SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

OCTOBER 9, 2015

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. JOSEPH D. VALENTINO

HON. GERALD J. WHALEN

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

672

CA 14-01761

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

PETER E. GREVELDING, JR., AS EXECUTOR OF THE
ESTATE OF JASON M. RHOADES, CLAIMANT-RESPONDENT,

V ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 109855.)
(APPEAL NO. 1.)

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

MACKENZIE HUGHES LLP, SYRACUSE (W. BRADLEY HUNT OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Court of Claims (Diane L. Fitzpatrick, J.), entered June 26, 2014. The order awarded claimant money damages after a trial.

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

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

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

673

CA 14-01762

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

PETER E. GREVELDING, JR., AS EXECUTOR OF THE ESTATE OF JASON M. RHOADES, CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 109855.)
(APPEAL NO. 2.)

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

MACKENZIE HUGHES LLP, SYRACUSE (W. BRADLEY HUNT OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Diane L. Fitzpatrick, J.), entered July 16, 2014. The judgment awarded claimant money damages after a trial.

It is hereby ORDERED that the judgment so appealed from is modified on the law by setting aside the award of damages for past and future loss of parental guidance, and as modified the judgment is affirmed without costs, and a new trial is granted on damages for past and future loss of parental guidance only unless claimant, within 20 days of service of a copy of the order of this Court with notice of entry, stipulates to reduce the award of damages for past loss of parental guidance to $500,000 per child, and the award of damages for future loss of parental guidance to $900,000 for decedent’s son and $1,000,000 for decedent’s daughter, in which event the judgment is modified accordingly and as modified the judgment is affirmed without costs.

Memorandum: Claimant’s decedent died of injuries he sustained when the vehicle he was driving vaulted off of the Park Street bridge over Interstate 81 in the City of Syracuse, flipped over in mid-air, and landed on its roof. The evidence at trial established that defendant plowed the snow from the bridge surface so that it formed an inclined snowbank that acted as a ramp extending from the road surface of the bridge to the top of the concrete barrier guard at the edge of the bridge. Decedent started to cross the bridge but lost control of his vehicle on the icy surface, slid up the ramped snowbank, and vaulted over the barrier, dropping to the pavement below. Defendant removed the snowbank from the bridge only after a second fatal vaulting accident occurred 36 hours later at the same location.

Claimant commenced this action seeking damages for, inter alia, wrongful death. Following a trial on liability, the Court of Claims dismissed the claim but, on appeal, we "conclude[d] under the circumstances of this case that defendant is liable for creating the dangerous condition, which was a proximate cause of decedent's accident" (*Grevelding v State of New York*, 91 AD3d 1309, 1310). We remitted the matter for "a new trial on the issues of decedent's alleged contributory negligence and damages, to be apportioned in the event that contributory negligence on the part of decedent is found" (*id*. at 1311). At the conclusion of the new trial, the court held "that [d]efendant has not established that any comparative negligence of [decedent] contributed to the cause of his injuries and death," and granted judgment in favor of claimant, including an award of damages of $900,000 to each of decedent's two children for past loss of parental care, guidance, and nurturing (hereafter, parental guidance), and an award of damages of $1,100,000 to decedent's son and $1,300,000 to decedent's daughter for future loss of parental guidance.

Defendant contends that decedent was negligent by, among other things, operating the vehicle with inadequate tires, pulling a trailer that was loaded unevenly, and failing to activate the vehicle's four-wheel-drive mode, that such negligence was a proximate cause of decedent's injuries, and that the court therefore erred in not apportioning any liability to decedent. We reject that contention. Mindful that the findings of the court are entitled to deference because it was in a position to observe the witnesses and view the evidence firsthand (*see Muhammad v State of New York*, 15 AD3d 807, 808; *Morrisseau v State of New York*, 237 AD2d 803, 804), we conclude that there is a " 'fair interpretation of the evidence' " supporting the court's finding that defendant failed to meet its burden of establishing that decedent was negligent, and its finding that, even assuming, arguendo, decedent was negligent, such negligence was not a proximate cause of decedent's injuries (*Guyotte v State of New York*, 22 AD2d 975, 975, *lv denied* 15 NY2d 483). Indeed, the evidence supports the court's finding that, even if decedent was negligent in the operation of his vehicle, such negligence would not have resulted in the vehicle leaving the roadway. Rather, the snow ramp defendant negligently created was the sole proximate cause of decedent's vehicle vaulting over the concrete guard barrier. Thus, the court reasonably concluded based on the evidence that defendant's negligence in creating the dangerous condition that rendered the concrete barrier guard ineffective was the sole proximate cause of decedent's injuries (*see generally Popolizio v County of Schenectady*, 62 AD3d 1181, 1183-1184; *Starr v Cambridge Homeowners Assn*., 300 AD2d 779, 780).

We reject defendant's contention that the court's award of damages was duplicative insofar as it included damages for both loss of inheritance and economic damages (*see e.g. Motelson v Ford Motor Co.*, 101 AD3d 957, 962-963, *affd* 24 NY3d 1025). Defendant's further contention that the award of damages for loss of inheritance is speculative is without merit. "The calculation of damages for loss of inheritance is generally a question of fact for the [factfinder], and does not require 'dollars and cents proof' " (*id.* at 962, quoting *Parilis v Feinstein*, 49 NY2d 984, 985). Here, we conclude that the

award of damages for loss of inheritance was properly "based upon the decedent's age, character, earning capacity, life expectancy, and the circumstances of the distributees" (*id.* at 962-963).

We further conclude, however, that the award of damages for loss of parental guidance deviates materially from what would be considered reasonable compensation and therefore must be set aside (*see* CPLR 5501 [c]). We instead conclude that awards of damages of $500,000 per child for past loss of parental guidance, and $900,000 for decedent's son and $1,000,000 for decedent's daughter for future loss of parental guidance would be reasonable compensation for the children's losses (*see Carlson v Porter* [appeal No. 2], 53 AD3d 1129, 1133-1134, *lv denied* 11 NY3d 708; *Adderley v City of New York*, 304 AD2d 485, 486, *lv denied* 100 NY2d 511; *cf. Snuzski v Wright*, 34 AD3d 1235, 1236, *appeal dismissed* 8 NY3d 980; *Bogen v State of New York*, 5 AD3d 521, 521). We therefore modify the judgment accordingly, and we grant a new trial on damages for past and future loss of parental guidance only unless claimant, within 20 days of service of a copy of the order of this Court with notice of entry, stipulates to reduce the award of damages for past loss of parental guidance to $500,000 per child and for future loss of parental guidance to $900,000 for decedent's son and $1,000,000 for decedent's daughter, in which event the judgment is modified accordingly.

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

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

674

CA 14-02239

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

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

V ORDER

ADIRONDACK INSURANCE EXCHANGE,
DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, SYRACUSE (HEATHER ZIMMERMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered March 4, 2014. The order, insofar as appealed from, denied in part the motion of defendant to dismiss the amended complaint.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on July 17, 2015, and filed in the Onondaga County Clerk's Office on July 17, 2015,

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

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

832

CA 14-02201

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

FARASA BROWN, PLAINTIFF-RESPONDENT,

V ORDER

WILLIAM PHIPPS, DEFENDANT-APPELLANT.

CABANISS CASEY LLP, ALBANY (BRIAN D. CASEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPSITZ & PONTERIO LLC, BUFFALO (NEIL J. MCKINNON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered September 27, 2014. The order withdrew the order of the court entered February 21, 2014, denied the motion of defendant for summary judgment and reinstated the complaint.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on July 15, 2015, and filed in the Monroe County Clerk’s Office on July 30, 2015,

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

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

904

CAF 14-01146

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

IN THE MATTER OF GRETCHEN R. BURNS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ROBERT J. HERROD, RESPONDENT-RESPONDENT.

IN THE MATTER OF ROBERT J. HERROD,
PETITIONER-RESPONDENT,

V

GRETCHEN R. BURNS, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

SUSAN JAMES, WATERLOO, FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

TERRENCE J. BAXTER, CORNING, FOR RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT.

WENDY S. SISSON, ATTORNEY FOR THE CHILDREN, GENESEO.

Appeal from an order of the Family Court, Allegany County (Thomas P. Brown, J.), entered May 15, 2014 in a proceeding pursuant to Family Court Act article 6. The order dismissed the modification and violation petitions of Gretchen R. Burns and granted the modification petitions of Robert J. Herrod.

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

Memorandum: In these consolidated appeals, petitioner-respondent mother appeals from three orders that, following a hearing, dismissed the mother's modification and violation petitions, granted respondent-petitioner father's cross petitions seeking, inter alia, to modify a prior order of custody and visitation, and awarded the father sole custody of the parties' children with limited visitation to the mother. Contrary to the contention of the mother and the Attorney for the Children, we conclude that Family Court's best interests determination is supported by a sound and substantial basis in the record and that the court properly considered the appropriate factors in awarding sole custody to the father (*see Matter of Tarrant v Ostrowski*, 96 AD3d 1580, 1582, *lv denied* 20 NY3d 855; *see generally*

Fox v Fox, 177 AD2d 209, 210). " 'It is well settled . . . that [a] concerted effort by one parent to interfere with the other parent's contact with the child[ren] is so inimical to the best interests of the child[ren] . . . as to, per se, raise a strong probability that [the interfering parent] is unfit to act as custodial parent' " (*Matter of Orzech v Nikiel*, 91 AD3d 1305, 1306), and here the evidence established that the mother made numerous unfounded reports of alleged abuse of the children to Child Protective Services (*see Matter of Gelster v Burns*, 122 AD3d 1294, 1295-1296, *lv denied* 24 NY3d 915; *Matter of Eck v Eck*, 57 AD3d 1243, 1244-1245; *Matter of Beyer v Tranelli-Ashe*, 195 AD2d 972, 972-973). The evidence further established that the mother violated a prior court order forbidding her from taking the children with her to visit her husband in prison (*see Matter of Lopez v Lugo*, 115 AD3d 1237, 1238). In addition, the record supports the court's determination that the father was able to provide a more stable home environment and was better able to meet the children's needs than the mother, who suffered from mental health issues, was unfamiliar with the children's developmental and educational needs, and had repeatedly relocated to the detriment of the children (*see e.g. Matter of Tod ZZ. v Paula ZZ.*, 113 AD3d 1005, 1006-1007; *Matter of Moore v Moore*, 78 AD3d 1630, 1630-1631, *lv denied* 16 NY3d 704). Although the mother is correct that the children's wishes were a necessary factor to consider, "the '[c]ourt [was], of course, not required to abide by the wishes of [the] child[ren] to the exclusion of other factors in the best interests analysis' " (*Matter of Marino v Marino*, 90 AD3d 1694, 1696). "[A] court's determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record" (*id.* at 1695 [internal quotation marks omitted]), and here there is ample evidence to support the court's award of sole custody of the children to the father with limited visitation to the mother.

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

905

CAF 14-01147

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

IN THE MATTER OF GRETCHEN R. BURNS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ROBERT J. HERROD, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

SUSAN JAMES, WATERLOO, FOR PETITIONER-APPELLANT.

TERRENCE J. BAXTER, CORNING, FOR RESPONDENT-RESPONDENT.

WENDY S. SISSON, ATTORNEY FOR THE CHILDREN, GENESEO.

Appeal from an order of the Family Court, Allegany County (Thomas P. Brown, J.), entered May 15, 2014 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for a modification of custody and visitation.

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

Same memorandum as in *Matter of Burns v Herrod* ([appeal No. 1] ___ AD3d ___ [Oct. 9, 2015]).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

906

CAF 14-01148

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

IN THE MATTER OF ROBERT J. HERROD,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

GRETCHEN R. BURNS, RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

SUSAN JAMES, WATERLOO, FOR RESPONDENT-APPELLANT.

TERRENCE BAXTER, CORNING, FOR PETITIONER-RESPONDENT.

WENDY S. SISSON, ATTORNEY FOR THE CHILDREN, GENESEO.

Appeal from an order of the Family Court, Allegany County (Thomas P. Brown, J.), entered May 15, 2014 in a proceeding pursuant to Family Court Act article 6. The order granted sole custody of the parties' children to Robert J. Herrod with visitation to Gretchen R. Burns.

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

Same memorandum as in *Matter of Burns v Herrod* ([appeal No. 1] ___ AD3d ___ [Oct. 9, 2015]).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

945

TP 15-00425

PRESENT: SMITH, J.P., CARNI, LINDLEY, VALENTINO, AND DEJOSEPH, JJ.

IN THE MATTER OF JERMAINE FANN, PETITIONER,

V MEMORANDUM AND ORDER

L.T. BRIGHT AND SUPERINTENDENT DOLCE,
RESPONDENTS.

JERMAINE FANN, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Orleans County [James P. Punch, A.J.], entered March 10, 2015) to review a determination of respondents. The determination found after a tier II hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the order transferring this proceeding is unanimously vacated without costs.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier II disciplinary hearing, that he violated certain inmate rules. Supreme Court denied the petition, and petitioner filed a notice of appeal from the judgment. Rather than perfecting his appeal from the judgment, however, petitioner moved to transfer the proceeding to this Court pursuant to CPLR 7804 (g), and the court granted the motion. That was error, inasmuch as the proceeding terminated in the judgment, and thus there was no proceeding pending in Supreme Court that could be transferred pursuant to CPLR 7804 (g). Instead, petitioner's remedy was to perfect his appeal. We therefore vacate as void the order transferring the proceeding to this Court (*see generally Matter of Drumm v Shah*, 107 AD3d 1476, 1476).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

948

TP 15-00352

PRESENT: SMITH, J.P., CARNI, LINDLEY, VALENTINO, AND DEJOSEPH, JJ.

IN THE MATTER OF ALEX SHOGA, PETITIONER,

V MEMORANDUM AND ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered February 27, 2015) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination is unanimously annulled on the law without costs, the amended petition is granted in part and the matter is remitted to respondent for further proceedings in accordance with the following memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, finding him guilty of violating various inmate rules. Although we conclude that the determination is supported by substantial evidence (*see Matter of Spears v Fischer*, 103 AD3d 1135, 1136), respondent correctly concedes that the determination must be annulled and remitted for a new hearing. The disciplinary hearing was adjourned pending the availability of additional witnesses and, when the hearing was reconvened, the Hearing Officer stated on the record that petitioner had been verbally inappropriate and abusive during the adjournment and that she was therefore excluding him from the remainder of the proceeding. The record, however, does not establish what petitioner's conduct was during the adjournment, and thus we are unable to determine whether the Hearing Officer properly excluded petitioner from the remainder of the hearing. The statements made during the adjournment were not recorded, and the Hearing Officer merely stated in a conclusory manner on the record that petitioner was verbally inappropriate and abusive, without specifying what petitioner said to her. We therefore conclude that the determination must be annulled,

and we remit the matter to respondent for a new hearing (*see generally Matter of Nova v Fischer*, 112 AD3d 1234, 1234, *lv denied* 22 NY3d 866; *Matter of Barnes v Fischer*, 108 AD3d 990, 990-991, *lv denied* 22 NY3d 855). Because we are remitting the matter for a new hearing rather than granting all of the relief sought in the amended petition, i.e., expungement of the charges, we are granting the amended petition only in part.

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

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

954

CA 15-00280

PRESENT: SMITH, J.P., CARNI, LINDLEY, VALENTINO, AND DEJOSEPH, JJ.

IN THE MATTER OF EXCELSIOR, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ASSESSOR, TOWN OF AMHERST, ET AL., RESPONDENTS,
AND AMHERST CENTRAL SCHOOL DISTRICT,
INTERVENOR-RESPONDENT.

WOLFGANG & WEINMANN, LLP, BUFFALO (PETER ALLEN WEINMANN OF COUNSEL), FOR PETITIONER-APPELLANT.

HODGSON RUSS LLP, BUFFALO (JOSHUA FEINSTEIN OF COUNSEL), FOR INTERVENOR-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered April 17, 2014 in a proceeding pursuant to RPTL article 7. The order, among other things, denied the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: We agree with petitioner that Supreme Court failed to comply with RPTL 720 (2) by failing "to set forth the essential facts upon which it relied in arriving at its determination of the fair value of the property during the tax year[] in question" (*Matter of Zacher v Assessor of Town of Hamburg*, 217 AD2d 945, 945; *see Matter of South Slope Holding Corp. v Board of Assessment Review of Town of Jerusalem*, 254 AD2d 684, 686). Consequently, the order must be reversed and the matter remitted to Supreme Court to comply with RPTL 720 (2). We note, however, that the court may not set an assessment in excess of the total assessment on the tax roll (*see Matter of Shubert Org. v Tax Commn. of City of N.Y.*, 60 NY2d 93, 95).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

955

CA 15-00234

PRESENT: SMITH, J.P., CARNI, LINDLEY, VALENTINO, AND DEJOSEPH, JJ.

RONALD KIMBALL, JR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LAWRENCE E. NORMANDEAU, JR., RONALD MATTESON, DONNA MATTESON, MICHELLE T. NORMANDEAU AND WILLIAM MARONEY, DEFENDANTS-RESPONDENTS.

ATHARI & ASSOCIATES, LLC, NEW HARTFORD (MO ATHARI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KNYCH & WHRITENOUR, LLC, SYRACUSE (MATTHEW E. WHRITENOUR OF COUNSEL), FOR DEFENDANT-RESPONDENT WILLIAM MARONEY.

LEWIS, BRISBOIS, BISGAARD & SMITH, LLP, NEW YORK CITY (MARSHA E. HARRIS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS LAWRENCE E. NORMANDEAU, JR. AND MICHELLE T. NORMANDEAU.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (RICHARD L. WEBER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS RONALD MATTESON AND DONNA MATTESON.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered May 30, 2014 in a personal injury action. The order, among other things, granted defendants' motions for summary judgment dismissing plaintiff's complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying in part the motion of defendant William Maroney and reinstating the premises liability cause of action against him, and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Oswego County, for determination of the remaining issues raised in the motion of plaintiff insofar as they concern that defendant.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained as a result of his exposure to lead paint as a child in three apartments in which he resided. The first apartment in which plaintiff resided was owned by defendants Lawrence E. Normandeau, Jr. and Michelle T. Normandeau (collectively, Normandeaus), the second was owned by defendant William Maroney, and the third was owned by defendants Ronald Matteson and Donna Matteson (collectively, Mattesons). The complaint set forth six causes of action, one against each set of defendants for negligent ownership and maintenance of the relevant premises (premises liability causes of

action), and one against each set of defendants for negligent abatement of the lead paint hazard in the pertinent premises (negligent abatement causes of action). Plaintiff moved for, inter alia, partial summary judgment on liability and dismissal of certain affirmative defenses, and each set of defendants moved separately for summary judgment dismissing the complaint against them. Supreme Court granted defendants' motions, denied that part of plaintiff's motion for partial summary judgment, and did not reach that part of plaintiff's motion seeking dismissal of certain affirmative defenses. Plaintiff appeals.

" 'To establish that a landlord is liable for a lead-paint condition, a plaintiff must demonstrate that the landlord had actual or constructive notice of, and a reasonable opportunity to remedy, the hazardous condition,' " and failed to do so (*Pagan v Rafter*, 107 AD3d 1505, 1506). Thus, to meet their burden on their motions for summary judgment with respect to the premises liability causes of action, defendants were required to establish that they "had no actual or constructive notice of the hazardous lead paint condition prior to an inspection conducted by the [Oswego] County Department of Health" (*Stokely v Wright*, 111 AD3d 1382, 1382-1383; *see generally Chapman v Silber*, 97 NY2d 9, 15). Notwithstanding plaintiff's repeated citations to irrelevant case law, "[t]he factors set forth in *Chapman* . . . remain the bases for determining whether a landlord knew or should have known of the existence of a hazardous lead paint condition and thus may be held liable in a lead paint case" (*Watson v Priore*, 104 AD3d 1304, 1305, *lv dismissed in part and denied in part* 21 NY3d 1052; *see Sykes v Roth*, 101 AD3d 1673, 1674). We conclude that the Mattesons and the Normandeaus met their burden of establishing that they had no actual or constructive notice of the hazardous lead paint condition before their premises were inspected by the Oswego County Department of Health (*see generally Chapman*, 97 NY2d at 15), and plaintiff failed to raise a triable issue of fact (*see Pagan*, 107 AD3d at 1506; *Watson*, 104 AD3d at 1305). The court therefore properly granted those parts of the motions of the Mattesons and the Normandeaus with respect to the causes of action for premises liability.

Although Maroney met his burden on his motion with respect to the premises liability cause of action against him, we conclude that plaintiff raised a triable issue of fact by submitting the testimony of plaintiff's mother that she informed Maroney's agent that paint was chipping and peeling at Maroney's premises and that plaintiff had prior health problems arising from exposure to lead paint chips. Thus, "plaintiff presented evidence from which it may be inferred that [Maroney] knew that . . . paint was peeling on the premises, and knew of the hazards of lead-based paint to young children" (*Jackson v Brown*, 26 AD3d 804, 805; *see Jackson v Vatter*, 121 AD3d 1588, 1589). We therefore modify the order by denying in part the motion of Maroney and reinstating the premises liability cause of action against him. We further conclude, however, that plaintiff failed to meet his burden on that part of his motion for partial summary judgment on the issue of liability with respect to Maroney (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324), and thus the court properly denied that part

of plaintiff's motion.

We reject plaintiff's further contention that the court erred in granting defendants' motions with respect to the negligent abatement causes of action. Defendants demonstrated that they took reasonable precautionary measures to remedy the hazardous lead condition after they received actual notice thereof from the Oswego County Department of Health, and plaintiff failed to raise a triable issue of fact (*see generally id.*). Indeed, we note that plaintiff did not live in the Mattesons' premises during or at any time after they performed their abatement procedures, and thus there is no possibility that he sustained any injury from those procedures.

Finally, we reject plaintiff's contention that the court should have granted that part of his motion for partial summary judgment on the issues of "liability (notice, negligence and substantial factor)." With respect to the only cause of action that remains, the premises liability cause of action against Maroney, "plaintiff failed to establish [that] defendant's liability as a matter of law" (*Pagan*, 107 AD3d at 1507; *see Hamilton v Miller*, 128 AD3d 1321, 1322; *Faison v Luong*, 122 AD3d 1268, 1269). We remit the matter to Supreme Court to determine the remaining issues raised in plaintiff's motion with respect to Maroney but not decided by the court, including the dismissal of certain affirmative defenses.

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

956

CA 15-00430

PRESENT: SMITH, J.P., CARNI, LINDLEY, VALENTINO, AND DEJOSEPH, JJ.

RACHEL REGDOS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, CITY OF BUFFALO POLICE DEPARTMENT AND POLICE OFFICER DEANNA FERA, DEFENDANTS-APPELLANTS.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered March 3, 2015 in a personal injury action. The interlocutory judgment apportioned fault between plaintiff and defendant Police Officer Deanna Fera on the issue of liability.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries she allegedly sustained when the vehicle she was driving was struck by a police vehicle driven by defendant Police Officer Deanna Fera (Officer Fera), who was employed by defendant City of Buffalo Police Department. Following the liability phase of a bifurcated trial, the jury rendered a verdict apportioning liability 45% to plaintiff and 55% to Officer Fera, and defendants appeal from the interlocutory judgment entered thereon.

We agree with plaintiff that Supreme Court properly denied that part of defendants' motion to set aside the verdict and for judgment notwithstanding the verdict (*see* CPLR 4404 [a]). Inasmuch as it cannot be said that there is "no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499; *see Pawlaczyk v Jones*, 26 AD3d 822, 823, *lv denied* 7 NY3d 701), defendants are not "entitled to judgment as a matter of law" (CPLR 4404 [a]). Contrary to defendants' contention, we conclude that the jury could have rationally determined that the combination of, inter alia, Officer Fera's excessive speed, her failure to activate the emergency

lights and siren and slow down or brake as she approached plaintiff's vehicle from behind, plaintiff's timely and appropriate engagement of her left turn signal, and Officer Fera's attempt to pass plaintiff's vehicle on the left on the wrong side of the street at a city intersection constituted "reckless disregard for the safety of others" (Vehicle and Traffic Law § 1104 [e]; *see Corallo v Martino*, 58 AD3d 792, 792-793).

