SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

NOVEMBER 20, 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

920

CA 14-02294

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

IN THE MATTER OF PROGRESSIVE CASUALTY
INSURANCE CO., PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY BEARDSLEY, RESPONDENT,
AND MERCHANTS MUTUAL INSURANCE CO.,
RESPONDENT-APPELLANT.

HISCOCK & BARCLAY, LLP, ROCHESTER (JOSEPH A. WILSON OF COUNSEL), FOR RESPONDENT-APPELLANT.

LAW OFFICE OF KEITH D. MILLER, LIVERPOOL (KEITH D. MILLER OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered June 24, 2014 in a proceeding pursuant to CPLR article 75. The order, among other things, determined that respondent Merchants Mutual Insurance Co., and petitioner Progressive Casualty Insurance Co., are coinsurers for purposes of the SUM claims of respondent Jeffrey Beardsley.

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 in accordance with the following memorandum: Jeffrey Beardsley (respondent) sustained injuries when he was struck by a vehicle while walking across a parking lot, and he subsequently recovered the full $25,000 policy limit from the insurer of that vehicle. Respondent thereafter submitted a claim for supplemental uninsured/underinsured motorist (SUM) benefits pursuant to a personal automobile policy issued by petitioner, Progressive Casualty Insurance Co. (Progressive), to his father, Jeffrey F. Beardsley (Beardsley), which listed respondent as an insured driver and household resident. Respondent also submitted a claim for SUM benefits under a commercial automobile policy issued by respondent Merchants Mutual Insurance Co. (Merchants) with respect to certain vehicles associated with Beardsley's excavation business. Merchants disclaimed coverage on the ground that Beardsley was "insured as a corporation," and the SUM coverage provided in its policy did not extend to respondent inasmuch as he was not a member of Beardsley's excavation business and was not occupying an insured vehicle at the time of the incident. Respondent thereafter demanded arbitration with respect to his claims for SUM coverage under each policy. Progressive commenced this proceeding

pursuant to CPLR article 75 seeking a temporary stay of arbitration pending the completion of discovery. In addition, Progressive sought an order determining that Merchants is a coinsurer for purposes of respondent's SUM claims and that any SUM award be paid in proportion to each insurer's policy limit. In its answer, Merchants asserted, inter alia, a "counterclaim and crossclaim" alleging that its policy was issued to Beardsley "as a 'corporation' engaged in excavation operations," and that respondent did not qualify as an insured because a policy issued to a corporation does not provide SUM coverage for family members of its officers or shareholders. Merchants thus sought a permanent stay of arbitration. In reply, Progressive asserted that the named insured on Merchants' policy was Beardsley as an individual, and that there was no indication that Beardsley was a corporation. Supreme Court granted Progressive's petition for a temporary stay of arbitration, and the court determined that Progressive and Merchants were coinsurers for purposes of respondent's SUM claims and that any award would be payable on a pro rata basis according to the insurer's policy limits. Merchants appeals.

"Where an automobile insurance policy contains a SUM provision and is issued to an individual, that individual and others in his or her family may be afforded SUM coverage under the policy when such person is injured in any vehicle, including a vehicle owned and insured by a third party" (*Roebuck v State Farm Mut. Auto. Ins. Co.*, 80 AD3d 1126, 1127). "Where such a policy is issued to a corporation, however, the SUM provision does not follow any particular individual, but instead 'covers any person [injured] while occupying an automobile owned by the corporation or while being operated on behalf of the corporation' " (*id.*, quoting *Buckner v Motor Veh. Acc. Indem. Corp.*, 66 NY2d 211, 215). Here, the declarations page of Merchants' commercial automobile policy states that the policy was issued to "Jeffrey F Beardsly [sic]" as the named insured, but the term "corporation" is listed on the "form of business" line. Inasmuch as the insurers do not contend that the Merchants' policy is ambiguous but, rather, they dispute whether it was issued to an individual or a corporation, and the record does not establish whether "Jeffrey F Beardsly [sic]" is a corporation (*cf. Buckner*, 66 NY2d at 212-213; *Roebuck*, 80 AD3d at 1127-1128), we conclude under the circumstances of this case that a temporary stay of arbitration is warranted for the further reason that additional discovery is needed to determine whether the Merchants' policy was issued to an individual or a corporation (*see generally Matter of AIG Claims Servs., Inc. v Bobak*, 39 AD3d 1178, 1179). We therefore modify the order accordingly.

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

928

KA 11-01336

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYRELL D. SIMMONS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered April 26, 2011. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (two counts) and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]) and one count of criminal possession of a weapon in the third degree (§ 265.02 [1]). Contrary to defendant's contention, Supreme Court properly determined that the police had probable cause to arrest him. The record establishes that defendant was observed crossing a street by two police officers who were part of a six-member tactical unit patrolling a high-crime area in three vehicles. One officer testified that he observed that the right front pocket of defendant's sweatshirt hung "dramatically lower" than the left front pocket and that there was a "large object" protruding from the right pocket. The officer further testified that, based upon his training and experience, he believed that defendant had a weapon. Before the officer exited his vehicle, he made eye contact with defendant, who cupped his hand around his right pocket, "bladed his body" away from the officer at a 45-degree angle, and walked diagonally away from the vehicle into a yard. When the officer exited his vehicle, he addressed defendant by stating that he wanted to talk to him "for a minute," and defendant began to run. After taking two steps, defendant pulled an object from the right pocket of his sweatshirt, which the officer observed was a dark object, and threw it. The officer testified that he "heard a distinct metal sound clanging as [the object] hit the ground." At that point,

the officer began to run and, when he observed that the object on the ground was indeed a gun, he continued to pursue defendant. The weapon was secured by another officer of the tactical unit, and defendant was apprehended by a third officer of the unit.

Although each of defendant's actions, " 'standing alone, could be susceptible to an innocent interpretation, a view of the entire circumstances' gave the [police] a founded suspicion that criminality was afoot, which invoked the common-law right to inquire" (*People v Gerard*, 94 AD3d 592, 593 quoting *People v Evans*, 65 NY2d 629, 630). The officer's observation of the weapon on the ground, along "with the attendant circumstances, gave rise to the requisite reasonable suspicion justifying police pursuit" (*People v Brown*, 67 AD3d 1439, 1440, *lv denied* 14 NY3d 798). When the police recovered the weapon that defendant had abandoned, they had probable cause to arrest him (*see People v Martinez*, 80 NY2d 444, 448-449; *People v Salamone*, 61 AD3d 1400, 1401, *lv denied* 12 NY3d 929; *People v Holland*, 221 AD2d 947, 948, *lv denied* 87 NY2d 922).

By failing to renew his motion to dismiss the indictment at the close of proof, defendant failed to preserve for our review his contention that the evidence is not legally sufficient to support the conviction (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678; *People v Mills*, 93 AD3d 1198, 1199, *lv denied* 19 NY3d 964). In any event, that contention is without merit. Defendant was observed by police discarding what was determined to be an operable weapon outside of his home or place of business (*see* Penal Law § 265.03 [3]), and section 265.15 (4) "provides that '[t]he possession by any person of any . . . weapon . . . is presumptive evidence of intent to use the same unlawfully against another' person" (*People v Galindo*, 23 NY3d 719, 722). We have reviewed the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), and we conclude, contrary to defendant's contention, "that an acquittal would have been unreasonable based upon the weight of the credible evidence presented at trial, and thus the verdict is not against the weight of the evidence" (*People v Kreutter*, 121 AD3d 1534, 1535-1536; *see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant failed to preserve for our review his contention that the indictment is multiplicitous (*see* CPL 470.05 [2]; *People v Quinn*, 103 AD3d 1258, 1258, *lv denied* 21 NY3d 946). In any event, that contention lacks merit inasmuch as each count of criminal possession of a weapon in the second degree "requires proof of an additional fact that the other does not" (*People v Jefferson*, 125 AD3d 1463, 1464, *lv denied* 25 NY3d 990 [internal quotation marks omitted]; *see generally Galindo*, 23 NY3d at 721-722). Defendant failed to object to the court's *Sandoval* ruling and thus failed to preserve for our review his contention that the court abused its discretion in permitting the People to use at trial defendant's two prior misdemeanor convictions (*see People v Tolliver*, 93 AD3d 1150, 1151, *lv denied* 19 NY3d 968), and we decline to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant failed to object to any of the remarks by the prosecutor during summation, which

he contends improperly vouched for the credibility of the People's witnesses, and thus failed to preserve for our review his contention that he was denied a fair trial by prosecutorial misconduct (*see People v Cotto*, 106 AD3d 1534, 1534). In any event, defendant's contention is without merit inasmuch as the prosecutor's remarks were a fair response to defendant's summation (*see id.*).

We reject defendant's contention that defense counsel's failure to renew the motion to dismiss the indictment at the close of proof, or to object to the *Sandoval* ruling and to the allegedly improper remarks of the prosecutor during summation, deprived him of meaningful representation. It is well established that "[a] defendant is not denied effective assistance of . . . counsel merely because counsel does not make a motion or argument that has little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287). Finally, the sentence is not unduly harsh or severe.

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

934

CA 15-00113

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF CERTIFIED ROAD CONSTRUCTORS, INC., DOING BUSINESS AS MATERIAL SAND & GRAVEL, AND TROY SAND & GRAVEL CO., INC., PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF RUSSIA ZONING BOARD OF APPEALS, RESPONDENT-RESPONDENT.

TUCZINSKI, CAVALIER & GILCHRIST, P.C., ALBANY (ANDREW W. GILCHRIST OF COUNSEL), FOR PETITIONERS-APPELLANTS.

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

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Herkimer County (Norman I. Siegel, J.), entered April 16, 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: Petitioners commenced this CPLR article 78 proceeding seeking to annul a determination of respondent, Town of Russia Zoning Board of Appeals (ZBA), denying petitioners' appeal of a stop work order issued by the "Codes/Zoning Enforcement Officer" of the Town of Russia (Town) after petitioners sought permission from the Town to update their asphalt-making machinery from older "cold mix" technology to incorporate a more modern "hot mix" process. Supreme Court dismissed the petition.

We affirm for reasons stated in the decision at Supreme Court. We add only that, contrary to petitioners' contentions, the ZBA did not improperly consider evidence submitted to the Town "by or on behalf of" petitioners with respect to previous, unrelated matters (*see Matter of Silveri v Nolte*, 128 AD2d 711, 712; *cf. Matter of Sunset Sanitation Serv. Corp. v Board of Zoning Appeals of Town of Smithtown*, 172 AD2d 755, 755), the ZBA fulfilled its obligation to "disclose all evidence upon which it relied in reaching a decision" (*Matter of Stein v Board of Appeals of Town of Islip*, 100 AD2d 590, 590; *see generally Matter of Collins v Behan*, 285 NY 187, 188), and

the ZBA's "determination is supported by more than the generalized objections of neighbors" (*Matter of Ifrah v Utschig*, 98 NY2d 304, 308).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

935

CA 14-02232

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF ARBITRATION BETWEEN ERIC SVENSON AND MARCELLE L. SVENSON, PETITIONERS-APPELLANTS,

AND MEMORANDUM AND ORDER

RICHARD B. SWEGAN, DEBRA A. DINNOCENZO, RESPONDENTS-RESPONDENTS, ET AL., RESPONDENT.

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

SELLSTROM LAW FIRM, LLP, JAMESTOWN (STEPHEN E. SELLSTROM OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Chautauqua County (Deborah A. Chimes, J.), entered September 15, 2014. The order and judgment denied in part petitioners' application to vacate an arbitrator's award.

