeal from that order in appeal No. 2.

With respect to appeal No. 2, we agree with the father that, although he completed serving the sentence of incarceration, his appeal is not moot with respect to the finding that he willfully

violated a prior child support order because of the " 'enduring consequences [that] potentially flow from an order adjudicating a party in civil contempt' " (*Matter of Jasco v Alvira*, 107 AD3d 1460, 1460 [4th Dept 2013], quoting *Matter of Bickwid v Deutsch*, 87 NY2d 862, 863 [1995]; *see Matter of Christine L.M. v Wlodek K.*, 45 AD3d 1452, 1452 [4th Dept 2007]).

We agree with the father in appeal No. 2 that the court erred when it determined that the father's alleged violation of the child support order was willful because it did not afford the father with the opportunity to be heard and present witnesses (*see Matter of Davis v Bond*, 104 AD3d 1227, 1228 [4th Dept 2013]; *Matter of Thompson v Thompson*, 59 AD3d 1104, 1105 [4th Dept 2009]; *see generally* Family Ct Act §§ 433, 454 [1]). Although "[n]o specific form of a hearing is required, . . . at a minimum the hearing must consist of an adducement of proof coupled with an opportunity to rebut it" (*Thompson*, 59 AD3d at 1105 [internal quotation marks omitted]). Moreover, "[i]t is well settled that neither a colloquy between a respondent and [the] [c]ourt nor between a respondent's counsel and the court is sufficient to constitute the required hearing" (*Davis*, 104 AD3d at 1228 [internal quotation marks omitted]; *see Thompson*, 59 AD3d at 1105).

Here, none of the parties' appearances on the violation petition consisted "of an adducement of proof coupled with an opportunity to rebut it" (*Thompson*, 59 AD3d at 1105 [internal quotation marks omitted]). At most, there was merely "a colloquy" between the father and Support Magistrate, which is insufficient to constitute the required hearing (*Davis*, 104 AD3d at 1228 [internal quotation marks omitted]). Moreover, there is nothing in the record to establish that petitioner mother provided admissible evidence with respect to the father's alleged willful failure to pay child support, nor is there any admissible evidence submitted by the Support Collection Unit (*see generally* Family Ct Act § 439 [d]; *Matter of Pringle v Pringle*, 296 AD2d 828, 828 [4th Dept 2002]). Also, the father was never given the opportunity to present evidence rebutting the allegations in the petition. Thus, we reverse the order in appeal No. 2 and remit the matter to Family Court for a hearing on the petition in compliance with Family Court Act § 433.

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1008

CA 19-00723

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

ROBERTO A. MORALES, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY LACLAIR, DEFENDANT-APPELLANT.

LAW OFFICES OF JENNIFER S. ADAMS, WILLIAMSVILLE (KEVIN J. GRAFF OF COUNSEL), FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., BUFFALO (TIM HEDGES OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Debra A. Martin, A.J.), entered October 17, 2018. The order, insofar as appealed from, denied that part of the motion of defendant seeking summary judgment dismissing the complaint against him.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained in a motor vehicle accident when the vehicle he was driving was struck by a vehicle owned by defendant. Defendant thereafter moved for, inter alia, summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury in the accident within the meaning of Insurance Law § 5102 (d), and Supreme Court, inter alia, denied that part of the motion. We affirm. Even assuming, arguendo, that defendant satisfied his initial burden on the issue of serious injury, plaintiff submitted in opposition to defendant's motion an affirmation of his treating physician that raised an issue of fact under the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories of serious injury (*see Stamps v Pudetti*, 137 AD3d 1755, 1757 [4th Dept 2016]; *see generally DeAngelis v Martens Farms, LLC*, 104 AD3d 1125, 1126-1127 [4th Dept 2013]).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1018

KA 18-00489

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARNELL CLEVELAND, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered January 22, 2018. The judgment convicted defendant upon his plea of guilty of burglary in the second degree, forgery in the second degree, identity theft, and unauthorized use of a vehicle in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed and the matter is remitted to Erie County Court for resentencing in accordance with the following memorandum: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, burglary in the second degree (Penal Law § 140.25 [2]), defendant contends, and the People concede, that his confession of judgment with respect to restitution must be voided because the amount thereof differs from the amount of restitution contemplated by the plea bargain. Although not raised by the parties, we conclude that defendant's sentence must be vacated in its entirety because County Court failed to pronounce the sentence of restitution in open court (*see People v Guadalupe*, 129 AD3d 989, 989 [2d Dept 2015]; *see generally People v Petrangelo*, 159 AD3d 1559, 1560 [4th Dept 2018]).

"CPL 380.20 and 380.40 (1) collectively require that courts 'must pronounce sentence in every case where a conviction is entered' and that—subject to limited exceptions not relevant here—'[t]he defendant must be personally present at the time sentence is pronounced' " (*People v Sparber*, 10 NY3d 457, 469 [2008]). Restitution is a component of the sentence to which CPL 380.20 and CPL 380.40 (1) apply (*see People v Nieves*, 2 NY3d 310, 316 [2004]; *People v Fuller*, 57 NY2d 152, 156-157 [1982]). The requirements of CPL 380.20 and CPL 380.40 (1) are "unyielding" (*Sparber*, 10 NY3d at 469), and their violation may be addressed on direct appeal notwithstanding a valid waiver of

the right to appeal or the defendant's failure to preserve the issue for appellate review (*see Guadalupe*, 129 AD3d at 989; *see generally People v Acevedo*, 17 NY3d 297, 301 [2011]). When the sentencing court fails to orally pronounce a component of the sentence, the sentence must be vacated and the matter remitted for resentencing in compliance with the statutory scheme (*see Sparber*, 10 NY3d at 471; *Petrangelo*, 159 AD3d at 1560; *see generally People v Lingle*, 16 NY3d 621, 634-635 [2011]).

Here, the court failed to orally pronounce the restitution component of defendant's sentence in his presence as required by CPL 380.20 and CPL 380.40 (1). We therefore modify the judgment by vacating defendant's sentence, and we remit the matter to County Court for resentencing (*see Guadalupe*, 129 AD3d at 989; *People v Bauer*, 229 AD2d 502, 502-503 [2d Dept 1996]). Upon remittal, the court should address and reconcile the discrepancy between the amount of restitution contemplated by the plea bargain ($350) and the amount of restitution specified in the written confession of judgment ($841.12).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1031

KA 17-01291

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CORDERO RUMPH, DEFENDANT-APPELLANT.

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

LORI P. RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered June 13, 2016. The judgment convicted defendant upon his plea of guilty of attempted criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal sale of a controlled substance in the third degree (Penal Law §§ 110.00, 220.39 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]). It is well settled that a " 'court need not engage in any particular litany when apprising a defendant pleading guilty of the individual rights abandoned' " (*People v Sanders*, 25 NY3d 337, 341 [2015]) and, here, the record establishes that County Court engaged defendant "in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Carr*, 147 AD3d 1506, 1506 [4th Dept 2017], *lv denied* 29 NY3d 1030 [2017] [internal quotation marks omitted]). That valid waiver forecloses any challenge by defendant to the severity of the sentence (*see generally People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Lasher*, 151 AD3d 1774, 1775 [4th Dept 2017], *lv denied* 29 NY3d 1129 [2017]).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1038

KA 17-01708

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TANEIKA KERCE, 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 Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered August 4, 2017. The judgment convicted defendant upon her plea of guilty of attempted robbery in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea and waiver of indictment are vacated, the superior court information 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 her upon a plea of guilty of attempted robbery in the third degree (Penal Law §§ 110.00, 160.05), defendant contends that her waiver of indictment is jurisdictionally defective because it did not contain the "approximate time" of the offense (CPL 195.20). We agree. A jurisdictionally valid waiver of indictment must contain, inter alia, the "approximate time" of each offense charged in the superior court information (SCI) (*id.*; *see People v St Denis*, — AD3d —, — [Nov. 8, 2019] [4th Dept 2019]). "The law demands strict and literal compliance with the constitutional and statutory framework for waiving indictment" (*People v Colon-Colon*, 169 AD3d 187, 188 [4th Dept 2019], *lv denied* 33 NY3d 975 [2019]). " '[S]ubstantial compliance [with CPL 195.20] will not be tolerated' " (*id.* at 191) because "compliance with [its] literal terms . . . is the sine qua non of the voluntariness of an indictment waiver" (*id.* at 193). Here, as the People correctly concede, the waiver of indictment does not contain the approximate time of the offense (*see St Denis*, — AD3d at —). Moreover, we note that this is not a case " 'where the time of the offense is unknown or, perhaps, unknowable' so as to excuse the absence of such information" (*People v Titus*, 171 AD3d 1256, 1257 [3d Dept 2019]). Therefore, we reverse the judgment, vacate the plea and waiver of

indictment, dismiss the SCI, and remit for proceedings pursuant to CPL 470.45 (*see Colon-Colon*, 169 AD3d at 193-194).