Defendants further contend that, because the jury assigned some fault to plaintiff, the jury necessarily concluded that Officer Fera had activated the emergency lights and siren on her vehicle prior to the accident and that plaintiff was negligent because she failed to comply with Vehicle and Traffic Law § 1144 (a) by yielding the right-of-way to Officer Fera's emergency police vehicle (*see* PJI 2:26). We reject that contention. In addition to charging the jury that the failure to comply with Vehicle and Traffic Law § 1144 (a) constitutes negligence, the court charged the jury concerning the general duty of drivers toward other motorists (*see* PJI 2:77, 2:77.1). Thus, the jury was not limited to a violation of Vehicle and Traffic Law § 1144 (a) as a basis for finding plaintiff negligent. The jury could have rationally concluded that, although Officer Fera had not activated her emergency lights or siren, plaintiff nonetheless "did not observe that which was there to be seen" and was "negligent in failing to look or in not looking carefully" (PJI 2:77.1).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

957

CA 14-01558

PRESENT: SMITH, J.P., CARNI, LINDLEY, VALENTINO, AND DEJOSEPH, JJ.

IN THE MATTER OF THE PROCEEDINGS UNDER
ARTICLE 81, MENTAL HYGIENE LAW, FOR THE
APPOINTMENT OF A GUARDIAN FOR REGINA L.F.,
AN INCAPACITATED PERSON.
---------- MEMORANDUM AND ORDER
LISA R., STEPHEN D.R. AND JOHN R.F.,
PETITIONERS-RESPONDENTS,

REGINA L.F., BY AND THROUGH HER GUARDIAN
CATHOLIC FAMILY CENTER, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

DUTCHER & ZATKOWSKY, ROCHESTER (MILES P. ZATKOWSKY OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from a modified order and judgment (one paper) of the Supreme Court, Monroe County (William P. Polito, J.), entered February 12, 2014 in a proceeding pursuant to Mental Hygiene Law article 81. The modified order and judgment, insofar as appealed from, directed that the provision of the order and judgment dated November 1, 2013 directing that comfort care for the incapacitated person "shall always include food and hydration, whether orally or artificially, including comatose conditions", shall remain in full force and effect.

It is hereby ORDERED that the modified order and judgment insofar as appealed from is unanimously reversed on the law without costs and the provision that comfort care to the incapacitated person "shall always include food and hydration, whether orally or artificially, including comatose conditions" is vacated.

Memorandum: As limited by her brief in this guardianship proceeding pursuant to article 81 of the Mental Hygiene Law, respondent, by her guardian, appeals in appeal No. 1 from an order and judgment insofar as it provides that "comfort care shall always be provided, and shall always include food and hydration, whether orally or artificially, including comatose conditions." In appeal No. 2, respondent appeals from an order in which Supreme Court modified the terms of her guardianship and discharged Catholic Family Center as her personal needs guardian. We agree with respondent in appeal No. 1 that the nutrition and hydration provision referenced above must be vacated, and we reverse the order in appeal No. 2. We note at the outset that the order and judgment from which respondent appeals in appeal No. 1 was superseded by a modified order and judgment. In the exercise of our discretion, we treat the notice of appeal as valid and

deem the appeal as properly taken from the modified order and judgment (*see* CPLR 5520 [c]; *see generally Matter of Donegan v Torres*, 126 AD3d 1357, 1358, *lv denied* 26 NY3d 905).

With respect to appeal No. 1, the law is clear that "a competent adult generally has the right to make health care decisions, including the right to refuse life-sustaining treatment" (*Matter of M.B.*, 6 NY3d 437, 439), and that this right must be respected "even when a [person] becomes incompetent, if while competent, the [person] stated that he or she did not want certain procedures to be employed under specified circumstances" (*Matter of Westchester County Med. Ctr. [O'Connor]*, 72 NY2d 517, 528; *see* Public Health Law §§ 2981 [5] [b]; 2982 [2] [a]; 2994-d [4] [a] [i]). The Court of Appeals in *O'Connor* determined that "clear and convincing evidence" of a person's pre-incompetency desire to refuse life-sustaining treatment is required, and further determined that a formal writing would satisfy that standard (*see O'Connor*, 72 NY2d at 530-532; *see also* § 2994-d [3] [a] [ii]).

Here, respondent's end-of-life wishes regarding artificial hydration and nutrition are memorialized in her health care proxy, which she executed when she was 66 years old and of sound mind and body. Respondent stated in her health care proxy that, "[i]f I should have an incurable or irreversible condition that is likely to cause my death within a relatively short time, . . . no artificial administered nourishment or liquids shall be furnished to me unless necessary for my comfort or to alleviate pain." Respondent further stated that, should she be in a state of permanent unconsciousness or profound dementia, all nourishment or liquids not necessary for her comfort or to alleviate pain "are to be withheld or withdrawn." Because the nutrition and hydration provision inserted in the modified order and judgment in appeal No. 1 by the court conflicts with respondent's wishes as clearly and unambiguously expressed in her health care proxy, that provision must be vacated.

We conclude in appeal No. 2 that the court also erred in discharging Catholic Family Center as respondent's personal needs guardian. Although the court stated in its decision and order that it was accepting Catholic Family Center's request to resign as guardian, there is no indication in the record that Catholic Family Center moved to resign. Indeed, the record establishes that, before the order in appeal No. 2 was entered, the attorney for Catholic Family Center informed the court that his client was not seeking to resign, as the court for some reason had believed, and no party requested that the guardian be discharged. In any event, a guardianship cannot be terminated without a hearing (*see* Mental Hygiene Law § 81.36 [c]; *Matter of Carl K.D.*, 45 AD3d 1441, 1441; *Matter of Marvin W.*, 306 AD2d 289, 290), which was not held here. We therefore reverse the order in appeal No. 2 and reinstate Catholic Family Center as respondent's personal needs guardian.

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

958

CA 14-02263

PRESENT: SMITH, J.P., CARNI, LINDLEY, VALENTINO, AND DEJOSEPH, JJ.

IN THE MATTER OF THE PROCEEDINGS UNDER
ARTICLE 81, MENTAL HYGIENE LAW, FOR THE
APPOINTMENT OF A GUARDIAN FOR REGINA L.F.,
AN INCAPACITATED PERSON.
---------- MEMORANDUM AND ORDER
LISA R., STEPHEN D.R., AND JOHN R.F.,
PETITIONERS-RESPONDENTS,

REGINA L.F., BY AND THROUGH HER GUARDIAN
CATHOLIC FAMILY CENTER, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

DUTCHER & ZATKOWSKY, ROCHESTER (MILES P. ZATKOWSKY OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Supreme Court, Monroe County (William P. Polito, J.), entered November 7, 2014 in a proceeding pursuant to Mental Hygiene Law article 81. The order removed Catholic Family Center as the guardian for the personal needs of Regina L.F., and reinstated the health care proxy of Regina L.F., dated April 13, 2000.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, and Catholic Family Center is reinstated as the personal needs guardian of the incapacitated person.

Same memorandum as in *Matter of Regina L.F.* ([appeal No. 1] ___ AD3d ___ [Oct. 9, 2015]).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

964

CA 15-00373

PRESENT: SMITH, J.P., CARNI, LINDLEY, VALENTINO, AND DEJOSEPH, JJ.

IN THE MATTER OF ALLEGANY MOUNTAIN RESORT, LLC,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF EAST OTTO, RESPONDENT-APPELLANT.

BRADY & SWENSON, P.C., SALAMANCA (ERIN M. BRADY SWENSON OF COUNSEL), FOR RESPONDENT-APPELLANT.

NIXON PEABODY LLP, BUFFALO (LAURIE STYKA BLOOM OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), entered May 27, 2014 in proceedings pursuant to RPTL article 7. The order granted the motion of petitioner for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of petitioner's motion with respect to the 57 trailers that are over 400 square feet and as modified the order is affirmed without costs.

Memorandum: Petitioner commenced these RPTL article 7 proceedings to challenge the tax assessments for property located in respondent, Town of East Otto (Town), for the tax years 2011 and 2012. Petitioner owns and operates a campground resort facility on the subject property. The Town appeals from an order that, inter alia, granted petitioner's motion for summary judgment and determined that 386 trailers located on the property were recreational vehicles pursuant to RPTL 102 (12) (g) (3) and therefore were not taxable as real property.

We agree with the Town that Supreme Court erred in granting petitioner's motion in its entirety, and instead should have denied the motion with respect to 57 of the trailers. We therefore modify the order accordingly. Pursuant to RPTL 102 (12) (g) (3), "[t]he value of any trailer or mobile home shall be included in the assessment of the land on which it is located," with the exception of " 'recreational vehicles' that are four hundred square feet or less in size, self propelled or towable by an automobile or light duty truck and used as temporary living quarters for recreational, camping, travel or seasonal use." We conclude that petitioner failed to meet its burden on the motion with respect to 57 of the trailers inasmuch

as it failed to establish that those trailers were 400 square feet or less in size (*see id.*; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Contrary to petitioner's contention, it did not establish that the trailers were 400 square feet or less by submitting measurements based upon the size of the chassis of each trailer. Trailers are vehicles (*see* Vehicle and Traffic Law §§ 156, 159), the dimensions of vehicles are measured "inclusive of load and bumpers" (§ 385 [3] [a]; *see* § 385 [1] [a] [i]; *see generally* 24 CFR 3282.8 [g] [2]), and the Town submitted evidence that 57 of the trailers had a size of over 400 square feet when measured from bumper to bumper. We therefore conclude as a matter of law that those 57 trailers are not entitled to the exemption set forth in RPTL 102 (12) (g) (3).

With respect to the remaining trailers, we reject the Town's contention that there is a triable issue of fact whether they were taxable as real property. We conclude that petitioner met its burden of establishing that the trailers were tax-exempt recreational vehicles by submitting evidence that all of the trailers had a size of 400 square feet or less, were towable by automobiles or light duty trucks, and were used as temporary living quarters for seasonal use (*see* RPTL 102 [12] [g] [3]), and the Town failed to raise a triable issue of fact (*see generally Zuckerman*, 49 NY2d at 562).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

968

KA 14-00232

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NORRIS D. HENDRIX, DEFENDANT-APPELLANT.

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

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (ERIC R. SCHIENER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Mark H. Dadd, J.), rendered December 12, 2013. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of assault in the second degree (Penal Law § 120.05 [3]) arising from an incident in which a correction officer at the correctional facility where defendant was incarcerated was injured while performing a pat frisk of defendant. Defendant contends that he was denied a fair trial by several alleged instances of prosecutorial misconduct, but we note that defendant failed to preserve his contention for our review with respect to any of those instances. In any event, we conclude that "[a]ny 'improprieties were not so pervasive or egregious as to deprive defendant of a fair trial' " (*People v Johnson*, 303 AD2d 967, 968, *lv denied* 100 NY2d 583).

Defendant further contends that he was denied effective assistance of counsel by his attorney's failure to object to the alleged instances of prosecutorial misconduct and failure to request a jury charge on the justified use of physical force pursuant to Penal Law § 35.15. With respect to the alleged instances of prosecutorial misconduct, inasmuch as they were not so egregious as to deprive defendant of a fair trial, defense counsel's failure to object thereto did not deprive defendant of effective assistance of counsel (*see People v Koonce*, 111 AD3d 1277, 1279). With respect to the jury charge on justification, we conclude that defendant failed to demonstrate the absence of a strategic or other legitimate explanation for defense counsel's decision not to request that charge (*see*

generally People v Benevento, 91 NY2d 708, 712). Indeed, defendant testified that he did not use physical force against the correction officer, and we therefore cannot conclude that defense counsel was ineffective for failing to seek a jury charge covering force that defendant swore he did not use.

Finally, defendant contends that the verdict is against the weight of the evidence because the testimony of the correction officer regarding his injuries and the way they were sustained is incredible as a matter of law. Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495). The injuries sustained by the correction officer, including a mild concussion and headaches (*see People v Newman*, 71 AD3d 1509, 1509-1510, *lv denied* 15 NY3d 754), were described in his testimony and corroborated by the testimony of the medical providers who treated him, as was the manner in which they were sustained, which the jury found probative of defendant's intent to prevent the correction officer "from performing a lawful duty" (Penal Law § 120.05 [3]; *see People v Pinero-Baez*, 67 AD3d 469, 469, *lv denied* 13 NY3d 941). We perceive no basis to disturb the jury's credibility determinations with respect to that testimony.

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

970

KA 13-01050

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC J. GARDNER, DEFENDANT-APPELLANT.

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

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (AMY LEIGH HALLENBECK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered August 12, 2013. The judgment convicted defendant, upon a jury verdict, of reckless endangerment in the first degree and criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of criminal possession of a weapon in the second degree, and dismissing the third count of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant was convicted, following a jury trial, of reckless endangerment in the first degree (Penal Law § 120.25) and criminal possession of a weapon in the second degree (§ 265.03 [3]). The charges arose from an incident in which defendant discharged a firearm into the bedroom window of an occupied, residential home in Oswego County during the early morning hours of March 5, 2012. Defendant was apprehended by the police later that day at a motel in Onondaga County, where a handgun was found in his vehicle. Prior to his trial in Oswego County Court, defendant was charged with and pleaded guilty to, in Onondaga County Court, criminal possession of a weapon in the second degree for the handgun recovered from his vehicle. Defendant contends that his prosecution for criminal possession of a weapon in Oswego County was barred by the protection against double jeopardy set forth in the United States Constitution and CPL 40.20. We agree, in part, and we therefore modify the judgment accordingly.

As a preliminary matter, we note that, despite defendant’s invocation of both federal constitutional and state statutory grounds, his double jeopardy contention on appeal is based solely on the Federal Constitution inasmuch as he alleges only that he was punished twice for the same offense, rather than that he was “prosecuted for

two offenses based upon the same act or criminal transaction" (CPL 40.20 [2]). We therefore address only the federal constitutional ground. Moreover, although defendant failed to preserve that ground for our review, we further note that a constitutional double jeopardy claim may be raised for the first time on appeal (*see People v Biggs*, 1 NY3d 225, 231; *People v Buffin*, 244 AD2d 925, 925, *lv denied* 91 NY2d 924).

It is well settled that a defendant has "the right not to be punished more than once for the same crime" (*People v Williams*, 14 NY3d 198, 214, *cert denied* 562 US 947, citing *United States v DiFrancesco*, 449 US 117, 129). "When successive prosecutions are involved, the guarantee serves a constitutional policy of finality for the defendant's benefit . . . and protects the accused from attempts to secure additional punishment after a prior conviction and sentence" (*Matter of Johnson v Morgenthau*, 69 NY2d 148, 150 [internal quotation marks omitted]). This case presents a prototypical instance of a constitutional double jeopardy violation inasmuch as defendant was prosecuted and convicted of a crime in Oswego County to which he had pleaded guilty in Onondaga County. In both instances, the charge was the same: criminal possession of a weapon in the second degree pursuant to Penal Law § 265.03 (3).

We reject the People's contention that double jeopardy did not attach because defendant was convicted in Oswego County before he was sentenced on his guilty plea in Onondaga County. "[T]ermination of a criminal action by entry of a guilty plea constitutes a previous prosecution for double jeopardy purposes" (*People v Searcy*, 2 AD3d 1395, 1397 [internal quotation marks omitted]; *see Morgenthau*, 69 NY2d at 150-151). We have examined the People's remaining contention in support of affirming the judgment, and we conclude that it is without merit.

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that his conviction of reckless endangerment is against the weight of the evidence with respect to the element of intent (*see generally People v Bleakley*, 69 NY2d 490, 495). We reject defendant's further contention that the court erred in denying his speedy trial motion. As part of his request for a preplea investigation, defendant agreed that the resulting accrual of time would not be charged to the People for speedy trial purposes (*see People v Wilcox*, 295 AD2d 914, 915, *lv denied* 98 NY2d 703). The time period not encompassed by that waiver totaled less than the six months permitted by CPL 30.30 (1) (a). Finally, contrary to defendant's remaining contention, his sentence is not unduly harsh and severe.

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

973

KA 12-00841

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KERRY LANDRY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Onondaga County Court (Jeffrey R. Merrill, A.J.), rendered May 1, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him, upon his guilty plea, of burglary in the third degree (Penal Law § 140.20) and, in appeal No. 2, he appeals from a judgment convicting him, upon his guilty plea, of criminal possession of a forged instrument in the second degree (§ 170.25). Defendant contends in each appeal that his respective pleas were involuntarily entered because County Court failed to advise him of all of the constitutional rights he would be forfeiting upon pleading guilty (*see Boykin v Alabama*, 395 US 238, 243; *People v Tyrell*, 22 NY3d 359, 361). By failing to move to withdraw the respective pleas or to vacate the respective judgments of conviction, however, defendant failed to preserve his contention for our review (*see* CPL 470.05 [2]; *People v Watkins*, 77 AD3d 1403, 1403, *lv denied* 15 NY3d 956), and the "narrow exception" to the preservation rule does not apply because defendant did not say anything during the respective plea colloquies that cast significant doubt on his guilt or otherwise called into question the voluntariness of his pleas (*People v Lopez*, 71 NY2d 662, 666). Although the Court of Appeals in *Tyrell* vacated a guilty plea based on an unpreserved *Boykins* claim, the defendant in that case was sentenced immediately following his plea and thus did not have an opportunity to move to withdraw his plea (*see Tyrell*, 22 NY3d at 364). Here, in contrast, defendant was sentenced more than two months after he entered his guilty pleas, thus affording him ample time to bring a motion.

We reject defendant's further contention in both appeals that the court abused its discretion in terminating him from a drug treatment program after he admittedly violated the conditions of the program. "Courts are afforded great deference in making judicial diversion determinations, and we perceive no abuse of discretion here" (*People v Williams*, 105 AD3d 1428, 1428, *lv denied* 21 NY3d 1021; *see* CPL 216.05 [9] [c]; *People v Dawley*, 96 AD3d 1108, 1109, *lv denied* 19 NY3d 1025). Finally, considering defendant's extensive criminal record and the multiple opportunities he has had to obtain substance abuse treatment, we decline to modify his sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

974

KA 12-00842

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KERRY LANDRY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Onondaga County Court (Jeffrey R. Merrill, A.J.), rendered May 1, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a forged instrument in the second degree.

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

Same memorandum as in *People v Landry* ([appeal No. 1] ___ AD3d ___ [Oct. 9, 2015]).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

976

CAF 13-00557

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

IN THE MATTER OF KATHERINE D. WARREN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER J. MILLER, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR RESPONDENT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), FOR PETITIONER-RESPONDENT.

LORENZO NAPOLITANO, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an amended order of the Family Court, Monroe County (Julie Anne Gordon, R.), entered January 25, 2013 in a proceeding pursuant to Family Court Act article 6. The amended order, among other things, granted petitioner sole custody of the subject child.

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

Memorandum: Petitioner-respondent mother commenced the proceeding in appeal No. 1 to modify the parties' existing visitation schedule with respect to the parties' child. Family Court sua sponte determined, however, that the existing joint custody arrangement was unworkable and entered an amended order awarding sole custody and primary physical residence to the mother, and visitation and access to respondent-petitioner father. The father appeals from that amended order in appeal No. 1. In appeal No. 2, the father appeals from an order dismissing his order to show cause and petition to modify the amended order in appeal No. 1. We now affirm in appeal No. 1.

The father contends in appeal No. 1 that the court lacked jurisdiction to determine the issue of custody. We reject that contention. Even without an application for sole custody by one of the parties, the court herein had the authority to address the issue of custody inasmuch as the parties were "adequately apprised prior to the hearing that custody was at issue, and . . . had a sufficient opportunity to present any testimony and evidence relevant to the issue of custody" (*Matter of Heintz v Heintz*, 28 AD3d 1154, 1155). "Once [the court] determine[s] that joint custody [is] not feasible,

it [becomes] incumbent upon [the court] to determine a custodial arrangement based upon the best interests of the child[] despite the absence of a petition definitively seeking sole custody" (*Matter of Mahoney v Regan*, 100 AD3d 1237, 1237-1238 [internal quotation marks omitted], *lv denied* 20 NY3d 859; *see Heintz*, 28 AD3d at 1154-1155; *Matter of Miller v Orbaker*, 17 AD3d 1145, 1145-1146, *lv denied* 5 NY3d 714).

In the instant case, the record establishes that the court informed the parties on two occasions prior to the hearing that sole custody would be at issue. In addition, during the hearing, and before the father engaged in cross-examination or called his first witness, the court specifically warned the father that he could lose custody if he failed to present evidence contradicting the mother's testimony. We note that the father demonstrated his understanding of the court's intent to determine the issue of custody by referencing it during his opening statement, by presenting testimony and evidence in support of his request therefor and, in his summation, by characterizing the proceeding as "a contested custody matter" and specifically requesting that he be awarded sole custody.

We reject the father's further contention in appeal No. 1 that the court's custody determination lacks a sound and substantial basis in the record. "Generally a court's determination regarding custody and visitation issues, based on its first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record" (*Matter of Dubuque v Bremiller*, 79 AD3d 1743, 1744 [internal quotation marks omitted]; *see Matter of Marino v Marino*, 90 AD3d 1694, 1695). Here, we conclude that the court's determination is supported by the requisite evidentiary basis. Notably, the record establishes that the father interfered with the child's enrollment in educational programming and that, although the child was diagnosed with a behavioral disorder, the father refused to acknowledge the disorder and to administer the child's prescribed medication. We therefore see no reason to disturb the court's determination. The father's contentions raised for the first time in his reply brief are not properly before us (*see Matter of Rossborough v Alatawneh*, 129 AD3d 1537, 1538), and we decline to take judicial notice of items submitted by the father outside of the record on appeal.

In light of our determination in appeal No. 1, we dismiss the appeal in appeal No. 2 as moot.

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

977

CAF 13-01098

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

IN THE MATTER OF CHRISTOPHER J. MILLER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KATHERINE D. WARREN, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR PETITIONER-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), FOR RESPONDENT-RESPONDENT.

LORENZO NAPOLITANO, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an order of the Family Court, Monroe County (Patricia E. Gallaher, J.), entered April 24, 2013 in a proceeding pursuant to Family Court Act article 6. The order denied and dismissed the petition to modify an amended custody order.

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

Same memorandum as in *Matter of Warren v Miller* ([appeal No. 1] ___ AD3d ___ [Oct. 9, 2015]).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

979

CAF 14-01013

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

IN THE MATTER OF ONTARIO COUNTY SUPPORT COLLECTION UNIT, ON BEHALF OF KRISTINE POPPLE, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER W. FALCONER, RESPONDENT-APPELLANT.

TYSON BLUE, MACEDON, FOR RESPONDENT-APPELLANT.

JOHN W. PARK, COUNTY ATTORNEY, CANANDAIGUA (BARRY D. MCFADDEN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Ontario County (William F. Kocher, J.), entered May 2, 2014 in a proceeding pursuant to Family Court Act article 4. The order, among other things, committed respondent to the Ontario County Jail for a term of six months.

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

Memorandum: Respondent father appeals from an order committing him to jail for a term of six months for his wilful violation of an order of child support. "Inasmuch as respondent's appeal is from the order revoking the suspension of his sentence and, according to [respondent], his . . . jail term has already been served, we conclude that the instant appeal is moot and must be dismissed" (*Matter of St. Lawrence County Support Collection Unit v Griffith*, 101 AD3d 1318, 1318; *see Matter of Barksdale v Gore*, 101 AD3d 1742, 1743; *Matter of Lomanto v Schneider*, 78 AD3d 1536, 1537; *Matter of St. Lawrence County Dept. of Social Servs. v Pratt*, 24 AD3d 1050, 1050, *lv denied* 6 NY3d 713; *cf. Matter of Bickwid v Deutsch*, 87 NY2d 862, 863).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

980

CAF 14-01117

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

IN THE MATTER OF CHRISTIAN J.S.,
NATHANIEL C.S., JACOB C.S., HEAVEN A.S.
AND ISAAC S.S.
---------- MEMORANDUM AND ORDER
JEFFERSON COUNTY DEPARTMENT OF SOCIAL
SERVICES, PETITIONER-RESPONDENT;

JODI A.F., RESPONDENT-APPELLANT.