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

Memorandum: In a proceeding pursuant to CPLR 7503, petitioners appeal from an order and judgment that modified an arbitration award by vacating the provision awarding punitive damages but otherwise confirmed the award. We affirm.

Richard B. Swegan and Debra A. Dinnocenzo (respondents) own a parcel of real property in Chautauqua County, and petitioners own an adjoining parcel. Several maple trees have grown along the border separating the two parcels. In 2008, petitioners hired an architect as part of a project to improve their property, and the architect thereafter directed a tree removal service to remove two maple trees located near the property line. Respondents commenced an action against petitioners seeking damages for the removal of the trees, alleging that the trees had been removed without respondents' consent. Following a prior appeal to this Court (*see Swegan v Svenson*, 104 AD3d 1131), the parties executed an arbitration agreement to resolve the dispute.

Following a hearing, the arbitrator found, inter alia, that petitioners had trespassed on respondents' property and violated RPAPL

861. The arbitrator awarded respondents treble damages pursuant to RPAPL 861 (1), as well as punitive damages. Petitioners subsequently made an application to Supreme Court to vacate the award pursuant to CPLR 7511, respondents opposed the application to vacate and sought to confirm the award pursuant to CPLR 7510, and the court granted each application in part, as we have noted above.

Initially, we reject respondents' contention that petitioners are estopped from pursuing an appeal because they agreed in the arbitration agreement that the "decision of the arbitrator would be final and binding on the parties." It is well settled that, notwithstanding the final and binding nature of an arbitration agreement, an award pursuant thereto may be vacated if it is "irrational, violates a strong public policy, or clearly exceeds a specifically enumerated limitation on the arbitrator's power" (*Matter of Buffalo Teachers Fedn., Inc. v Board of Educ. of City Sch. Dist. of City of Buffalo*, 50 AD3d 1503, 1505, *lv denied* 11 NY3d 708 [internal quotation marks omitted]; *see Matter of New York City Tr. Auth. v Transport Workers Union of Am., Local 100*, 14 NY3d 119, 123; *Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City Sch. Dist. of City of N.Y.*, 1 NY3d 72, 79). Inasmuch as petitioners contend, inter alia, that the award was made in excess of the arbitrator's authority and is against public policy, we conclude that those issues are subject to our review.

We reject, however, petitioners' contention that the arbitrator's alleged misapplication of RPAPL 861 is a sufficient ground to vacate the award in its entirety. "An arbitrator's resolution of questions of substantive law or fact is not judicially reviewable" (*Matter of Professional Staff Congress/City Univ. of N.Y. v Board of Higher Educ. of City of N.Y.*, 39 NY2d 319, 323; *see Matter of SCM Corp. [Fisher Park Lane Co.]*, 40 NY2d 788, 793). Thus, even assuming, arguendo, that the arbitrator misapplied RPAPL 861, we conclude that such error is beyond our review. Alternatively, we note that the broad language in the arbitration agreement concerning the arbitrator's discretion to award damages provides an independent basis upon which to affirm the damages award (*see generally Matter of SCM Corp. [Fisher Park Lane Co.]*, 40 NY2d at 792-793).

We reject petitioners' further contention that the award of treble compensatory damages is punitive in nature and therefore violative of public policy or in excess of the arbitrator's authority (*see Garrity v Lyle Stuart, Inc.*, 40 NY2d 354, 357). Treble damages pursuant to RPAPL 861 (1) are not equivalent to punitive damages. "[I]n order to recover punitive damages for trespass on real property, [a plaintiff has] the burden of proving that the trespasser acted with actual malice involving an intentional wrongdoing, or that such conduct amounted to a wanton, willful or reckless disregard of plaintiff[']s] rights" (*Western N.Y. Land Conservancy, Inc. v Cullen*, 66 AD3d 1461, 1463, *appeal dismissed* 13 NY3d 904, *lv denied* 14 NY3d 705, *reconsideration denied* 15 NY3d 746 [internal quotation marks omitted]; *see Golonka v Plaza at Latham*, 270 AD2d 667, 670; *Ligo v Gerould*, 244 AD2d 852, 853). By contrast, RPAPL 861 (1) permits a

property owner to maintain an action "for treble the stumpage value of the tree . . . or two hundred fifty dollars per tree, or both" against "any person" who, "without the consent of the owner thereof, cuts, removes, injures or destroys, or causes to be cut, removed, injured or destroyed, any . . . tree." Such person may avoid the imposition of treble damages if he or she "establishes by clear and convincing evidence, that when the person committed the violation, he or she had cause to believe that the land was his or her own" (RPAPL 861 [2]). If such person satisfies that burden, he or she remains "liable for the stumpage value or two hundred fifty dollars per tree, or both" (*id.*). Thus, contrary to petitioners' contention, inasmuch as no showing of actual malice or a wanton, willful or reckless disregard of respondents' rights is necessary to justify an award of treble damages under RPAPL 861 (1), that portion of the arbitrator's award is not punitive in nature.

We reject petitioners' contention that the court erred when it ordered interest on the arbitration award from April 10, 2014, the date of the award (*see* CPLR 5002, 5003; *Board of Educ. of Cent. Sch. Dist. No. 1 of Towns of Niagara, Wheatfield, Lewiston & Cambria v Niagara-Wheatfield Teachers Assn.*, 46 NY2d 553, 558; *Dermigny v Harper*, 127 AD3d 685, 686).

Finally, we have examined petitioners' remaining contention with respect to General Obligations Law § 15-108 and conclude that it is without merit.

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

936

CA 14-01767

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, VALENTINO, AND WHALEN, JJ.

PHILLIP WOLFE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WAYNE-DALTON CORP., ET AL., DEFENDANTS,
JOANNE LESKA AND ROBERT TARSON, JR.,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

KNYCH & WHRITENOUR, LLC, SYRACUSE (MATTHEW E. WHRITENOUR OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

STANLEY LAW OFFICES, LLP, SYRACUSE (JON COOPER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered December 4, 2013. The order, among other things, granted plaintiff's motion for partial summary judgment pursuant to Labor Law § 240 (1) as against defendants Joanne Leska and Robert Tarson, Jr.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying plaintiff's motion except insofar as it sought dismissal of the fifth affirmative defense as asserted by defendants Joanne Leska and Robert Tarson, Jr., and as modified the order is affirmed without costs.

Memorandum: Plaintiff, a warehouse manager, fell from a safety ladder and sustained injuries while attempting to reattach a "dumped" cable to its spindle on an overhead receiving door at the warehouse where he worked. Plaintiff commenced this action against four owners of the warehouse, including Joanne Leska and Robert Tarson, Jr. (hereafter, defendants), seeking damages for injuries sustained by plaintiff as a result of, among other things, a violation of Labor Law § 240 (1). As relevant to this appeal, by the order in appeal No. 1, Supreme Court granted plaintiff's motion for partial summary judgment on the issue of liability with respect to the section 240 (1) claim as asserted against defendants based upon its determination that plaintiff had established that, at the time he was injured, he was engaged in a repair, an enumerated activity pursuant to the statute. The court thus denied that part of defendants' cross motion seeking dismissal of that claim against them. By the order in appeal No. 2, the court denied defendants' motion for leave to renew their cross motion.

In appeal No. 1, defendants contend that plaintiff was not engaged in a protected activity at the time he was injured and, thus, the court erred in granting plaintiff's motion and in denying the corresponding part of their cross motion. We reject that contention. It is well settled that section 240 (1) " 'does not apply to routine maintenance in a non-construction, non-renovation context' " (*Ozimek v Holiday Val., Inc.*, 83 AD3d 1414, 1415). " '[D]eliniating between routine maintenance and repairs is frequently a close, fact-driven issue' " (*Kostyo v Schmitt & Behling, LLC*, 82 AD3d 1575, 1576), and "[t]hat distinction depends upon 'whether the item being worked on was inoperable or malfunctioning prior to the commencement of the work' . . . , and whether the work involved the replacement of components damaged by normal wear and tear" (*Pieri v B&B Welch Assoc.*, 74 AD3d 1727, 1728). Here, plaintiff submitted evidence establishing that he was injured while attempting to repair "an uncommon [door] malfunction, which is a protected activity under Labor Law § 240 (1)" (*Pieri*, 74 AD3d at 1728; *see Ozimek*, 83 AD3d at 1415; *Brown v Concord Nurseries, Inc.*, 37 AD3d 1076, 1077), and defendants failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We agree with defendants, however, that plaintiff failed to meet his burden of establishing that his injury resulted from an elevation-related risk as contemplated by the statute, and we therefore modify the order accordingly. "A plaintiff is entitled to summary judgment under Labor Law § 240 (1) by establishing that he or she was 'subject to an elevation-related risk, and [that] the failure to provide any safety devices to protect the worker from such a risk [was] a proximate cause of his or her injuries' " (*Bruce v Actus Lend Lease*, 101 AD3d 1701, 1702). Here, it is undisputed that the safety ladder used by plaintiff did not tip. Plaintiff, the only witness to the accident, testified at his deposition that he had no recollection of the accident, and "[t]he simple fact that plaintiff fell from a ladder does not automatically establish liability on the part of [defendants]" (*Beardslee v Cornell Univ.*, 72 AD3d 1371, 1372). Plaintiff testified that he closed the overhead door before climbing the ladder and that after the accident the overhead door was open, but plaintiff did not know whether the overhead door moved and struck him and/or the ladder, or whether he merely slipped and fell from the ladder. In the absence of any other evidence concerning the manner in which the accident occurred, we conclude that there is a "triable issue of fact whether [plaintiff] fell because the ladder did not afford him proper protection" (*Sistrunk v County of Onondaga*, 89 AD3d 1552, 1554; *see Bruce*, 101 AD3d at 1702; *Harris v Eastman Kodak Co.*, 83 AD3d 1563, 1564). On this record, we further conclude that defendants failed to meet their entitlement to judgment as a matter of law dismissing the section 240 (1) claim (*see generally Dean v City of Utica*, 75 AD3d 1130, 1131).

Defendants also contend in appeal No. 1 that the court erred in granting that part of plaintiff's motion seeking dismissal of the defense of immunity pursuant to Workers' Compensation Law §§ 11 and 29 (6), and in denying that part of defendants' cross motion seeking

to establish the applicability of that defense as a matter of law. We reject that contention. "It is well established that 'a worker . . . who is injured during the course of his [or her] employment[] cannot maintain an action to recover damages for personal injuries against the owner of the premises where the accident occurred when the owner is also an officer of the corporation that employed the worker' " (*Ciapa v Miso*, 103 AD3d 1157, 1159; *see* Workers' Compensation Law §§ 11, 29 [6]). "The protection against lawsuits brought by injured workers which is afforded to employers by Workers' Compensation Law §§ 11 and 29 (6) also extends to entities which are alter egos of the entity which employs the plaintiff" (*Samuel v Fourth Ave. Assoc., LLC*, 75 AD3d 594, 595-596). Here, plaintiff met his burden on his motion by submitting evidence establishing that, at the time of the accident, defendants were not officers of plaintiff's employer or any purported alter ego of plaintiff's employer (*see Olsen v Koslowski*, 100 AD3d 1396, 1397; *see also Melson v Sabastiano*, 32 AD3d 1259, 1260), and defendants failed to raise a triable issue of fact (*see generally Zuckerman*, 49 NY2d at 562).