In light of the foregoing, defendant's remaining contention is academic.

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1040

CAF 18-00062

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

IN THE MATTER OF TARIQ S.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ASHLEE B., RESPONDENT-APPELLANT.

IN THE MATTER OF NABIL A.A.,
PETITIONER-RESPONDENT,

V

ASHLEE B., RESPONDENT-APPELLANT.

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

DEBORAH J. SCINTA, ORCHARD PARK, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Brenda Freedman, J.), entered December 1, 2017 in paternity proceedings. The order dismissed the petitions.

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

Memorandum: Petitioner Tariq S. filed a petition seeking to vacate his acknowledgment of paternity with respect to the subject child pursuant to Family Court Act § 516-a (b). Petitioner Nabil A.A. thereafter filed a petition seeking to establish his paternity of the child, and the Attorney for the Child (AFC) moved to dismiss the petitions based on principles of equitable estoppel (*see* § 418 [a]). Family Court determined, after a hearing, that it was not in the best interests of the child to order genetic marker testing to determine the child's paternity and dismissed the petitions. Respondent mother appeals.

We conclude that the mother's appeal must be dismissed inasmuch as she is not an aggrieved party (*see* CPLR 5511). A party is aggrieved "when he or she asks for relief but that relief is denied in whole or in part . . . [or] when someone asks for relief against him or her, which the person opposes, and the relief is granted in whole or in part" (*Mixon v TBV, Inc.*, 76 AD3d 144, 156-157 [2d Dept 2010] [emphasis and footnotes omitted]; *see Benedetti v Erie County Med. Ctr. Corp.*, 126 AD3d 1322, 1323 [4th Dept 2015]). Here, the mother

did not seek any relief herself, and the AFC's motion to dismiss the petitions did not seek any relief against her (*see Mahmood v Gutman*, 81 AD3d 792, 792 [2d Dept 2011]). The mother did not join in the petitions that were dismissed by the court, nor did she file a petition of her own seeking to vacate the acknowledgment of paternity signed by Tariq S. or to establish the paternity of Nabil A.A. (*cf. Matter of Jennifer L. v Gerald S.*, 145 AD3d 1581, 1582 [4th Dept 2016], *lv dismissed* 29 NY3d 942 [2017]). Moreover, neither petitioner appealed from the order, which left the mother's rights unchanged (*see generally Matter of DeLong*, 89 AD2d 368, 369-370 [4th Dept 1982], *lv denied* 58 NY2d 606 [1983]). The fact that the mother may be disappointed by the order does not equate to aggrievement under CPLR 5511 (*see DeLong*, 89 AD2d at 370).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1042

CAF 18-01344

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

IN THE MATTER OF RAMERE D.

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

MEMORANDUM AND ORDER

BIESHA D., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST OF COUNSEL), FOR RESPONDENT-APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (JOSEPH MARZOCCHI OF COUNSEL), FOR PETITIONER-RESPONDENT.

COURTNEY S. RADICK, OSWEGO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered June 5, 2018 in a proceeding pursuant to Family Court Act article 10. The order, among other things, terminated the subject child's placement with petitioner.

It is hereby ORDERED that said appeal is unanimously dismissed except insofar as respondent challenges the denial of her attorney's request for an adjournment, and the order is affirmed without costs.

Memorandum: In appeal No. 1, respondent mother appeals from an order that, inter alia, terminated the subject child's placement with the Onondaga County Department of Children and Family Services, the petitioner therein. In appeal No. 2, the mother appeals from an order that, inter alia, awarded sole legal and physical custody of the child to his paternal grandparents, the petitioners therein. Both orders were entered following a dispositional hearing at which the mother failed to appear and in which her attorney, although present, elected not to participate (*see Matter of Makia S. [Catherine S.]*, 134 AD3d 1445, 1445-1446 [4th Dept 2015]; *Matter of Shawn A. [Milisa C.B.]*, 85 AD3d 1598, 1598-1599 [4th Dept 2011], *lv denied* 17 NY3d 713 [2011]). Where, as here, the orders appealed from were made upon the mother's default, "review is limited to matters which were the subject of contest below" (*Matter of Paulino v Camacho*, 36 AD3d 821, 822 [2d Dept 2007] [internal quotation marks omitted]; *see Matter of DiNunzio v Zylinski*, 175 AD3d 1079, 1080 [4th Dept 2019]). Thus, in both appeals, review is limited to the denial of the request of the mother's attorney for an adjournment (*see Paulino*, 36 AD3d at 822). We reject the mother's contention that Family Court abused its

discretion in denying that request inasmuch as the mother's attorney offered nothing beyond a "vague and unsubstantiated claim that the [mother] could not appear" (*Matter of Sophia M.G.-K. [Tracy G.-K.]*, 84 AD3d 1746, 1747 [4th Dept 2011] [internal quotation marks omitted]; *see Matter of Sanaia L. [Corey W.]*, 75 AD3d 554, 554-555 [2d Dept 2010]).

Finally, to the extent that the mother contends in these appeals that the court erred by imposing in its permanency orders concurrent and contradictory permanency goals, that contention is not properly before us inasmuch as the mother did not appeal from those orders (*see Matter of Lakeya P. v Ajja M.*, 169 AD3d 1409, 1410 [4th Dept 2019], *lv denied* 33 NY3d 906 [2019]).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1043

CAF 18-01342

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

IN THE MATTER OF LEONARD M. AND DEBORAH M.,
PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND
FAMILY SERVICES, TIMETHEUS M.,
RESPONDENTS-RESPONDENTS,
AND BIESHA D., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST OF COUNSEL), FOR RESPONDENT-APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (JOSEPH MARZOCCHI OF COUNSEL), FOR RESPONDENT-RESPONDENT ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES.

COURTNEY S. RADICK, OSWEGO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered June 5, 2018 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioners sole legal and physical custody of the subject child.

It is hereby ORDERED that said appeal is unanimously dismissed except insofar as respondent Biesha D. challenges the denial of her attorney's request for an adjournment, and the order is affirmed without costs.

Same memorandum as in *Matter of Ramere D. (Biesha D.)* (— AD3d — [Nov. 15, 2019] [4th Dept 2019]).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1044

CAF 19-00416

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

IN THE MATTER OF ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, ON BEHALF OF KELLY STRIKER, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

WADE BOWER, RESPONDENT-RESPONDENT.

JAMES HARMON, BUFFALO, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered August 16, 2018 in a proceeding pursuant to Family Court Act article 4. The order denied petitioner's objection to an order of dismissal of the Support Magistrate.

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

Memorandum: Petitioner appeals from an order of Family Court that denied its objection to the order of the Support Magistrate dismissing its modification petition seeking from respondent father certain confinement costs incurred at the birth of the subject child. We affirm.

In 1992, an order of filiation and support (1992 order) was entered on consent of the parties, which required the father to, inter alia, pay child support and obtain health insurance for the subject child. It also established the value of the confinement costs. Crucially, however, an ordering paragraph in the preprinted 1992 order that could have been used to direct a party—e.g., the father—to pay the amount of the costs incurred at the child's birth was intentionally crossed out and left incomplete, and there is no language in the 1992 order compelling either party to pay those costs. Approximately 26 years later, petitioner filed a modification petition seeking an order requiring the father to pay those costs, arguing that he now could afford to pay them. On the father's motion, the Support Magistrate dismissed the petition. Contrary to petitioner's contentions on appeal, we conclude that the court properly denied its objection to the Support Magistrate's order.

Although the factual findings of the Support Magistrate are entitled to great deference (*see generally Matter of DeNoto v DeNoto*, 96 AD3d 1646, 1648 [4th Dept 2012]), the interpretation of a consent order like the 1992 order presents a question of law permitting de

novo review thereof because it is akin to a contract between the parties (*see generally Rollo v Servico N.Y., Inc.*, 79 AD3d 1799, 1800 [4th Dept 2010]; *Matter of Hanlon v Hanlon*, 62 AD3d 702, 703-704 [2d Dept 2009]). Even assuming, arguendo, that the court improperly deferred to the Support Magistrate's findings, we conclude that both the Support Magistrate and the court properly held that the plain language of the 1992 order does not require the father to pay the confinement costs incurred at the child's birth (*see Biggio v Biggio*, 110 AD3d 654, 655 [2d Dept 2013], *lv denied* 22 NY3d 860 [2014]). Moreover, we note the absence of any language in the 1992 order holding the payment of those costs in abeyance until such time as the father is capable of providing payment, and we decline to read such language into the order.