PAUL B. WATKINS, FAIRPORT, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Jefferson County (Richard V. Hunt, J.), entered March 27, 2014 in a proceeding pursuant to Family Court Act article 10. The order determined that respondent had neglected her children and continued custody of the children with their father.

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

Memorandum: On appeal from an order that, inter alia, found that she neglected her five children and granted permanent custody of the children to their father, respondent mother contends that Family Court erred in denying her motion to dismiss the petition at the close of petitioner's case. We agree, and we therefore reverse the order and dismiss the petition.

We note at the outset that, before the petition in this case was filed in Lewis County, where the mother had lived in February 2012, a temporary order was entered pursuant to Family Court Act article 6 granting custody of the children to their father, who resides in Jefferson County. Because the children were living and thriving with their father in Jefferson County, where they were receiving services from petitioner, petitioner moved to withdraw the petition shortly after it was filed, asserting that no child protective proceedings were necessary pursuant to Family Court Act article 10. Petitioner also noted that the mother had moved to Madison County, where it would be difficult for petitioner to provide services to her and where, as a Medicaid recipient, the mother could receive services from the appropriate local agency. The court denied petitioner's motion, however, and directed petitioner to proceed with a fact-finding hearing.

At the hearing, petitioner called only two witnesses, a caseworker for the Department of Social Services in Lewis County (Department), where the children lived with the mother and her boyfriend for a short period before moving in with their father, and the children's father. The Lewis County caseworker testified about the conditions in the residence in Lewis County where the children were living when he first visited, and acknowledged not only that the Department had not sought to remove the children from the mother's care during the 18 days the children resided in Lewis County, but that the conditions of the mother's residence improved after his first visit. The children's father testified about the children's appearance and lack of hygiene and self-care skills when they moved in with him, and also relayed reports from his oldest son, then age eight, that the mother left the younger children at home with him on occasion, and that he would have to make them meals. The father also acknowledged, however, that when the children lived with the mother, he never had any concerns regarding their care.

After calling those two witnesses, petitioner rested its case. The mother moved for a directed verdict dismissing the petition, contending that petitioner's evidence was legally insufficient to establish a prima facie case of neglect. The motion was opposed by the Attorney for the Children and the father, neither of whom, we note, has filed a respondent's brief on appeal. The court, although acknowledging that it was "not comfortable [with the] level of proof" before it, subsequently denied the motion. That was error.

For a finding of neglect, there must be proof of actual or imminent physical, emotional, or mental impairment to a child, and proof that any such actual or imminent impairment is a "consequence of the parent's failure to exercise a minimum degree of parental care" (*Matter of Afton C. [James C.]*, 17 NY3d 1, 9; *see* Family Ct Act § 1012 [f] [i]). Here, the children were living with their father for over two months before the petition was filed, and thus they did not face "imminent" danger of impairment. Under those circumstances, petitioner had the burden of demonstrating "actual . . . physical, emotional or mental impairment to the child[ren]" that resulted in "serious harm . . . to the child[ren], not just . . . what might be deemed undesirable parental behavior" (*Nicholson v Scoppetta*, 3 NY3d 357, 369). In our view, the proof adduced by petitioner, which concerned only the 18 days the children resided in Lewis County, failed to meet that burden. The children's father did not have firsthand knowledge concerning the allegations in the petition, and he acknowledged that he never had any concerns about the care of the children when they resided with the mother. The testimony of the Lewis County caseworker at most demonstrated that the conditions at the residence where the children lived and the manner in which they dressed and attended to hygiene were less than optimal, but it did not appear that those conditions resulted in any actual physical, emotional, or mental impairment to the children (*see Matter of Annastasia C. [Carol C.]*, 78 AD3d 1579,1580, *lv denied* 16 NY3d 708; *Matter of Erik M.*, 23 AD3d 1056, 1057; *cf. Matter of Holly B. [Scott*

B.], 117 AD3d 1592, 1592-1593).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

982

CA 15-00244

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

SCOTT BOWMAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JEANETTE E. ZUMPANO, JOHN S. ZUMPANO,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

ATHARI & ASSOCIATES, LLC, NEW HARTFORD (MO ATHARI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FELDMAN KIEFFER, LLP, BUFFALO (ALAN J. BEDENKO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered September 11, 2014. The order granted the motion of defendants Jeanette E. Zumpano and John S. Zumpano for summary judgment and dismissed the complaint against them.

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 against defendants Jeanette E. Zumpano and John S. Zumpano is reinstated.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained as a result of his exposure to lead paint as a child. The exposure allegedly occurred when plaintiff resided in an apartment (hereafter, premises) rented by his mother from defendants-respondents (defendants). Plaintiff asserted as a first cause of action that defendants were negligent in their ownership and maintenance of the premises and, as a second cause of action, that defendants were negligent in the abatement of the lead paint hazard. We agree with plaintiff that Supreme Court erred in granting defendants' motion for summary judgment dismissing the complaint against them.

As a preliminary matter, we note that the court erred in conducting a separate analysis for each of the two defendants inasmuch as defendants purchased the premises during their marriage and are co-owners thereof (*cf. Turner v Davis*, 105 AD3d 946, 948), and we determine the issues on appeal from that perspective. With respect to the first cause of action, we conclude that, even assuming, arguendo, defendants met their initial burden of establishing as a matter of law that they lacked constructive notice of a lead paint hazard at the

premises, plaintiff raised triable issues of fact. Specifically, "plaintiff submitted evidence from which it may be inferred that defendant[s] knew that paint was peeling on the premises" (*Jackson v Vatter*, 121 AD3d 1588, 1589), and "evidence from which a jury could infer that [defendants] knew or should have known of the dangers of lead paint to children" (*Abreu v Huang*, 298 AD2d 471, 472; *see Jackson v Brown*, 26 AD3d 804, 805). With respect to the second cause of action, we likewise conclude that, even assuming, arguendo, defendants established their entitlement to judgment as a matter of law dismissing that cause of action, "the evidence submitted by plaintiff raised triable issues of fact whether defendant[s] took reasonable measures to abate the lead paint hazard after they received actual notice thereof" (*Pagan v Rafter*, 107 AD3d 1505, 1506-1507).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

988

CA 15-00257

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

JONATHAN KLEIN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MAN SUI, DEFENDANT-APPELLANT.

HISCOCK & BARCLAY, LLP, BUFFALO (MATTHEW ROSNO OF COUNSEL), FOR DEFENDANT-APPELLANT.

VANDETTE PENBERTHY LLP, BUFFALO (JAMES M. VANDETTE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Michael L. D'Amico, A.J.), entered April 24, 2014. The order granted the motion of plaintiff for partial summary judgment on the issue of liability.

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

Memorandum: Plaintiff, a police officer employed by the Town of Amherst, commenced this action pursuant to General Municipal Law § 205-e seeking damages for injuries he sustained while chasing and apprehending defendant, who had fled on foot from the scene of a traffic stop. Following joinder of issue, plaintiff moved for partial summary judgment on the issue of liability, and Supreme Court granted the motion. We affirm.

General Municipal Law § 205-e permits police officers to bring a private cause of action for injuries resulting from a tortfeasor's noncompliance with "any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments." To assert a cause of action under the statute, the injured police officer "must [1] identify the statute or ordinance with which the defendant failed to comply, [2] describe the manner in which the [police officer] was injured, and [3] set forth those facts from which it may be inferred that the defendant's negligence directly or indirectly caused the harm" (*Gammons v City of New York*, 24 NY3d 562, 570 [internal quotation marks omitted]; *see Williams v City of New York*, 2 NY3d 352, 363; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 77-78).

Here, there is no dispute that plaintiff identified the statute violated by defendant, who pleaded guilty to disorderly conduct, and

that he sufficiently described the manner in which he was injured (*see Baiamonte v Buongiovanni*, 207 AD2d 324, 324-325). The dispute is whether plaintiff established as a matter of law that defendant's actions caused his injury, either directly or indirectly and, if so, whether defendant raised a triable issue of fact. We conclude that plaintiff met his initial burden of demonstrating "a practical or reasonable connection between the violation and [his] injury" by submitting, inter alia, a copy of his police report in which he stated that he was injured as a result of his apprehension of defendant, along with an affidavit swearing to the truth of the matters asserted in the report (*Campbell v City of New York*, 31 AD3d 594, 595).

The burden then shifted to defendant to raise an issue of fact, and the court properly determined that he failed to meet that burden. In opposition to the motion, defendant relied exclusively on the affidavit of a chiropractor who merely summarized plaintiff's preincident medical records, which show that plaintiff suffered from lower back pain and discomfort prior to his encounter with defendant. We conclude, however, that the affidavit is insufficient to raise an issue of fact whether plaintiff's injuries are owing wholly to a preexisting medical condition, thereby absolving defendant of all liability. We note that it is undisputed that plaintiff was capable of working at the time of the incident, and that, following his arrest of defendant, plaintiff was deemed partially disabled and awarded Workers' Compensation benefits. The chiropractor's affidavit, however, offers no opinion regarding causation of plaintiff's disability after the incident. Even assuming, arguendo, that plaintiff had a preexisting medical condition involving his back, it does not compel the conclusion that he was not injured by defendant's actions. Rather, the nature and extent of any preexisting medical condition involving plaintiff's back will be relevant to any apportionment of liability to defendant for the purpose of determining any damages he owes to plaintiff (*see Oakes v Patel*, 20 NY3d 633, 647), and those issues must be resolved by a trier of fact.

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

990

TP 15-00290

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

IN THE MATTER OF BRIAN D. GAFFNEY, PETITIONER,

V MEMORANDUM AND ORDER

SHARON ADDISON, CITY MANAGER, RESPONDENT.

BOUSQUET HOLSTEIN, PLLC, SYRACUSE (LAWRENCE M. ORDWAY, JR., OF COUNSEL), FOR PETITIONER.

SLYE & BURROWS, WATERTOWN (ROBERT J. SLYE 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, Jefferson County [James P. McClusky, J.], entered January 29, 2015) to annul a determination of respondent. The determination terminated the employment of petitioner.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul a determination finding him guilty of misconduct based upon actions constituting insubordination and terminating his employment as chief operator of the water treatment plant for the City of Watertown (City). The charges arose when petitioner's supervisor made a certain operational decision, and petitioner reported the decision to the New York State Department of Health (DOH) without notifying his supervisor, thereby allegedly violating prior directives concerning the chain of command. According to petitioner's supervisor, petitioner subsequently stated that he had intended for DOH to "intervene" in the operational decision, and that, given the same circumstances, he would take the same action again in reporting the decision to DOH.

Contrary to petitioner's contention, the determination that he engaged in insubordination is supported by substantial evidence (*see Matter of Longton v Village of Corinth*, 57 AD3d 1273, 1274, *lv denied* 13 NY3d 709; *Matter of Scazafavo v Erie County Water Auth.*, 30 AD3d 1034, 1035, *lv denied* 7 NY3d 714), i.e., by "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180). In addition, substantial evidence supports the finding of the Hearing Officer, which respondent adopted, that

petitioner failed to make a good faith effort to notify the City of the information to be disclosed and, therefore, petitioner's disclosure to DOH was not protected by Civil Service Law § 75-b (*see* § 75-b [2] [b]; *Moore v County of Rockland*, 192 AD2d 1021, 1024; *see generally Matter of Coombs v Village of Canaseraga*, 247 AD2d 895, 896). Although petitioner contends that such an effort would have been futile (*see Tipaldo v Lynn*, 48 AD3d 361, 362), we conclude that his testimony to that effect merely raised an issue of credibility that the Hearing Officer was entitled to resolve against him (*see generally Matter of Dinnocenzo v Staniszewski*, 270 AD2d 840, 841).

Finally, we conclude that the penalty of termination is not " 'so disproportionate to the offense as to be shocking to one's sense of fairness' " and thus does not constitute an abuse of discretion as a matter of law (*Matter of Kelly v Safir*, 96 NY2d 32, 38, *rearg denied* 96 NY2d 854; *see Matter of Short v Nassau County Civ. Serv. Commn.*, 45 NY2d 721, 722-723), particularly in light of petitioner's statement that he would take the same action again if he were placed in the same situation (*see Matter of Winters v Board of Educ. of Lakeland Cent. Sch. Dist.*, 99 NY2d 549, 550).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

993

KA 13-01739

PRESENT: SCUDDER, P.J., SMITH, LINDLEY, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RUDELL J. JEMES, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN C. MINISTERO OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered September 3, 2013. The judgment convicted defendant, upon a jury verdict, of rape in the first degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of rape in the first degree (Penal Law § 130.35 [1]), defendant contends that County Court erred in refusing to suppress the statements he made to the police and the DNA sample he provided at the police station because he was coerced, i.e., the police conditioned his freedom on his willingness to provide them with the statements and the DNA sample. We reject that contention. The record demonstrates that defendant voluntarily went to the police station, spoke with detectives about the allegations against him after being informed of his *Miranda* rights and waiving them, and voluntarily provided a DNA sample after being advised that he could refuse to do so. Although the detectives prefaced the recitation of defendant's rights by stating that they wanted to hear defendant's "version of what happened" in order to "clear things up," and that defendant would be free to leave after speaking with them, those statements did not "effectively vitiate[] or . . . neutralize[] the effect of the subsequently-delivered *Miranda* warnings" (*People v Dunbar*, 24 NY3d 304, 316, *cert denied* ___ US ___, 135 S Ct 2052).

Defendant failed to preserve for our review his further contentions that the court erred in not instructing the jury on the voluntariness of his statements to the police, and in allowing the prosecutor to question the victim about her prior consistent statements (*see* CPL 470.05 [2]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of

justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's contention, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to support his conviction (*see generally People v Bleakley*, 69 NY2d 490, 495), and we further conclude that, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), the verdict is not against the weight of the evidence (*see generally Bleakley,* 69 NY2d at 495). The jury credited the testimony of the victim that defendant had vaginal sexual intercourse with her by forcible compulsion, over her protest, and that testimony was corroborated by the medical evidence. We see no reason to disturb the jury's credibility determination in that regard, even though the jury apparently rejected the victim's testimony that defendant also penetrated her anally, because "the jury was entitled to assess the credibility of the [victim] and to credit certain parts of the victim's testimony while rejecting other parts" (*People v Weaver*, 302 AD2d 872, 873, *lv denied* 99 NY2d 633).

Defendant also contends that he was denied a fair trial by prosecutorial misconduct. Defendant failed to preserve his contention for our review with respect to the majority of the alleged instances of misconduct inasmuch as defendant did not object to any of those alleged instances (*see People v Paul*, 78 AD3d 1684, 1684-1685, *lv denied* 16 NY3d 834), and we decline to exercise our power to review that alleged misconduct as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We further conclude that the two instances of alleged prosecutorial misconduct preserved for our review, i.e, allegedly leading questions asked of the victim and a summation comment that it was the "job of a defense attorney to try [to] trip up witnesses," were not so egregious or prejudicial as to deny defendant a fair trial (*see e.g. People v DePillo*, 262 AD2d 996, 997, *lv denied* 93 NY2d 1044).

To the extent defendant contends that he was penalized for exercising his right to a jury trial, defendant failed to preserve that contention for our review (*see People v Robinson*, 104 AD3d 1312, 1314, *lv denied* 21 NY3d 1008), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Finally, we reject defendant's challenge to the severity of the sentence.

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

995

KA 10-00808

PRESENT: SCUDDER, P.J., SMITH, LINDLEY, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUAN C. MEDINA, DEFENDANT-APPELLANT.

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

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (NICOLE L. KYLE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered March 15, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted promoting prison contraband in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Jefferson County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted promoting prison contraband in the first degree (Penal Law §§ 110.00, 205.25 [2]). The record of the plea proceeding establishes that County Court failed to apprise defendant, a noncitizen, that deportation was a potential consequence of his guilty plea. As defendant contends and the People correctly concede, the case should be remitted to afford defendant "the opportunity to move to vacate his plea upon a showing that there is a 'reasonable probability' that he would not have pleaded guilty had the court advised him of the possibility of deportation" (*People v Fermin*, 123 AD3d 465, 466, quoting *People v Peque*, 22 NY3d 168, 198). We therefore hold the case, reserve decision, and remit the matter to County Court for that purpose. Defendant further contends that counsel was ineffective in failing to inform him that deportation was a potential consequence of the plea (*see Padilla v Kentucky*, 559 US 356). Inasmuch as that contention is based upon matters outside the record, it must be raised in a motion pursuant to CPL 440.10 (*see People v Drammeh*, 100 AD3d 650, 651, *lv denied* 20 NY3d 1098).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

996

KA 13-00070

PRESENT: SCUDDER, P.J., SMITH, LINDLEY, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT THOMPSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered July 18, 2012. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree and criminal possession of a weapon in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence of imprisonment to a term of 15 years and as modified the judgment is affirmed in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [3]) and criminal possession of a weapon in the fourth degree (§ 265.01 [1]), in connection with the knife-point robbery of an 81-year-old woman. County Court conducted a joint *Mapp/Wade/Huntley* hearing, following which the court properly refused to suppress the knife recovered from defendant, the statement he made to the police that he had a knife in his pocket, and the show-up identification. The evidence at the suppression hearing established that the police had reasonable suspicion to stop defendant (*see People v Mitchell*, 118 AD3d 1417, 1417-1418, *lv denied* 24 NY3d 963; *see generally People v DeBour* 40 NY2d 210, 223). Within minutes before the reported robbery, a police witness had observed defendant, whom he knew, following closely behind an elderly woman at the location of the reported robbery. The description of the robbery suspect matched that of defendant, and he was apprehended shortly thereafter while running from the scene. Thus, contrary to defendant's contention, the police had a reasonable suspicion that he had committed a felony and, based upon the dispatched report, the officer was authorized to frisk defendant for officer safety and to seize the knife (*see People v Williams*, 67 AD3d 1050, 1052, *lv denied* 13 NY3d 942; *People v Wallace*, 41 AD3d 1223, 1224, *lv denied* 9 NY3d 883). Furthermore, defendant's statement that he had a knife was not in response to any question by

the police, and thus the court properly refused to suppress that spontaneous statement (*see People v Roseboro*, 124 AD3d 1374, 1375).

Contrary to defendant's further contention, the show-up identification procedure was reasonable inasmuch as it occurred approximately 15 minutes after the crime and approximately two blocks away from the crime scene during a continuous, on-going investigation (*see People v Williams*, 118 AD3d 1478, 1479, *lv denied* 24 NY3d 1090). Contrary to defendant's contention, the fact that he was handcuffed and standing next to a police officer during the show-up identification procedure does not render the procedure unduly suggestive as a matter of law (*see People v Delarosa*, 28 AD3d 1186, 1187, *lv denied* 7 NY3d 811). Following the identification by the victim, the police had probable cause to arrest defendant (*see People v Dumbleton*, 67 AD3d 1451, 1452, *lv denied* 14 NY3d 770).

Defendant concedes that he failed to preserve for our review his contention that the 911 call constituted improper bolstering of the victim's testimony and thus should not have been admitted in evidence. In any event, that contention is without merit. Where, as here, a 911 call fits within an exception to the hearsay rule, i.e., as an excited utterance, its admission is proper "notwithstanding the characterization as a prior consistent statement" (*People v Buie*, 86 NY2d 501, 511; *see People v Spicola*, 16 NY3d 441, 452, *cert denied* ___ US ___, 132 S Ct 400). We reject defendant's contention that the evidence was more prejudicial than probative. Although the victim cried during much of the call, the probative value of her accurate description of defendant and the account of the events outweighed any prejudicial effect arising from her emotional state (*see People v Morris*, 21 NY3d 588, 597; *People v Carrenard*, 56 AD3d 486, 487, *lv denied* 12 NY3d 781).

We reject defendant's contention that the court abused its discretion in permitting a police witness to testify that he knew defendant inasmuch as the testimony was relevant to the central issue in the case, i.e., identity, and any prejudicial effect did not outweigh the probative value (*see People v McCullough*, 117 AD3d 1415, 1416, *lv denied* 23 NY3d 1040; *see generally People v Primo*, 96 NY2d 351, 355-356). We further conclude that the court did not abuse its discretion in denying defendant's motion for a mistrial on the ground that a police evidence technician's testimony referenced an item retrieved from defendant, in violation of a prior court order. The court properly assessed the impact of the testimony upon the jury, and there is no basis upon which to disturb the court's denial of the motion (*see People v Abston*, 229 AD2d 970, 971, *lv denied* 88 NY2d 1066), particularly where, as here, the court had issued a curative instruction with respect to that testimony (*see People v Roman*, 17 AD3d 1166, 1166-1167, *lv denied* 5 NY3d 768).

We also reject defendant's contention that the police witnesses improperly bolstered the testimony of the victim regarding the out-of-court identification of defendant. Neither officer testified that the victim identified defendant during the show-up identification procedure (*cf. People v Smalls*, 100 AD3d 1428, 1429, *lv denied* 21 NY3d

1010), and we conclude that their testimony did not implicitly bolster the victim's testimony, but instead completed the narrative of events leading to defendant's arrest (*see People v Mulligan*, 118 AD3d 1372, 1374, *lv denied* 25 NY3d 1075).

Contrary to defendant's contention, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakely*, 69 NY2d 490, 495). The evidence established that a police officer who knew defendant observed him walking closely behind an elderly woman at approximately 8:00 a.m. and that, minutes later, the officer received a report of a robbery of an elderly woman at that location by a man fitting defendant's description. The victim testified in detail regarding the events, which coincided with the report she made to a 911 operator immediately thereafter. A knife fitting the description given by the victim was recovered from defendant, who was seen running from the scene by the police, and the victim identified defendant within 15 minutes of the crime. The jury was entitled to credit the testimony of the People's witnesses (*see People v Baker*, 30 AD3d 1102, 1102-1103, *lv denied* 7 NY3d 846), and we conclude that a different verdict would have been unreasonable (*see generally Bleakley*, 69 NY2d at 495).

We reject defendant's contention that the court, in sentencing him, punished him for exercising his right to a trial. " '[T]here is no indication in the record before us that the sentencing court acted in a vindictive manner based on defendant's exercise of the right to trial' " (*People v Stubinger*, 87 AD3d 1316, 1317, *lv denied* 18 NY3d 862). We agree with defendant, however, that the sentence is unduly harsh and severe insofar as the court imposed a term of imprisonment of 25 years. Defendant has no prior felony convictions, and none of the misdemeanor convictions was a violent offense. Furthermore, defendant has a history of mental illness. We therefore modify the judgment as a matter of discretion in the interest of justice by reducing the sentence of imprisonment to a term of 15 years (*see* CPL 470.15 [6] [b]), to be followed by the five years of postrelease supervision imposed by the court.

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

998

KA 09-01744

PRESENT: SCUDDER, P.J., SMITH, LINDLEY, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMIE TRAVERSO, JR., ALSO KNOWN AS JAIME,
DEFENDANT-APPELLANT.

DONALD R. GERACE, UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered November 6, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Oneida County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [1]). We agree with defendant, a noncitizen, that County Court failed to advise him of the deportation consequences of his felony plea, as required by *People v Peque* (22 NY3d 168). We therefore hold the case, reserve decision and remit the matter to County Court to afford defendant the opportunity to move to vacate his plea based upon a showing that there is a "reasonable probability" that he would not have pleaded guilty had he known that he faced the risk of being deported as a result of the plea (*id.* at 176; *see People v Charles*, 117 AD3d 1073, 1074).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1004

CA 15-00428

PRESENT: SCUDDER, P.J., SMITH, LINDLEY, VALENTINO, AND WHALEN, JJ.