Contrary to defendants' contention in appeal No. 2, we conclude that the court did not abuse its discretion in denying defendants' motion for leave to renew. Although a court has discretion to grant leave to renew, in the interest of justice, upon facts which were known to the movant at the time the original motion was made, "it may not exercise that discretion unless the movant establishes a 'reasonable justification for the failure to present such facts on the prior motion' " (*Robinson v Consolidated Rail Corp.*, 8 AD3d 1080, 1080, quoting CPLR 2221 [e] [3]; *see DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp.*, 120 AD3d 909, 911). Here, defendants failed to provide a reasonable justification for the failure to produce the purported new evidence on the prior cross motion (*see DiPizio Constr. Co., Inc.*, 120 AD3d at 911; *Chiappone v William Penn Life Ins. Co. of N.Y.*, 96 AD3d 1627, 1628).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

940

CA 15-00411

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF BRIARWOOD MANOR PROPERTY LLC,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF NIAGARA AND MOUNT VIEW PROPERTIES
OF LOCKPORT LLC, RESPONDENTS-RESPONDENTS.

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (GERALD T. WALSH OF COUNSEL), FOR PETITIONER-APPELLANT.

CLAUDE A. JOERG, COUNTY ATTORNEY, LOCKPORT, FOR RESPONDENT-RESPONDENT COUNTY OF NIAGARA.

WOODS OVIATT GILMAN LLP, ROCHESTER (BRIAN D. GWITT OF COUNSEL), FOR RESPONDENT-RESPONDENT MOUNT VIEW PROPERTIES OF LOCKPORT LLC.

Appeal from a judgment (denominated amended order) of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered May 21, 2014 in a proceeding pursuant to CPLR article 78. The judgment dismissed the proceeding as time-barred.

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

Memorandum: This appeal involves the sale and conveyance of a former skilled nursing facility (property) by respondent County of Niagara (County) to respondent Mount View Properties of Lockport LLC (Mount View). Petitioner sought to challenge the transaction on the ground that the County failed to comply with provisions of County Law § 215 requiring the sale or lease of such property only to the highest responsible bidder after public advertisement. Petitioner commenced this lawsuit by summons and verified complaint filed January 17, 2014, seeking a declaratory judgment or, in the alternative, a judgment pursuant to CPLR article 78 determining the transaction to be unlawful, voiding the transaction, and directing that respondents perform various actions consistent with that relief. Inasmuch as petitioner's challenge was directed at the legislative procedures by which the transaction was effectuated rather than the substance of the County's action, Supreme Court, inter alia, "convert[ed]" the declaratory judgment action into a CPLR article 78 proceeding, which is subject to the four-month statute of limitations set forth in CPLR 217 (*see* CPLR 103 [c]; *Matter of Save the Pine Bush v City of Albany*, 70 NY2d 193, 203; *P & N Tiffany Props., Inc. v Village of Tuckahoe*, 33

AD3d 61, 63-66, *appeal dismissed* 8 NY3d 943). In light of the papers submitted in support of and in opposition to respondents' motions to dismiss, the court concluded that the parties were deliberately charting a summary judgment course and therefore deemed the motions as ones for summary judgment (*see Nowacki v Becker*, 71 AD3d 1496, 1497). The court then granted respondents' motions on the ground that the proceeding was time-barred pursuant to CPLR 217 (1). We affirm.

The County operated the subject property as a skilled nursing facility until 2008, when it was closed following the recommendation of a state commission that the County's certificate for operation be rescinded or revoked and that the facility be transitioned to the operation of a regional assisted living program. The County Legislature unanimously adopted resolutions declaring that the property be sold or leased. Despite 1½ years of advertising and marketing by a realtor, however, no purchase offers were received for the property. In August 2011, the County retained a different realtor to advertise and market the property. Subsequently, David Tosetto, on behalf of an entity that would eventually become Mount View, submitted an offer to purchase the property for $555,000. On July 11, 2012, the County Legislature unanimously adopted a resolution approving the sale based on Tosetto's offer and authorizing the Chairman of the County Legislature to execute a sales contract. The resolution stated that the County had negotiated in good faith with Tosetto "on behalf of an entity to be formed . . . for purposes of the sale of such buildings and grounds." The resolution further stated that the purchase was contingent upon state approval of the buyer's application to operate an assisted living program, as well as completion by the buyer of a due diligence inspection period during which the terms of the contract could be further negotiated. In addition, the resolution provided that, upon the County obtaining price quotes for asbestos abatement, either party could terminate the agreement within a specified period if all such price quotes exceeded a certain cost. Thereafter, the County and Tosetto, acting on behalf of an entity to be formed for purposes of the transaction, i.e., Mount View, executed a purchase agreement. On July 31, 2013, the Administration Committee of the County Legislature voted unanimously to support a resolution reducing the sale price of the property to $196,000 to reflect some of the costs associated with asbestos abatement and the handling of two underground storage tanks on the property. Petitioner, a developer and owner of another health care facility, objected on the ground that reducing the sale price would constitute an unlawful formation of a new contract without first making the property available through a public bidding process. Petitioner further stated that, subject to a review and investigation, it would be willing to pay the County at least $300,000 for the property. The County Legislature subsequently withdrew its proposed resolution to reduce the sale price. Notwithstanding petitioner's further assertions that the property should be subject to public advertisement with bids taken to determine the highest responsible bidder, the County completed the sale and conveyance of the property to Mount View on September 18, 2013, for $550,000.

Initially, we reject petitioner's contention that the court erred

in denying its cross motion for a default judgment inasmuch as respondents did not default but filed timely motions to dismiss in lieu of answering (*see* CPLR 7804 [c], [f]). We further conclude that the court properly dismissed the proceeding as time-barred. Contrary to petitioner's contention, "the limitations period 'was triggered on . . . the date on which the [County Legislature] adopted the resolution' [approving] the sale" (*Riverview Dev. LLC v City of Oswego*, 125 AD3d 1417, 1418; *see Matter of Long Is. Pine Barrens Socy., Inc. v County of Suffolk*, 55 AD3d 610, 612; *Matter of Gach v City of Long Beach*, 218 AD2d 801, 801). "The 'determination to be reviewed' became final and binding on [petitioner] on [July 11, 2012] when the resolution went into effect" (*Riverview Dev. LLC*, 125 AD3d at 1418, quoting *Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34, *rearg denied* 5 NY3d 824). "It was at that juncture that the [County] 'reached a definitive position . . . that inflict[ed] actual, concrete injury . . . [that could not] be prevented or significantly ameliorated by further administrative action or by steps available to the complaining part[y]' " (*Riverview Dev. LLC*, 125 AD3d at 1419; *see Best Payphones, Inc.*, 5 NY3d at 34; *Long Is. Pine Barrens Socy., Inc.*, 55 AD3d at 612; *Gach*, 218 AD2d at 801-802).

Contrary to petitioner's further contention, we conclude that the contingent events and minor modifications in the terms of the contract did not detract from the finality of the resolution, which "clearly committ[ed] the County to a definite course of future action" (*Matter of Price v County of Westchester*, 225 AD2d 217, 220; *see Matter of Young v Board of Trustees of Vil. of Blasdell*, 221 AD2d 975, 977, *affd* 89 NY2d 846; *Matter of Sierra Club v Power Auth. of State of N.Y.*, 203 AD2d 15, 16-17). Unlike the cases relied upon by petitioner, there was no ambiguity here to render the impact of the resolution on petitioner as anything other than final and binding (*cf. Matter of Jewish Mem. Hosp. v Whalen*, 47 NY2d 331, 333; *Berkshire Nursing Ctr., Inc. v Novello*, 13 AD3d 327, 328; *Sutton v Yates County*, 193 AD2d 1126, 1126, *lv denied* 82 NY2d 656). Further, the proposed resolution to reduce the sales price is inconsequential inasmuch as the proposal was withdrawn and never enacted (*see generally Matter of Cabrini Med. Ctr. v Axelrod*, 107 AD2d 965, 966-967), and it is irrelevant that Mount View, rather than Tosetto, was the eventual purchaser because the resolution expressly authorized the sale to an entity to be formed for the purpose of completing the transaction.

We thus conclude that the four-month statute of limitations period began to run when the County Legislature adopted the resolution on July 11, 2012, and inasmuch as petitioner commenced this proceeding on January 17, 2014, the court properly dismissed the proceeding as time-barred.

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

942

CA 15-00351

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, VALENTINO, AND WHALEN, JJ.

PHILLIP WOLFE, PLAINTIFF-RESPONDENT

V MEMORANDUM AND ORDER

WAYNE-DALTON CORP., ET AL., DEFENDANTS,
JOANNE LESKA AND ROBERT TARSON, JR.,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

KNYCH & WHRITENOUR, LLC, SYRACUSE (MATTHEW E. WHRITENOUR OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

STANLEY LAW OFFICES, LLP, SYRACUSE (JON COOPER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered September 23, 2014. The order denied the motion of defendants Joanne Leska and Robert Tarson, Jr., for leave to renew their cross motion for summary judgment.

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

Same memorandum as in *Wolfe v Wayne-Dalton Corp.* ([appeal No. 1] ___ AD3d ___ [Nov. 20, 2015]).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

953

CA 14-01729

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

EVA E. DUNLOP, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SAINT LEO THE GREAT R.C. CHURCH AND CATHOLIC DIOCESE OF BUFFALO, DEFENDANTS-RESPONDENTS.

KEVIN T. STOCKER, TONAWANDA, FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered July 1, 2014. The order granted the motion of defendants to dismiss the action.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint against defendant Saint Leo the Great R.C. Church, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that she allegedly sustained when she fell at defendant Saint Leo the Great R.C. Church (Church) on November 1, 2008. A prior action based on the same occurrence was commenced by summons with notice on the last day of the statute of limitations (hereafter, first action), and Supreme Court denied the motion of the Church seeking to dismiss the first action against it on the ground that plaintiff did not timely serve the complaint after the Church made a demand therefor. On a prior appeal, this Court reversed that order, granted the motion, and dismissed the first action against the Church (*Dunlop v Saint Leo the Great R.C. Church*, 109 AD3d 1120, *lv denied* 22 NY3d 858) (hereafter, *Dunlop I*). In another prior appeal, this Court affirmed an order that granted the cross motion of defendant Catholic Diocese of Buffalo (Diocese) seeking to dismiss the first action against it for lack of personal jurisdiction (*Dunlop v Saint Leo the Great R.C. Church*, 125 AD3d 1282) (hereafter, *Dunlop II*). Less than two months after our decision in *Dunlop I*, but before the entry of the order appealed from in *Dunlop II*, plaintiff commenced the present action against the Church and the Diocese. Plaintiff now appeals from an order granting defendants' motion to dismiss the present action as time-barred.

Contrary to plaintiff's contention, CPLR 205 (a) does not apply

to render her present action against the Diocese timely commenced. That statute allows the commencement of a new action within six months when the prior action "is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits" (*id.*). We conclude that CPLR 205 (a) is inapplicable to the present action against the Diocese inasmuch as the present action was commenced before the prior action against the Diocese was terminated (*see Gem Flooring v Kings Park Indus.*, 5 AD3d 542, 544). Moreover, the prior action against the Diocese was dismissed for lack of personal jurisdiction (*Dunlop II*, 125 AD3d at 1282-1283), and the statute by its express terms "cannot be applied in that circumstance to extend the period of limitations" (*Wydallis v United States Fid. & Guar. Co.*, 63 NY2d 872, 874; *see* CPLR 205 [a]; *Rinaldi v Rochford*, 77 AD3d 720, 720).

We agree with plaintiff, however, that her present action against the Church was properly commenced pursuant to CPLR 205 (a), and thus that the court erred in granting defendants' motion with respect to the Church. We therefore modify the order accordingly. In cases involving a neglect to prosecute, CPLR 205 (a) does not allow the recommencement of an action when the court in the previously dismissed action "set[s] forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation." Here, we conclude that the conduct set forth in our decision in *Dunlop I* does not demonstrate a general pattern of delay in proceeding with the case (*see* CPLR 205 [a]; *cf. Zulic v Persich*, 106 AD3d 904, 905, *lv denied* 22 NY3d 860).