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1045

CA 19-00120

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

NANCY J. BRADY AND PATRICK J. BRADY,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TIMOTHY J. CONTANGELO, DEFENDANT-RESPONDENT.

LAW OFFICE OF FRANCIS LETRO, BUFFALO (CAREY C. BEYER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (DANIEL J. CERCONE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an amended order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered July 17, 2018. The amended order denied plaintiffs' motion to set aside the jury verdict and for a new trial.

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

Memorandum: Plaintiffs appeal from an amended order that denied their posttrial motion pursuant to CPLR 4404 (a) seeking to set aside the jury verdict and grant a new trial. Plaintiffs contend that Supreme Court's supplemental jury charge on negligence was erroneous. Initially, plaintiffs preserved their contention for our review only in part, because only some of the specific grounds now raised on appeal were raised before the jury began deliberations (*see* CPLR 4110-b; *McFadden v Oneida, Ltd.*, 93 AD3d 1309, 1310 [4th Dept 2012]). In any event, " 'the charge as a whole adequately conveyed the proper legal principles' " (*Garris v K-Mart, Inc.*, 37 AD3d 1065, 1066 [4th Dept 2007]; *see generally Brady v Contangelo*, 148 AD3d 1544, 1545 [4th Dept 2017]).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1052

TP 18-01054

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

IN THE MATTER OF MARCUS AYUSO, PETITIONER,

V MEMORANDUM AND ORDER

SUPERINTENDENT H. GRAHAM, RESPONDENT.

MARCUS AYUSO, PETITIONER PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Thomas G. Leone, A.J.], entered May 31, 2018) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul a determination, following a tier II disciplinary hearing, that he violated inmate rules 114.10 (7 NYCRR 270.2 [B] [15] [i] [smuggling]) and 116.13 (7 NYCRR 270.2 [B] [17] [iv] [vandalism or possession of stolen property]). Contrary to petitioner's contention, the misbehavior report and the testimony of a civilian employee of the correctional facility with personal knowledge of the facts provide substantial evidence to support the determination that petitioner violated those inmate rules (*see generally Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]).

We reject petitioner's further contention that he was deprived of due process by respondent's purported failure to render a determination on petitioner's administrative appeal, which is based on the fact that respondent did not check any box on the determination of that appeal indicating the disposition thereof. "[A]n administrative body's failure to render a decision on an administrative appeal does not necessarily preclude a party from obtaining judicial review of the underlying determination" (*Matter of Meehan v Annucci*, 144 AD3d 1278, 1279 [3d Dept 2016]). Here, a full reading of respondent's determination on the administrative appeal demonstrates that he rejected petitioner's contentions with respect thereto and that the underlying determination was therefore, in effect, administratively

affirmed. Even assuming, arguendo, that respondent's ministerial error in failing to state the disposition on the administrative appeal constituted a failure to render a decision, we note that respondent does not assert that petitioner failed to exhaust his administrative remedies as a defense to this proceeding (*cf. Matter of DePonceau v Fischer*, 93 AD3d 1040, 1041 [3d Dept 2012], *appeal dismissed* 19 NY3d 897 [2012]; *see generally Matter of Koch v Sheehan*, 95 AD3d 82, 86 [4th Dept 2012], *affd* 21 NY3d 697 [2013]). We therefore conclude that petitioner has not sustained any prejudice from the ministerial error (*see Meehan*, 144 AD3d at 1279).

Finally, petitioner contends that the underlying determination is arbitrary and capricious. By failing to raise that contention during the administrative hearing, however, petitioner did not preserve it for our review (*see Matter of Allah v Fischer*, 118 AD3d 1507, 1507 [4th Dept 2014]), and because he did not raise it in his administrative appeal, petitioner did not exhaust his administrative remedies with respect to that contention (*see Matter of Stewart v Fischer*, 109 AD3d 1122, 1123 [4th Dept 2013], *lv denied* 22 NY3d 858 [2013]). This Court therefore has no discretionary power to reach it (*see Matter of Nelson v Coughlin*, 188 AD2d 1071, 1071 [4th Dept 1992], *appeal dismissed* 81 NY2d 834 [1993]).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1055

KA 17-00662

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUIS GONZALEZ, 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 Erie County Court (Michael F. Pietruszka, J.), rendered March 23, 2017. The judgment convicted defendant, upon a plea of guilty, of attempted 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, upon his plea of guilty, of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). We affirm. Even assuming, arguendo, that defendant did not validly waive his right to appeal, we nevertheless conclude that the sentence is not unduly harsh or severe. We note that the certificate of conviction incorrectly indicates that defendant was convicted of a class E felony, and it must be amended to reflect his conviction of a class D felony (*see generally People v Correa*, 145 AD3d 1640, 1641 [4th Dept 2016]).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1060

KA 17-01343

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAURA A. HURLBURT, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (MELANIE J. BAILEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered May 24, 2017. The judgment convicted defendant, upon a jury verdict, of offering a false instrument for filing in the first degree (six counts), grand larceny in the third degree and welfare fraud in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the facts by reversing that part convicting defendant of welfare fraud in the third degree and dismissing count eight of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting her, upon a jury verdict, of six counts of offering a false instrument for filing in the first degree (Penal Law § 175.35 [1]), one count of grand larceny in the third degree (§ 155.35 [1]), and one count of welfare fraud in the third degree (§ 158.15). Viewing the evidence in the light most favorable to the People (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the evidence is legally sufficient to support the conviction on the counts of offering a false instrument for filing in the first degree and grand larceny in the third degree (*see People v Hure*, 16 AD3d 774, 775-776 [3d Dept 2005], *lv denied* 4 NY3d 854 [2005]; *see generally Danielson*, 9 NY3d at 349; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that the verdict with respect to those counts is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). As the parties correctly recognize, however, the crimes of welfare fraud under Penal Law article 158 do not apply to the Section 8 housing benefits at issue in this case (*see People v Davis*, 155 AD3d 1527, 1528-1530 [4th Dept 2017], *lv denied* 31 NY3d 1012 [2018]; *see generally* § 158.00 [1] [c]). The jury's verdict with respect to the crime of welfare fraud in the third degree is thus

against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495), and we therefore modify the judgment accordingly (*see* CPL 470.20 [5]).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1063

CAF 18-00928

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

IN THE MATTER OF BRYAN M. BRANT,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DARLENE M. WIDGER, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Onondaga County (Karen Stanislaus, R.), entered April 26, 2018 in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to stay away from petitioner.

It is hereby ORDERED that the order of protection so appealed from is unanimously affirmed without costs and the finding in the underlying oral decision of April 26, 2018 that respondent committed the family offense of aggravated harassment in the second degree under Penal Law § 240.30 (1) (a) is vacated.

Memorandum: In a proceeding pursuant to Family Court Act article 8, respondent appeals from an order of protection that, after a fact-finding hearing and upon a related decision made after the hearing, found that she committed family offenses against petitioner. We note at the outset that respondent's contention that a dispositional hearing was required is moot. The order of protection expired by its terms on April 11, 2019, and respondent's contention on appeal concerning the terms of that order "will not, at this juncture, directly affect the rights and interests of the parties" (*Matter of Whitney v Judge*, 138 AD3d 1381, 1382 [4th Dept 2016], *lv denied* 27 NY3d 911 [2016] [internal quotation marks omitted]; *see Matter of Gansburg v Gansburg*, 127 AD2d 766, 766 [2d Dept 1987]). We conclude, however, that respondent's challenges to the findings that she committed family offenses are properly before us " 'in light of enduring consequences which may potentially flow from an adjudication that a party has committed a family offense' " (*Matter of Hunt v Hunt*, 51 AD3d 924, 925 [2d Dept 2008]; *see Whitney*, 138 AD3d at 1382).

Petitioner testified that he received an anonymous telephone call from an individual whose voice he recognized to be respondent's. The caller called him "a pathetic piece of shit" and told him that he "deserve[d] to die" and "sit in jail forever." Petitioner received approximately 5 to 10 anonymous hang-up telephone calls per day for

the next three days. Petitioner thereafter filed the instant family offense petition, and the calls stopped following entry of a temporary order of protection against respondent.

We agree with respondent that the evidence is legally insufficient to establish that she committed the family offense of aggravated harassment in the second degree under Penal Law § 240.30 (1) (a). We conclude that petitioner did not sustain his burden of establishing by a fair preponderance of the evidence that "a threat to cause physical harm to, or unlawful harm to the property of [petitioner], or a member of [petitioner's] same family or household" was communicated during the initial anonymous telephone call (*id.*; *see* Family Ct Act § 832; *cf. Matter of Jennifer G. v Benjamin H.*, 84 AD3d 1433, 1435 [3d Dept 2011]). We therefore vacate the finding in the underlying decision that respondent committed the family offense of aggravated harassment in the second degree under Penal Law § 240.30 (1) (a) (*see Whitney*, 138 AD3d at 1382; *Matter of Hodiantov v Aronov*, 110 AD3d 881, 882 [2d Dept 2013]).