JUSTIN T. BARENDS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF CHEEKTOWAGA, DEFENDANT-APPELLANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (KATIE L. RENDA OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered February 6, 2015. The order denied the motion of defendant for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained in a gymnasium at a community center owned by defendant. While playing basketball there, plaintiff collided with and broke a window located near the edge of the basketball court. Supreme Court properly denied defendant's motion seeking summary judgment dismissing the complaint on the ground that plaintiff assumed the risks associated with playing basketball. It is well settled that, "by engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks [that] are inherent in and arise out of the nature of the sport generally and flow from such participation" (*Morgan v State of New York*, 90 NY2d 471, 484; *see Larson v Cuba Rushford Cent. Sch. Dist.*, 78 AD3d 1687, 1687-1688). "A plaintiff, however, will not be deemed to have consented to 'concealed or unreasonably increased risks' " (*Menter v City of Olean*, 105 AD3d 1405, 1405, quoting *Morgan*, 90 NY2d at 485; *see Andrews v County of Onondaga*, 298 AD2d 837, 838). Here, even assuming, arguendo, that defendant met its initial burden on the motion, we conclude that plaintiff raised a triable issue of fact by submitting the affidavit of a licensed architect who opined that the window involved in the accident did not meet industry standards for use in a gymnasium because the glass was not covered by a protective screen, nor was it laminated or tempered to withstand impact by a person (*see Stevens v Central Sch. Dist. No. 1*, 25 AD2d 871, 872, *affd* 21 NY2d 780). Thus, there is a triable issue of fact whether defendant " 'created a dangerous condition over and above the usual dangers that are inherent

in the sport' " of basketball (*Morgan*, 90 NY2d at 485; *see Menter*, 105 AD3d at 1405-1406; *Andrews*, 298 AD2d at 838).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1005

CA 14-01843

PRESENT: SCUDDER, P.J., SMITH, LINDLEY, VALENTINO, AND WHALEN, JJ.

EDWARD P. CASE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HAZELTON COURT HOMEOWNERS ASSOCIATION, INC.,
DEFENDANT-RESPONDENT,
SAXE 5, LLC, DEFENDANT-APPELLANT,
ROBER B. SMITH , BETTY W. SMITH, ET AL., DEFENDANTS.

REISNER LAW GROUP, PLLC, OLEAN (JEFFREY P. REISNER OF COUNSEL), FOR DEFENDANT-APPELLANT.

ALEXANDER & CATALANO, LLC, PITTSFORD (JAMES L. DONIGAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM LLC, ROCHESTER (ALISON K.L. MOYER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered June 25, 2014. The order, among other things, denied the motion of defendant Saxe 5, LLC for summary judgment dismissing plaintiff's complaint and all cross claims against it, and granted the cross motion of defendant Hazelton Court Homeowners Association, Inc. for summary judgment dismissing plaintiff's complaint and all cross claims against it.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the cross motion in part and reinstating the cross claim of defendant Saxe 5, LLC against defendant Hazelton Court Homeowners Association, Inc., and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when he slipped and fell on a driveway leading to the condominium complex where he resided. The driveway, to which the parties refer as the "east access road," is located on property owned by defendants Saxe 5, LLC (Saxe) and Roger B. Smith and Betty W. Smith (Smiths). Defendant Hazelton Court Homeowners Association, Inc. (Hazelton) has an easement for ingress and egress in common with Saxe, the Smiths and others over the east access road.

Supreme Court properly denied Saxe's motion for summary judgment dismissing the complaint and cross claims against it on the ground that, as a servient owner, it owed no duty to maintain the easement

(*see generally Tagle v Jacob*, 97 NY2d 165, 168; *Raksin v Crown-Kingston Realty Assoc.*, 254 AD2d 472, 473, *lv denied* 94 NY2d 751). The record contains evidence that Saxe made use of the easement for its own purposes, raising a triable issue of fact whether Saxe "retain[ed] its duty as a landowner to maintain the portion of its premises that is subject to the easement in a reasonably safe condition" (*Kleyner v City of New York*, 115 AD3d 710, 711).

The court erred, however, in granting that part of Hazelton's cross motion for summary judgment dismissing Saxe's cross claim against it. Hazelton failed to meet its burden of establishing as a matter of law that the use of the easement by Saxe relieved Hazelton of the duty it would otherwise owe, as the owner of the dominant estate, to maintain the east access road in a reasonably safe condition (*see Penn Hgts. Beach Club, Inc. v Myers*, 42 AD3d 602, 605-606, *lv dismissed* 10 NY3d 746). We note that neither plaintiff nor the Smiths have appealed from the order, and we therefore do not disturb the order to the extent that it granted Hazelton's cross motion for summary judgment dismissing the complaint and the Smiths' cross claim against Hazelton (*see Foster v Spevack*, 198 AD2d 892, 894).

Finally, Saxe contends that it is entitled to summary judgment dismissing the complaint and cross claims against it, and Hazelton contends that it was properly granted summary judgment dismissing Saxe's cross claim against it, on the additional ground that they were not responsible for the allegedly dangerous condition of the east access road. As the court properly determined, those defendants met their burden of establishing that they did not create the dangerous condition or have actual notice of it, and plaintiff failed to raise a triable issue of fact (*see Lane v Wilmorite, Inc.*, 1 AD3d 907, 908). The court also properly determined, however, that there is an issue of fact concerning their lack of constructive notice of the allegedly dangerous condition. Plaintiff's deposition testimony, submitted in support of Saxe's motion, was "sufficient 'to raise an issue of fact whether the ice existed for a sufficient period of time to permit discovery and corrective action by [those] defendants' " (*Coleman v LoRusso*, 63 AD3d 1613, 1613).

We therefore modify the order by denying Hazelton's cross motion in part and reinstating Saxe's cross claim against Hazelton, which may be treated as a properly commenced third-party action (*see Merkley v Palmyra-Macedon Cent. Sch. Dist.*, 130 AD2d 937, 939).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1009

CA 15-00392

PRESENT: SCUDDER, P.J., SMITH, LINDLEY, VALENTINO, AND WHALEN, JJ.

TODD T. POHLMAN AND TMAC HOLDINGS, LLC,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MICHAEL R. MADIA, JOSEPH J. MADIA,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

BLAIR & ROACH, LLP, TONAWANDA (J. MICHAEL LENNON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

KLOSS STENGER & LOTEMPIO, BUFFALO (MITCHELL M. STENGER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered November 13, 2014. The order denied the motion of defendants Michael R. Madia and Joseph J. Madia for summary judgment and granted summary judgment to plaintiffs on the issue of specific performance of the contract.

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 against defendants Michael R. Madia and Joseph J. Madia is dismissed.

Memorandum: Plaintiffs commenced this action seeking specific performance of a real estate contract involving commercial property owned by defendants-appellants (defendants) on Grand Island. Supreme Court denied defendants' motion for summary judgment dismissing the complaint against them and searched the record to grant summary judgment to plaintiffs, concluding that a meeting of the minds had occurred between the parties and that the transaction should have proceeded to closing. We now reverse and grant summary judgment to defendants.

On August 28, 2013, Todd T. Pohlman (plaintiff) signed a contract to purchase the subject property for $90,000, and defendants signed the contract on September 15, 2013. The contract was contingent upon approval by the parties' respective attorneys. Plaintiff's attorney, Richard Pohlman, approved the contract on the condition that defendants sign an addendum requiring them to, among other things, provide plaintiff with a Phase I Environmental Assessment Report (Phase 1 report) and a warranty representing that defendants had no

knowledge of any environmental problems with the property. Defendants' attorney, John Blair, conditionally approved the contract as well, proposing 12 relatively minor modifications of the contract and rejecting Pohlman's request for a Phase I report and an environmental warranty. Pohlman thereafter notified Blair by email that plaintiff had "ordered" a Phase I report and a structural analysis of the property, adding that, "[a]ssuming these reports come back reasonably OK, which we anticipate, we're good to go."

Six days later, by letter dated September 26, 2013, Pohlman advised Blair that he had "no problem" with defendants' proposed modifications of the contract. Pohlman further stated that, should a Phase II environmental report become necessary based on the results of the Phase I report, plaintiff expected defendants to pay for it. Blair responded that defendants would not agree to pay for a Phase II report. On October 16, 2013, attorney Michael Burwick, who was representing plaintiff because Pohlman was out of town, sent a letter to Blair stating that the "environmental and structure report inspections have been completed," and that plaintiff had "agreed to proceed" with the purchase of the property. Burwick thus asked Blair to forward him the "search and survey" so that he could prepare for closing. Blair informed Burwick that there was no contract in place because the contract had not been unconditionally approved by plaintiff's attorneys. Plaintiffs thereafter commenced this breach of contract action.

As the Court of Appeals has stated, "[c]larity and predictability are particularly important" in the area of law dealing with attorney approval of real estate contracts (*Moran v Erk*, 11 NY3d 452, 457). Here, we conclude that, although plaintiff could have unilaterally waived the environmental conditions that Pohlman placed on his approval of the contract inasmuch as those conditions benefitted only him (*see Regional Gravel Prods. v Stanton*, 135 AD2d 1079, 1079, *lv dismissed in part and denied in part* 71 NY2d 949), neither Pohlman nor Burwick clearly and unequivocally did so. Thus, the contract was never unconditionally approved by plaintiff's attorneys.

Contrary to plaintiffs' contention, Burwick did not waive any conditions or unconditionally approve the contract in his October 16, 2013 letter. Instead, Burwick merely stated that the environmental and structural reports had been completed and that plaintiff wished to proceed with the purchase. Although it may reasonably be inferred from the letter that the Phase I report had shown no environmental problems with the property and that a Phase II report was therefore unnecessary, no mention was made of the environmental warranty previously requested by plaintiff. "[C]onsiderations of clarity, predictability, and professional responsibility weigh against reading an implied limitation into the attorney approval contingency" (*Moran*, 11 NY3d at 457). If Burwick intended to waive the conditions placed by Pohlman on his approval of the contract, he should have done so expressly and not left anything for inference, or he should have stated that he, as plaintiff's counsel, unconditionally approved the contract as proposed by defendants. Because he failed to do so, we conclude that there was not a valid contract between the parties and

that the court erred in directing defendants to sell the property to plaintiffs.

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1011

CA 15-00400

PRESENT: SCUDDER, P.J., SMITH, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF ARBITRATION BETWEEN
MONROE COUNTY AND MONROE COUNTY SHERIFF'S
OFFICE, PETITIONERS-RESPONDENTS-APPELLANTS,

AND MEMORANDUM AND ORDER

MONROE COUNTY LAW ENFORCEMENT ASSOCIATION,
RESPONDENT-PETITIONER-RESPONDENT.
(APPEAL NO. 1.)

HARRIS BEACH, PLLC, PITTSFORD (EDWARD TREVVETT OF COUNSEL), FOR PETITIONERS-RESPONDENTS-APPELLANTS.

BLITMAN & KING LLP, ROCHESTER (BRIAN J. LACLAIR OF COUNSEL), FOR RESPONDENT-PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (W. Patrick Falvey, A.J.), dated March 31, 2014. The order, among other things, denied the petition to stay arbitration and granted the cross petition to compel arbitration.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435; *see also* CPLR 5501 [a] [1]).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1012

CA 15-00402

PRESENT: SCUDDER, P.J., SMITH, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF ARBITRATION BETWEEN
MONROE COUNTY AND MONROE COUNTY SHERIFF'S
OFFICE, PETITIONERS-RESPONDENTS-APPELLANTS,

AND MEMORANDUM AND ORDER

MONROE COUNTY LAW ENFORCEMENT ASSOCIATION,
RESPONDENT-PETITIONER-RESPONDENT.
(APPEAL NO. 2.)

HARRIS BEACH, PLLC, PITTSFORD (EDWARD TREVVETT OF COUNSEL), FOR PETITIONERS-RESPONDENTS-APPELLANTS.

BLITMAN & KING LLP, ROCHESTER (BRIAN J. LACLAIR OF COUNSEL), FOR RESPONDENT-PETITIONER-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (W. Patrick Falvey, A.J.), entered May 1, 2014. The judgment denied the petition to stay arbitration and granted the cross petition to compel arbitration.

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

Memorandum: Petitioners-respondents (petitioners) employ, in the Court Security Bureau, persons in the positions of Deputy Sheriff Court Security Sergeant (Sergeants) and Deputy Sheriff Court Security Deputy (Deputies). Petitioners and respondent-petitioner, Monroe County Law Enforcement Association (Union), are parties to a collective bargaining agreement (CBA) that, inter alia, sets forth the terms and conditions of employment for the Deputies and Sergeants.

A dispute arose concerning the compensation owed to Sergeants and Deputies for their required attendance at roll call briefings. In 2010, 13 current or former Sergeants and Deputies commenced an action against petitioners in the United States District Court for the Western District of New York (*Crespo v County of Monroe, New York*, 2015 WL 2406112 [WD NY]), alleging, inter alia, that petitioners violated the Fair Labor Standards Act ([FLSA] 29 USC § 201 *et seq.*) in compensating them for attending or conducting roll call briefings. Thereafter, in 2013, the Union filed a grievance alleging that petitioners violated the CBA provisions governing compensation for roll call briefings. After petitioners denied the grievance through the stages provided in the CBA, the Union demanded arbitration.

Supreme Court properly denied the petition to stay arbitration and granted the Union's cross petition to compel arbitration. Contrary to petitioners' contention, the Union did not waive its right to arbitrate its grievance under the CBA when certain of its members commenced an action in federal court under the FLSA (*see Barrentine v Arkansas-Best Frgt. Sys., Inc.*, 450 US 728, 745-746; *see generally Sherrill v Grayco Bldrs.*, 64 NY2d 261, 272-273). "[T]he claims asserted in [the federal] action are entirely separate from those raised in the arbitration proceeding, and distinct remedies are sought in each" (*Radzievsky v Macmillan, Inc.*, 170 AD2d 400, 400). The Union, moreover, is not a party to the federal action, which seeks enforcement of the plaintiffs' rights as individual employees protected by the FLSA rather than as Union members subject to the CBA (*see Barrentine*, 450 US at 745-746; *Polanco v Brookdale Hosp. Med. Ctr.*, 819 F Supp 2d 129, 133 [ED NY]).

Contrary to petitioners' further contention, arbitration is not barred by res judicata inasmuch as there is no identity of parties or issues (*see Tuper v Tuper*, 34 AD3d 1280, 1281; *O'Riordan v Suffolk Ch., Local No. 852, Civ. Serv. Empls. Assn.*, 89 AD2d 558, 558-559, *appeal dismissed* 57 NY2d 956), nor in any event has there been a final determination in the federal action (*see Landau, P.C. v LaRossa, Mitchell & Ross*, 11 NY3d 8, 13; *Matter of LaSonde v Seabrook*, 89 AD3d 132, 140, *lv denied* 18 NY3d 911).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1019

KA 13-01884

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDIBERTO RODRIGUEZ, DEFENDANT-APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

EDIBERTO RODRIGUEZ, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. LOWRY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered October 7, 2013. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, and the matter is remitted to Supreme Court, Erie County, for further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of assault in the second degree (Penal Law § 120.05 [9]). As the People correctly concede, "[b]ecause the court failed to specify the period of postrelease supervision or the permissible range of postrelease supervision prior to imposing sentence, reversal is required" (*People v Hernandez*, 83 AD3d 1581, 1581; *see People v Turner*, 24 NY3d 254, 258; *People v Catu*, 4 NY3d 242, 245). We nevertheless reject defendant's contention in his pro se supplemental brief that the matter must be remitted to a different Supreme Court Justice inasmuch as he has "failed to show the existence of any actual impropriety, prejudice, or bias with respect to" sentencing or the manner in which the Justice herein conducted the proceedings (*Matter of Serkez v Serkez*, 34 AD3d 592, 592; *see People v Weekes*, 46 AD3d 583, 584-585, *lv denied* 10 NY3d 845; *see generally* Judiciary Law § 14; *People v Moreno*, 70 NY2d 403, 405).

In view of our decision, we do not address defendant's remaining contentions.

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1023

CAF 14-01469

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

IN THE MATTER OF KEVIN BLAIR,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CRYSTAL DIGREGORIO, RESPONDENT-RESPONDENT.

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

KELLY M. CORBETT, FAYETTEVILLE, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Onondaga County (Salvatore Pavone, R.), entered July 24, 2014 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded respondent sole custody of the subject child.

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

Memorandum: Petitioner father appeals from an order that, inter alia, awarded sole custody of the subject child to respondent mother. We affirm. We agree with the father that Family Court erred in not admitting in evidence a video depicting the child in a vehicle with the mother on the ground that only the creator of that video could lay a proper foundation for its admission in evidence. During her testimony, the mother denied recording the video and testified that her older son recorded it. The father sought to introduce the video, which was sent by the mother to the father's cell phone, to show that the mother was engaged in distracted driving by taking a video of the child while she was driving the vehicle. The father also sought to introduce that video to show that the mother was not a credible witness because the video supported the father's assertion that the mother recorded the video, not her older son. A video may be authenticated by a person other than the creator of the video where "the testimony of a witness to the recorded events . . . [demonstrates] that the videotape accurately represents the subject matter depicted" (*People v Patterson*, 93 NY2d 80, 84; *see Zegarelli v Hughes*, 3 NY3d 64, 69; *Read v Ellenville Natl. Bank*, 20 AD3d 408, 409), and thus the court erred in not admitting the video in evidence on the ground that the mother did not record it. We conclude, however, that the error is harmless. Inasmuch as the father watched the video and testified to its contents, we conclude that the admission of the video would have been cumulative of the testimony

adduced at trial (*see generally Hixson v Cotton-Hanlon, Inc.*, 60 AD3d 1297, 1298).

Contrary to the father's further contention, the court properly determined that it was in the best interests of the child to award sole custody to the mother. The court's custody determination following a hearing is entitled to deference (*see Eschbach v Eschbach*, 56 NY2d 167, 173), "particularly in view of the hearing court's superior ability to evaluate the character and credibility of the witnesses" (*Matter of Thillman v Mayer*, 85 AD3d 1624, 1625). Here, the court's written decision establishes that the court engaged in a " 'careful weighing of [the] appropriate factors' " (*Matter of Triplett v Scott*, 94 AD3d 1421, 1422), and the court's determination has a sound and substantial basis in the record (*see Matter of Misty D.B. v David M.S.*, 38 AD3d 1317, 1317; *Betro v Carbone*, 5 AD3d 1110, 1110).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1024

CAF 14-01619

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

IN THE MATTER OF PAUL KADER, II,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MEGAN L. KADER, RESPONDENT-APPELLANT.

MUSCATO, DIMILLO & VONA, LLP, LOCKPORT (BRIAN J. HUTCHISON OF COUNSEL), FOR RESPONDENT-APPELLANT.

MELISSA A. CAVAGNARO, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from a corrected order of the Family Court, Niagara County (John F. Batt, J.), entered July 18, 2014 in a proceeding pursuant to Family Court Act article 6. The corrected order denied the motion of respondent to vacate a default order granting petitioner sole custody of the subject child and to dismiss the petition for custody.

It is hereby ORDERED that the corrected order so appealed from is unanimously reversed on the law without costs, the default order is vacated, and the petition is dismissed.

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from a corrected order that denied her motion seeking to vacate a default order granting petitioner father sole custody of their child, and to dismiss the father's petition for custody. After the parents' relationship ended in December 2012, the mother and the child resided with the child's maternal grandmother. In February 2013, the mother ceased communicating with the father and denied him visitation with the child, and the father filed a petition for custody in April 2013. During business hours on three weekdays in May 2013, the process server unsuccessfully attempted to serve process on the mother at the grandmother's apartment. After the third attempt, the process server used the "nail and mail" method of service at the grandmother's apartment. The grandmother testified at a hearing, however, that the mother had moved to Maryland in March 2013. The mother and the Attorney for the Child contend that Family Court erred in denying the mother's motion inasmuch as the court did not obtain personal jurisdiction over her by the "nail and mail" method of service because the father failed to meet the due diligence requirement of CPLR 308 (4). We agree, and we therefore reverse the corrected order, vacate the default order, and dismiss the petition for custody.

CPLR 308 (4) allows the "nail and mail" method of service only "when service pursuant to CPLR 308 (1) and (2) cannot be made with due diligence" (*Austin v Tri-County Mem. Hosp.*, 39 AD3d 1223, 1224; *see Interboro Ins. Co. v Tahir*, 129 AD3d 1687, 1688-1689). "[A]lthough a process server's affidavit of service ordinarily constitutes prima facie evidence of proper service, here the process server's affidavit submitted by plaintiff fails to demonstrate the requisite due diligence" (*Interboro Ins. Co.*, 129 AD3d at 1688-1689; *see D'Alesandro v Many*, 137 AD2d 484, 484; *see generally Matter of El Greco Socy. of Visual Arts, Inc. v Diamantidis*, 47 AD3d 929, 929-930). Specifically, the affidavit of service did not contain any averment whether the process server had made an attempt to effectuate service at the mother's actual "dwelling place or usual place of abode" (CPLR 308 [4]), or whether he had made genuine inquiries to ascertain the mother's actual residence or place of employment (*see Prudence v Wright*, 94 AD3d 1073, 1074; *Earle v Valente*, 302 AD2d 353, 353-354). While the process server attempted to serve the mother on Friday, May 10, 2013, at 11:50 a.m., Monday, May 13, 2013, at 9:30 a.m., and Tuesday, May 14, 2013, at 1:30 p.m., "[t]hose three attempts at service, all on weekdays during normal business hours, did not satisfy the due diligence requirement [of CPLR 308 (4)]" (*Austin*, 39 AD3d at 1224).

In light of our determination, we do not reach the mother's alternative contention.

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1025

CAF 13-01252

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

IN THE MATTER OF SOPHIA M.G.K.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

TRACY G.K., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

MERIDETH H. SMITH, COUNTY ATTORNEY, ROCHESTER (PETER A. ESSLEY OF COUNSEL), FOR PETITIONER-RESPONDENT.

BETH A. RATCHFORD, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered June 18, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, terminated the parental rights of respondent with respect to the subject child and freed the child for adoption.

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

Memorandum: Respondent mother appeals from two dispositional orders that, inter alia, terminated her parental rights with respect to the two subject children and freed the children for adoption. We affirm the order in each appeal.

We conclude with respect to both appeals that, contrary to the mother's contention, Family Court's determinations that she permanently neglected the children are supported by clear and convincing evidence (*see Matter of Peter D.*, 262 AD2d 998, 998). The mother failed to obtain required mental health evaluations and to obtain a suitable and stable housing situation (*see Matter of Jessica Lynn W.*, 244 AD2d 900, 901). "Because she failed to make any progress in overcoming the problems that initially endangered the children and continued to prevent their safe return, the court properly found that [the mother] was unable to make an adequate plan for her children's future" (*Matter of Rebecca D.*, 222 AD2d 1092, 1092; *see* Social Services Law § 384-b [7] [a]). The court's determinations in both appeals that it was in the children's best interests to be adopted by the foster parents with whom they had lived for most of their lives

rather than to be returned to the mother is entitled to great deference (*see Matter of Elijah D. [Allison D.]*, 74 AD3d 1846, 1847), and we see no reason to disturb the court's determinations.

We have reviewed the mother's remaining contention in appeal No. 1 and conclude that it is without merit.

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1026

CAF 13-01279

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

IN THE MATTER OF RICHARD C.S., JR.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

TRACY G.K., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

MERIDETH H. SMITH, COUNTY ATTORNEY, ROCHESTER (PETER A. ESSLEY OF COUNSEL), FOR PETITIONER-RESPONDENT.

BETH A. RATCHFORD, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered June 18, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, terminated the parental rights of respondent with respect to the subject child and freed the child for adoption.

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

Same memorandum as in *Matter of Sophia M.G.K.* ([appeal No. 1] ___ AD3d ___ [Oct. 9, 2015]).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1028

CA 15-00397

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

JANE A. GILMORE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MARK B. JORDAN AND LEONARD P. JORDAN, ALSO KNOWN AS LEONARD P. JORDAN, JR., DEFENDANTS-APPELLANTS.

KARPINSKI STAPLETON & TEHAN, P.C., AUBURN (ADAM H. VANBUSKIRK OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CARBONARO LAW OFFICES, P.C., AUBURN (PATRICK A. CARBONARO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered November 4, 2014. The judgment granted the motion of plaintiff for summary judgment seeking a declaration that plaintiff is the owner in fee simple absolute of the title to certain real property.