Finally, although plaintiff contends that costs were erroneously awarded to defendants, we note that the order on appeal does not in fact include an award of costs to them.

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

984

CA 14-01604

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

IN THE MATTER OF JP MORGAN CHASE BANK, N.A. (SUCCESSOR BY MERGER TO THE CHASE MANHATTAN BANK) (SUCCESSOR BY MERGER TO CHASE LINCOLN FIRST BANK, N.A.) (SUCCESSOR IN INTEREST TO LINCOLN FIRST BANK, N.A.) (SUCCESSOR BY CONSOLIDATION TO LINCOLN FIRST BANK OF ROCHESTER) (FORMERLY KNOWN AS LINCOLN ROCHESTER TRUST COMPANY), AS TRUSTEE UNDER THE TRUST AGREEMENT DATED MAY 23, 1932 BY ALVAH G. STRONG, DECEASED AND PURSUANT TO THE EXERCISE OF THE POWER OF APPOINTMENT UNDER PARAGRAPH NINTH OF THE WILL OF MARJORIE H. STRONG, DECEASED, FOR THE BENEFIT OF MARJORIE STRONG WEHLE, DECEASED (WHO DIED JANUARY 8, 2004), PETITIONER-APPELLANT-RESPONDENT.
(PROCEEDING NO. 1.)

ORDER

IN THE MATTER OF JP MORGAN CHASE BANK, N.A. (SUCCESSOR BY MERGER TO THE CHASE MANHATTAN BANK) (SUCCESSOR BY MERGER TO CHASE LINCOLN FIRST BANK, N.A.) (SUCCESSOR IN INTEREST TO LINCOLN FIRST BANK, N.A.) (SUCCESSOR BY CONSOLIDATION TO LINCOLN FIRST BANK OF ROCHESTER) (FORMERLY KNOWN AS LINCOLN ROCHESTER TRUST COMPANY), AS TRUSTEE UNDER PARAGRAPH 22(b)(4) OF THE WILL OF ALVAH G. STRONG, DECEASED, FOR THE BENEFIT OF MARJORIE STRONG WEHLE, DECEASED (WHO DIED JANUARY 8, 2004), PETITIONER-APPELLANT-RESPONDENT.
(PROCEEDING NO. 2.)

IN THE MATTER OF JP MORGAN CHASE BANK, N.A. (SUCCESSOR BY MERGER TO THE CHASE MANHATTAN BANK) (SUCCESSOR BY MERGER TO CHASE LINCOLN FIRST BANK, N.A.) (SUCCESSOR IN INTEREST TO LINCOLN FIRST BANK, N.A.) (SUCCESSOR BY CONSOLIDATION TO LINCOLN FIRST BANK OF ROCHESTER) (FORMERLY KNOWN AS LINCOLN ROCHESTER TRUST COMPANY), AS TRUSTEE UNDER PARAGRAPH FOURTH OF THE WILL OF ALVAH G. STRONG, DECEASED, FOR THE BENEFIT OF MARJORIE STRONG WEHLE, DECEASED (WHO DIED JANUARY 8, 2004), PETITIONER-APPELLANT-RESPONDENT.
(PROCEEDING NO. 3.)

IN THE MATTER OF JP MORGAN CHASE BANK, N.A. (SUCCESSOR BY MERGER TO THE CHASE MANHATTAN

BANK) (SUCCESSOR BY MERGER TO CHASE LINCOLN FIRST BANK, N.A.) (SUCCESSOR IN INTEREST TO LINCOLN FIRST BANK, N.A.) (SUCCESSOR BY CONSOLIDATION TO LINCOLN FIRST BANK OF ROCHESTER) (FORMERLY KNOWN AS LINCOLN ROCHESTER TRUST COMPANY), AS TRUSTEE UNDER PARAGRAPH TENTH OF THE WILL OF MARJORIE H. STRONG, DECEASED, FOR THE BENEFIT OF MARJORIE STRONG WEHLE, DECEASED (WHO DIED JANUARY 8, 2004), PETITIONER-APPELLANT-RESPONDENT.
(PROCEEDING NO. 4.)

CHARLES WEHLE AND HENRY WEHLE, OBJECTANTS-RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

HARRIS BEACH PLLC, PITTSFORD (A. VINCENT BUZARD OF COUNSEL), FOR PETITIONER-APPELLANT-RESPONDENT.

HARRIS, WILTSHIRE & GRANNIS LLP, WASHINGTON, D.C. (MARK A. GRANNIS OF COUNSEL), FOR OBJECTANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Surrogate's Court, Monroe County (Edmund A. Calvaruso, S.), entered November 26, 2013. The order, inter alia, determined that petitioner should be surcharged and denied the request of objectants for attorneys' fees.

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

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

985

CA 14-01605

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

IN THE MATTER OF JP MORGAN CHASE BANK, N.A. (SUCCESSOR BY MERGER TO THE CHASE MANHATTAN BANK) (SUCCESSOR BY MERGER TO CHASE LINCOLN FIRST BANK, N.A.) (SUCCESSOR IN INTEREST TO LINCOLN FIRST BANK, N.A.) (SUCCESSOR BY CONSOLIDATION TO LINCOLN FIRST BANK OF ROCHESTER) (FORMERLY KNOWN AS LINCOLN ROCHESTER TRUST COMPANY), AS TRUSTEE UNDER THE TRUST AGREEMENT DATED MAY 23, 1932 BY ALVAH G. STRONG, DECEASED AND PURSUANT TO THE EXERCISE OF THE POWER OF APPOINTMENT UNDER PARAGRAPH NINTH OF THE WILL OF MARJORIE H. STRONG, DECEASED, FOR THE BENEFIT OF MARJORIE STRONG WEHLE, DECEASED (WHO DIED JANUARY 8, 2004), PETITIONER-APPELLANT-RESPONDENT.
(PROCEEDING NO. 1.)

ORDER

IN THE MATTER OF JP MORGAN CHASE BANK, N.A. (SUCCESSOR BY MERGER TO THE CHASE MANHATTAN BANK) (SUCCESSOR BY MERGER TO CHASE LINCOLN FIRST BANK, N.A.) (SUCCESSOR IN INTEREST TO LINCOLN FIRST BANK, N.A.) (SUCCESSOR BY CONSOLIDATION TO LINCOLN FIRST BANK OF ROCHESTER) (FORMERLY KNOWN AS LINCOLN ROCHESTER TRUST COMPANY), AS TRUSTEE UNDER PARAGRAPH 22(b)(4) OF THE WILL OF ALVAH G. STRONG, DECEASED, FOR THE BENEFIT OF MARJORIE STRONG WEHLE, DECEASED (WHO DIED JANUARY 8, 2004), PETITIONER-APPELLANT-RESPONDENT.
(PROCEEDING NO. 2.)

IN THE MATTER OF JP MORGAN CHASE BANK, N.A. (SUCCESSOR BY MERGER TO THE CHASE MANHATTAN BANK) (SUCCESSOR BY MERGER TO CHASE LINCOLN FIRST BANK, N.A.) (SUCCESSOR IN INTEREST TO LINCOLN FIRST BANK, N.A.) (SUCCESSOR BY CONSOLIDATION TO LINCOLN FIRST BANK OF ROCHESTER) (FORMERLY KNOWN AS LINCOLN ROCHESTER TRUST COMPANY), AS TRUSTEE UNDER PARAGRAPH FOURTH OF THE WILL OF ALVAH G. STRONG, DECEASED, FOR THE BENEFIT OF MARJORIE STRONG WEHLE, DECEASED (WHO DIED JANUARY 8, 2004), PETITIONER-APPELLANT-RESPONDENT.
(PROCEEDING NO. 3.)

IN THE MATTER OF JP MORGAN CHASE BANK, N.A. (SUCCESSOR BY MERGER TO THE CHASE MANHATTAN

BANK) (SUCCESSOR BY MERGER TO CHASE LINCOLN FIRST BANK, N.A.) (SUCCESSOR IN INTEREST TO LINCOLN FIRST BANK, N.A.) (SUCCESSOR BY CONSOLIDATION TO LINCOLN FIRST BANK OF ROCHESTER) (FORMERLY KNOWN AS LINCOLN ROCHESTER TRUST COMPANY), AS TRUSTEE UNDER PARAGRAPH TENTH OF THE WILL OF MARJORIE H. STRONG, DECEASED, FOR THE BENEFIT OF MARJORIE STRONG WEHLE, DECEASED (WHO DIED JANUARY 8, 2004), PETITIONER-APPELLANT-RESPONDENT.
(PROCEEDING NO. 4.)

CHARLES WEHLE AND HENRY WEHLE, OBJECTANTS-RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

HARRIS BEACH PLLC, PITTSFORD (A. VINCENT BUZARD OF COUNSEL), FOR PETITIONER-APPELLANT-RESPONDENT.

HARRIS, WILTSHIRE & GRANNIS LLP, WASHINGTON, D.C. (MARK A. GRANNIS OF COUNSEL), FOR OBJECTANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an amended order of the Surrogate's Court, Monroe County (Edmund A. Calvaruso, S.), entered February 14, 2014. The amended order amended an order entered November 26, 2013 by awarding interest on commissions forfeited by petitioner.

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

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

986

CA 14-01606

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

IN THE MATTER OF JP MORGAN CHASE BANK, N.A. (SUCCESSOR BY MERGER TO THE CHASE MANHATTAN BANK) (SUCCESSOR BY MERGER TO CHASE LINCOLN FIRST BANK, N.A.) (SUCCESSOR IN INTEREST TO LINCOLN FIRST BANK, N.A.) (SUCCESSOR BY CONSOLIDATION TO LINCOLN FIRST BANK OF ROCHESTER) (FORMERLY KNOWN AS LINCOLN ROCHESTER TRUST COMPANY), AS TRUSTEE UNDER THE TRUST AGREEMENT DATED MAY 23, 1932 BY ALVAH G. STRONG, DECEASED AND PURSUANT TO THE EXERCISE OF THE POWER OF APPOINTMENT UNDER PARAGRAPH NINTH OF THE WILL OF MARJORIE H. STRONG, DECEASED, FOR THE BENEFIT OF MARJORIE STRONG WEHLE, DECEASED (WHO DIED JANUARY 8, 2004), PETITIONER-APPELLANT-RESPONDENT.
(PROCEEDING NO. 1.)

ORDER

IN THE MATTER OF JP MORGAN CHASE BANK, N.A. (SUCCESSOR BY MERGER TO THE CHASE MANHATTAN BANK) (SUCCESSOR BY MERGER TO CHASE LINCOLN FIRST BANK, N.A.) (SUCCESSOR IN INTEREST TO LINCOLN FIRST BANK, N.A.) (SUCCESSOR BY CONSOLIDATION TO LINCOLN FIRST BANK OF ROCHESTER) (FORMERLY KNOWN AS LINCOLN ROCHESTER TRUST COMPANY), AS TRUSTEE UNDER PARAGRAPH 22(b)(4) OF THE WILL OF ALVAH G. STRONG, DECEASED, FOR THE BENEFIT OF MARJORIE STRONG WEHLE, DECEASED (WHO DIED JANUARY 8, 2004), PETITIONER-APPELLANT-RESPONDENT.
(PROCEEDING NO. 2.)