We further conclude, however, that petitioner sustained his burden of establishing by a fair preponderance of the evidence that respondent committed the family offense of aggravated harassment in the second degree as defined in subdivision (2) of Penal Law § 240.30. Contrary to respondent's contention, the evidence is sufficient to establish respondent's identity as the anonymous hang-up caller. "The determination of whether a family offense was committed is a factual issue to be resolved by the Family Court, and that court's determination regarding the credibility of witnesses is entitled to great weight on appeal, and will not be disturbed unless clearly unsupported by the record" (*Matter of Megyn J.B. v Cory A.D.*, 113 AD3d 1086, 1086 [4th Dept 2014] [internal quotation marks omitted]; *see Whitney*, 138 AD3d at 1383). The record supports the court's determination that petitioner met his burden of establishing by a fair preponderance of the evidence that respondent committed acts constituting the crime of aggravated harassment in the second degree (§ 240.30 [2]), thus warranting the issuance of an order of protection in favor of petitioner (*see* Family Ct Act § 812 [1]; *Matter of Danielle S. v Larry R.S.*, 41 AD3d 1188, 1189 [4th Dept 2007]).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1068

CA 19-00008

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

IN THE MATTER OF JOSE COLON, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT-RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered October 25, 2018 in a CPLR article 78 proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding challenging the denial of his application for release to parole supervision after a hearing in October 2017. The Attorney General has advised this Court that, subsequent to that denial, petitioner reappeared before the Board of Parole in October 2019 and was again denied release. Consequently, this appeal must be dismissed as moot (*see Matter of Hill v Annucci*, 149 AD3d 1540, 1541 [4th Dept 2017]; *Matter of Sanchez v Evans*, 111 AD3d 1315, 1315 [4th Dept 2013]). Contrary to petitioner's contention, this matter does not fall within the exception to the mootness doctrine (*see Matter of Porter v Annucci*, 148 AD3d 1779, 1779 [4th Dept 2017]; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1070

CA 19-00105

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

JOSE M. LAGARES AND CARMEN J. RAMOS,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CARRIER TERMINAL SERVICES, INC.,
DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered October 10, 2018. The order, among other things, granted plaintiffs' motion for partial summary judgment on the issue of liability with respect to the Labor Law § 240 (1) cause of action and denied in part defendant's cross motion for summary judgment dismissing plaintiffs' amended complaint.

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

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries that Jose M. Lagares (plaintiff) sustained when he fell through the roof of defendant's building while working on a project involving the roof's removal and replacement. Defendant appeals from an order that, inter alia, granted plaintiffs' motion for partial summary judgment on the issue of liability under Labor Law § 240 (1) and denied those parts of defendant's cross motion seeking summary judgment dismissing the section 240 (1) cause of action and the section 241 (6) claim. We affirm.

Defendant contends that Supreme Court erred in granting plaintiffs' motion for partial summary judgment on the issue of liability with respect to the Labor Law § 240 (1) cause of action. We reject that contention. Plaintiffs met their initial burden on the motion by establishing that defendant's failure to provide any fall protection was a proximate cause of the accident (*see Lord v Whelan & Curry Constr. Servs., Inc.*, 166 AD3d 1496, 1497 [4th Dept 2018]; *Peters v Kissling Interests, Inc.*, 63 AD3d 1519, 1520 [4th Dept 2009],

lv denied 13 NY3d 903 [2009]; *Whiting v Dave Hennig, Inc*., 28 AD3d 1105, 1106 [4th Dept 2006]). In opposition, defendant failed to raise a triable issue of fact whether plaintiff's own negligence was the sole proximate cause of his injuries. Contrary to defendant's contention, plaintiff's mere failure to follow safety instructions cannot be said to be the sole proximate cause of the accident (*see Luna v Zoological Socy. of Buffalo, Inc*., 101 AD3d 1745, 1746 [4th Dept 2012]; *see also Stolt v General Foods Corp.*, 81 NY2d 918, 920 [1993]; *Nephew v Klewin Bldg. Co., Inc*., 21 AD3d 1419, 1420 [4th Dept 2005]). Rather, plaintiff's alleged conduct would amount only to comparative fault and thus cannot bar recovery under the statute (*see generally LoVerde v 8 Prince St. Assoc., LLC*, 35 AD3d 1224, 1226 [4th Dept 2006]).

In light of our determination, defendant's contention that the court erred in denying that part of its cross motion seeking summary judgment dismissing plaintiffs' Labor Law § 241 (6) claim is academic (*see Wilk v Columbia Univ*., 150 AD3d 502, 503 [1st Dept 2017]).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1082

KA 17-01354

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEMAR M. MCCALL, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, DAVISON LAW OFFICE PLLC (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 Ontario County Court (William F. Kocher, J.), rendered April 21, 2017. The judgment convicted defendant upon a jury verdict of robbery in the first degree and robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [4]) and robbery in the second degree (§ 160.10 [1]). Defendant contends that the verdict is against the weight of the evidence because the People's key witness on the issue of identity was not credible. We reject that contention. Even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude that "the jury was in the best position to assess the credibility of the witness[ ] and, on this record, it cannot be said that the jury failed to give the evidence the weight it should be accorded" (*People v Orta*, 12 AD3d 1147, 1147 [4th Dept 2004], *lv denied* 4 NY3d 801 [2005]; *see People v Elmore*, 175 AD3d 1003, 1005 [4th Dept 2019]). 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]). Inasmuch as he did not request an adverse inference instruction at trial, defendant failed to preserve for our review his related contention that, in performing our weight of the evidence review, we should draw an adverse inference against the People based upon their alleged failure to call certain witnesses (*see generally People v Bradley*, 108 AD3d 1101, 1102 [4th Dept 2013], *lv denied* 22 NY3d 1039 [2013]).

Defendant next contends that County Court failed to satisfy its

obligation to determine whether he was eligible for youthful offender treatment (*see generally People v Middlebrooks*, 25 NY3d 516, 525-527 [2015]; *People v Rudolph*, 21 NY3d 497, 499-501 [2013]). We reject that contention. "[A] court in an armed felony case can satisfy its obligation under *Middlebrooks* by declining to adjudicate the defendant a youthful offender after consideration on the record of factors pertinent to a determination whether an eligible youth should be adjudicated a youthful offender" (*People v Stitt*, 140 AD3d 1783, 1784 [4th Dept 2016], *lv denied* 28 NY3d 937 [2016]; *see People v Rice*, 175 AD3d 1826, 1826 [4th Dept 2019]). In this case, the court "implicitly resolved the threshold issue of eligibility in defendant's favor" (*People v Macon*, 169 AD3d 1439, 1440 [4th Dept 2019], *lv denied* 33 NY3d 978 [2019]; *see People v Keith B.J.*, 158 AD3d 1160, 1160 [4th Dept 2018]).

Contrary to the further contention of defendant, even assuming, arguendo, that defendant was eligible for youthful offender status, we conclude that the court did not abuse its discretion in refusing to grant him that status (*see Rice*, 175 AD3d at 1826; *Macon*, 169 AD3d at 1440), particularly in light of the seriousness of the offense and defendant's failure to accept any responsibility (*see People v Ford*, 144 AD3d 1682, 1683 [4th Dept 2016], *lv denied* 28 NY3d 1184 [2017]). In addition, we perceive no basis for exercising our own discretion in the interest of justice to adjudicate defendant a youthful offender (*cf. Keith B.J.*, 158 AD3d at 1160-1161; *People v Thomas R.O.*, 136 AD3d 1400, 1402-1403 [4th Dept 2016]).

Finally, the sentence is not unduly harsh or severe.

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1084

KA 17-01302

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA L. MILLER, DEFENDANT-APPELLANT.