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

Memorandum: Plaintiff commenced this action pursuant to RPAPL article 15 seeking a determination on the viability of a right of first refusal in favor of defendants. In 1979, plaintiff's husband (hereafter, Mr. Gilmore), as seller, and defendants, as buyers, executed a contract for the sale of a 71-acre parcel of real property. The contract stated that it "shall constitute a binding contract of purchase and sale and it shall bind the heirs, executors, and assigns of both [defendants] and [Mr. Gilmore]." The contract also provided that "[defendants] shall have the right of first refusal to purchase the 29 acres of land next north of parcel to be conveyed hereunder." In 1980, the parties closed the transaction, and the warranty deed provided, inter alia, that Mr. Gilmore "grant[ed] and release[d]" the 71-acre parcel to defendants and "their heirs and assigns forever." The warranty deed also provided that "[defendants] shall have the right of first refusal to purchase the 29 acres of land next north of parcel conveyed hereunder." In 2001, Mr. Gilmore died testate, leaving all of his real property to plaintiff. In 2013, plaintiff entered into a contract with a third party to sell a parcel of real property which included the 29 acres of land covered by the right of first refusal. In 2014, plaintiff commenced this action and subsequently moved for summary judgment seeking a declaration that she is the owner in fee simple absolute of the title to the disputed 29

acres. Plaintiff's rationale was that the right of first refusal was extinguished upon Mr. Gilmore's death because the 1980 deed did not bind his heirs and assigns with respect thereto. Supreme Court granted the motion, and we affirm.

The right of first refusal provision contained in the 1979 contract "merged into the subsequent [1980] deed executed pursuant to the [contract]," and "[a]ny inconsistencies between the contract and the deed are presumed to be explained and governed solely by the latter" (*Spiegel v Rickey*, 285 AD2d 879, 880 [internal quotation marks omitted]). Therefore, contrary to defendants' contention, the right of first refusal was extinguished upon the death of Mr. Gilmore inasmuch as the 1980 deed did not purport to bind Mr. Gilmore's heirs and assigns (*see Adler v Simpson*, 203 AD2d 691, 692-693; *Smith v Estate of LaTray*, 161 AD2d 1178, 1179). We reject defendants' further contention that the "savings provision" of EPTL 9-1.3 (b) requires this Court to uphold defendants' power to exercise the right of first refusal. Indeed, we see no provision in the deed that needs to be "saved." Rather, because there is nothing in the deed to indicate that the right of first refusal was meant to be anything other than "a personal agreement [between the parties], binding on themselves only and not their [heirs] and assigns" (*Adler*, 203 AD2d at 692-693), we are compelled to conclude that the right of first refusal was extinguished upon the death of Mr. Gilmore.

Defendants remaining contentions have been raised for the first time on appeal, and thus they are not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1032

CA 14-02191

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

THOMAS D. ANGIELCZYK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RICHARD P. LIPKA, DEFENDANT-RESPONDENT.

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

BARTH SULLIVAN BEHR, BUFFALO (ALEX M. NEUROHR OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Erie County Court (Sheila A. DiTullio, J.), dated March 19, 2014. The order affirmed a judgment of the Buffalo City Court.

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

Memorandum: Plaintiff commenced this small claims action in Buffalo City Court seeking damages in the sum of $5,200 for the diminution in value of his 1996 Jaguar XJR (Jaguar) allegedly caused by an accident in which defendant's wife, who was driving defendant's vehicle, backed the vehicle into the Jaguar in a parking lot. After a hearing, City Court awarded judgment in favor of defendant. On appeal, County Court (hereafter, court) affirmed. We affirm.

As an initial matter, we note that, by commencing this action upon a small claim under UCCA article 18, plaintiff waived his right to appeal, except to the extent that he may "appeal on the sole grounds that substantial justice has not been done between the parties according to the rules and principles of substantive law" (UCCA 1807). "[A] small claims judgment may not be overturned simply because the determination appealed from involves an arguable point on which an appellate court may differ; the deviation from substantive law must be readily apparent and the court's determination clearly erroneous" (*Coppola v Kandey Co.*, 236 AD2d 871, 871-872 [internal quotation marks omitted]; *see Pugliatti v Riccio*, 130 AD3d 1420, 1421; *Schiffman v Deluxe Caterers of Shelter Rock*, 100 AD2d 846, 846-847). "Thus, judgment rendered in a small claims action will be overturned only if it is 'so shocking as to not be substantial justice' " (*Coppola*, 236 AD2d at 872; *see Blair v Five Points Shopping Plaza*, 51 AD2d 167, 169).

With the above principles in mind, we reject plaintiff's contention that this Court's opinion in *Franklin Corp. v Prahler* (91 AD3d 49) compels the conclusion that he is entitled to judgment on his claim for damages based on the Jaguar's alleged diminution in value. At the hearing, plaintiff testified that, prior to the accident, the Jaguar was "basically all original," that he had entered it in car shows and that, as a result of the accident, it had diminished in value in the amount of $5,200. Plaintiff also submitted written appraisals indicating that the resale value of the Jaguar had diminished as a result of the accident. Unlike the plaintiff in *Franklin Corp.*, however, plaintiff submitted no evidence demonstrating that the Jaguar appreciated in value from the time that he had purchased it to the time of the accident. We therefore conclude that the court properly determined that *Franklin Corp.* is inapplicable to the instant case (*cf. id.* at 56-57), and that the rule articulated in *Johnson v Scholz* (276 App Div 163) is applicable, instead: "The measure of damages for injury to property resulting from negligence is the difference in the market value immediately before and immediately after the accident, or the reasonable cost of repairs necessary to restore it to its former condition, whichever is lesser" (*id.* at 164; *see* PJI 2:311). In addition, "where, as here, there is no dispute that the repairs fully restored the vehicle to its condition before the accident, and the only basis of the claim made by the plaintiff for the difference in value immediately before and immediately after the accident is not that his automobile could not be fully repaired, but, rather, that after repair the resale value would be diminished because the car had been in an accident, 'the diminution in resale value is not to be taken into account' " (*Parkoff v Stavsky*, 109 AD3d 646, 648, *lv denied* 22 NY3d 864).

We have examined plaintiff's remaining evidentiary contention and conclude that it is not properly before us because it has been raised for the first time on appeal (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985). In any event, that contention cannot serve as a basis for reversal of the small claims judgment herein (*see Blair*, 51 AD2d at 169; *see also Williams v Roper*, 269 AD2d 125, 126-127, *lv denied* 95 NY2d 898).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1033

CA 15-00269

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

TYLER BULLUCK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MARYANNE E. FIELDS, DEFENDANT-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KAREN J. KROGMAN DAUM OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered November 21, 2014. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained in a fire at defendant's residence. Plaintiff alleges that his injuries were caused by the negligence of defendant in failing to maintain functional, properly placed smoke detectors and in maintaining faulty electrical wiring.

Supreme Court properly denied defendant's motion for summary judgment dismissing the complaint. Even assuming, arguendo, that defendant met her initial burden of establishing that she had installed smoke detectors in the residence (*see Verizon N.Y., Inc. v Garvin*, 13 NY3d 851, 852; *see generally* CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562), we conclude that there are triable issues of fact whether those smoke detectors were functioning properly on the night of the fire (*see Pierre-Louis v DeLonghi Am., Inc.*, 66 AD3d 857, 858; *see generally McKnight v Coppola*, 113 AD3d 1087, 1087-1088), and whether "a properly positioned smoke detector would have given adequate warning of fire" to plaintiff (*Lein v Czaplinski*, 106 AD2d 723, 725). We further conclude that there are triable issues of fact whether the alleged failure of the smoke detectors to function properly caused or contributed to plaintiff's injuries (*see Hanes v Narracci*, 113 AD3d 1125, 1126; *see also Foreman v Coyne Textile Servs. of Buffalo*, 284 AD2d 912, 912), and whether the fire was the result of defendant's negligence in maintaining a dangerous condition at her residence, i.e., faulty electrical wiring

in the room where the fire originated (*see generally New York Mun. Ins. Reciprocal v Casella Constr., Inc.*, 105 AD3d 1440, 1441). Finally, the court properly declined to consider contentions raised by defendant for the first time in her reply papers (*see Jackson v Vatter*, 121 AD3d 1588, 1589).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1034

CA 15-00213

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

GREECE TOWN MALL, L.P., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DENNIS M. MULLEN, COMMISSIONER, NEW YORK STATE DEPARTMENT OF ECONOMIC DEVELOPMENT, DEFENDANT-RESPONDENT.

FEERICK LYNCH MACCARTNEY, ESQS., SOUTH NYACK (DENNIS E.A. LYNCH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered April 7, 2014 in a declaratory judgment action. The judgment, inter alia, granted the cross motion of plaintiff for partial summary judgment on the first cause of action of the first amended complaint.

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

Memorandum: In this declaratory judgment action, plaintiff asserted eight causes of action, only the first of which is at issue on appeal. As relevant here, in 1986, the Legislature passed the New York State Empire Zones Act (General Municipal Law § 955 *et seq.*), which provides, inter alia, certain tax and utility cost reductions to eligible businesses. Plaintiff operates the "Greece Town Mall" and, in 2002, it proposed an economic development plan for that facility under the Empire Zones Act. In August 2003, plaintiff was duly certified as an Empire Zone business enterprise by New York State, retroactive to July 31, 2002. In 2009, the Legislature amended the Empire Zones Act, requiring, inter alia, that defendant conduct a review of all business enterprises to determine whether they should be decertified. Later in 2009, defendant revoked plaintiff's certification, retroactively effective to January 1, 2008.

Plaintiff's first cause of action in the first amended complaint alleged that defendant "violated lawful procedure in adopting regulations that were inconsistent with the Empire Zone Act . . . with regard to the across the board retroactive date of decertification of January 1, 2008 . . . regarding the 2009 Amendment to the Empire Zone." Defendant moved for partial summary judgment dismissing the

eighth cause of action and, in doing so, conceded that plaintiff was entitled to relief on the first cause of action. Plaintiff thereafter cross-moved for partial summary judgment on the first cause of action, stating that "the concession by [d]efendant for relief in [p]laintiff's [f]irst [c]ause of [a]ction compels th[e] [c]ourt to grant [s]ummary [j]udgment declaring that any retroactive revocation of the [p]laintiff's Empire Zone Program benefits is illegal and that the [p]laintiff is entitled to have those benefits continued through 2015." Supreme Court granted plaintiff's cross motion "as acquiesced by the [d]efendant" and requested that plaintiff provide a proposed "order and judgment" (hereafter, judgment). Plaintiff's proposed judgment provided, inter alia, that "the retroactive decertification of the [p]laintiff from the Empire Zone Program is hereby declared illegal, invalid, null and void and that the [p]laintiff be reinstated to all rights and benefits in the Empire Zone Program through August 31, 2010." Defendant submitted an affirmation in opposition to plaintiff's proposed judgment and provided its own proposed judgment, which "declared that [d]efendant's . . . determination dated June 29, 2009 that revoked the [p]laintiff's Empire Zone Program certification cannot be retroactive to January 1, 2008." The court executed defendant's proposed judgment.

Plaintiff contends that defendant "acquiesced" to its request for relief in the first cause of action, "which sought continued Empire Zone benefits through 2015." We reject that contention. In the attorney affirmation accompanying the motion, defendant's attorney acknowledged only that, pursuant to the holding of *James Sq. Assoc. LP v Mullen* (21 NY3d 233), the subject 2009 amendment was not to be applied retroactively, and he therefore conceded that judgment in favor of plaintiff was warranted on the first cause of action. Defendant did not concede that plaintiff would be entitled to continued Empire Zone benefits through 2015, and defendant did not discuss, even in more general terms, any relief to which plaintiff might be entitled under the first cause of action. More importantly, as we have noted above, the gravamen of the first cause of action is the retroactive date of decertification of January 1, 2008, and plaintiff did not plead that the improper retroactive decertification entitles it to continued Empire Zone benefits through 2015. Moreover, plaintiff's proposed judgment did not recite that plaintiff is entitled to benefits through 2015. "Even assuming, arguendo, that we may decide this appeal on a legal theory not expressly raised in the complaint" (*South Buffalo Dev., LLC v PVS Chem. Solutions, Inc.*, 115 AD3d 1152, 1153), we conclude that plaintiff's claim that it was entitled to the "continued benefit of the Empire Zone Program through 2015" is without merit inasmuch as plaintiff does not have a "vested right to continue receiving tax credits" (*Matter of Greece Town Mall, L.P. v New York State*, 105 AD3d 1298, 1300).

We have examined plaintiff's remaining contention and conclude that it is without merit.

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1037

KA 13-02162

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRANCE B. HINES, DEFENDANT-APPELLANT.

DAVID P. ELKOVITCH, 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 November 7, 2013. The judgment convicted defendant, after a nonjury trial, of criminal sale of a controlled substance in the third degree (two counts) and criminal possession of a controlled substance in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him after a nonjury trial of two counts each of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal sale of a controlled substance in the third degree (§ 220.39 [1]). Contrary to defendant's contention, the conviction is supported by legally sufficient evidence, i.e., the eyewitness testimony of the confidential informant and police officers and the forensic testimony establishing the existence of cocaine (*see People v Brown*, 2 AD3d 1423, 1424, *lv denied* 1 NY3d 625). Contrary to defendant's further contention, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

We reject defendant's contention that County Court erred in refusing to order judicial diversion instead of incarceration. "Courts are afforded great deference in making judicial diversion determinations," and here the court did not abuse its discretion (*People v Williams*, 105 AD3d 1428, 1428, *lv denied* 21 NY3d 1021). We also reject defendant's contention that he is entitled to a new trial based on *Brady* violations. Even assuming, arguendo, that the prosecutor delayed in providing defendant with *Brady* material, we conclude that a new trial is not warranted inasmuch as defendant received the material in time for its meaningful and effective use at

trial (*see People v Daniels*, 115 AD3d 1364, 1365, *lv denied* 23 NY3d 1019; *see generally People v Reese*, 23 AD3d 1034, 1036, *lv denied* 6 NY3d 779).

Defendant further contends that the People failed to disclose evidence of an allegedly lenient sentence given to the confidential informant in an unrelated matter in exchange for favorable testimony, and that such evidence would have impeached the credibility of the witness whose testimony was determinative of guilt (*see Giglio v United States*, 405 US 150, 154). Even assuming, arguendo, that this evidence constituted *Brady/Giglio* material, we conclude that defendant's right to a fair trial was not violated because he was provided a meaningful opportunity to use the allegedly exculpatory evidence to cross-examine the People's witness (*see People v Leavy*, 290 AD2d 516, 516-517, *lv denied* 98 NY2d 698). Likewise, even assuming, arguendo, that the confidential informant's probation violation constituted a "conviction" subject to disclosure under CPL 240.45 (1) (b), we conclude that defendant was fully apprised of this information in time for a meaningful opportunity to cross-examine the witness at trial (*see People v Clark*, 194 AD2d 868, 869, *lv denied* 82 NY2d 752).

Defendant's contention that pretrial conversations between the confidential informant and members of the Finger Lakes Drug Task Force constitute *Rosario* material is without merit. There is no indication that any of the conversations during those meetings were transcribed or recorded (*see People v Barnes*, 200 AD2d 751, 751, *lv denied* 83 NY2d 849), and thus the People had no disclosure obligation pursuant to CPL 240.45 (1) (a). Inasmuch as the People were not required to prove the quantity of the cocaine to sustain the conviction of the crimes charged (*see People v Kisenik*, 285 AD2d 829, 830-831, *lv denied* 97 NY2d 657), defendant's contention that the People's failure to produce the calibration records of the forensic lab requires reversal is without merit. Even assuming, arguendo, that the curriculum vitae of the People's forensic scientist constituted *Rosario* material, we conclude that defendant's contention in this regard is also without merit because he failed to establish that he was substantially prejudiced by the delay in obtaining that document prior to the commencement of trial (*see People v Gardner*, 26 AD3d 741, 741, *lv denied* 6 NY3d 848).

We also reject defendant's contention that the court erred in failing to conduct a *Wade/Rodriguez* hearing. It is well settled that "[a] *Wade* hearing is not required when the witness is so familiar with the defendant that there is little or no risk that police suggestion could lead to a misidentification" (*People v Carter*, 57 AD3d 1017, 1017-1018, *lv denied* 12 NY3d 781 [internal quotation marks omitted]). Here, the People established that the confidential informant had known defendant "for years" prior to the drug transactions at issue. Thus, the identification of defendant by the confidential informant from a single photograph was "merely confirmatory," and no hearing was required based on any issue of suggestiveness (*People v Furman*, 294 AD2d 848, 848, *lv denied* 98 NY2d 696; *see People v Rodriguez*, 79 NY2d

445, 449-450). With respect to the in-court identification of defendant by a police witness, the People established that there was no pretrial identification procedure that would trigger the notice requirements of CPL 710.30 (*see People v Jackson*, 94 AD3d 1559, 1560, *lv denied* 19 NY3d 1026), and we thus reject defendant's contention that the court erred in allowing that witness to testify at trial based on the People's alleged failure to comply with CPL 710.30.

By failing to object to the court's ultimate *Sandoval* ruling, defendant failed to preserve for our review his contention that he was denied a fair trial based on that ruling (*see People v Riley*, 117 AD3d 1495, 1495-1496, *lv denied* 24 NY3d 1088). In any event, we conclude in this nonjury trial that the court's *Sandoval* ruling did not constitute an abuse of discretion (*see People v Small*, 79 AD3d 1807, 1808, *lv denied* 16 NY3d 837; *see generally People v Hayes*, 97 NY2d 203, 207-208). Contrary to defendant's further contention, the court's discretionary determination to deny recusal was not an abuse of discretion (*see People v Evans*, 118 AD3d 1476, 1476-1477). We reject defendant's further contention that the court erred in permitting the People to adduce hearsay testimony from a police officer to connect defendant to the vehicle that was used in the drug transactions. It is well settled that a court is presumed in a nonjury trial to have considered only competent evidence (*see People v LoMaglio*, 124 AD3d 1414, 1416, *lv denied* 25 NY3d 1203; *People v Sims*, 127 AD2d 805, 806, *lv denied* 70 NY2d 656). In any event, we conclude that the testimony was properly introduced for the "nonhearsay purpose of completing the narrative of events and explaining police actions" (*People v Guerrero*, 22 AD3d 266, 266, *lv denied* 5 NY3d 882).

To the extent defendant contends that he was penalized by the court for exercising his right to a trial, defendant failed to preserve that contention for our review because he did not raise the issue at the time of sentencing (*see People v Coapman*, 90 AD3d 1681, 1683-1684, *lv denied* 18 NY3d 956). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Finally, the sentence is not unduly harsh or severe.

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1038

KA 13-00818

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUSTIN JONES, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (John J. Ark, J.), rendered August 14, 2012. 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 case is held, the decision is reserved and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him, upon his guilty plea, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that Supreme Court erred in denying his request for a probable cause hearing to determine the lawfulness of his arrest and the admissibility of evidence obtained by the police as a result thereof. We agree. As the People correctly concede, the court erred in determining that defendant was not entitled to a hearing because his motion papers did not include an affidavit from defendant (*see* CPL 710.60 [1]; *People v Mendoza*, 82 NY2d 415, 421; *People v Battle*, 109 AD3d 1155, 1156, *lv denied* 22 NY3d 1038). The court also erred in determining that the factual assertions contained in defendant's moving papers were insufficient to warrant a hearing.

In determining whether a hearing is required pursuant to CPL 710.60, "the sufficiency of defendant's factual allegations should be evaluated by (1) the face of the pleadings, (2) assessed in conjunction with the context of the motion, and (3) defendant's access to information" (*Mendoza*, 82 NY2d at 426). Here, considering defendant's limited access to information regarding the basis for the actions of the arresting officers, he "could do little more than dispute the circumstances surrounding his arrest . . . [D]efendant's lack of access to information precluded more specific factual allegations and created factual disputes, the resolution of which required a hearing" (*People v Bryant*, 8 NY3d 530, 534). Thus, "[w]e

conclude that, under the circumstances, defense counsel's affirmation was sufficient to raise a factual issue necessitating a hearing" (*People v Fagan*, 203 AD2d 933, 933). We therefore hold the case, reserve decision and remit the matter to Supreme Court to conduct a suppression hearing.

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1039

KA 14-00755

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARRYL NANCE, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (JULIE BENDER FISKE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered March 21, 2014. 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 reject defendant's contention that Supreme Court erred in refusing to suppress the handgun seized by the police from defendant's apartment on the ground that his girlfriend's consent to search was not voluntarily given. " 'It is well established that the police need not procure a warrant in order to conduct a lawful search when they have obtained the voluntary consent of a party possessing the requisite authority or control over the premises or property to be inspected' " (*People v Plumley*, 111 AD3d 1418, 1419, *lv denied* 22 NY3d 1140). "Here, the totality of the circumstances establishes that [defendant's girlfriend] 'not only consented to the search, but also cooperated with the [search by drawing the officers' attention to the location where the gun was recovered] to accomplish the search. Such conduct signified the voluntary consent and willingness [of defendant's girlfriend] to cooperate with the police officers in their search' " (*People v McCray*, 96 AD3d 1480, 1481, *lv denied* 19 NY3d 1104; *see People v Santiago*, 41 AD3d 1172, 1173-1174, *lv denied* 9 NY3d 964). Contrary to defendant's contention, his girlfriend did not indicate that she was under duress or compelled by law enforcement to consent to the search.

Also contrary to defendant's contention, he was not improperly

detained in order to prevent him from objecting to the search. The officer's prior knowledge of defendant's dangerous propensities provided him with a reasonable basis for detaining defendant, to ensure officer safety (*see People v Binion*, 100 AD3d 1514, 1516, *lv denied* 21 NY3d 911). Defendant failed to preserve for our review his contention that the police lacked probable cause to arrest him (*see People v Williams*, 118 AD3d 1429, 1429-1430, *lv denied* 24 NY3d 1222), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Finally, we reject defendant's contention that the court erred in refusing to suppress the showup identification as unduly suggestive. "The showup procedure was reasonable under the circumstances because it was conducted in 'geographic and temporal proximity to the crime,' " and it was not rendered unduly suggestive by the fact that defendant was in handcuffs and in the presence of a police officer during the procedure (*People v Santiago*, 83 AD3d 1471, 1471, *lv denied* 17 NY3d 800).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1043

CA 15-00442

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

GREAT LAKES MOTOR CORP., DOING BUSINESS AS MERCEDES-BENZ OF BUFFALO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PATRICK J. JOHNSON, DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, BUFFALO (WILLIAM F. SAVINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered January 13, 2015. The order denied defendant's motion for summary judgment dismissing plaintiff's complaint.

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

Memorandum: Plaintiff commenced this action seeking damages allegedly arising from defendant's breach of an "Agreement Not to Export" (Agreement), which defendant signed when he purchased a Mercedez-Benz motor vehicle from plaintiff's dealership in Buffalo. The Agreement prohibited defendant from exporting the vehicle outside of North America for a period of one year, and included a $20,000 liquidated damages clause. The vehicle was exported to China approximately two weeks after defendant purchased it, prompting plaintiff to commence this action. In his answer, defendant asserted as an affirmative defense that plaintiff's claims "are barred in whole or in part because Plaintiff suffered no loss or damages," and the liquidated damages clause in the Agreement is unenforceable. Following joinder of issue but prior to discovery, defendant moved for summary judgment dismissing the complaint, contending, inter alia, that the liquidated damages clause is unenforceable because the amount of liquidated damages is essentially a penalty and bears no relation to plaintiff's actual damages, which are nonexistent. Supreme Court denied the motion without prejudice, and we now affirm.

Liquidated damages are enforceable only to the extent that they comprise " 'an estimate, made by the parties at the time they enter into their agreement, of the extent of the injury that would be sustained as a result of breach of the agreement' " (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 380). As a general rule, a

liquidated damages clause is enforceable only if the stipulated amount of damages "bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation" (*Truck Rent-A-Ctr. v Puritan Farms 2nd*, 41 NY2d 420, 425; *see G3-Purves St., LLC v Thomson Purves, LLC*, 101 AD3d 37, 41). If, however, the clause provides for damages that are " 'plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced' " (*JMD Holding Corp.*, 4 NY3d at 380).