IN THE MATTER OF JP MORGAN CHASE BANK, N.A. (SUCCESSOR BY MERGER TO THE CHASE MANHATTAN BANK) (SUCCESSOR BY MERGER TO CHASE LINCOLN FIRST BANK, N.A.) (SUCCESSOR IN INTEREST TO LINCOLN FIRST BANK, N.A.) (SUCCESSOR BY CONSOLIDATION TO LINCOLN FIRST BANK OF ROCHESTER) (FORMERLY KNOWN AS LINCOLN ROCHESTER TRUST COMPANY), AS TRUSTEE UNDER PARAGRAPH FOURTH OF THE WILL OF ALVAH G. STRONG, DECEASED, FOR THE BENEFIT OF MARJORIE STRONG WEHLE, DECEASED (WHO DIED JANUARY 8, 2004), PETITIONER-APPELLANT-RESPONDENT.
(PROCEEDING NO. 3.)

IN THE MATTER OF JP MORGAN CHASE BANK, N.A. (SUCCESSOR BY MERGER TO THE CHASE MANHATTAN

BANK) (SUCCESSOR BY MERGER TO CHASE LINCOLN FIRST BANK, N.A.) (SUCCESSOR IN INTEREST TO LINCOLN FIRST BANK, N.A.) (SUCCESSOR BY CONSOLIDATION TO LINCOLN FIRST BANK OF ROCHESTER) (FORMERLY KNOWN AS LINCOLN ROCHESTER TRUST COMPANY), AS TRUSTEE UNDER PARAGRAPH TENTH OF THE WILL OF MARJORIE H. STRONG, DECEASED, FOR THE BENEFIT OF MARJORIE STRONG WEHLE, DECEASED (WHO DIED JANUARY 8, 2004), PETITIONER-APPELLANT-RESPONDENT.
(PROCEEDING NO. 4.)

CHARLES WEHLE AND HENRY WEHLE, OBJECTANTS-RESPONDENTS-APPELLANTS.
(APPEAL NO. 3.)

HARRIS BEACH PLLC, PITTSFORD (A. VINCENT BUZARD OF COUNSEL), FOR PETITIONER-APPELLANT-RESPONDENT.

HARRIS, WILTSHIRE & GRANNIS LLP, WASHINGTON, D.C. (MARK A. GRANNIS OF COUNSEL), FOR OBJECTANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Surrogate's Court, Monroe County (Edmund A. Calvaruso, S.), entered April 21, 2014. The order denied the motion of petitioner to set aside an amended order entered February 14, 2014.

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

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

987

CA 14-01754

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

IN THE MATTER OF JP MORGAN CHASE BANK, N.A. (SUCCESSOR BY MERGER TO THE CHASE MANHATTAN BANK) (SUCCESSOR BY MERGER TO CHASE LINCOLN FIRST BANK, N.A.) (SUCCESSOR IN INTEREST TO LINCOLN FIRST BANK, N.A.) (SUCCESSOR BY CONSOLIDATION TO LINCOLN FIRST BANK OF ROCHESTER) (FORMERLY KNOWN AS LINCOLN ROCHESTER TRUST COMPANY), AS TRUSTEE UNDER THE TRUST AGREEMENT DATED MAY 23, 1932 BY ALVAH G. STRONG, DECEASED AND PURSUANT TO THE EXERCISE OF THE POWER OF APPOINTMENT UNDER PARAGRAPH NINTH OF THE WILL OF MARJORIE H. STRONG, DECEASED, FOR THE BENEFIT OF MARJORIE STRONG WEHLE, DECEASED (WHO DIED JANUARY 8, 2004), PETITIONER-APPELLANT-RESPONDENT.
(PROCEEDING NO. 1.)

MEMORANDUM AND ORDER

IN THE MATTER OF JP MORGAN CHASE BANK, N.A. (SUCCESSOR BY MERGER TO THE CHASE MANHATTAN BANK) (SUCCESSOR BY MERGER TO CHASE LINCOLN FIRST BANK, N.A.) (SUCCESSOR IN INTEREST TO LINCOLN FIRST BANK, N.A.) (SUCCESSOR BY CONSOLIDATION TO LINCOLN FIRST BANK OF ROCHESTER) (FORMERLY KNOWN AS LINCOLN ROCHESTER TRUST COMPANY), AS TRUSTEE UNDER PARAGRAPH 22(b)(4) OF THE WILL OF ALVAH G. STRONG, DECEASED, FOR THE BENEFIT OF MARJORIE STRONG WEHLE, DECEASED (WHO DIED JANUARY 8, 2004), PETITIONER-APPELLANT-RESPONDENT.
(PROCEEDING NO. 2.)

IN THE MATTER OF JP MORGAN CHASE BANK, N.A. (SUCCESSOR BY MERGER TO THE CHASE MANHATTAN BANK) (SUCCESSOR BY MERGER TO CHASE LINCOLN FIRST BANK, N.A.) (SUCCESSOR IN INTEREST TO LINCOLN FIRST BANK, N.A.) (SUCCESSOR BY CONSOLIDATION TO LINCOLN FIRST BANK OF ROCHESTER) (FORMERLY KNOWN AS LINCOLN ROCHESTER TRUST COMPANY), AS TRUSTEE UNDER PARAGRAPH FOURTH OF THE WILL OF ALVAH G. STRONG, DECEASED, FOR THE BENEFIT OF MARJORIE STRONG WEHLE, DECEASED (WHO DIED JANUARY 8, 2004), PETITIONER-APPELLANT-RESPONDENT.
(PROCEEDING NO. 3.)

IN THE MATTER OF JP MORGAN CHASE BANK, N.A. (SUCCESSOR BY MERGER TO THE CHASE MANHATTAN

BANK) (SUCCESSOR BY MERGER TO CHASE LINCOLN FIRST BANK, N.A.) (SUCCESSOR IN INTEREST TO LINCOLN FIRST BANK, N.A.) (SUCCESSOR BY CONSOLIDATION TO LINCOLN FIRST BANK OF ROCHESTER) (FORMERLY KNOWN AS LINCOLN ROCHESTER TRUST COMPANY), AS TRUSTEE UNDER PARAGRAPH TENTH OF THE WILL OF MARJORIE H. STRONG, DECEASED, FOR THE BENEFIT OF MARJORIE STRONG WEHLE, DECEASED (WHO DIED JANUARY 8, 2004), PETITIONER-APPELLANT-RESPONDENT.
(PROCEEDING NO. 4.)

CHARLES WEHLE AND HENRY WEHLE, OBJECTANTS-RESPONDENTS-APPELLANTS.
(APPEAL NO. 4.)

HARRIS BEACH PLLC, PITTSFORD (A. VINCENT BUZARD OF COUNSEL), FOR PETITIONER-APPELLANT-RESPONDENT.

HARRIS, WILTSHIRE & GRANNIS LLP, WASHINGTON, D.C. (MARK A. GRANNIS OF COUNSEL), FOR OBJECTANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from a judgment of the Surrogate's Court, Monroe County (Edmund A. Calvaruso, S.), entered April 21, 2014. The judgment, inter alia, granted objectants money damages of $3,711,262.55.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by dismissing the objections to the petitions seeking judicial settlement of the accounts of Trust I, Trust II, and Trust III and vacating the third through sixth decretal paragraphs and as modified the judgment is affirmed without costs.

Memorandum: Petitioner-appellant-respondent (petitioner) served as trustee for, inter alia, three trusts that were established for the benefit of Marjorie Strong Wehle. Trust I was funded on August 2, 1976 with 15,430 shares of Kodak stock. The stock originally was placed in trust by Henry Alvah Strong, who was one of George Eastman's original partners and who served as Kodak's first president, for the benefit of his grandson, Alvah G. Strong. Alvah Strong assigned his remainder interest to an inter vivos trust he established in 1932 for the benefit of his wife, Marjorie H. Strong. In her will, Marjorie Strong directed that the principal of the trust be divided into three trusts for the benefit of her daughters, one of whom was Wehle, with a remainder interest for their respective issue, per stirpes. Trust I received additional shares of Kodak stock from two stock splits and from the estate of Alvah Strong's father, Henry Griffin Strong. Trust II was created in 1966 in the will of Alvah Strong for the benefit of his wife, and he directed that, at his wife's death, the remaining principal be placed into trusts for each of their three daughters, including Wehle, with a remainder interest to their respective issue, per stirpes. It was funded with 5,668 shares of Kodak stock. Trust

III also was created in Alvah Strong's will, for Wehle's benefit, with a remainder interest for her issue, per stirpes. It was funded with 1,000 shares of Kodak stock.

It is undisputed that petitioner had sole investment authority over the three trusts and that none of the trusts provided for any restrictions regarding investment decisions (*cf. Matter of Chase Manhattan Bank*, 26 AD3d 824, 825-826, *lv denied* 7 NY3d 824, *rearg denied* 7 NY3d 922). The three trusts were entirely divested of Kodak stock by January 2002. Petitioner sold 8,400 shares held in Trust I between June 1993 and January 1998, 16,199 shares between May 1999 and April 2000, and the remaining 2,000 shares in January 2002. Petitioner completely divested Trust II of Kodak stock in two sales that occurred in 1978 and 1979, respectively. Petitioner sold small amounts of the Kodak stock held in Trust III between January 1968 and July 1972, approximately one-half of the remaining shares in February 1977, and the balance of the shares in January 1979.

Following Wehle's death in 2004, petitioner filed petitions on June 26, 2006, seeking judicial settlement of the accounts of the three trusts. The respective petitions alleged that Trust I had a gross value of assets, including principal and income, totaling more than $4.5 million, that Trust II had a gross value of assets totaling more than $3 million, and that Trust III had a gross value of assets totaling more than $718,000.

Objectants-respondents-appellants (objectants), Wehle's two surviving sons, filed objections to each account, alleging with respect to each account, inter alia, that petitioner had failed to prudently invest trust assets, including failing to adequately diversify the investment portfolios; that petitioner failed to exercise reasonable diligence, care, and skill in the management and administration of the respective trusts; that petitioner failed and neglected to establish investment objectives for the respective trusts and to formulate strategies to accomplish those objectives; and that petitioner failed to communicate with the beneficiaries with respect to management of the trust and the risk of maintaining a concentration of Kodak stock. Objectants sought compensatory damages, a return of petitioner's commissions, and legal fees.

Following a nonjury trial, Surrogate's Court determined, inter alia, that petitioner was negligent in its management of the three trusts, particularly with respect to its failure to diversify and divest the trusts of a concentration of Kodak stock. The Surrogate determined that petitioner should have sold 95% of the Kodak stock held in each trust within 30 days of the receipt of the stock, i.e., by September 1, 1976 and July 4, 1987 with respect to Trust I; by August 20, 1976 with respect to Trust II; and by August 19, 1966 with respect to Trust III. The Surrogate employed the lost capital method set forth in *Matter of Janes* (90 NY2d 41, 55, *rearg denied* 90 NY2d 885) to calculate the damages. Specifically, he determined the value of the stock on the date on which he determined that it should have been sold and subtracted from that figure the proceeds from the sale of the stock. He then added compound interest at the statutory rate

from the date he determined that the stock should have been sold, i.e., six percent before June 15, 1981 and nine percent thereafter, and offset that amount by the amount paid to Wehle in dividends, with compound interest (*see id.*; *see also Matter of HSBC Bank USA, N.A. [Knox]*, 98 AD3d 300, 320-321). The Surrogate determined that there were no damages as a result of petitioner's management of Trust I, noting that the stock held in Trust I came from the time of Kodak's inception and had not received a step-up in the tax basis in over 80 years, which would have reduced the amount of capital gains tax liability. The Surrogate therefore determined that, at the two dates on which he determined that the stock should have been sold, inasmuch as the hypothetical sale would have resulted in the payment of significant capital gains taxes, there was a net loss of zero dollars. With respect to Trust II and Trust III, collectively, the Surrogate determined that the surcharge amount to be imposed against petitioner was $3,069,644, plus compound interest. He further determined that petitioner's commissions were to be added to the surcharge amount, with prejudgment compound interest applied at the statutory rate to the commissions. We conclude that the Surrogate erred in his determination that petitioner was negligent in the management of the three trusts and, consequently, in imposing surcharges, and we therefore modify the judgment by dismissing the objections to the accounts of each of the three trusts.