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

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (SUSAN M. HOWARD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered October 17, 2016. The judgment convicted defendant upon his plea of guilty of attempted criminal possession of a controlled substance in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a controlled substance in the second degree (Penal Law §§ 110.00, 220.18 [2]). We reject defendant's contention that his waiver of the right to appeal was invalid. The plea colloquy establishes that defendant knowingly, voluntarily, and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]). Inasmuch as defendant's valid waiver of the right to appeal specifically included a waiver of the right to challenge the severity of the sentence and defendant was informed of "the maximum sentence [County Court] could impose in its discretion," the waiver encompasses his challenge to the severity of his sentence (*People v Lococo*, 92 NY2d 825, 827 [1998]; *see People v Lasher*, 151 AD3d 1774, 1775 [4th Dept 2017], *lv denied* 29 NY3d 1129 [2017]). Defendant's valid waiver of the right to appeal likewise encompasses his challenges to the court's suppression ruling (*see People v Antonio J.*, 173 AD3d 1743, 1744 [4th Dept 2019]; *People v Brand*, 112 AD3d 1320, 1321 [4th Dept 2013], *lv denied* 23 NY3d 961 [2014]).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1098

KA 18-00250

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID SCHMIDINGER, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (NATHANIEL V. RILEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAVID SCHMIDINGER, 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 (Robert L. Bauer, A.J.), rendered June 16, 2017. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of murder in the second degree (Penal Law § 125.25 [1]). Defendant correctly argues in his main brief that his waiver of the right to appeal is invalid because he pleaded guilty to the sole count of the indictment " 'without receiving a sentencing commitment or any other consideration' " (*People v Mitchell*, 147 AD3d 1361, 1362 [4th Dept 2017]; *see People v Gramza*, 140 AD3d 1643, 1643-1644 [4th Dept 2016], *lv denied* 28 NY3d 930 [2016]; *People v Collins*, 129 AD3d 1676, 1676 [4th Dept 2015], *lv denied* 26 NY3d 1038 [2015]). County Court's promise to *consider* imposing a sentence below the statutory maximum merely restated its preexisting statutory and common-law obligation to impose an appropriate legal sentence (*see generally People v Farrar*, 52 NY2d 302, 305-306 [1981]), and we agree with defendant that such a promise is the equivalent of no promise at all and cannot supply the consideration necessary to enforce a waiver of the right to appeal (*see generally Ogdensburgh & Lake Champlain R.R. Co. v Vermont & Can. R.R. Co.*, 63 NY 176, 180 [1875]). As the Second Circuit explained in invalidating a waiver of the right to appeal under similar circumstances, such an illusory promise is not consideration for a waiver because it affords the defendant "no benefit . . . beyond what he would have gotten by pleading guilty without an agreement" (*United States v Lutchman*, 910 F3d 33, 37 [2d Cir 2018]). We nevertheless conclude that, contrary to defendant's

contentions in his main and pro se supplemental briefs, the sentence is not unduly harsh or severe.

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1100

CAF 18-01884

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

IN THE MATTER OF STEUBEN COUNTY SUPPORT COLLECTION UNIT, STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES, ON BEHALF OF LUCY DIAZ, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN S. CREGAN, RESPONDENT-APPELLANT.

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR RESPONDENT-APPELLANT.

AMY C. KELLER, BATH, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Steuben County (Patrick F. McAllister, A.J.), entered October 3, 2018 in a proceeding pursuant to Family Court Act article 4. The order, among other things, confirmed a determination of the Support Magistrate that respondent had willfully violated an order of the court and committed respondent to the Steuben County Jail for a period of four months.

It is hereby ORDERED that said appeal from the order insofar as it concerns commitment to jail is unanimously dismissed and the order is affirmed without costs.

Memorandum: Respondent appeals from an order, inter alia, confirming the determination of the Support Magistrate that he willfully violated an order of child support and committing him to jail for a period of four months. Contrary to respondent's contention, his undisputed failure to comply with the order of child support constituted prima facie evidence of a willful violation of that order (*see* Family Ct Act § 454 [3] [a]; *Matter of Powers v Powers*, 86 NY2d 63, 69 [1995]; *Matter of Leslie v Rodriguez*, 303 AD2d 1016, 1016 [4th Dept 2003]), and the burden therefore shifted to him to rebut that prima facie showing of willfulness (*see Powers*, 86 NY2d at 69). Respondent failed to meet that burden. At the hearing, respondent testified that he was not actively seeking the type of employment that would enable him to comply with the child support order. The ability to pay child support includes the ability to find employment, and respondent failed to show that he made a reasonable effort to find gainful employment (*see Leslie*, 303 AD2d at 1017; *Matter of Fallon v Fallon*, 286 AD2d 389, 389 [2d Dept 2001]).

Finally, respondent's contention that a jail term was improperly imposed is moot because that part of the order with regard to the

commitment has expired by its own terms (*see Matter of Alex A.C. [Maria A.P.]*, 83 AD3d 1537, 1538 [4th Dept 2011]; *see generally Matter of Johnson v Boone*, 289 AD2d 938, 938 [4th Dept 2001]). We therefore dismiss respondent's appeal from that part of the order (*see Alex A.C.*, 83 AD3d at 1538).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1105

CAF 18-00729

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

IN THE MATTER OF ZACKERY C., NEVAEH L., AND NICKOLAS B.

NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KATHERINE L., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (CONNIE LOZINSKY OF COUNSEL), FOR RESPONDENT-APPELLANT.

MATTHEW E. BROOKS, LOCKPORT, FOR PETITIONER-RESPONDENT.

LAURA A. MISKELL, LOCKPORT, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Niagara County (John F. Batt, J.), entered April 3, 2018 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject children.

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

Same memorandum as in *Matter of Nevaeh L.* ([appeal No. 4] — AD3d — [Nov. 15, 2019] [4th Dept 2019]).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1106

CAF 18-00730

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

IN THE MATTER OF NEVAEH L. AND NICKOLAS B.

NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KATHERINE L., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (CONNIE LOZINSKY OF COUNSEL), FOR RESPONDENT-APPELLANT.

MATTHEW E. BROOKS, LOCKPORT, FOR PETITIONER-RESPONDENT.

LAURA A. MISKELL, LOCKPORT, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Niagara County (Erin P. DeLabio, J.), entered February 26, 2018 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that the permanency goal with respect to the subject children is adoption.

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

Same memorandum as in *Matter of Nevaeh L.* ([appeal No. 4] — AD3d — [Nov. 15, 2019] [4th Dept 2019]).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1107

CAF 18-00731

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

IN THE MATTER OF ZACKERY C.

NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KATHERINE L., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (CONNIE LOZINSKY OF COUNSEL), FOR RESPONDENT-APPELLANT.

MATTHEW E. BROOKS, LOCKPORT, FOR PETITIONER-RESPONDENT.

LAURA A. MISKELL, LOCKPORT, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Niagara County (Erin P. DeLabio, J.), entered February 26, 2018 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that the permanency goal with respect to the subject child is adoption.

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

Same memorandum as in *Matter of Nevaeh L.* ([appeal No. 4] — AD3d — [Nov. 15, 2019] [4th Dept 2019]).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1108

CAF 18-01505

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

IN THE MATTER OF NEVAEH L., NICKOLAS B.,
AND ZACKERY C.

NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KATHERINE L., RESPONDENT-APPELLANT.
(APPEAL NO. 4.)

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (CONNIE LOZINSKY OF COUNSEL), FOR RESPONDENT-APPELLANT.

MATTHEW E. BROOKS, LOCKPORT, FOR PETITIONER-RESPONDENT.

LAURA A. MISKELL, LOCKPORT, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Niagara County (Erin P. DeLabio, J.), entered August 14, 2018 in a proceeding pursuant to Family Court Act article 10. The order, among other things, placed the subject children in the custody of petitioner.

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

Memorandum: Petitioner commenced this neglect proceeding pursuant to Family Court Act article 10 alleging, inter alia, that respondent mother neglected her three children on two occasions after she consumed alcohol to the point that she was unable to care for them. During the first incident, the mother consumed alcohol during the middle of the day and, after seeing her oldest child pour out the remaining alcohol, she locked him out of the house before falling into a sleep from which she could not be awakened. The mother's younger two children, both under the age of 10 at the time, were thus left in the house without any supervision. On the second occasion, the mother again consumed alcohol and, ultimately, the oldest child observed her "passed out" on the couch with empty beer cans next to her.

In appeal No. 1, the mother appeals from a fact-finding order determining that she neglected the subject children. In appeal Nos. 2 and 3, the mother appeals from permanency orders that changed the permanency goals with respect to the children from reunification to adoption. In appeal No. 4, the mother appeals from a final order of disposition that, inter alia, directed that the mother remain under petitioner's supervision and placed the children in petitioner's

custody, to reside in foster care with their maternal grandmother and step-grandfather.

As a preliminary matter, appeal No. 1 must be dismissed inasmuch as the appeal from the dispositional order in appeal No. 4 "brings up for review the propriety of a fact-finding order" (*Matter of Lisa E.* [appeal No. 1], 207 AD2d 983, 983 [4th Dept 1994]; *see Matter of Jaime D. [James N.]* [appeal No. 2], 170 AD3d 1524, 1525 [4th Dept 2019]). We also note that, although subsequent permanency orders have been entered, appeal Nos. 2 and 3 are not moot inasmuch as the orders in those appeals changed the permanency goals for the children so as to "alter[ ] petitioner's obligations in future permanency hearings from working toward reunification to working toward permanent placement and termination of parental rights" (*Matter of Jacelyn TT. [Tonia TT.—Carlton TT.]*, 80 AD3d 1119, 1120 [3d Dept 2011]; *see Matter of Victoria B. [Jonathan M.]*, 164 AD3d 578, 580 [2d Dept 2018]; *Matter of Alexander L. [Andrea L.]*, 109 AD3d 767, 767 [1st Dept 2013], *lv dismissed* 22 NY3d 1056 [2014]).