Here, defendant failed to meet his initial burden of establishing as a matter of law that the amount of liquidated damages does not bear a reasonable relation to plaintiff's actual damages. In support of his motion, defendant relied on affidavits from himself and his attorney, both of whom asserted, upon information and belief only, that plaintiff sustained no actual damages, and that the liquidated damages clause is therefore unenforceable. Defendant offered no evidence in support of those conclusory assertions, and therefore failed to meet his initial burden of proof (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Thus, the court properly denied defendant's motion, "regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). Although defendant may be correct in contending that plaintiff cannot establish at trial that it sustained any actual damages as a result of defendant's breach of the Agreement, it is well settled that a party moving for summary judgment must affirmatively establish the merits of its cause of action or defense "and does not meet its burden by noting gaps in its opponent's proof" (*Atkins v United Ref. Holdings, Inc.*, 71 AD3d 1459, 1460 [internal quotation marks omitted]; *see Burke, Albright, Harter & Rzepka, LLP v Sills*, 83 AD3d 1413, 1413).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1044

CA 15-00486

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

JAMIE MURRAY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD GOLLEY, DEFENDANT-RESPONDENT,
WILLIAM EMMONS, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, ROCHESTER (SARAH E. BREINER OF COUNSEL), FOR DEFENDANT-APPELLANT.

DEFRANCISCO & FALGIATANO LAW FIRM, SYRACUSE (JEFF D. DEFRANCISCO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

LAW OFFICES OF GIALLEONARDO & HARTFORD, GETZVILLE (SHEILA FINN SCHWEDES OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Hugh A. Gilbert, J.), entered January 9, 2015. The order denied the motion of defendant William Emmons to dismiss the complaint against him.

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 against defendant William Emmons is dismissed.

Memorandum: Plaintiff was injured when the motorcycle he was operating collided with a vehicle operated by defendant Richard Golley. He commenced this action alleging, inter alia, that William Emmons (defendant), an employee of Autotech of Syracuse, Inc., negligently allowed Golley's vehicle to pass inspection prior to the accident. Defendant contends that Supreme Court erred in denying his pre-answer motion to dismiss the complaint against him pursuant to CPLR 3211 (a) (7) on the ground that he owed no duty of care to plaintiff. We agree. It is well settled that, on such a motion, all factual allegations in the complaint must be accepted as true and the benefit of every possible inference shall be afforded to the plaintiff (*see Gibraltar Steel Corp. v Gibraltar Metal Processing*, 19 AD3d 1141, 1142). Here, plaintiff alleged with respect to defendant that he knowingly passed a vehicle for inspection that should not have passed, but he did not allege, either in the complaint or in opposition to the motion, that defendant created or exacerbated any dangerous condition relating to Golley's vehicle by inspecting it. Thus, even assuming, arguendo, that defendant did not conduct a proper inspection of Golley's vehicle, we conclude that plaintiff has failed to allege that

defendant assumed a duty to plaintiff by "launch[ing] an instrument of harm since there is no reason to believe that the inspection made [Golley's] vehicle less safe than it was beforehand" (*Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253, 257; *see Hartsock v Scaccia*, 84 AD3d 1697, 1698-1699). Contrary to the court's determination in denying the motion, plaintiff failed to "establish[ ] that additional discovery would disclose facts 'essential to justify opposition' to defendant's motion" (*Bouley v Bouley*, 19 AD3d 1049, 1051; *see Englert v Schaffer*, 61 AD3d 1362, 1363). Finally, we note that Golley's cross claim against defendant had not been pleaded at the time of defendant's motion, and neither the parties nor the court addressed it in connection with defendant's motion. Golley's cross claim therefore shall now be treated as "a properly commenced third-party action" (*Merkley v Palmyra-Macedon Cent. Sch. Dist.*, 130 AD2d 937, 938).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1049

CA 14-01932

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

TAMMY L. WESTFALL, RAYMOND WESTFALL, GLEN C. DRAKE, MARYANN DRAKE, JOHN R. GAYTON, MARJORY S. NEWARK, CLARENCE J. NEWARK, BARBARA A. COMSTOCK, SHARON E. LOWE, DONALD LOWE, RYAN M. GERRITY, KATHLENE Y. RUCINSKI, WADE VOSBURGH, DOROTHY VOSBURGH, BOBBI JO GROFF, WAYNE GROFF, CYNTHIA L. PENNELL, DANIEL PENNELL, RAYMOND L. MCGINNIS, JOLENE E. WEST, DANE SEXTON, CAROL SEXTON, JAMES S. RAUH, JR., CINDY RAUH, TONYA I. FINSTER, GEORGE FINSTER, WEALTHY BUCKTOOTH, MELISSA M. STEVENS, VIOLA STEVENS, JOHN S. BRENNAN, SCOTT L. ANDERSON, TERESA ANDERSON, EDWARD WHITE AND OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS,

MEMORANDUM AND ORDER

V

OLEAN GENERAL HOSPITAL AND UPPER ALLEGHENY HEALTH SYSTEM, INC., DEFENDANTS-RESPONDENTS.

BROWN CHIARI, LLP, LANCASTER (MICHAEL SCINTA OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (SALLY J. BROAD OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cattaraugus County (Paula L. Feroleto, J.), entered July 30, 2014. The order denied plaintiffs' motion for an order certifying this action as a class action.

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

Memorandum: Plaintiffs, a group of over 1,900 patients who received insulin injections while at Olean General Hospital (defendant) between November 2009 and January 2013, appeal from an order denying their motion for class certification pursuant to CPLR 902. We conclude that Supreme Court properly denied the motion. This action is based on a letter received by plaintiffs from defendant in January 2013 informing them that, during the period in which they were hospitalized, insulin pens may have been shared by more than one patient, although defendant had not identified any particular patient who had received an insulin injection from an insulin pen used on another patient. The letter also offered free and confidential

testing for hepatitis B, hepatitis C and HIV. The complaint, in its present form, asserts causes of action for negligence, malpractice, and loss of consortium.

"[A] class action may be maintained in New York only after the five prerequisites set forth in CPLR 901 (a) have been met, i.e., the class is so numerous that joinder of all members is impracticable, common questions of law or fact predominate over questions affecting only individual members, the claims or defenses of the representative parties are typical of the class as a whole, the representative parties will fairly and adequately protect the interests of the class, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy" (*Rife v Barnes Firm, P.C.*, 48 AD3d 1228, 1229, *lv dismissed in part and denied in part* 10 NY3d 910). The class representative "bears the burden of establishing compliance with the requirements of both CPLR 901 and 902" (*Ackerman v Price Waterhouse*, 252 AD2d 179, 191).

Where, as here, no plaintiff has tested positive for the blood-borne disease to which he or she allegedly was exposed as a result of defendant's negligence, a prerequisite to recovery is proof of actual exposure to the blood-borne disease (*see e.g. Ornstein v New York City Health & Hosps. Corp.*, 10 NY3d 1, 6; *Siegrist v State of New York*, 55 AD3d 717, 718). The issue of actual exposure will require individualized determinations with respect to each plaintiff. Further, even if members of the proposed class could establish such actual exposure, "the extent of the damages resulting therefrom [is a] question[] requiring individual investigation and separate proof as to each individual claim" (*Komonczi v Fields*, 232 AD2d 374, 375). Thus, we conclude that, "even if there are common issues in this case, those issues do not predominate" (*Geiger v American Tobacco Co.*, 277 AD2d 420, 421, *lv dismissed* 96 NY2d 754), and "[t]he predominance of individualized factual questions . . . renders this case unsuitable for class treatment" (*Dimich v Med-Pro, Inc.*, 34 AD3d 329, 330, *lv dismissed in part and denied in part* 8 NY3d 904; *see* CPLR 901 [a] [2]).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1054

CA 15-00312

PRESENT: SCUDDER, P.J., SMITH, LINDLEY, AND DEJOSEPH, JJ.

IN THE MATTER OF FRANK TALLARINO, INDIVIDUALLY AND AS MINORITY LEADER OF ONEIDA COUNTY BOARD OF LEGISLATORS, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ONEIDA COUNTY BOARD OF LEGISLATORS AND COUNTY OF ONEIDA, RESPONDENTS-RESPONDENTS.

GUSTAVE J. DETRAGLIA, JR., UTICA, FOR PETITIONER-APPELLANT.

CALLI, CALLI & CULLY, UTICA (HERBERT J. CULLY OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered September 18, 2014 in a CPLR article 78 proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul Rule No. 26 of respondent Oneida County Board of Legislators (Board), which was adopted by the Board at the outset of its 2014-2015 biennial session. Prior to 2012, Rule No. 26 provided that all committees of the Board "shall consist of a number of members of each political party, proportionate to the percentage of such members on the Board." At the outset of the 2012-2013 session, however, the Board adopted a version of the rules that did not include within Rule No. 26 the proportionate representation requirement for committees. Petitioner, the minority leader of the Board, was the only legislator to vote against the proposed rules in 2012. Two years later, at a reorganizational meeting held on January 3, 2014, the Board voted unanimously to adopt rules that were the same as those adopted in 2012, including Rule No. 26.

Although petitioner voted in favor of the rules in 2014, he nevertheless contends in this proceeding that Rule No. 26 was adopted in violation of Rule No. 60, which provides: "After the approval of the Rules of the Board during the reorganizational meeting, these rules shall not be altered or amended except by resolution adopted by the Board, and only after every proposed alteration or amendment shall have been approved by the Ways [and] Means Committee of the Board."

According to petitioner, Rule No. 26 should be annulled because it was not approved by the Ways and Means Committee. As a threshold matter, we note that it is well settled that a challenge to a legislative body's compliance with its own internal rules constitutes a nonjusticiable political question (*see Heimbach v State of New York*, 59 NY2d 891, 892-893, *appeal dismissed* 464 US 956; *Matter of Montano v County Legislature of County of Suffolk*, 70 AD3d 203, 210-214; *Matter of Fornario v Clerk to Rockland County Legislature*, 307 AD2d 927, 928-929). In any event, as Supreme Court properly concluded, Rule No. 60 was not implicated because the Board did not alter or amend Rule No. 26 after it was adopted at the reorganizational meeting on January 3, 2014. Rule No. 60 applies only to amendments to rules that are made after the rules are initially adopted at the biennial reorganizational meeting, and no such amendments were made to Rule No. 26.

Finally, we conclude that petitioner's constitutional challenge to Rule No. 26, for which he cites no authority, similarly lacks merit, inasmuch as there is no constitutional requirement that the political makeup of legislative committees be proportionate to the political makeup of the legislature body as a whole (*see Davids v Akers*, 549 F2d 120, 123-125).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1055

CA 14-01837

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

ASHLEY SWAGGARD, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES DAGONESE, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (RODGER P. DOYLE, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAVID M. GIGLIO & ASSOCIATES, LLC, UTICA (DAVID M. GIGLIO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered June 27, 2014. The amended order denied the motion of defendant Charles Dagonese to dismiss the complaint against him and granted the cross motion of plaintiff for an extension of time to serve that defendant.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries she allegedly sustained as a result of exposure to hazardous lead paint. Charles Dagonese (defendant) moved to dismiss the complaint against him based on plaintiff's failure to effect proper service of the summons and complaint and thus to obtain personal jurisdiction over him (*see* CPLR 3211 [a] [8]), and plaintiff cross-moved to extend the time in which to serve defendant pursuant to CPLR 306-b. Supreme Court properly denied defendant's motion and granted plaintiff's cross motion. Pursuant to CPLR 306-b, if service is not timely made, "the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service." Even assuming, arguendo, that plaintiff failed to establish good cause for an extension, we conclude that the court properly granted plaintiff's cross motion in the interest of justice. That standard "requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the [s]tatute of [l]imitations, the

meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant" (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105-106). Here, upon weighing the relevant factors, "and noting that no one factor is more important than the others," we conclude that the court properly denied defendant's motion and granted plaintiff's cross motion (*Moss v Bathurst*, 87 AD3d 1373, 1374).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1058

KA 12-02288

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FARRAH A. DONALD, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

FARRAH A. DONALD, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered January 5, 2012. 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 modified as a matter of discretion in the interest of justice and on the law by vacating the sentence, and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that Supreme Court erred in imposing an enhanced sentence without specifically warning him of that possibility if he failed to appear for sentencing. "Although defendant failed to preserve his contention for our review by objecting to the enhanced sentence or by moving to withdraw his plea or to vacate the judgment of conviction (*see People v Fortner*, 23 AD3d 1058, 1058 [2005]; *People v Sundown*, 305 AD2d 1075, 1076 [2003]), we nevertheless exercise our power to review defendant's contention as a matter of discretion in the interest of justice" (*People v Spencer*, 129 AD3d 1458, 1459; *see* CPL 470.15 [3] [c]; *People v Ignatowski*, 70 AD3d 1472, 1473). We agree with defendant that the court erred in imposing an enhanced sentence inasmuch as it did not advise defendant at the time of his plea that "a harsher sentence than he bargained for could be imposed if [he] failed to appear at sentencing" (*People v Ortiz*, 244 AD2d 960, 961; *see Sundown*, 305 AD2d at 1075-1076). We therefore modify the judgment by vacating the sentence, and we remit the matter to Supreme Court to impose the promised sentence or to afford defendant the opportunity to withdraw his plea (*see Spencer*,

129 AD3d at 1459; *Fortner*, 23 AD3d at 1058).

Defendant further contends that we are required to afford him the even greater remedy of vacatur of his plea because the court failed to warn him at the plea hearing that an enhanced sentence could also include a period of postrelease supervision (PRS). Under the circumstances presented here, that contention is not preserved for our review because defendant never objected to the term of PRS (*see People v Turner*, 24 NY3d 254, 258-259; *People v Murray*, 15 NY3d 725, 726-727). We decline to exercise our power to reach defendant's contention as a matter of discretion in the interest of justice inasmuch as defendant was made aware at the plea hearing that his sentence would include a term of five years of PRS, and the court did not increase that term of PRS when it imposed the enhanced sentence (*cf. People v McAlpin*, 17 NY3d 936, 938; *People v Singletary*, 118 AD3d 610, 611; *see generally* CPL 470.15 [3] [c]).

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

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1059

KA 12-00911

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAQUAN EVANS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered May 15, 2012. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]), charges that arose from the shooting death of a 19-month-old boy, an innocent bystander caught in the midst of gang-related violence. Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is contrary to the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Even assuming, arguendo, that a different verdict would not have been unreasonable, "the jury was in the best position to assess the credibility of the witnesses 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, *lv denied* 4 NY3d 801; *see People v Kalinowski*, 118 AD3d 1434, 1436, *lv denied* 23 NY3d 1064). We note that defendant was identified at trial as the shooter by a fellow gang member, and that data from his GPS ankle bracelet that he wore while on parole placed him at the scene of the shooting at the approximate time of the shooting. The GPS data also showed that, after the shooting, defendant went to his grandfather's house, where a revolver was found by the police that was consistent with the weapon used to fire the bullet that killed the victim.

We reject defendant's further contention that Supreme Court erred

in imposing consecutive sentences. The court sentenced defendant to an indeterminate term of 25 years to life for the murder, and a consecutive determinate term of 15 years, plus 5 years of postrelease supervision, for the weapon possession. Defendant was charged with "simple" weapon possession (Penal Law § 265.03 [3]) and, when a defendant is so charged, "[s]o long as [the] defendant knowingly unlawfully possesses a loaded firearm before forming the intent to cause a crime with that weapon, the possessory crime has already been completed, and consecutive sentencing is permissible" (*People v Brown*, 21 NY3d 739, 751). Contrary to defendant's contention, the evidence was legally sufficient to establish that he possessed the murder weapon in the car on the way to the shooting, and thus "there was a completed possession, within the meaning of [section 265.03 (3)], before the shooting took place" (*People v Rodriguez*, 118 AD3d 451, 452, *lv denied* 24 NY3d 964; *see People v Mitchell*, 118 AD3d 1417, 1418-1419, *lv denied* 24 NY3d 963).

Defendant failed to preserve his contentions concerning alleged prosecutorial misconduct, and we decline to exercise our power to reach them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v West*, 129 AD3d 1629, 1630). We conclude that defense counsel's failure to preserve those contentions did not deprive defendant of effective assistance of counsel (*see People v Koonce*, 111 AD3d 1277, 1279; *see generally People v Baldi*, 54 NY2d 137, 147).

Finally, although defendant contends that he was illegally arrested without a warrant in violation of *Payton v New York* (445 US 573), the evidence establishes that defendant was arrested in the threshold of his apartment, and thus "defendant's arrest did not implicate *Payton* rights" (*People v Reynoso*, 309 AD2d 769, 770, *affd* 2 NY3d 820; *see People v Correa*, 55 AD3d 1380, 1380, *lv denied* 11 NY3d 924).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1073

CA 15-00201

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

BONNIE J. SARAVULLO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

HERBERT M. TILLOTSON, DEFENDANT-RESPONDENT.

WILLIAM MATTAR, P.C., WILLIAMSVILLE (JOHN E. ABEEL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, ROCHESTER (RICHARD C. BRISTER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), entered August 20, 2014. The order, insofar as appealed from, granted the motion of defendant in part by directing plaintiff to provide certain cell phone records for in camera review.

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

Memorandum: In this personal injury action arising from a motor vehicle accident, plaintiff appeals from an order granting defendant's motion in part by directing plaintiff to provide Supreme Court with her cell phone records for in camera review. Although it is true, as plaintiff contends, that defendant did not make the good faith effort required by 22 NYCRR 202.7 to resolve the discovery dispute prior to filing the motion, the court properly concluded that, inasmuch as plaintiff had previously refused defendant's request to release the records, defendant's failure to comply with the above rule may be excused because "any effort to resolve the [discovery] dispute non-judicially would have been futile" (*Yargeau v Lasertron*, 74 AD3d 1805, 1806 [internal quotation marks omitted]).

We reject plaintiff's further contention that the court abused its discretion in refusing to deny the motion as untimely. "Where additional discovery is sought more than 20 days after the filing of the note of issue, the moving party must demonstrate unusual or unanticipated circumstances and substantial prejudice absent the additional discovery" (*Blinds To Go [US], Inc. v Times Plaza Dev., L.P.*, 111 AD3d 775, 775). Here, the note of issue was filed on June 11, 2014, and defendant's motion to compel was served on June 27, 2014, within the 20-day period. Thus, defendant was not required to show unusual or unanticipated circumstances; instead, defendant merely had to demonstrate that discovery was not complete (*see* 22 NYCRR

202.21 [e]; *Gallo v SCG Select Carrier Group, L.P.*, 91 AD3d 714, 714-715), which he did in fact show based on plaintiff's refusal to authorize the release of her cell phone records as requested by defendant before the note of issue was filed.

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1074

CA 15-00134

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

BILL'S FEED SERVICE, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WILLIAM ADAMS, DEFENDANT-RESPONDENT.

SCHMITT & LASCURETTES, LLC, UTICA, LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (ERIN K. SKUCE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HRABCHAK & GEBO, P.C., WATERTOWN (MARK G. GEBO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered June 3, 2014. The order denied without prejudice the motion of plaintiff to dismiss the counterclaim of defendant.

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

Memorandum: Plaintiff commenced this action to recover money owed for animal feed it supplied to defendant for his dairy cows. Defendant asserted a counterclaim for money damages, alleging that, among other things, the animal feed was defective and harmed his cows and farming business. Plaintiff served defendant with a notice to preserve evidence that specifically included the subject feed. Following discovery, plaintiff moved to dismiss the counterclaim on the ground of spoliation of evidence, i.e., for defendant's alleged failure to preserve feed samples and deceased cows. Supreme Court denied the motion without prejudice to any appropriate similar application during trial. We affirm.

"A party seeking a sanction pursuant to CPLR 3126 such as preclusion or dismissal is required to demonstrate that a litigant, intentionally or negligently, dispose[d] of crucial items of evidence . . . before the adversary ha[d] an opportunity to inspect them . . . , thus depriving the party seeking a sanction of the means of proving his claim or defense" (*Koehler v Midtown Athletic Club, LLP*, 55 AD3d 1444, 1445 [internal quotation marks omitted]). "Spoliation sanctions may be appropriate even if the destruction occurred through negligence rather than wilfulness, and even if the evidence was destroyed before the spoliator became a party, provided [the party] was on notice that the evidence might be needed for future litigation"

(*Enstrom v Garden Place Hotel*, 27 AD3d 1084, 1086 [internal quotation marks omitted]). Here, we conclude that plaintiff failed to establish that defendant intentionally or negligently disposed of the evidence at issue. The record establishes that defendant disposed of the feed samples and deceased cows before he had any notice that plaintiff intended to commence the instant action and, "[i]n the absence of pending litigation or notice of a specific claim, a defendant should not be sanctioned for discarding items in good faith and pursuant to its normal business practices" (*Anthony v Wegmans Food Mkts., Inc.*, 11 AD3d 953, 954 [internal quotation marks omitted]; *see C.P. Ward, Inc. v Deloitte & Touche LLP*, 74 AD3d 1828, 1830-1831).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1076

CA 15-00374

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

WILLIAM J. FAZEKAS AND ANGELA M. FAZEKAS,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

TIME WARNER CABLE, INC.,
DEFENDANT-RESPONDENT-APPELLANT.

DREYER BOYAJIAN LLP, ALBANY (JOHN B. CASEY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

SCHMITT & LASCURETTES, LLC, UTICA (WILLIAM P. SCHMITT OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Herkimer County (Norman I. Siegel, J.), entered November 3, 2014. The order denied the motion of plaintiffs for partial summary judgment, and denied in part the cross motion of defendant for summary judgment.

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

Memorandum: Plaintiffs commenced this common-law negligence and Labor Law action seeking damages for injuries sustained by William J. Fazekas (plaintiff) when the ladder he was standing on slid on snow and ice where it had been placed, causing him to fall to the ground below. At the time of the accident, plaintiff was installing cable service on behalf of his employer, who was a subcontractor for defendant. Plaintiffs appeal and defendant cross-appeals from an order denying plaintiffs' motion for partial summary judgment on the issue of liability on the Labor Law § 240 (1) and § 241 (6) causes of action, and denying in part defendant's cross motion for summary judgment dismissing the complaint.

Contrary to the contentions of the parties, we conclude that Supreme Court properly denied that part of plaintiffs' motion seeking partial summary judgment on the issue of liability on the Labor Law § 240 (1) cause of action and that part of defendant's cross motion seeking summary judgment dismissing that cause of action. Liability under section 240 (1) "is contingent on a statutory violation and proximate cause" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287). If both elements are established, "contributory negligence cannot defeat the plaintiff's claim" (*id.*). There can be no liability under Labor Law § 240 (1), however, "when there is no

violation and the worker's actions . . . are the 'sole proximate cause' of the accident" (*id.* at 290). It is therefore "conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury. Thus, if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation" (*id.*).

While we agree with plaintiffs that evidence that a ladder is "structurally sound and not defective is not relevant on the issue of whether it was properly placed" (*Whalen v ExxonMobil Oil Corp.*, 50 AD3d 1553, 1554 [internal quotation marks omitted]; *see Woods v Design Ctr., LLC*, 42 AD3d 876, 877; *Petit v Board of Educ. of W. Genesee Sch. Dist.*, 307 AD2d 749, 749-750), we conclude that there are triable issues of fact whether plaintiff's actions were the sole proximate cause of his injuries (*see Sistrunk v County of Onondaga*, 89 AD3d 1552, 1552; *Tronolone v Praxair, Inc.*, 22 AD3d 1031, 1033). Although defendant also raises the issue whether plaintiff was a recalcitrant worker, "[t]he controlling question . . . is not whether plaintiff was 'recalcitrant,' but whether a jury could [find] that his own conduct . . . was the sole proximate cause of his accident" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40). We therefore address defendant's contention only in the context of sole proximate cause.

Where, as here, a ladder slips and falls, causing a worker to fall from an elevated work site, the worker may assert a prima facie violation of Labor Law § 240 (1) on the ground that the ladder was not so placed as to give proper protection (*see Kin v State of New York*, 101 AD3d 1606, 1607; *Morin v Machnick Bldrs.*, 4 AD3d 668, 670; *Dahl v Armor Bldg. Supply*, 280 AD2d 970, 971). When the evidence establishes, however, that a "plaintiff had adequate safety devices available; that he [or she] knew both that they were available and that he [or she] was expected to use them; that he [or she] chose for no good reason not to do so; and that had he [or she] not made that choice he [or she] would not have been injured," there will be no liability under Labor Law § 240 (1) (*Cahill*, 4 NY3d at 40; *see Gordon v Eastern Ry. Supply*, 82 NY2d 555, 563; *Piotrowski v McGuire Manor, Inc.*, 117 AD3d 1390, 1390-1391; *cf. Evans v Syracuse Model Neighborhood Corp.*, 53 AD3d 1135, 1137). In such circumstances, the worker's own conduct, rather than any violation of the Labor Law, is the sole proximate cause of the accident (*see Cahill*, 4 NY3d at 40).