As a preliminary matter, we agree with petitioner that the Surrogate abused his discretion by directing it to forfeit its commissions and by awarding prejudgment interest on those commissions. Trustees "shall be entitled" to annual commissions (SCPA 2309 [2]; 2312 [2], [4] [a]) where, as here, the Surrogate "made no finding of bad faith, fraud or personal enrichment" against petitioner (*Matter of Blodgett*, 261 App Div 878, 878, *affd* 286 NY 602). Indeed, the Surrogate rejected the objectants' claim that petitioner acted in its own self-interest or was disloyal to the beneficiaries (*see Matter of Lasdon*, 105 AD3d 499, 500, *lv denied* 22 NY3d 856). Contrary to objectants' contention, our decision in *Matter of Janes* (223 AD2d 20, *affd* 90 NY2d 41, *rearg denied* 90 NY2d 885), does not support the forfeiture of commissions. In that case, we concluded that the trustee "exhibited total indifference" to a "prolonged and steep decline" in the price of the stock and then misled the beneficiary for several years to conceal the loss (*id.* at 32). We denied petitioner commissions based upon its "nondisclosure, concealment, and misrepresentation" (*id.*), none of which is present here. Although "[t]rustees can be denied commission 'where their acts involve bad faith, a complete indifference to their fiduciary obligations or some other act that constitutes malfeasance or significant misfeasance' . . . [,] [t]he denial of a commission . . . should not be 'in the nature of an additional penalty' " (*Matter of Gregory Stewart Trust*, 109 AD3d 755, 757). We conclude that, inasmuch as there is no evidence of malfeasance or significant misfeasance here, the Surrogate's award to objectants of petitioner's commissions constitutes an additional penalty to petitioner. We note that, although there may be rare cases in which prejudgment interest on commissions may be appropriate (*see generally Beard v Beard*, 140 NY 260, 265-266), this is not such a case

and, thus, the Surrogate also abused his discretion in awarding prejudgment interest.

" 'In reviewing a determination made after a nonjury trial, the power of this Court is as broad as that of [Surrogate's Court], and we may render a judgment we find warranted by the facts, bearing in mind that in a close case, the [Surrogate] had the advantage of seeing the witnesses' " (*Matter of Hunter*, 100 AD3d 996, 997-998, *lv dismissed* 21 NY3d 1037, *lv denied* 22 NY3d 860). We conclude that the Surrogate erred in sustaining the objections to the three accounts because objectants failed to sustain their burden of proving that petitioner failed to diversify the trusts prudently within a reasonable time, and also failed to establish a reasonable date from which a surcharge could be calculated. As we explained in *Knox* (98 AD3d at 308-309), petitioner was subject to three separate standards of care as trustee: "[f]rom [1966] until 1970, the standard was the common-law rule, which provided that 'the trustee is bound to employ such diligence and such prudence in the care and management, as in general, prudent [persons] of discretion and intelligence in such matters, employ in their own like affairs' . . . From 1970 to 1995, the standard of care was the prudent person rule established in EPTL 11-2.2 (a) (1), which provided that '[a] fiduciary holding funds for investment may invest the same in such securities as would be acquired by prudent [persons] of discretion and intelligence in such matters who are seeking a reasonable income and preservation of their capital' . . . Effective, January 1, 1995, the Prudent Investor Act (EPTL 11-2.3 [L 1994, ch 609, § 1]) created a new standard of care by providing that '[a] trustee shall exercise reasonable care, skill and caution to make and implement investment and management decisions as a prudent investor would for the entire portfolio, taking into account the purposes and terms and provisions of the governing instrument' (EPTL 11-2.3 [b] [2]). The statute lists various elements of the prudent investor standard, including: pursuing an overall investment strategy; considering numerous factors pertaining to the overall portfolio including, e.g., general economic conditions; and diversifying assets (*see* EPTL 11-2.3 [b] [3] [A]-[C])." Notably, the "Prudent Investor Act requires a trustee 'to diversify assets unless the trustee reasonably determines that it is in the interests of the beneficiaries not to diversify' " (*Janes*, 90 NY2d at 49 n, quoting EPTL 11-2.3 [b] [3] [C]; *see Knox*, 98 AD3d at 310).

Petitioner's performance with respect to the three trusts is assessed under the above standards of care; i.e., Trust I is assessed by the guidelines contained in the prudent person rule and the Prudent Investor Act; Trust II is assessed by the guidelines contained in the prudent person rule; and Trust III is assessed by the common-law rule and the prudent person rule. Under each of the standards, however, "[i]n order to warrant a surcharge, 'the objectant[s] must show that a financial loss resulted from the trustee's negligence or failure' to act prudently" (*Knox*, 98 AD3d at 310-311; *see Matter of Donner*, 82 NY2d 574, 585). Furthermore, "[u]nder all three standards, 'it is not sufficient that hindsight might suggest that another course would have been more beneficial; nor does a mere error of investment judgment mandate a surcharge' " (*Knox*, 98 AD3d at 309). "Whether a surcharge

should be imposed . . . depends on 'a balanced and perceptive analysis of [petitioner's] consideration and action in the light of the history of each individual investment, viewed at the time of its action or its omission to act' " (*Donner*, 82 NY2d at 585).

With respect to Trust I, we conclude that the court erred in sua sponte determining that petitioner was negligent in failing to dispose of 95% of the stock within 30 days of receipt, i.e., by September 1, 1976 and by July 4, 1987, dates which were neither pleaded nor proved by objectants (*see Chase Manhattan Bank*, 26 AD3d at 828). Objectants presented the testimony of a former portfolio manager, who explained that, in 1976, Kodak was considered a "top-quality stock" and that the sale of the stock in Trust I would have resulted in significant capital gains taxes because of the 81 cents per share cost basis of the stock held in that trust. Petitioner's gradual divestiture of the Kodak stock in 14 sales, each of which involved 250 to 2000 shares, between the years 1977 and 1993, satisfied the requirements of the prudent person rule inasmuch as the gradual sale of the Kodak stock in order to reduce the capital gains tax liability preserved the principal of the trust and the income paid to Wehle, both of which would have been reduced if the stock had been sold within 30 days of receipt (*see* EPTL 11-2.2 [a] [1]). Indeed, "it is well established 'that retention of securities received from the creator of the trust may be found to be prudent even when purchase of the same securities might not' " (*Knox*, 98 AD3d at 309). "[T]he very nature of the prudent person standard dictates against any absolute rule that a fiduciary's failure to diversify, in and of itself, constitutes imprudence" (*Janes*, 90 NY2d at 50). The record supports our conclusion that, in light of the tax implications of the sale of the stock and the fact that the concentration of the stock in Trust I provided significant income, "it would be unreasonable to hold that petitioner acted imprudently in retaining securities that . . . had appreciated or were appreciating in value and were providing significant income to [Trust I]" (*Knox*, 98 AD3d at 318). Indeed, the objectants neither alleged nor offered proof that a compelling reason for the sale of the Kodak stock other than diversification existed on either September 1, 1976 or July 4, 1987. Instead, the record establishes that the value of the stock continued to rise after 1993 until 1998, at which time petitioner divested Trust I of all but 2000 shares over a two-year period, thereby eliminating a concentration of Kodak shares from Trust I. Petitioner's expert explained that the trust made a cumulative profit of $2,856,763 from the sale of the Kodak stock, and that if the Kodak stock had been sold within 30 days of its receipt, the investable base of principal would have been nearly halved by taxes.

We further conclude that petitioner did not violate the Prudent Investor Act from 1995 to 1998 because it "reasonably determine[d] that it [was] in the interests of the beneficiaries not to diversify" (EPTL 11-2.3 [b] [3] [C]). The Valueline rating for safety from December 1994 through June 1997 was 2, on a scale of 1 to 5, with 1 being the highest rating, and the value of the stock rose steadily from December 1994 through September 1998. The safety rating dropped to 3 in September 1997, where it remained until it again rose to 2 in

September 2000. Petitioner divested Trust I of Kodak stock with eight sales during the period beginning in January 1998 through April 2000 with a gain in excess of $1.4 million. We also conclude that petitioner complied with the Prudent Investor Act from 1998 through 2000 by diversifying the remaining concentration of Kodak stock, with the exercise of "reasonable care, skill and caution" (EPTL 11-2.3 [b] [2]), "in light of facts and circumstances prevailing at the time" (EPTL 11-2.3 [b] [1]).

With respect to Trust II, which we analyze under the prudent person rule, we likewise conclude that the Surrogate erred in sua sponte determining that petitioner should have divested the trust of a concentration of Kodak stock within 30 days, inasmuch as that determination improperly constitutes an "absolute rule that a fiduciary's failure to diversify, in and of itself, constitutes imprudence" (*Janes*, 90 NY2d at 50). We further conclude that objectants failed to meet their burden of establishing that the three-year period over which petitioner diversified the portfolio was in any way a violation of its duty to hold and invest securities as would a prudent person "of discretion and intelligence in such matters who are seeking a reasonable income and preservation of their capital" (EPTL 11-2.2 [a] [1]). In engaging in "a balanced and perceptive analysis of [petitioner's] consideration and action in light of the history of each individual investment, viewed at the time of its action or its omission to act [,] . . . [and viewing] [petitioner's] conduct over *the entire course of the investment*," (*Janes*, 90 NY2d at 50 [internal quotation marks omitted]), we conclude that petitioner acted prudently with respect to Trust II. We therefore conclude that the Surrogate erred in imposing a surcharge with respect to that trust.

We conclude with respect to Trust III that the Surrogate erred in determining that 95% of the stock should have been sold within 30 days, i.e., by August 19, 1966, inasmuch as that date was arbitrary, not supported by the record or, indeed, pleaded by objectants (*see Chase Manhattan Bank*, 26 AD3d at 828). At the time the trust was funded and until 1970, petitioner was obligated "to employ such diligence and such prudence in the care and management, as in general, prudent [persons] of discretion and intelligence in such matters, employ in their own like affairs" (*King v Talbot*, 40 NY 76, 85-86; *see Knox*, 98 AD3d at 308). From 1970 until the stock was sold in two sales in 1978 and 1979, petitioner was obligated to comply with the prudent person rule. Although petitioner stipulated that it could not determine who managed Trust III between 1966 and 1975 and that it did not have annual review forms for that period, objectants nevertheless failed to establish that any loss was caused by such failure (*see generally Matter of Hahn*, 93 AD2d 583, 587-588, *affd* 62 NY2d 821; *Knox*, 98 AD3d at 311). The record establishes that the Kodak stock significantly outperformed the Standard & Poor's 500 Index during the entire period it was held in Trust III. "Under the facts of this case, we conclude that it would be unreasonable to hold that petitioner acted imprudently in retaining securities that, by all accounts, had appreciated or were appreciating in value and were providing significant income to [Trust III]" (*Knox*, 98 AD3d at 318). We therefore conclude that the Surrogate erred in assessing a

surcharge with respect to Trust III.

In light of our determination, we do not address the contention raised by objectants on their cross appeal.

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

994

KA 11-01119

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARQUIS PARKER, DEFENDANT-APPELLANT.