Contrary to the mother's contention in appeal Nos. 2, 3 and 4, we conclude that Family Court properly determined that the children were neglected, i.e., that their physical, mental or emotional condition was "in imminent danger of becoming impaired as a result of" the mother's failure to exercise a minimum degree of care "in providing the child[ren] with proper supervision or guardianship" (Family Ct Act § 1012 [f] [i] [B]; *see generally Nicholson v Scoppetta*, 3 NY3d 357, 369-370 [2004]). The children had been removed from the mother's custody in 2013 and placed with her mother and stepfather due to her substance abuse issues, and the mother had relapsed twice before. The children had only recently been returned to the mother's custody when the first of the two incidents occurred. The oldest child, who was 14 years old at the time of the respective incidents, testified at the fact-finding hearing that he and his siblings were afraid of the mother when she consumed alcohol, and his testimony was corroborated by the testimony of the caseworker who interviewed the younger siblings.

Although no actual physical harm befell the children, petitioner established by a preponderance of the evidence (*see Matter of Afton C. [James C.]*, 17 NY3d 1, 9 [2011]) that the mother's " 'pattern' " of relapsing and her behavior while under the influence of alcohol created an imminent danger of emotional or mental impairment to the children (*Matter of Amodea D. [Jason D.]*, 112 AD3d 1367, 1368 [4th Dept 2013]; *see generally Nicholson*, 3 NY3d at 369-370). This is not a situation where the mother used alcohol or other substances after the children were asleep and thus ignorant of any such use (*cf. Matter of Anna F.*, 56 AD3d 1197, 1198 [4th Dept 2008]). The mother, who had a long history of problems with alcohol, was drinking and "pass[ing] out" when her children were awake and in need of her care (*see Matter of Hailey W.*, 42 AD3d 943, 944 [4th Dept 2007], *lv denied* 9 NY3d 812 [2007]). We thus conclude that there is a sound and substantial basis to support the court's determination that the mother neglected the children and that they should remain in petitioner's custody (*see*

generally Matter of Sean P. [Brandy P.], 156 AD3d 1339, 1339-1340 [4th Dept 2017], *lv denied* 31 NY3d 903 [2018]).

We reject the mother's further contention in appeal Nos. 2 and 3 that the court erred in changing the permanency goals for the children to placement for adoption. Petitioner established, by a preponderance of the evidence, that the children would be at risk of neglect if returned to the mother (*see generally Matter of Jamie J. [Michelle E.C.]*, 30 NY3d 275, 283 [2017]), and the court's determination that it was in their best interests "to change the permanency goal[s] to placement for adoption was supported by a sound and substantial basis in the record" (*Matter of Angela N.L. [Ying L.]*, 153 AD3d 1408, 1411-1412 [2d Dept 2017]; *see Matter of Diceir D.R.R. [Takeyia J.]*, 114 AD3d 948, 948 [2d Dept 2014], *lv denied* 23 NY3d 901 [2014]).

To the extent the mother contends in these appeals that the court erred in denying her Family Court Act § 1028 application for the return of her children and asks this Court to return them to her, we note that the appeal from the order denying that application was dismissed (*Matter of Nickolas B. [Katherine F.L.]*, 167 AD3d 1538, 1539 [4th Dept 2018]), and thus we do not address that contention.

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1119.1

CAF 19-00849

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

IN THE MATTER OF JEANETTE L. JAGGER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BRYAN T. JAGGER, RESPONDENT-APPELLANT.

KAMAN BERLOVE MARAFIOTI JACOBSTEIN & GOLDMAN LLP, ROCHESTER (MARGARET M. RESTON OF COUNSEL), FOR RESPONDENT-APPELLANT.

SUSAN E. GRAY, CANANDAIGUA, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Ontario County (Frederick G. Reed, A.J.), entered January 25, 2019 in a proceeding pursuant to Family Court Act article 4. The order denied respondent's objections to an order of the Support Magistrate.

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

Memorandum: Petitioner mother commenced this proceeding pursuant to Family Court Act article 4 seeking an order directing respondent father to pay child support for their two children, who were the subject of a prior order of support entered in Pennsylvania. A Support Magistrate granted the petition upon the father's default, and the father now appeals from an order of Family Court that denied his objections to the order of the Support Magistrate. In his objections, the father argued, inter alia, that the court lacked personal and subject matter jurisdiction. We conclude that the appeal must be dismissed. "[T]he proper procedure to challenge an order entered upon a default is by way of a motion to vacate the default pursuant to CPLR 5015 (a) rather than by way of the filing of objections pursuant to Family Court Act § 439 (e)" (*Matter of Chautauqua County Dept. of Social Servs. v Rita M.S.*, 94 AD3d 1509, 1510 [4th Dept 2012]; *see Matter of Bowman v Muniz*, 172 AD3d 1491, 1492 [3d Dept 2019]; *Matter of Delong v Bristol* [appeal No. 1], 117 AD3d 1566, 1566 [4th Dept 2014], *lv denied* 24 NY3d 909 [2014]).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1122

KA 18-00168

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

XAVION WILLIAMS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PIOTR BANASIAK 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 (Stephen J. Dougherty, J.), rendered September 21, 2017. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We note that, as the People correctly concede, defendant did not waive his right to appeal. We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1123

KA 17-01409

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RYAN LAWS, DEFENDANT-APPELLANT.

RYAN LAWS, DEFENDANT-APPELLANT PRO SE.

MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS (BRUCE A. ROSEKRANS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Daniel G. Barrett, J.), rendered September 22, 2016. The judgment convicted defendant, upon his plea of guilty, of robbery in the third degree and criminal possession of a forged instrument in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea and waiver of indictment are vacated, the superior court information is dismissed and the matter is remitted to Wayne County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him of robbery in the third degree (Penal Law § 160.05) and criminal possession of a forged instrument in the second degree (§ 170.25) upon his plea of guilty to a superior court information (SCI). On appeal, defendant contends that the written waiver of indictment failed to comply with CPL 195.20 inasmuch as it did not state the approximate time that he committed each offense. We agree, and we therefore reverse the judgment, vacate the plea and waiver of indictment, dismiss the SCI, and remit the matter to County Court for proceedings pursuant to CPL 470.45 (*see generally People v Walker*, 148 AD3d 1570, 1570 [4th Dept 2017]).

A written waiver of indictment must be executed in strict compliance with the requirements of CPL 195.20 (*see People v Vaughn*, 173 AD3d 1260, 1261 [3d Dept 2019]; *People v Edwards*, 171 AD3d 1402, 1403 [3d Dept 2019]), which in relevant part provides that such a waiver shall contain the "approximate time . . . of each offense to be charged in the [SCI]" (CPL 195.20). The People correctly concede that the written waiver of indictment failed to contain the approximate time of each offense and, because strict compliance with CPL 195.20 is required, we agree with defendant that the waiver was defective (*see People v Colon-Colon*, 169 AD3d 187, 193 [4th Dept 2019], *lv denied* 33 NY3d 975 [2019]). Contrary to the People's contention, even if we

assume, arguendo, that we are able to read an SCI in conjunction with a written waiver of indictment in order to cure a defect therein, that would not cure the defect in the written waiver in this case because the SCI does not state the approximate time of each offense (*see generally Vaughn*, 173 AD3d at 1261).

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

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1124

KA 17-01085

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WALTER C. O'CONNOR, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

ADAM H. VAN BUSKIRK, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered October 6, 2016. The judgment convicted defendant upon his plea of guilty of grand larceny in the third degree.

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

Memorandum: In appeal Nos. 1 and 2, defendant appeals from judgments convicting him upon his respective pleas of guilty of grand larceny in the third degree (Penal Law § 155.35 [1]) and attempted assault in the second degree (§§ 110.00, 120.05 [2]). In appeal No. 3, defendant appeals from an amended order that set the amount of restitution related to the conviction of grand larceny in the third degree at $7,100.

Addressing appeal No. 3 first, contrary to defendant's contention, the amount of restitution is supported by a preponderance of the evidence. It is well settled that the People have the burden at a restitution hearing to establish "the victim's out-of-pocket loss—the amount necessary to make the victim whole—by a preponderance of the evidence" (*People v Tzitzikalakis*, 8 NY3d 217, 221 [2007]; *see People v Consalvo*, 89 NY2d 140, 145 [1996]). "Any relevant evidence, not legally privileged, may be received regardless of its admissibility under the exclusionary rules of evidence" (CPL 400.30 [4]). Here, we conclude that County Court properly determined the amount of restitution based on defendant's admission during the plea proceedings in appeal No. 1 that he stole $7,100 from the victim (*see People v Spossey*, 107 AD3d 1420, 1420-1421 [4th Dept 2013], *lv denied* 22 NY3d 1159 [2014]; *People v Price*, 277 AD2d 955, 955-956 [4th Dept 2000]); *see generally People v Connolly*, 27 NY3d 355, 360 [2018]).