In this case, we conclude that plaintiffs failed to meet their initial burden of establishing entitlement to partial summary judgment on the issue of liability on the Labor Law § 240 (1) cause of action inasmuch as they submitted evidence raising a triable issue of fact whether plaintiff's conduct in "refusing to use available, safe and appropriate equipment" was the sole proximate cause of the accident (*Gordon*, 82 NY2d at 563; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Specifically, plaintiffs submitted deposition testimony from defendant's customer, who purportedly owned the

building on which plaintiff was working. The owner testified that, on the day of the accident, he advised plaintiff that the ladder was not placed in a safe position. The owner offered to retrieve safety equipment from his own truck that would help to remove ice from underneath the ladder and thereby stabilize the ladder. Plaintiff, however, rejected that offer. The owner also attempted to hold the ladder for plaintiff, but plaintiff again rejected the owner's assistance.

It is well settled that the failure to follow an instruction by an employer or owner to avoid unsafe practices does not constitute a refusal to use available, safe and appropriate equipment, and we therefore agree with plaintiffs that plaintiff's failure to follow the owner's instructions and advice does not preclude defendant's liability under Labor Law § 240 (1) (*see Miles v Great Lakes Cheese of N.Y., Inc.*, 103 AD3d 1165, 1167; *see also Luna v Zoological Socy. of Buffalo, Inc.*, 101 AD3d 1745, 1746*; see generally Gordon*, 82 NY2d at 563). According to the deposition testimony of the owner "and the reasonable inferences to be drawn therefrom" (*Scott v Crystal Constr. Corp.*, 1 AD3d 992, 993), plaintiff had knowledge of and refused to use "available, safe and appropriate equipment" provided by the owner that would have helped stabilize the ladder to keep it from slipping (*Gordon*, 82 NY2d at 563). Such evidence raises a triable issue of fact whether plaintiff's conduct was the sole proximate cause of his accident (*see Scott*, 1 AD3d at 993-994*; see also Andrews v Ryan Homes, Inc.*, 27 AD3d 1197, 1198). Inasmuch as plaintiffs failed to meet their initial burden on that part of their motion seeking partial summary judgment on the issue of liability on the Labor Law § 240 (1) cause of action, we do not consider defendant's submissions in opposition to the motion (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). We nevertheless have examined defendant's submissions insofar as it cross-moved for summary judgment dismissing that cause of action. We conclude that defendant failed to meet its initial burden on the cross motion because defendant failed to establish that plaintiff knew that he was expected to use "available, safe and appropriate equipment" offered to him by the owner and thus failed to establish that plaintiff "chose for no good reason not to" use the equipment (*Gordon*, 82 NY2d at 563; *see Cahill*, 4 NY3d at 40; *cf. Gallagher v New York Post*, 14 NY3d 83, 88; *Kin*, 101 AD3d at 1607-1608). We therefore conclude that neither party has eliminated all issues of fact on their respective applications for summary relief on the Labor Law § 240 (1) cause of action.

Additionally, we agree with defendant that the court properly denied that part of plaintiff's motion seeking partial summary judgment on the issue of liability on the Labor Law § 241 (6) cause of action. Even assuming, arguendo, that plaintiffs established that defendant violated certain Industrial Code regulations, any such violation "does not establish negligence as a matter of law but is merely some evidence to be considered on the question of a defendant's negligence" (*Puckett v County of Erie*, 262 AD2d 964, 965 [internal quotation marks omitted]; *see Rizzutto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 349; *Arenas v Bon-Ton Dept. Stores, Inc.*, 35 AD3d 1205, 1206). Furthermore, where, as here, there is an issue of fact on

plaintiff's alleged comparative negligence, summary judgment to plaintiffs is inappropriate (*see Puckett*, 262 AD2d at 965). Finally, the court properly granted that part of defendant's motion for summary judgment seeking dismissal of the common-law negligence and Labor Law § 200 cause of action. "Defendant established that it did not supervise or control the work at issue, and plaintiff[s] failed to raise a triable issue of fact" (*Brunette v Time Warner Entertainment Co., L.P.*, 32 AD3d 1170, 1170).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1078

CA 15-00408

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

UTICA MUTUAL INSURANCE COMPANY,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

AMERICAN RE-INSURANCE COMPANY, NOW KNOWN AS
MUNICH REINSURANCE AMERICA, INC., AND
TRANSATLANTIC REINSURANCE COMPANY,
DEFENDANTS-RESPONDENTS.

HUNTON & WILLIAMS LLP, MCLEAN, VIRGINIA (SYED S. AHMAD, OF THE VIRGINIA AND DISTRICT OF COLUMBIA BARS, ADMITTED PRO HAC VICE, OF COUNSEL), AND FELT EVANS, LLP, CLINTON FOR PLAINTIFF-APPELLANT.

PETRONE & PETRONE, UTICA (MARK CHIECO OF COUNSEL), AND RUBIN, FIORELLA & FRIEDMAN LLP, NEW YORK CITY, FOR DEFENDANT-RESPONDENT AMERICAN RE-INSURANCE COMPANY, NOW KNOWN AS MUNICH REINSURANCE AMERICA, INC.

Appeal from an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered December 4, 2014. The order granted the motion of defendant American Re-insurance Company, now known as Munich Reinsurance America, Inc., to sever the claims against it from the claims against defendant Transatlantic Reinsurance Company.

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

Memorandum: Plaintiff, an insurance company, commenced this breach of contract and declaratory judgment action against defendants, American Re-Insurance Company, now known as Munich Reinsurance America, Inc. (Munich), and Transatlantic Reinsurance Company (Transatlantic), seeking enforcement of reinsurance policies issued by them to plaintiff. After answering the complaint, Munich moved to sever the claims against it from those against Transatlantic. According to Munich, there are no common questions of law or fact between the claims, and plaintiff's sole purpose in joining them was to avoid removal of the claims against Munich to federal court. Supreme Court granted the motion, and we now affirm.

"In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue" (CPLR 603). The determination of a severance motion under CPLR 603 "is a matter of judicial discretion which will not be disturbed on appeal absent an abuse of discretion or

prejudice to a substantial right of the party seeking severance" (*Finning v Niagara Mohawk Power Corp.*, 281 AD2d 844, 844; *see Sunshine Imaging Assn./WNY MRI v Government Empls. Ins. Co.*, 66 AD3d 1419, 1420). "While the granting of a motion for consolidation or joint trial hinges upon a finding of common issues of law or fact, the granting of severance generally depends upon an absence of such commonality" (*Herskovitz v Klein*, 91 AD3d 598, 599; *see* 3-603 Weinstein-Korn-Miller, NY Civ Prac, CPLR ¶ 603.03).

Here, although the claims against both defendants relate to insurance payments made by plaintiff to the same insured for asbestos-related losses, defendants have no relationship to one another, and the claims arise from different reinsurance contracts, were triggered by different underlying umbrella polices, and involve different time periods. Moreover, defendants asserted different affirmative defenses, and a finding of liability against one defendant will not impact the liability of the other. Under those circumstances, we conclude that the court did not abuse its discretion in granting Munich's severance motion.

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1079

CA 15-00254

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

LEO JOSEPH SWIETLIKOWSKI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

VILLAGE OF HERKIMER, DEFENDANT-APPELLANT.

MURPHY, BURNS, BARBER & MURPHY, LLP, ALBANY (STEPHEN M. GROUDINE OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL A. CASTLE, HERKIMER (SCOTT H. OBERMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Erin P. Gall, J.), entered November 19, 2014. The order denied defendant's motion for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he fell from his bicycle while riding on a road owned and maintained by defendant. According to plaintiff, the accident was caused by a defective condition in the road. Supreme Court denied defendant's motion for summary judgment dismissing the complaint, and we affirm.

Contrary to defendant's contention, the court properly denied that part of its motion seeking dismissal of the complaint on the ground that it did not receive prior written notice of any defective or dangerous condition. Defendant asserted on its motion, and plaintiff conceded, that defendant did not have any such notice (*see Groninger v Village of Mamaraneck*, 17 NY3d 125, 129*; see generally* Village Law § 6-628). Therefore, this case turns on whether defendant created the allegedly defective or dangerous condition with an "affirmative act of negligence" (*Groninger*, 17 NY3d at 127 [internal quotation marks omitted]). Here, plaintiff's expert opined that the dangerous condition was caused by the intentional removal of paving material from the area adjacent to the water valve box cover at the time the roadway was resurfaced, and we therefore conclude that "plaintiff raised an issue of fact whether defendant created a dangerous condition that caused the accident" (*Hawley v Town of Ovid*, 108 AD3d 1034, 1035; *see Carpenter v Rapini*, 35 AD3d 1202, 1203; *Smith v City of Syracuse*, 298 AD2d 842, 842-843).

Defendant further contends that it was entitled to summary judgment dismissing the complaint because plaintiff could not identify the cause of his fall. We reject that contention. Although a defendant " 'may establish its prima facie entitlement to judgment as a matter of law by submitting evidence that the plaintiff cannot identify the cause of his or her fall' without engaging in speculation" (*Dixon v Superior Discounts & Custom Muffler*, 118 AD3d 1487, 1487; *see Hunt v Meyers*, 63 AD3d 685, 685, *lv denied* 13 NY3d 712), we conclude that defendant failed to meet that burden here (*see Smart v Zambito*, 85 AD3d 1721, 1721; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). In support of its motion, defendant submitted plaintiff's deposition testimony and plaintiff's testimony from a hearing pursuant to General Municipal Law § 50-h, in which plaintiff testified that the accident occurred after the front wheel of the bicycle hit something on the roadway. Although plaintiff could not remember seeing the object with which he collided, he testified that the accident occurred in the immediate vicinity of a gap in the pavement adjacent to a water valve box cover, "thereby rendering any other potential cause of [his] fall 'sufficiently remote or technical to enable [a] jury to reach [a] verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence' " (*Nolan v Onondaga County*, 61 AD3d 1431, 1432; *see Paternostro v Advance Sanitation, Inc.*, 126 AD3d 1376, 1377; *Dixon*, 118 AD3d at 1488).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1080

KA 12-01920

PRESENT: SMITH, J.P., CENTRA, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID F. ROBINSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered November 10, 2010. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by reducing the amount of restitution to $2,000, and as modified the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [4]) and, in appeal No. 2, he appeals from a judgment convicting him, also upon his plea of guilty, of criminal possession of a weapon in the second degree (§ 265.03 [3]). In both appeals, defendant contends that he was represented by counsel on a matter upon which he was questioned by the police, and that County Court therefore erred in refusing to suppress his statements to the police. Although defendant's contention survives his guilty pleas (*see* CPL 710.70 [2]), we conclude that it lacks merit. There was no evidence at the *Huntley* hearing that defendant was represented by counsel on any pending charge when he was questioned, and he thus failed to demonstrate that his right to counsel had indelibly attached (*cf. People v Huntsman*, 96 AD3d 1390, 1391-1392).

Contrary to defendant's further contention in both appeals, the court properly refused to conduct a *Mapp* hearing in connection with his request to suppress all evidence arising from the stop of the vehicle that he was operating. In seeking a hearing, defendant alleged that the police lacked reasonable suspicion to stop the vehicle because he had properly stopped at a stop sign before the police pursued him on a high-speed chase throughout the City of

Rochester. The discovery materials and accusatory instruments that had been provided to defendant indicated that a police sergeant observed defendant operating a vehicle that had been reported stolen the day before, and that as the sergeant began to pursue the vehicle he observed it go through a stop sign without coming to a complete stop. The discovery materials further indicated that the sergeant and other officers observed defendant commit a lengthy series of crimes and additional traffic infractions during the resulting pursuit, culminating in defendant crashing into a stopped Rochester Police Department patrol vehicle. "The allegations in defendant's moving papers, when considered in the context of the detailed information provided to defendant, were insufficient to create a factual dispute requiring such a hearing" (*People v Springs*, 58 AD3d 541, 542, *lv denied* 12 NY3d 788; *see People v Caldwell*, 78 AD3d 1562, 1563, *lv denied* 16 NY3d 796; *see generally People v Long*, 8 NY3d 1014, 1015).

Defendant further contends in appeal No. 1 that the court erred in denying his day-of-trial request for an adjournment to retain a new attorney. Even assuming, arguendo, that defendant did not forfeit that contention by pleading guilty (*see generally People v Hansen*, 95 NY2d 227, 230-232), we reject defendant's contention. It is well settled that "the constitutional right to [a defense] by counsel of one's own choosing does not bestow upon a criminal defendant the absolute right to demand that his trial be delayed while he selects another attorney to represent him at trial . . . Whether a continuance should be granted is largely within the discretion of the Trial Judge" (*People v Arroyave*, 49 NY2d 264, 271). Here, we perceive no abuse of that discretion.

Defendant further contends that the court erred in imposing restitution in excess of the amount promised during the plea. Even assuming, arguendo, that the People are correct that "[d]efendant failed to preserve for our review his challenge to the amount of restitution imposed" (*People v White*, 70 AD3d 1316, 1318, *lv denied* 14 NY3d 845), we nevertheless exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). We conclude, as the People correctly concede, that the amount of restitution imposed was in excess of the amount set forth in the plea agreement, and we thus conclude that the court erred in imposing that amount. The parties agree, and the record establishes, that the court promised at the time of the plea to cap the amount of restitution at $2,000. We therefore modify the judgment in appeal No. 1 by reducing the amount of restitution accordingly (*see People v Butti*, 250 AD2d 859, 860, *lv denied* 92 NY2d 923).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1081

KA 12-01921

PRESENT: SMITH, J.P., CENTRA, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID F. ROBINSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered November 10, 2010. 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.

Same memorandum as in *People v Robinson* ([appeal No. 1] ___ AD3d ____ [Oct. 9, 2015]).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1083

KA 13-00302

PRESENT: SMITH, J.P., CENTRA, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY MORALES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered June 18, 2012. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [3]). Defendant contends that the judgment should be reversed and the indictment dismissed because he was improperly shackled and dressed in jail attire during the grand jury proceeding. Defendant failed to preserve that contention for our review (*see People v Williams*, 90 AD3d 1514, 1515, *lv denied* 18 NY3d 999) and, in any event, it lacks merit. "[T]he evidence presented to the grand jury was overwhelming, and it cannot be said that defendant's . . . shackling [and jail attire] amounted to an 'instance[] where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice[d] the ultimate decision reached by the [g]rand [j]ury' such that dismissal of the indictment is warranted" (*People v Burroughs*, 108 AD3d 1103, 1106, *lv denied* 22 NY3d 995, quoting *People v Huston*, 88 NY2d 400, 409). We reject defendant's further contention that he received ineffective assistance of counsel based on defense counsel's failure to object to the shackling and jail attire during the grand jury proceeding. Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Defendant contends that the verdict is against the weight of the evidence because the evidence established that he used force with the intent of escaping from store security personnel, and not with the

intent of retaining control of stolen property required for his conviction of robbery under Penal Law § 160.15 (3). We reject that contention. The evidence at trial established that defendant took a pair of boots out of the store without paying for any merchandise, and then defendant pulled out a knife when confronted by store security personnel. " 'Given that defendant was in possession of the stolen property while he was engaged in such use of force, the jury was entitled to infer that his purpose in using force was to retain control of the stolen property, not merely to escape' " (*People v Sullivan*, 119 AD3d 1335, 1336, *lv denied* 25 NY3d 953). We therefore conclude that, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1084

KA 10-02499

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANACIN L. HYMES, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Joan S. Kohout, A.J.), rendered October 25, 2010. The judgment convicted defendant, after a nonjury trial, of burglary 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, following a nonjury trial, of burglary in the third degree (Penal Law § 140.20). Supreme Court properly refused to suppress defendant's statement made to a police officer outside the building where a burglary in progress had been reported. Although defendant was then in custody, the officer's pre-*Miranda* question was a permissible threshold crime scene inquiry that did not constitute custodial interrogation (*see People v Burnett*, 228 AD2d 788, 790; *People v Mallory*, 175 AD2d 623, 623-624, *lv denied* 78 NY2d 1013). When the officer asked defendant what he was doing, "it was quite possible that defendant was not the burglar, [and thus] the question [was] designed to clarify the nature of the situation confronted, rather than to coerce statements" (*People v Nesby*, 161 AD2d 246, 247, *lv denied* 76 NY2d 793).

The evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to establish that defendant possessed the requisite intent to commit a crime when he unlawfully entered the building (*see generally People v Bleakley*, 69 NY2d 490, 495). His "criminal intent can be inferred from his unexplained, unauthorized presence on the premises, from his actions while on the premises, and from his actions and assertions when confronted by the police" (*People v Gates*, 170 AD2d 971, 971-972, *lv denied* 78 NY2d 922; *see People v Ostrander*, 46 AD3d 1217, 1218). Viewing the evidence in light of the elements of the crime in this

nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Contrary to defendant's further contention, we conclude that County Court properly curtailed the cross-examination of a prosecution witness with respect to alleged omissions of fact in her statement to a police officer on the night of the burglary. The witness testified that she did not omit any facts from her statement, but the officer did not write everything down. "[T]hus[,] there was no basis for impeachment of her trial testimony based on that statement" (*People v Hamm*, 96 AD3d 1482, 1483, *affd* 21 NY3d 708; *see People v Bornholdt*, 33 NY2d 75, 88; *People v Ogborn*, 57 AD3d 1430, 1431, *lv denied* 12 NY3d 786).

Finally, the court properly denied as untimely defendant's request that two persons who identified him on the night of the burglary be treated as missing witnesses by the court (*see People v Tomlin*, 130 AD3d 1455, 1456; *People v Williams*, 94 AD3d 1555, 1556).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1085

KA 13-02166

PRESENT: SMITH, J.P., CENTRA, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON R. ALEXANDER, DEFENDANT-APPELLANT.

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

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE (ANDREW M. MOLITOR OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered October 7, 2013. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the first degree (two counts) and course of sexual conduct against a child in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his guilty plea of, inter alia, two counts of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a]), defendant contends that his guilty plea was not knowingly and voluntarily entered. Defendant failed to preserve his contention for our review because he failed to move to withdraw the plea or to vacate the judgment of conviction (*see People v Laney*, 117 AD3d 1481, 1482). This case does not fall within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666), " 'inasmuch as nothing in the plea colloquy casts significant doubt on defendant's guilt or the voluntariness of the plea' " (*Laney*, 117 AD3d at 1482).

Defendant failed to preserve for our review his contention that County Court should have assigned defendant substitute counsel before proceeding to sentencing, inasmuch as the record indicates that defendant never requested new counsel (*see People v Johnson*, 94 AD3d 1496, 1496-1497, *affd* 20 NY3d 990; *see generally* CPL 470.05 [2]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Finally, the sentence is not unduly harsh or severe.

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1086

KA 13-01139

PRESENT: SMITH, J.P., CENTRA, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA MITCHELL, DEFENDANT-APPELLANT.

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

JOSHUA MITCHELL, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered June 19, 2013. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [1]). Defendant was a passenger in the backseat of a Saturn that was stopped by a police officer who heard gunshots and observed the Saturn leaving the location from which the shots were fired. The officer saw defendant exit the Saturn immediately before the shooting. Although a man was hit by one of the gunshots and died shortly thereafter, the officer was unaware that anyone had been injured when he stopped the Saturn. The officer and several backup officers removed defendant and the other people from the car and, without providing *Miranda* warnings, the initial officer questioned defendant about what had occurred. Defendant told the officer that he had been in the area to purchase marihuana when someone started shooting. Defendant made similar statements to a second officer who questioned him without providing *Miranda* warnings, and also spoke to a third officer who questioned him but did provide the warnings.

In the initial omnibus motion, defendant's first attorney sought, inter alia, suppression of defendant's statements to the police or a *Huntley* hearing. After that hearing, County Court suppressed defendant's statements to the second officer, but declined to suppress those made to the other officers. The court granted defendant's

motion to replace his attorney and assigned a second attorney who, shortly before trial, moved to suppress all fruits of the stop of the Saturn on the ground that the officer who stopped it lacked probable cause to arrest defendant or reasonable suspicion to stop the vehicle. The court denied the motion, concluding that it was untimely and that the allegations in the motion papers were insufficient to warrant a hearing.

Contrary to defendant's contention in his main brief, we conclude that his statements to the first officer "were responses to threshold inquiries by the police that were 'intended to ascertain the nature of the situation during initial investigation of a crime, rather than to elicit evidence of a crime,' and those statements thus were not subject to suppression" (*People v Naradzay*, 50 AD3d 1489, 1491-1492, *affd* 11 NY3d 460, 468; *see also People v Shelton*, 111 AD3d 1334, 1336-1337, *lv denied* 23 NY3d 1025). Even assuming, arguendo, that the third officer's failure to make a verbatim record of defendant's statement would be a basis for suppression (*cf. People v Bridges*, 226 AD2d 471, 471; *cf. generally People v Esquerdo*, 71 AD3d 1424, 1425, *lv denied* 14 NY3d 887), we conclude that there is no evidence supporting defendant's contention in his main brief that there was such a failure here. Thus, the court properly denied defendant's motion to suppress his statements to those two officers.

Defendant further contends in his main brief that the court erred in denying his second suppression motion without conducting a hearing, and in his main and pro se supplemental briefs he contends that he was denied effective assistance of counsel by his attorneys' failures to make a timely, sufficient motion to suppress the evidence seized as the result of the stop. He also raises additional instances of alleged ineffective assistance of counsel in his pro se supplemental brief. We reject those contentions.

It is well settled that " '[h]earings are not automatic or generally available for the asking by boilerplate allegations' " (*People v Bryant*, 8 NY3d 530, 533, quoting *People v Mendoza*, 82 NY2d 415, 422). Here, "[t]he allegations in defendant's moving papers, when considered in the context of the detailed information provided to defendant, were insufficient to create a factual dispute requiring such a hearing . . . Defendant . . . did not address the specific allegations set forth in the felony complaint" and the other discovery materials provided to him (*People v Springs*, 58 AD3d 541, 542, *lv denied* 12 NY3d 788), which included the relevant grand jury testimony of the witness. Thus, the court properly denied the motion without conducting a hearing based on the insufficiency of the allegations and, under the circumstances of this case, any issue concerning the timeliness of the motion is of no moment. Furthermore, "we agree with the People that defendant's attorney was not ineffective in failing to make a suppression motion 'that ha[d] little or no chance of success' " (*People v Chappell*, 124 AD3d 1409, 1410, *lv denied* 25 NY3d 1070, quoting *People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702). We have considered defendant's remaining challenges to the representation provided by his attorneys, and we conclude that they are without merit. Viewing the evidence, the law and the

circumstances of the case, in totality and as of the time of the representation, we conclude that each of defendant's attorneys provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Defendant further contends that the conviction is not supported by legally sufficient evidence and that the verdict is contrary to the weight of the evidence, based primarily upon his contention that there is no direct evidence that he fired the shot that killed the victim. "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 [factfinder] on the basis of the evidence at trial, viewed in the light most favorable to the People" (*People v Pichardo*, 34 AD3d 1223, 1224, *lv denied* 8 NY3d 926 [internal quotation marks omitted]; *see People v Annis*, 126 AD3d 1525, 1525-1526; *see generally People v Bleakley*, 69 NY2d 490, 495). In addition to the observations of the officer noted above, the People established, among other things, that one of the passengers in the Saturn saw defendant throw a black object consistent with a handgun out of the window of the vehicle as it left the scene of the shooting, a .38 caliber handgun was found on defendant's route of travel where the passenger said defendant threw the object, and an expert testified that the projectile recovered from the victim's body had been fired by that .38 caliber handgun. Furthermore, the same type of ammunition was found in the trunk of the Saturn. The People also established that defendant sent a text message to a friend two days before this incident, seeking a weapon and .38 caliber ammunition. We conclude that there is ample evidence in the record from which the jury could have reasonably concluded that defendant fired the shot that killed the victim. Further, upon viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

"By failing to object to County Court's ultimate *Sandoval* ruling, defendant failed to preserve for our review his present challenge to that ruling" (*People v Reed*, 115 AD3d 1334, 1335, *lv denied* 23 NY3d 1024). In any event, the court's *Sandoval* ruling does not constitute an abuse of discretion. To the contrary, "[t]he prior convictions in question were relevant to the credibility of defendant" (*People v Tolliver*, 93 AD3d 1150, 1152, *lv denied* 19 NY3d 968; *see People v Williams*, 101 AD3d 1730, 1732, *lv denied* 21 NY3d 1021), and the court's ruling took into account all relevant factors and struck a proper balance between the probative value of the convictions on which it permitted the prosecutor to cross-examine defendant and the possible prejudice to him, and precluded or limited cross-examination with respect to other convictions (*see People v Dupleasis*, 112 AD3d 1318, 1320, *lv denied* 22 NY3d 1138).