SHIRLEY A. GORMAN, BROCKPORT, FOR DEFENDANT-APPELLANT.

MARQUIS PARKER, DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered March 3, 2011. The judgment convicted defendant, upon a jury verdict, of assault in the first degree (two counts), attempted robbery in the first degree, burglary in the first degree, criminal possession of a weapon in the second degree and 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, inter alia, two counts of assault in the first degree (Penal Law § 120.10 [4]), and one count of attempted robbery in the first degree (§§ 110.00, 160.15 [4]). We reject defendant's contention that he was denied effective assistance of counsel based on defense counsel's failure to seek suppression of DNA evidence allegedly obtained from him without his consent. It is well settled that "[a] defendant is not denied effective assistance of trial counsel merely because counsel does not make a motion or argument that has little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702). Here, the police recording of defendant's interrogation establishes that defendant voluntarily agreed to provide the DNA sample (*see People v Osborne*, 88 AD3d 1284, 1285, *lv denied* 19 NY3d 999, *reconsideration denied* 19 NY3d 1104; *People v Beam*, 78 AD3d 1067, 1068, *lv denied* 16 NY3d 828). The investigating police officers were not required to advise defendant of his right to refuse consent (*see generally Osborne*, 88 AD3d at 1285). We have reviewed defendant's remaining contentions with respect to his assertions of ineffective assistance of counsel and conclude that they lack merit. 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 was afforded meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Defendant failed to preserve for our review his contention that Supreme Court abused its discretion when it read Penal Law § 20.00 to prospective jurors, and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's further contention that the prosecutor should have been disqualified after she testified at the reopened midtrial *Wade* hearing. The prosecutor did not conduct that hearing, and thus she did not "serve[] as both a witness and an advocate" in violation of the advocate-witness rule (*People v Washington*, 233 AD2d 684, 687, *lv denied* 89 NY2d 1042; *see People v Paperno*, 54 NY2d 294, 299-300). Furthermore, the prosecutor did not inject her own credibility into the trial in violation of the unsworn witness rule (*see Paperno*, 54 NY2d at 300).

We reject defendant's further contention that the People failed to comply with the notice requirements of CPL 710.30. "CPL 710.30 requires that . . . the People serve notice of their intention to offer at trial any 'testimony regarding an observation of the defendant either at the time or place of the commission of the offense or upon some other occasion relevant to the case, to be given by a witness who has previously identified him as such' " (*People v Gee*, 99 NY2d 158, 161, *rearg denied* 99 NY2d 652, quoting CPL 710.30 [1]). In preparation for the trial, the victim of the attempted robbery viewed an image taken from a surveillance video. We conclude that this was not a police-arranged identification procedure within the meaning of CPL 710.30 (*see id.* at 162-164) but, rather, the People were merely preparing the witness for trial with the use of that evidence (*see generally People v Herner*, 85 NY2d 877, 879; *People v Ortiz*, 1 AD3d 1017, 1018-1019, *lv denied* 1 NY3d 632).

Defendant's contention that he was entitled to specific performance of an alleged promise that he would not be charged with assaulting a police officer if he made certain admissions during his interrogation lacks merit. Even assuming, arguendo, that the investigator made such a promise, we note that "[a] district attorney has 'unfettered discretion to determine whether to prosecute' " (*Matter of Soares v Carter*, 113 AD3d 993, 996, *affd* 25 NY3d 1011), and that discretion includes the power to determine the charges to be prosecuted (*see People v Cajigas*, 19 NY3d 697, 702-703).

We reject defendant's challenge to the severity of the sentence, and his contention in his pro se supplemental brief that his sentence is illegal lacks merit. The sentencing transcript establishes that the court imposed two consecutive 20-year determinate terms of incarceration for the two counts of assault in the first degree, to be served concurrently with the sentences imposed for the remaining counts of which defendant was convicted, resulting in an aggregate sentence of 40 years' incarceration (*cf. People v Dennis*, 91 AD3d 1277, 1280, *lv denied* 19 NY3d 995).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1022

CAF 14-01082, CAF 14-01052

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

IN THE MATTER OF RICHARD STENT,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MARY SCHWARTZ AND DAN SCHWARTZ,
RESPONDENTS-APPELLANTS.

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

KELIANN M. ARGY, ORCHARD PARK, FOR RESPONDENT-APPELLANT MARY SCHWARTZ.

JACQUELINE M. GRASSO, ATTORNEY FOR THE CHILD, BATAVIA.

Appeals from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered June 4, 2014 in a proceeding pursuant to Family Court Act article 6. The order granted custody of the subject child to petitioner with visitation to respondents.

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

Memorandum: Respondents, the mother and the father of the child who is the subject of this proceeding, both appeal from an order that granted custody of the child to petitioner, the child's half brother. Initially, we agree with the mother and the father that Family Court erred in drawing a negative inference against them based on their failure to testify. The mother and the father were both called as witnesses and gave testimony for petitioner, and they were also questioned by their own attorneys and the Attorney for the Child. The court therefore erred in drawing a negative inference against them inasmuch as they did in fact testify at the hearing (*see Matter of Raymond D.*, 45 AD3d 1415, 1415-1416).

We nevertheless agree with the court's determination that petitioner met his burden of establishing that extraordinary circumstances exist to warrant an inquiry into whether it is in the best interests of the child to award him custody (*see Matter of Scala v Parker*, 304 AD2d 858, 859; *see generally Matter of Bennett v Jeffreys*, 40 NY2d 543, 548). It is well-settled that, "as between a parent and nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of 'surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances' "

(*Matter of Gary G. v Roslyn P.*, 248 AD2d 980, 981, quoting *Bennett*, 40 NY2d at 544). Here, the evidence established that the mother and the father changed residences frequently over a period of 18 months, and they were evicted from one residence and were homeless for several months, living in a tent or their vehicle. The child changed schools five times in four school districts over that same time period and, with each change in school, the child missed at least several days and sometimes several weeks of school. Indeed, we note that "[u]nrebutted evidence of excessive school absences [is] sufficient to establish . . . educational neglect" (*Matter of Gabriella G. [Jeannine G.]*, 104 AD3d 1136, 1137 [internal quotation marks omitted]). The evidence also supports the court's conclusion that the child had poor hygiene. Thus, the record establishes that the mother and the father have exhibited "behavior evincing utter indifference and irresponsibility," and the court therefore properly concluded that extraordinary circumstances exist (*Matter of Male Infant L.*, 61 NY2d 420, 427; *see Matter of Darrow v Darrow*, 106 AD3d 1388, 1391-1392; *Scala*, 304 AD2d at 859-860; *see also Matter of Braun v Decicco*, 117 AD3d 1453, 1454, *lv dismissed in part and denied in part* 24 NY3d 927).

It is well settled that, "once extraordinary circumstances are found, the court must then make the disposition that is in the best interest[s] of the child" (*Bennett*, 40 NY2d at 548), and we agree with the court that the child's best interests are served by awarding petitioner custody of the child with visitation to the mother and the father (*see Matter of Vincent A.B. v Karen T.*, 30 AD3d 1100, 1101, *lv denied* 7 NY3d 711). A best interests analysis considers numerous factors, " 'including the continuity and stability of the existing custody arrangement, the quality of the child's home environment and that of the [party] seeking custody, the ability of each [party] to provide for the child's emotional and intellectual development, the financial status and ability of each [party] to provide for the child, and the individual needs and expressed desires of the child' " (*Matter of Michael P. v Judi P.*, 49 AD3d 1158, 1159; *see generally Fox v Fox*, 177 AD2d 209, 210). Petitioner lived with the child and the mother and the father until 2012, and he has had regular visitation with the child since May 2013. Petitioner has full-time employment and his own residence and, unlike the mother and the father, he has shown the ability to budget and prioritize to provide for the child. Petitioner has also planned for the child's schooling and medical needs. We therefore conclude on the record before us that the court's custody determination has a sound and substantial basis in the record (*see Matter of Loukopoulos v Loukopoulos*, 68 AD3d 1470, 1472-1473; *Vincent A.B.*, 30 AD3d at 1101-1102; *see generally Matter of Goossen v Goossen*, 72 AD3d 1591, 1591).

All concur except CARNI and DEJOSEPH, JJ., who dissent and vote to reverse in accordance with the following memorandum: We respectfully dissent. In our view, Family Court erred in granting custody of the subject child to petitioner, and we therefore would reverse the order and dismiss the petition.

While we agree with the majority that the court erred in drawing a negative inference against respondents on the basis that they

"declined to testify at the fact-finding hearing" inasmuch as respondents in fact testified at the hearing (*see Matter of Raymond D.*, 45 AD3d 1415, 1415-1416), we conclude that the court erred in awarding custody of the child to petitioner because petitioner failed to demonstrate the existence of extraordinary circumstances (*see generally Matter of Bennett v Jeffreys*, 40 NY2d 543, 544). "A finding of extraordinary circumstances is rare, and the circumstances must be such that they 'drastically affect the welfare of the child' " (*Matter of Jenny L.S. v Nicole M.*, 39 AD3d 1215, 1215, *lv denied* 9 NY3d 801, quoting *Bennett*, 40 NY2d at 549; *see Matter of Aylward v Bailey*, 91 AD3d 1135, 1136). Absent a threshold showing of extraordinary circumstances, "the question of best interests does not arise and the natural parent[s] must be awarded custody" (*Matter of Male Infant L.*, 61 NY2d 420, 429; *see Matter of Jody H. v Lynn M.*, 43 AD3d 1318, 1318).

Here, we conclude that the evidence at the hearing concerning respondents' alleged deficiencies as parents fell short of establishing unfitness, persisting neglect, or similar misconduct constituting extraordinary circumstances (*see Aylward*, 91 AD3d at 1136-1137; *Matter of Culver v Culver*, 190 AD2d 960, 961-962; *see also Jenny L.S.*, 39 AD3d at 1216; *cf. Matter of Braun v Decicco*, 117 AD3d 1453, 1454, *lv dismissed in part and denied in part* 24 NY3d 927). The fact that respondents moved between various temporary residences with the child for some time after being evicted from their apartment is not, by itself, sufficient to establish unfitness (*see Matter of Mildred PP. v Samantha QQ.*, 110 AD3d 1160, 1161-1162; *Matter of Darrow v Darrow*, 106 AD3d 1388, 1392; *see generally Male Infant L.*, 61 NY2d at 430), and the record does not establish that their living situation was ever unsafe (*cf. Matter of Van Dyke v Cole*, 121 AD3d 1584, 1585-1586; *Darrow*, 106 AD3d at 1392), or that the child's medical care was being neglected (*see Matter of Jerry Q. v Malissa R.*, 287 AD2d 810, 811).

In our view, the child's school absences and hygiene do not rise to the level of extraordinary circumstances, and petitioner's testimony that the child would be better off living with him also does not establish extraordinary circumstances (*see Bennett*, 40 NY2d at 548; *Jody H.*, 43 AD3d at 1319). In view of petitioner's failure to demonstrate the existence of extraordinary circumstances, the court erred in awarding him custody of the child (*see generally Male Infant L.*, 61 NY2d at 429; *Jody H.*, 43 AD3d at 1318).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1050

CA 15-00267

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

JUSTIN COFFEE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TANK INDUSTRY CONSULTANTS, INC. AND WORLDWIDE INDUSTRIES CORP., DEFENDANTS-RESPONDENTS.

WORLDWIDE INDUSTRIES CORP., THIRD-PARTY PLAINTIFF,

V

CDK INDUSTRIES, INC., THIRD-PARTY DEFENDANT-RESPONDENT.