We reject defendant's contention in appeal No. 3 that the court abused its discretion in denying his request to substitute counsel prior to the restitution hearing. The court made the requisite "minimal inquiry" into defendant's objections concerning his attorney (*People v Sides*, 75 NY2d 822, 825 [1990]), and reasonably determined that defendant had not shown good cause for substitution (*see People v Jones*, 149 AD3d 1576, 1578 [4th Dept 2017], *lv denied* 29 NY3d 1129 [2017]; *People v Blackwell*, 129 AD3d 1690, 1691 [4th Dept 2015], *lv denied* 26 NY3d 926 [2015]). We further conclude in appeal No. 3 that defendant was not deprived of effective assistance of counsel during the restitution hearing (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, in appeal Nos. 1 and 2, defendant's sentence is not unduly harsh or severe.

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1125

KA 17-01086

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WALTER C. O'CONNOR, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ADAM H. VAN BUSKIRK, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered October 6, 2016. The judgment convicted defendant upon his plea of guilty of attempted assault in the second degree.

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

Same memorandum as in *People v O'Connor* ([appeal No. 1] — AD3d — [Nov. 15, 2019] [4th Dept 2019]).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1126

KA 18-01980

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WALTER C. O'CONNOR, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

ADAM H. VAN BUSKIRK, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from an amended order of the Cayuga County Court (Thomas G. Leone, J.), dated September 24, 2018. The amended order directed defendant to pay restitution.

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

Same memorandum as in *People v O'Connor* ([appeal No. 1] — AD3d — [Nov. 15, 2019] [4th Dept 2019]).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1127

KA 18-00875

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESSICA GAZZILLO, 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 (Daniel R. King, J.), rendered November 17, 2017. The judgment convicted defendant upon a jury verdict of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). We reject defendant's contention that County Court erred in refusing to dismiss the indictment pursuant to CPL 210.35 (5). " '[T]here is no indication that the People knowingly or deliberately presented false testimony before the [g]rand [j]ury, and thus there is no basis for finding that the integrity of the [g]rand [j]ury proceeding[] was impaired' " (*People v Williams*, 163 AD3d 1422, 1422 [4th Dept 2018]; *see People v Morales*, 160 AD3d 1414, 1418 [4th Dept 2018], *lv denied* 32 NY3d 939 [2018]; *People v Bean*, 66 AD3d 1386, 1386 [4th Dept 2009], *lv denied* 14 NY3d 769 [2010]). We further conclude that, insofar as defendant sought dismissal of the indictment in the interest of justice under CPL 210.40 based, inter alia, on alleged misconduct during the grand jury proceeding, the court did not abuse its discretion in refusing to dismiss the indictment on that ground. The court afforded the parties an opportunity to be heard and create a record, including the questioning of the grand jury prosecutor in connection with defendant's allegations of misconduct, and, upon review of the record, we agree with the court that this is not one of those "rare cases where there is a compelling factor which clearly demonstrates that prosecution of the indictment would be an injustice" (*People v Quadrozzi*, 55 AD3d 93, 103 [2d Dept 2008], *lv denied* 12 NY3d

761 [2009] [internal quotation marks omitted]; *see People v May*, 100 AD3d 1411, 1413 [4th Dept 2012], *lv denied* 20 NY3d 1063 [2013]).

Defendant further contends that she was denied her right to a fair trial by the cumulative effect of the allegations rejected above and the prosecutor's failure to disclose *Brady* material. Even assuming, arguendo, that a *Brady* violation did occur, we conclude that there was no violation of defendant's right to a fair trial because she was "given a meaningful opportunity to use the allegedly exculpatory material to cross-examine the People's witnesses or as evidence during [her] case" (*People v Cortijo*, 70 NY2d 868, 870 [1987]; *see People v McMillian*, 158 AD3d 1059, 1060 [4th Dept 2018], *lv denied* 31 NY3d 1119 [2018]).

Finally, 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]).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1128

KA 16-00851

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NICHOLAS A. NICORVO, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

MARK A. FOTI, ROCHESTER, FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (NICOLE L. KYLE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered September 22, 2015. The judgment convicted defendant upon his plea of guilty of attempted murder in the second degree.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is affirmed.

Same memorandum as in *People v Nicorvo* ([appeal No. 2] — AD3d — [Nov. 15, 2019] [4th Dept 2019]).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1129

KA 16-00852

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NICHOLAS A. NICORVO, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

MARK A. FOTI, ROCHESTER, FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (NICOLE L. KYLE OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Jefferson County Court (Kim H. Martusewicz, J.), rendered October 2, 2015. Defendant was resentenced upon his conviction of attempted murder in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him as a juvenile offender upon his plea of guilty of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and, in appeal No. 2, he appeals from a resentence placing him in the custody of the New York State Office of Children and Family Services. We note at the outset that, inasmuch as the sentence in appeal No. 1 was superseded by the resentence in appeal No. 2, the appeal from the judgment in appeal No. 1 insofar as it imposed sentence must be dismissed (*see People v Primm*, 57 AD3d 1525, 1525 [4th Dept 2008], *lv denied* 12 NY3d 820 [2009]).

We reject defendant's contention that County Court erred in refusing to suppress his statements to law enforcement that were made prior to *Miranda* warnings being given. The evidence at the suppression hearing established that the statements were made in response to the officers' questioning of him pursuant to the emergency doctrine (*see People v Harris*, 129 AD3d 1522, 1522-1523 [4th Dept 2015], *lv denied* 27 NY3d 998 [2016]; *see generally People v Doll*, 21 NY3d 665, 670-671 [2013], *rearg denied* 22 NY3d 1053 [2014], *cert denied* 572 US 1022 [2014]). Contrary to defendant's further contention, the court did not abuse its discretion in declining to grant youthful offender status (*see People v Abdul-Jaleel*, 142 AD3d 1296, 1298-1299 [4th Dept 2016], *lv denied* 29 NY3d 946 [2017]), and we decline to exercise our interest of justice jurisdiction to adjudicate

defendant a youthful offender (*see id.* at 1299).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1133

KA 16-01623

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAMIEN TRIPP, DEFENDANT-APPELLANT.

LINDA M. CAMPBELL, SYRACUSE, FOR DEFENDANT-APPELLANT.

DAMIEN TRIPP, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Walter W. Hafner, Jr., A.J.), rendered June 20, 2016. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree (two counts) and assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that all of the sentences imposed shall run concurrently and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]) and one count of assault in the second degree (§ 120.05 [2]). Defendant shot the victim in the leg during an argument at a party in October 2014, and the same victim was shot and killed by a masked gunman approximately one month later, in November 2014. After the victim's murder, several people who had attended the October 2014 party identified defendant as having been present that night and as having shot the victim. Defendant was charged with both assault and murder, but was convicted only with respect to the charges associated with the October 2014 shooting, and was acquitted on all charges related to the November 2014 murder.

We reject defendant's contention in his main brief that verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Four witnesses to the October 2014 shooting testified that defendant was present on the night that the victim was shot, that he argued with the victim, and that he fired a gun in the victim's direction. Although defendant identifies reasons to question the witnesses' veracity, "the testimony of the

People's witnesses was not incredible as a matter of law, i.e., it was not impossible of belief because it is manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Perkins*, 160 AD3d 1455, 1457 [4th Dept 2018], *lv denied* 31 NY3d 1151 [2018] [internal quotation marks omitted]; *see People v Resto*, 147 AD3d 1331, 1334 [4th Dept 2017], *lv denied* 29 NY3d 1000 [2017], *reconsideration denied* 29 NY3d 1094 [2017]; *People v Griffin*, 128 AD3d 1218, 1219-1220 [3d Dept 2015], *lv denied* 27 NY3d 998 [2016], *reconsideration denied* 27 NY3d 1151 [2016]). " 'Where, as here, witness credibility is of paramount importance to the determination of guilt or innocence,' we must afford great deference to the fact-finder's opportunity to view the witnesses, hear their testimony and observe their demeanor" (*People v Friello*, 147 AD3d 1519, 1520 [4th Dept 2017], *lv denied* 29 NY3d 1031 [2017]), and we conclude that the jury properly considered the issues of credibility, including the inconsistencies in the witnesses' testimony, and there is no basis for disturbing its determinations (*see People v Rogers*, 70 AD3d 1340, 1340 [4th Dept 2010], *lv denied* 14 NY3d 892 [2010], *cert denied* 562 US 969 [2010]). With respect to defendant's contention that the evidence did not establish that he intended to shoot the victim because some of the witnesses testified that defendant shot at the ground, the jury could have reasonably inferred that defendant was aiming his gun at the victim with intent to cause him physical injury based on the evidence that defendant had been arguing with the victim prior to the shooting, and that witnesses testified that defendant fired multiple shots from close range in the victim's direction (*see People v Tatis*, 170 AD3d 45, 50-51 [1st Dept 2019], *lv denied* 33 NY3d 981 [2019]).