Defendant's further contention in his pro se supplemental brief that the felony complaint is defective is not properly before us. "The felony complaint was superseded by the indictment [upon which

defendant was found] guilty, and he therefore may not challenge the felony complaint" on appeal (*People v Anderson*, 90 AD3d 1475, 1477, *lv denied* 18 NY3d 991; *see People v Jackson*, 286 AD2d 912, 912, *lv denied* 97 NY2d 755).

The sentence is not unduly harsh or severe. We have reviewed defendant's remaining contentions in his main and pro se supplemental briefs, and conclude that they are without merit.

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1088

KA 12-00912

PRESENT: SMITH, J.P., CENTRA, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARCUS JACKSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered March 19, 2012. The judgment convicted defendant, upon his plea of guilty, of failure to register as a sex offender.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by vacating the sentence of imprisonment and imposing a term of probation of three years, and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of failure to register as a sex offender (Correction Law § 168-f [4]). We reject defendant's contention that the *Miranda* warnings given to him were defective and that Supreme Court therefore erred in refusing to suppress the statements he made to the police. "In determining whether police officers adequately conveyed the [*Miranda*] warnings, . . . [t]he inquiry is simply whether the warnings reasonably conve[y] to [a suspect] his rights as required by *Miranda*" (*Florida v Powell*, 559 US 50, 60 [internal quotation marks omitted]; *see People v Dunbar*, 24 NY3d 304, 315, *cert denied* ___ US ___, 135 S Ct 2052). Here, we conclude that "the warnings given to defendant reasonably apprised him of his rights" (*People v Bakerx*, 114 AD3d 1244, 1247, *lv denied* 22 NY3d 1196). We agree with defendant that, under the circumstances of this case, the imposition of a sentence of imprisonment was unduly harsh and severe. We therefore modify the judgment as a matter of discretion in the interest of justice by vacating the sentence of imprisonment and imposing a term of probation of three years. We remit the matter to Supreme Court to specify the conditions of probation and, if necessary, to transfer supervision of probation to the appropriate probation department

pursuant to CPL 410.80 (1).

Frances E. Cafarell

Entered: October 9, 2015

Clerk of the Court

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

1089

CAF 14-01710

PRESENT: SMITH, J.P., CENTRA, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF GREGG A. HEFFNER, LCSW-R, COMMISSIONER OF SOCIAL SERVICES, ON BEHALF OF SHERRI L. CLARK, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH M. JASKOWIAK, JR., RESPONDENT-APPELLANT.

LISA DIPOALA HABER, SYRACUSE, FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Oswego County (Donald E. Todd, A.J.), entered August 21, 2014 in a proceeding pursuant to Family Court Act article 4. The order, among other things, confirmed the determination of the Support Magistrate that respondent had willfully failed to obey an order of the court.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the sentence of probation and as modified the order is affirmed without costs.

Memorandum: Respondent father appeals from an order confirming the determination of the Support Magistrate that he willfully violated an order of child support, and imposing a sentence of three months in jail and three years' probation. We reject the father's contention that he was deprived of effective assistance of counsel. That contention is "impermissibly based on speculation, i.e., that favorable evidence could and should have been offered on his behalf" (*Matter of Devonte M.T. [Leroy T.]*, 79 AD3d 1818, 1819). The record, viewed in its totality, establishes that the father received meaningful representation (*see Matter of Hicks v Hicks*, 126 AD3d 975, 977).

Although the father does not challenge the legality of his sentence, we note that the sentence imposed is illegal. Family Court Act § 454 (3) "explicitly allows the court a choice of probation or jail" upon a finding of a willful violation of a support order (*Matter of Powers v Powers*, 86 NY2d 63, 71), but it does not authorize both probation and a jail term. This Court has inherent authority to correct an illegal sentence (*see People v Perrin*, 94 AD3d 1551, 1551; *see also People v Samms*, 95 NY2d 52, 56), and we may consider the legality of the sentence despite the father's failure to raise the

issue in Family Court "because it involves a court's 'essential' authority to incarcerate, as legally prescribed" (*Matter of Walker v Walker*, 86 NY2d 624, 627). Here, the record establishes that the father has completed his three-month jail term, and we thus conclude that the additional sentence of probation must be vacated (*see generally People v DiSalvo*, 130 AD3d 841, 841). We therefore modify the order accordingly.

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1090

CAF 14-00216

PRESENT: SMITH, J.P., CENTRA, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF ANNA H. MORGAN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES W. PETERSON, JR., RESPONDENT-APPELLANT.

IN THE MATTER OF JAMES W. PETERSON, JR.,
PETITIONER-APPELLANT,

V

ANNA H. MORGAN, RESPONDENT-RESPONDENT.

MARY R. HUMPHREY, NEW HARTFORD, FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

PAUL A. NORTON, CLINTON, FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

PAUL SKAVINA, ATTORNEY FOR THE CHILD, ROME.

Appeal from an order of the Family Court, Oneida County (Julia M. Brouillette, R.), entered December 19, 2013 in proceedings pursuant to Family Court Act article 6. The order, among other things, awarded Anna H. Morgan sole legal custody of the subject child.

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

Memorandum: On appeal from an order of custody and visitation entered following a hearing pursuant to Family Court Act article 6, respondent-petitioner father contends that Family Court erred in vacating a prior order of custody and visitation entered upon the consent of the parties and in conducting a de novo hearing. We reject that contention. It is well established that a court retains inherent authority to vacate its own order in the interest of justice, even when entered on consent (*see Matter of Chomik v Sypniak*, 70 AD3d 1336, 1336-1337). "Indeed, the court's power to [vacate an order in the interest of justice] is inherent and 'does not depend upon any statute' " (*Ruben v American & Foreign Ins. Co.*, 185 AD2d 63, 67; *see Matter of Delfin A.*, 123 AD2d 318, 320). Here, petitioner-respondent mother had the right to the assistance of counsel in this custody proceeding (*see* § 262 [a] [v]; *Matter of Kristin R.H. v Robert E.H.*,

48 AD3d 1278, 1279), and the conceded failure on the part of the court to advise her of that right was a sufficient basis for vacating the resulting order in the interest of justice (*see generally Delfin A.*, 123 AD2d at 319-320).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1091

CAF 14-00713

PRESENT: SMITH, J.P., CENTRA, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF JOYCE S., PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KEVIN M. AND ROBERT S., RESPONDENTS-RESPONDENTS.

MICHAEL STEINBERG, ROCHESTER, FOR PETITIONER-APPELLANT.

KELIANN M. ARGY, ORCHARD PARK, FOR RESPONDENT-RESPONDENT ROBERT S.

JENNIFER M. LORENZ, ATTORNEY FOR THE CHILD, LANCASTER.

Appeal from an order of the Family Court, Wyoming County (Michael F. Griffith, J.), entered August 15, 2013 in a proceeding pursuant to Family Court Act article 5. The order dismissed the petition.

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

Memorandum: Petitioner commenced this proceeding pursuant to article 5 of the Family Court Act, seeking a determination that respondent Kevin M. is the biological father of the subject child. Petitioner appeals from an order granting the motion of respondent Robert S. to dismiss the petition based on the doctrine of equitable estoppel. Contrary to petitioner's contention, Family Court properly determined that petitioner was equitably estopped from asserting paternity on behalf of Kevin, based on the best interests of the child (*see generally Matter of Shondel J. v Mark D.*, 7 NY3d 320, 326). The court properly conducted a hearing to determine whether the best interests of the child required the application of that doctrine (*see generally Matter of Tracy C.O. v Douglas A.F.*, 66 AD3d 1390, 1392), and the evidence from that hearing supports the court's conclusion that Kevin does not have any meaningful bond with the subject child. The evidence also supports the court's further conclusion that the child recognized Robert as her father for her entire life until petitioner attempted to remove Robert from the child's life, that petitioner permitted Robert to be the child's primary caregiver and to develop a close and loving bond with Robert during that time, and that it would be "detrimental to the child's interests to disrupt her close relationship" with Robert (*Matter of Fidel A. v Sharon N.*, 71 AD3d 437, 437; *see Matter of John S. v Imari W.*, 121 AD3d 538, 538). Indeed, we note that Kevin admittedly did not visit the subject child for the seven months prior to the hearing on this issue, despite the fact that petitioner had custody of the child for the majority of that

time. Thus, we agree with Robert and the Attorney for the Child that the court properly applied the doctrine of equitable estoppel to bar petitioner from challenging Robert's paternity.

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1093

CAF 14-01168

PRESENT: SMITH, J.P., CENTRA, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF COURTNEY M. CAMPBELL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BRYANT M. KNAPP, RESPONDENT-APPELLANT.

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

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (JOHN M. WESLEY OF COUNSEL), FOR PETITIONER-RESPONDENT.

ELIZABETH C. FRANI, ATTORNEY FOR THE CHILD, SYRACUSE.

Appeal from an order of the Family Court, Onondaga County (Salvatore Pavone, R.), entered September 12, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole legal and primary physical custody of the subject child.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting respondent visitation on holidays and birthdays and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, respondent father appeals from an order awarding petitioner mother sole legal and primary physical custody of their child. We note at the outset that, although the father contends that Family Court erred in granting his request for visitation in the absence of his attorney, the father received the visitation that he requested and thus will not "be heard to complain" with respect to visitation (*Matter of Mayes v Laplatney*, 125 AD3d 1488, 1489). Upon our review of the record, we conclude that there is a sound and substantial basis for the court's determination awarding the mother sole custody (*see generally Matter of Donegan v Torres*, 126 AD3d 1357, 1359). Although we agree with the father that the record does not support the court's conclusion that he had smoked marihuana, we nevertheless see no basis to disturb the court's determination. Here, the record demonstrates that the determination was "the product of 'careful weighing of [the] appropriate factors' " (*Matter of McLeod v McLeod*, 59 AD3d 1011, 1011), and we "accord great deference to the findings of the court, which [was] in the best position to evaluate the character and credibility of the witnesses"

(*Matter of Garland v Goodwin*, 13 AD3d 1059, 1059). We likewise reject the father's alternative contention that joint legal custody with shared physical placement is in the child's best interests. It is well settled that " '[j]oint custody should not be imposed on embattled and embittered parents who appear unable to put aside their differences for the benefit of the child' " (*Matter of Vasquez v Barfield*, 81 AD3d 1398, 1399), and here the record establishes that the parties have an acrimonious relationship.

Finally, we agree with the father that the Referee erred in failing to award him visitation on holidays and birthdays. We therefore modify the order accordingly, and we remit the matter to Family Court for a determination of that visitation schedule.

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1094

CA 15-00286

PRESENT: SMITH, J.P., CENTRA, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

STEFKA FERREL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER J. FERREL, DEFENDANT-APPELLANT.

CHRISTOPHER J. FERREL, THIRD-PARTY PLAINTIFF-APPELLANT,

V

ANDREW FERREL, THIRD-PARTY DEFENDANT-RESPONDENT.

KUSTELL LAW GROUP, LLP, BUFFALO (CARL B. KUSTELL OF COUNSEL), FOR DEFENDANT-APPELLANT AND THIRD-PARTY PLAINTIFF-APPELLANT.

VENZON LAW FIRM PC, BUFFALO (CATHARINE M. VENZON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

JAMES P. RENDA, BUFFALO, FOR THIRD-PARTY DEFENDANT-RESPONDENT.

EDWARD J. SNYDER, ATTORNEY FOR THE CHILD, WEST SENECA.

Appeal from a judgment of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered May 21, 2014 in a divorce action. The judgment, inter alia, directed plaintiff to make a distributive award to defendant.

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

Memorandum: Defendant-third-party plaintiff (defendant) appeals from a judgment of divorce that, inter alia, distributed marital property. Supreme Court properly determined that none of the funds in the accounts of the parties' children, i.e., third-party defendant and his minor sibling, are marital property subject to distribution (*see Hutchings v Hutchings*, 155 AD2d 971, 972; *cf. Wortman v Wortman*, 11 AD3d 604, 606). Contrary to defendant's contention, we conclude that "the court properly exercised its broad discretion in making an equitable distribution of the marital property" (*Krolikowski v Krolikowski*, 110 AD3d 1449, 1450). In making that distribution, the court properly accorded respect to "[t]he parties' choice of how to spend funds during the course of the marriage" and declined to "second-guess the economic decisions made during the course of [the]

marriage" (*Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 421; *see Kessler v Kessler*, 118 AD3d 946, 948). The court did not abuse its discretion in denying defendant's request for counsel fees. Contrary to defendant's contention, the record contains no evidence that plaintiff engaged in dilatory or otherwise improper conduct during the course of the litigation (*see Blake v Blake* [appeal No. 1], 83 AD3d 1509, 1509). Finally, we note that plaintiff's cross appeal from the judgment was deemed abandoned and dismissed pursuant to 22 NYCRR 1000.12 (b), and thus her contention that the court abused its discretion in denying her request for counsel fees is not properly before us.

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1095

CA 14-02006

PRESENT: SMITH, J.P., CENTRA, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

ANTONIA BARONE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES D. HASKINS, COMMONWEALTH EQUITY SERVICES, INC., DOING BUSINESS AS COMMONWEALTH FINANCIAL NETWORK, DEFENDANTS-APPELLANTS, LINCOLN NATIONAL CORPORATION, ET AL., DEFENDANTS.

PADUANO & WEINTRAUB LLP, NEW YORK CITY (KATHERINE B. HARRISON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

JOHN J. FLAHERTY, WILLIAMSVILLE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, Jr., J.), entered October 17, 2014. The order denied the motion of defendants James D. Haskins and Commonwealth Equity Services, Inc., doing business as Commonwealth Financial Network, to compel arbitration.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Plaintiff commenced this action alleging fraud, negligence, breach of contract, breach of fiduciary duty, and violations of the General Business Law. James D. Haskins and Commonwealth Equity Services, Inc., doing business as Commonwealth Financial Network (defendants), brought a motion seeking, inter alia, to compel arbitration pursuant to CPLR 7503 (a). We conclude that Supreme Court properly determined that *Matter of Brady v Williams Capital Group, L.P.* (14 NY3d 459) applies in the financial/investment industry context (*see generally Green Tree Fin. Corp.–Alabama v Randolph*, 531 US 79, 88-91). We further conclude, however, that the court erred in denying the motion to compel arbitration on the ground that arbitration in this case would be financially prohibitive to plaintiff without first directing plaintiff to apply for a waiver of the arbitration fee charged by the Financial Industry Regulatory Authority. We therefore reverse the order and remit the matter to Supreme Court for that purpose before deciding the motion pursuant to the factors set forth in *Brady* (*id.* at 467).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1096

CA 14-00879

PRESENT: SMITH, J.P., CENTRA, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

FIRST FRANKLIN FINANCIAL CORPORATION,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WILLIAM NORTON, ALSO KNOWN AS WILLIAM A. NORTON,
DEFENDANT-RESPONDENT,
NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE,
ET AL., DEFENDANTS.

FEIN, SUCH & CRANE, LLP, ROCHESTER, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (MARCO CERCONE OF COUNSEL), AND ARTHUR N. BAILEY & ASSOCIATES, JAMESTOWN, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered June 6, 2012. The order, inter alia, granted the motion of defendant William Norton, also known as William A. Norton, to dismiss the complaint against him for lack of standing and directed the Chautauqua County Clerk to mark as cancelled a certain mortgage-like instrument.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the second ordering paragraph, and as modified the order is affirmed without costs.

Memorandum: In this mortgage foreclosure action, plaintiff appeals from an order that, inter alia, granted the motion of William Norton, also known as William A. Norton (defendant) to dismiss the complaint against him and sua sponte cancelled the mortgage. Contrary to plaintiff's contention, Supreme Court properly granted the motion to dismiss the complaint on the ground that plaintiff lacked standing. "A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced" (*Kondaur Capital Corp. v McCary*, 115 AD3d 649, 650; *see Deutsche Bank Trust Co. Ams. v Vitellas*, 131 AD3d 52, 59; *US Bank N.A. v Guy*, 125 AD3d 845, 846). Here, defendant met his burden on his motion to dismiss by establishing that plaintiff lacked standing because it did not have " '[e]ither a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action' " (*US Bank N.A. v Madero*, 80

AD3d 751, 753; *see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361-362; *cf. Deutsche Bank Trust Co. Ams.*, 131 AD3d at 59-60), and plaintiff failed to raise a question of fact (*cf. US Bank N.A. v Faruque*, 120 AD3d 575, 578; *Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, 683).

Contrary to plaintiff's further contention, the court properly reconsidered defendant's CPLR 3211 motion to dismiss, having expressly denied the earlier motion with leave to renew after the completion of discovery. Indeed, in the order on appeal and in its written decision underlying the order, the court specified that it had "reserved decision" on the earlier motion.

We agree with plaintiff, however, that the court erred in sua sponte cancelling the mortgage. Defendant "was not entitled to the judicial determination cancelling and discharging the subject mortgage and adjudging the subject property free therefrom" (*Ruiz v Mortgage Elec. Registration Sys., Inc.*, 130 AD3d 1000, 1002; *see generally IndyMac Bank, F.S.B. v Yano-Horoski*, 78 AD3d 895, 896). We therefore modify the order accordingly.

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1098

CA 15-00151

PRESENT: SMITH, J.P., CENTRA, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

JO ANN D'AMATO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOSEPH D'AMATO, DEFENDANT-RESPONDENT.

HOGAN WILLIG, PLLC, AMHERST (STEVEN G. WISEMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BENNETT, SCHECHTER, ARCURI & WILL, LLC, BUFFALO (CAROL A. CONDON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Henry J. Nowak, Jr., J.), entered June 23, 2014 in a divorce action. The judgment, inter alia, equitably distributed the marital assets of the parties.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by increasing the award of attorney's fees to $10,000, and by vacating the 20th decretal paragraph and directing defendant to pay toward the cost of his son's college education 50% of the cost of an education at a college in the State University of New York system, and as modified the judgment is affirmed without costs and the matter is remitted to Supreme Court, Erie County, to calculate that amount.

Memorandum: Plaintiff appeals from a judgment of divorce that, among other things, awarded plaintiff durational maintenance, awarded plaintiff $5,000 in attorney's fees, and determined that defendant had no obligation to contribute to the cost of the college education of the parties' son.

We reject plaintiff's contention that she should have been awarded nondurational maintenance. "As a general rule, the amount and duration of maintenance are matters committed to the sound discretion of the trial court" (*Gately v Gately*, 113 AD3d 1093, 1093, *lv dismissed* 23 NY3d 1048 [internal quotation marks omitted]; *see McCarthy v McCarthy*, 57 AD3d 1481, 1481-1482), and we perceive no abuse of discretion here. Although the authority of this Court in determining issues of maintenance is as broad as that of the trial court, we decline to substitute our discretion for that of the trial court with respect to the duration of defendant's maintenance obligation (*see Martin v Martin*, 115 AD3d 1315, 1315; *see generally Scala v Scala*, 59 AD3d 1042, 1043).

Plaintiff further contends that Supreme Court erred with respect to the distributive award by permitting defendant to recoup his overpayment of child support and maintenance during the pendency of the action. We note with respect to child support that, although there is a strong public policy against restitution or recoupment of child support overpayments (*see Johnson v Chapin*, 12 NY3d 461, 466, *rearg denied* 13 NY3d 888; *Matter of Annette M.R. v John W.R.*, 45 AD3d 1306, 1307), here the record establishes that the court did not award defendant credit for overpayment of child support. Contrary to plaintiff's contention with respect to maintenance, we conclude that the court did not abuse its discretion in giving defendant a credit for his overpayment of maintenance during the pendency of the action (*see Johnson*, 12 NY3d at 466).

We agree with plaintiff, however, that the court abused its discretion in awarding her only $5,000 in attorney's fees, inasmuch as defendant "is the monied spouse and there is no evidence in this record that [plaintiff] engaged in dilatory tactics" (*Murphy v Murphy*, 126 AD3d 1443, 1447; *see* Domestic Relations Law § 237 [a]; *Mann v Mann*, 244 AD2d 928, 929-930). We therefore modify the judgment by increasing the award of attorney's fees to $10,000.

We also agree with plaintiff that the court erred in refusing to direct defendant to contribute to the cost of the son's education at a private college, and we therefore further modify the judgment accordingly. Upon consideration of the parents' educational backgrounds, the child's scholastic ability, and the parents' ability to pay (*see Francis v Francis*, 72 AD3d 1594, 1595; *Reiss v Reiss*, 56 AD3d 1293, 1294), we conclude that "[defendant's] contribution should [be] 50% of what it would annually cost to send his son to a college in the State University of New York (hereinafter SUNY) system" (*Matter of Holliday v Holliday*, 35 AD3d 468, 469; *see Reiss*, 56 AD3d at 1294), with a credit for the $5,000 that defendant contributed to the son's college expenses pursuant to a prior order. Inasmuch as we are unable to determine the annual cost of attending a college in the SUNY system from the record on appeal, we remit the matter to Supreme Court to calculate the amount of defendant's contribution (*see Holliday*, 35 AD3d at 469). We note that, upon remittal, the court may consider whether defendant is entitled to a credit against child support for college expenses, " 'taking into account the needs of the custodial parent to maintain a household and provide certain necessaries' " (*Juhasz v Juhasz* [appeal No. 2], 92 AD3d 1209, 1212).

Finally, we reject plaintiff's contention that the court erred in refusing to order defendant to pay plaintiff the sum of $4,650, for a debt incurred to purchase a vehicle for the parties' daughter. It is undisputed that defendant owes the debt to a third party for an expense incurred after the commencement of the divorce action, and thus the court properly refused to order him to pay that amount to plaintiff. "Expenses incurred after the commencement of an action for a divorce are, in general, the responsibility of the party who

incurred the debt" (*Epstein v Messner*, 73 AD3d 843, 845).

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court

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

1099

CAF 14-00999, CAF 14-02096

PRESENT: SMITH, J.P., CENTRA, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF TOBIAS WITZIGMAN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JENNIFER WITZIGMAN, RESPONDENT-APPELLANT.

WILLIAM D. BRODERICK, JR., ESQ., ATTORNEY
FOR THE CHILDREN, APPELLANT.

WILLIAM D. BRODERICK, JR., ATTORNEY FOR THE CHILDREN, ELMA, APPELLANT PRO SE.

WAGNER & HART, LLP, OLEAN (JANINE FODOR OF COUNSEL), FOR RESPONDENT-APPELLANT.

FERN S. ADELSTEIN, OLEAN, FOR PETITIONER-RESPONDENT.

Appeals from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered April 21, 2014 in a proceeding pursuant to Family Court Act article 6. The order awarded sole custody of the parties' children to petitioner.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, and the matter is remitted to Family Court, Cattaraugus County, for compliance with 22 NYCRR 202.44.

Memorandum: Respondent mother and the Attorney for the Children (AFC) appeal from an order adopting the report of the Referee that recommended granting petitioner father's petition to modify an existing custody order. We agree with the AFC that Family Court erred in adopting the Referee's report without providing the parties with notice of the filing of the report and affording them an opportunity to object to it (*see* 22 NYCRR 202.44 [a]; *Matter of Wilder v Wilder*, 55 AD3d 1341, 1341). The record establishes that the Referee was authorized only to hear the matter and issue a report inasmuch as the mother did not consent to the referral to the Referee for a final determination on the father's petition. We therefore reverse the order, and we remit the matter to Family Court for compliance with 22 NYCRR 202.44 (*see Wilder*, 55 AD3d at 1341). Pending the court's determination upon remittal, the custody and visitation provisions in

the order appealed from shall remain in effect.

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court