We agree with defendant in his main brief, however, that the sentence is illegal insofar as County Court directed that the sentences imposed on the two counts charging criminal possession of a weapon in the second degree run consecutively to the sentence imposed on the count charging assault in the second degree. We note that defendant's contention does not require preservation (*see People v Fuentes*, 52 AD3d 1297, 1300-1301 [4th Dept 2008], *lv denied* 11 NY3d 736 [2008]). The People had the burden of establishing that consecutive sentences were legal, i.e., that the crimes were committed through separate acts or omissions (*see People v Rodriguez*, 25 NY3d 238, 244 [2015]; *see generally* Penal Law § 70.25 [2]), and they failed to meet that burden. With respect to the count charging criminal possession of a weapon in the second degree under Penal Law § 265.03 (1) (b), "the People neither alleged nor proved that defendant's possession [of the gun] was marked by an unlawful intent separate and distinct from his intent to shoot the victim[]" (*People v Wright*, 19 NY3d 359, 367 [2012]). With respect to the count charging criminal possession of a weapon in the second degree under Penal Law § 265.03 (3), there was no evidence presented at trial that defendant's act of possessing a loaded firearm "was separate and distinct from" his act of shooting the victim (*People v Harris*, 115 AD3d 761, 763 [2d Dept 2014], *lv denied* 23 NY3d 1062 [2014], *reconsideration denied* 24 NY3d 1084 [2014]; *see People v Houston*, 142 AD3d 1397, 1399 [4th Dept 2016], *lv denied* 28 NY3d 1146 [2017]; *see generally People v Brown*, 21 NY3d 739, 750-752 [2013]). We therefore modify the judgment by

directing that all of the sentences shall run concurrently. The sentence, as modified, is not unduly harsh or severe.

Defendant contends in his pro se supplemental brief that he was denied his right to present a defense when the court refused to allow him to call a witness who had indicated, outside the presence of the jury, that he would invoke his privilege against self-incrimination. We reject that contention. "[T]he decision whether to permit defense counsel to call a particular witness solely 'to put him to his claim of privilege against self[-]incrimination in the presence of the jury' rests within the sound discretion of the trial court" (*People v Thomas*, 51 NY2d 466, 472 [1980]; *see People v Grimes*, 289 AD2d 1072, 1073 [4th Dept 2001], *lv denied* 97 NY2d 755 [2002]), and we perceive no abuse of discretion here.

Contrary to defendant's further contention in his pro se supplemental brief, the court did not abuse its discretion in denying defendant's request for a day's adjournment to prepare for summations. "The decision whether to grant an adjournment lies in the sound discretion of the trial court . . . and the court's exercise of that discretion 'in denying a request for an adjournment will not be overturned absent a showing of prejudice' " (*People v Adair*, 84 AD3d 1752, 1754 [4th Dept 2011], *lv denied* 17 NY3d 812 [2011]; *see Resto*, 147 AD3d at 1332). Defendant has made no showing that he was prejudiced by the court's ruling.

Defendant failed to preserve for our review his contention in his pro se supplemental brief that the prospective jurors were not given the requisite oath pursuant to CPL 270.15 (1) (a) (*see People v Gaston*, 104 AD3d 1206, 1207 [4th Dept 2013], *lv denied* 22 NY3d 1156 [2014]; *People v Schrock*, 73 AD3d 1429, 1432 [4th Dept 2010], *lv denied* 15 NY3d 855 [2010]). In any event, that contention is not supported by the record.

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1134

KA 17-01078

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DERRICK W. MCDERMID, DEFENDANT-APPELLANT.

PETER J. DIGIORGIO, JR., 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 (Daniel R. King, J.), rendered April 7, 2017. The judgment convicted defendant upon his plea of guilty of manslaughter in the first degree, assault in the first degree, assault in the second degree (two counts) and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, manslaughter in the first degree (Penal Law § 125.20 [4]) and assault in the first degree (§ 120.10 [3]). We agree with defendant that his oral waiver of the right to appeal from his "conviction" does not encompass his challenge to the severity of the sentence and thus does not foreclose our review of that challenge (*see People v Maracle*, 19 NY3d 925, 927-928 [2012]; *People v Tomeno*, 141 AD3d 1120, 1120 [4th Dept 2016], *lv denied* 28 NY3d 974 [2016]). Although defendant also executed a written waiver of the right to appeal, that waiver failed to state that defendant was waiving his right to appeal the severity of the sentence (*see Tomeno*, 141 AD3d at 1121). Contrary to defendant's contention, however, the sentence is not unduly harsh or severe. Defendant's further contention that the sentence constitutes cruel and unusual punishment is not preserved for our review (*see People v Pena*, 28 NY3d 727, 730 [2017]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

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

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court

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

1136

CAF 19-00876

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

IN THE MATTER OF ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, ON BEHALF OF CHEYENNE M. JOHNSON, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MOHAMMED ABU-ZAMAQ, RESPONDENT-RESPONDENT.

TRACY L. PUGLIESE, ROME, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered December 21, 2018 in a proceeding pursuant to Family Court Act article 4. The order denied the objection of petitioner to an order of a Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the objection is granted, the petition is granted in its entirety, and the matter is remitted to Family Court, Oneida County, for further proceedings in accordance with the following memorandum: Petitioner appeals from an order denying its objection to an order of the Support Magistrate, which had denied in part its petition seeking, inter alia, an upward modification of respondent father's support obligation. On appeal, petitioner contends that the Support Magistrate erred in directing that the modification of child support be retroactive to July 30, 2018, i.e., the date on which petitioner filed the petition, instead of May 30, 2018, i.e., the date on which the father became employed, and that Family Court therefore should have granted its objection. We agree.

The court erroneously concluded that the modification of child support could only be retroactive to the date petitioner filed the petition. Because it is undisputed that the father did not notify the Support Collection Unit of his change in employment status as required by the prior support order, the court had the authority to modify the child support payments retroactive to the date of his employment on May 30, 2018 (*see Matter of Department of Social Servs. v Douglas D.*, 226 AD2d 633, 634 [2d Dept 1996]; *Matter of Monroe County Dept. of Social Servs. v Campbell*, 161 AD2d 1176, 1177 [4th Dept 1990]; *see also* Family Ct Act § 451). We therefore reverse the order on appeal, grant the objection, grant the petition in its entirety, and remit the matter to Family Court for a determination of the correct amount of

arrears.

Entered: November 15, 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 19-00212

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

KATE MODAFFERI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TIFFANY A. DIMATTEO, DEFENDANT-RESPONDENT.

COTE & VAN DYKE, LLP, SYRACUSE (JOSEPH S. COTE, III, OF COUNSEL), FOR PLAINTIFF-APPELLANT.

THE LAW OFFICES OF JOHN TROP, DEWITT (KEVIN M. MATHEWSON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered August 27, 2018. The order granted the motion of defendant for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff was walking her leashed small breed dog by defendant's home when defendant's two dogs escaped from defendant's fenced backyard. One of defendant's dogs attacked plaintiff's dog and, as plaintiff attempted to separate the dogs, she was bitten by defendant's dog. Supreme Court granted defendant's motion for summary judgment dismissing the complaint. 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" (*Collier*, 1 NY3d at 447; *see Long v Hess*, 162 AD3d 1646, 1647 [4th Dept 2018]).

Even assuming, arguendo, that defendant met her initial burden on the motion, we conclude that plaintiff raised an issue of fact to defeat that motion. Plaintiff submitted her own affidavit, wherein she stated that, after she was bitten, defendant told her that defendant "was aware of the risk that her dogs would attack small dogs." It was "foreseeable that if [defendant's dog] attacked another dog, someone would attempt to pull the dogs apart and be injured in the process" (*Morse v Colombo*, 8 AD3d 808, 809 [3d Dept 2004]). Thus, we conclude that issues of fact exist whether defendant's dog had a vicious propensity and whether defendant had knowledge of that propensity (*see Pollard v United Parcel Serv.*, 302 AD2d 884, 884 [4th Dept 2003]; *see generally Bavifard v Capretto*, 169 AD3d 1402, 1403 [4th Dept 2019]).

Entered: November 15, 2019

Mark W. Bennett
Clerk of the Court