STANLEY LAW OFFICES, LLP, SYRACUSE (JON COOPER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (STEPHEN A. DAVOLI OF COUNSEL), FOR DEFENDANT-RESPONDENT TANK INDUSTRY CONSULTANTS, INC.

GOLDBERG SEGALLA LLP, SYRACUSE (NICHOLAS PONTZER OF COUNSEL), FOR DEFENDANT-RESPONDENT WORLDWIDE INDUSTRIES CORP.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (CHRISTOPHER DEFRANCESCO OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered November 14, 2014. The order, among other things, denied without prejudice the motion of plaintiff to sever the third-party action and granted the motion of third-party defendant to strike the note of issue.

Now, upon reading and filing the stipulation discontinuing the action against defendant Tank Industry Consultants, Inc., signed by the attorneys for the parties on June 22, 2015, and filed in the Onondaga County Clerk’s Office on July 10, 2015,

It is hereby ORDERED that said appeal insofar as it concerns defendant Tank Industry Consultants, Inc. is unanimously dismissed upon stipulation and the order is affirmed without costs.

Memorandum: Plaintiff commenced this common-law negligence and Labor Law action seeking damages for injuries he sustained when he fell from a hoist ladder. Plaintiff moved pursuant to CPLR 1010 to

sever the third-party indemnification action from the main action, and third-party defendant, CDK Industries, Inc. (CDK), moved to strike the note of issue. Supreme Court denied plaintiff's severance motion without prejudice, and granted the motion to strike. We affirm.

Contrary to plaintiff's contention, the court did not abuse its discretion in denying his severance motion where, as here, plaintiff failed to show substantial prejudice (*see* CPLR 1010; *Quinn v Broder*, 225 AD2d 1110, 1110; *see also Nielsen v New York State Dormitory Auth.*, 84 AD3d 519, 520). The court also properly granted the motion to strike because, inter alia, the third-party action was commenced after the note of issue was filed in the main action, and CDK had outstanding requests for discovery (*see* 22 NYCRR 202.21 [e]).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1066

CA 14-01620

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

LISA M. PANARO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PASCAL S. PANARO, JR., DEFENDANT-APPELLANT.

LEONARD G. TILNEY, JR., LOCKPORT, FOR DEFENDANT-APPELLANT.

JUSTIN S. WHITE, WILLIAMSVILLE, FOR PLAINTIFF-RESPONDENT.

PAMELA THIBODEAU, ATTORNEY FOR THE CHILDREN, WILLIAMSVILLE.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered June 10, 2014 in a divorce action. The order, insofar as appealed from, granted defendant visitation with the parties' children from Wednesday evening through Friday morning and on alternate weekends.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the second and third ordering paragraphs are vacated, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Defendant father appeals from an order that, inter alia, modified a judgment of divorce by setting forth a new schedule for the father's visitation with the parties' children. Contrary to the father's contention, Supreme Court's determination did not improperly exceed the scope of the relief requested by the parties. The record establishes that plaintiff mother submitted a motion and the father submitted a cross motion in which they requested, inter alia, modification of the visitation schedule set forth in the judgment of divorce. Moreover, the record further establishes that the parties and the Attorney for the Children entered into a stipulation whereby the court would fashion a new visitation schedule based upon the parties' written submissions. Consequently, we conclude that "[the father] had adequate notice that [the visitation schedule] was at issue[,] and [that he] was not prejudiced by the action of the court" (*Matter of Heintz v Heintz*, 28 AD3d 1154, 1155; *see Matter of Bow v Bow*, 117 AD3d 1542, 1543; *cf. Matter of Myers v Markey*, 74 AD3d 1344, 1345).

We further conclude that the father waived his contention that the mother failed to establish a change of circumstances warranting review of the judgment inasmuch as the father stipulated that the court could fashion a new visitation schedule (*see generally Matter of*

James Jerome C. v Mary Elizabeth J., 31 AD3d 1184, 1184-1185).

We agree with the father, however, that the adjusted visitation schedule was not in the best interests of the children because it conflicts with the father's work schedule and thus will prevent the father from exercising his visitation rights (*see generally Matter of Vasquez v Barfield*, 81 AD3d 1398, 1399; *Matter of Wendy Q. v Richard Q.*, 36 AD3d 1000, 1001). We therefore reverse the order insofar as appealed from, and we remit the matter to Supreme Court to fashion a visitation schedule that provides the same amount of parenting time for each parent as set forth in the order on appeal but does not conflict with either parent's work schedule.

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1072

CA 15-00198

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

MICHAEL MEYER, M.D., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

UNIVERSITY NEUROLOGY, DEFENDANT-RESPONDENT.

JUSTIN S. WHITE, WILLIAMSVILLE, FOR PLAINTIFF-APPELLANT.

BROWN & KELLY, LLP, BUFFALO (KEVIN D. WALSH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered October 21, 2014. The order granted defendant's motion for summary judgment, dismissed the complaint, and denied plaintiff's cross motion for leave to amend the complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, the complaint is reinstated, and the cross motion is granted upon condition that plaintiff shall serve the amended complaint within 30 days after service of the order of this Court with notice of entry.

Memorandum: It is undisputed that plaintiff was employed by defendant to manage the Department of Neurology at Erie County Medical Center and to perform services as a neurologist at that facility. It is also undisputed that there was no written agreement memorializing the terms of that employment. Following a dispute concerning whether plaintiff was entitled to payments in addition to his agreed-upon salary, plaintiff commenced this action asserting causes of action for breach of contract, unjust enrichment, quantum meruit, and "detrimental reliance." Defendant thereafter moved for summary judgment dismissing the complaint, and plaintiff cross-moved for leave to amend the complaint to rename the fourth cause of action, removing the caption "Detrimental Reliance," and inserting the caption "Equitable Estoppel." Plaintiff contended that, "for all intents and purposes," the fourth cause of action asserted a cause of action for equitable estoppel and, therefore, the proposed amendment, which merely rephrased the language of a caption in the complaint, would not add any additional claims. Supreme Court granted defendant's motion and denied plaintiff's cross motion. We now reverse.

We conclude that, inasmuch as defendant failed to establish its entitlement to summary judgment, the court erred in granting the motion. Defendant's "own submissions contain evidence of . . .

disputes between the parties with respect to the provisions of the [oral] contract relating to plaintiff's compensation" (*Micro-Link, LLC v Town of Amherst*, 109 AD3d 1130, 1131). In addition, although there was no dispute that defendant made some payments to plaintiff in addition to his salary, the evidence submitted by defendant established that the parties had conflicting explanations for such payments. Resolution of those disputes and conflicts "turn[s] on issues of credibility . . . , thereby precluding summary judgment" (*Wasek v New York City Health & Hosps. Corp.*, 123 AD3d 493, 494; *see Sabre Intl. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 436; *U.K. Cable Ventures v Bell Atl. Invs.*, 232 AD2d 294, 294-295). Indeed, it is well settled that, "[o]n a motion for summary judgment[,] the court must not weigh the credibility of witnesses unless it clearly appears that the issues are feigned and not genuine[,] and [a]ny conflict in the testimony or evidence presented merely raise[s] an issue of fact" (*Pryor & Mandelup, LLP v Sabbeth*, 82 AD3d 731, 732 [internal quotation marks omitted]; *see generally Ferrante v American Lung Assn.*, 90 NY2d 623, 631). Inasmuch as defendant failed to meet its initial burden on its motion for summary judgment, the burden never shifted to plaintiff to raise a triable issue of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

We further conclude that the court erred in denying plaintiff's cross motion seeking leave to amend the complaint. It is well settled that "[p]ermission to amend pleadings should be 'freely given' " unless the proposed amendment is patently lacking in merit (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959, quoting CPLR 3025 [b]; *see Manufacturers & Traders Trust Co. v Reliance Ins. Co.*, 8 AD3d 1000, 1001). As plaintiff correctly contends, this is not a situation in which a party is seeking to defeat a motion for summary judgment by offering a new theory of liability not contained in the complaint or bill of particulars (*cf. Darrisaw v Strong Mem. Hosp.*, 74 AD3d 1769, 1770, *affd* 16 NY3d 729). Rather, the proposed amendment is based on the same factual allegations contained in the complaint, is " 'consistent with . . . plaintiff['s] existing theories sounding in [breach of contract, unjust enrichment, and quantum meruit], [is] not devoid of merit[,] and [will] not result in significant prejudice or surprise' " (*Haga v Pyke*, 19 AD3d 1053, 1055).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1077

CA 15-00316

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

THE VALLEY CADILLAC CORP., PLAINTIFF-RESPONDENT,

V ORDER

DAVID G. HOFFMAN, DEFENDANT-APPELLANT.

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

HARTER SECREST & EMERY LLP, ROCHESTER (MAURA MCGUIRE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered April 15, 2014. The order and judgment, among other things, granted in part plaintiff's motion for summary judgment.

It is hereby ORDERED that the order and judgment so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1082

KA 10-01365

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT E. JOHNSON, DEFENDANT-APPELLANT.

PATRICIA M. MCGRATH, LOCKPORT, FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (LAURA T. BITTNER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered January 26, 2010. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the fourth degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and three counts of criminal possession of a weapon in the fourth degree (§ 265.01 [2]), stemming from the brutal murder of his wife at their home. When the police arrived, they found the victim lying face down on the kitchen floor in a pool of blood. A medical examiner testified that the victim sustained 22 stab wounds and 27 cutting wounds. The evidence established that at least three different knives were used, and that two knives with broken handles were left protruding from the victim's body.

Contrary to defendant's contention, County Court properly refused to suppress statements he made at the crime scene because he was not in custody or subject to interrogation at that time (*see People v Paulman*, 11 AD3d 878, 878-879, *affd* 5 NY3d 122; *People v Kaufman*, 288 AD2d 895, 896, *lv denied* 97 NY2d 684). The court also properly refused to suppress statements defendant made at the police station that evening. After about 10 to 15 minutes of questioning at his home, defendant agreed to accompany the police to the station for further questioning. Defendant was never restrained in any way, he was free to use the restroom, he was offered food and drink, and he was told that he was free to leave. After approximately three hours, the interview ended when defendant indicated that he wanted to leave. Under the circumstances, we agree with the court that defendant was not in custody while at the station (*see People v Petrovich*, 202 AD2d

523, 523-524, *affd* 87 NY2d 961; *People v Murphy*, 43 AD3d 1276, 1276-1277, *lv denied* 9 NY3d 1008; *People v Dozier*, 32 AD3d 1346, 1346, *lv dismissed* 8 NY3d 880).

The court also properly refused to suppress the swab of the blood stain taken from defendant's torso. Defendant agreed to give his clothing to the police and, when he removed his shirt, an officer noticed a reddish brown stain on defendant's chest that appeared to be blood. When asked what it was, defendant responded that it was a bruise. The officer swabbed the area, which later tested positive for blood and matched the victim's DNA. Where, as here, the police did not obtain a warrant for the seizure of the blood evidence, "the police had to satisfy two requirements in order to justify the action taken. First, the police had to have reasonable cause to believe the [blood stain] constituted evidence, or tended to demonstrate that an offense had been committed, or, that a particular person participated in the commission of an offense . . . Second, there had to have been an exigent circumstance of sufficient magnitude to justify immediate seizure without resort to a warrant" (*People v Thomas*, 188 AD2d 569, 571, *lv denied* 81 NY2d 1021; *see People v Loomis*, 17 AD3d 1019, 1020-1021, *lv denied* 5 NY3d 830). We agree with the court that the police had reasonable cause to believe that the blood stain on defendant's chest constituted evidence, and that the seizure was appropriate because it could have been easily destroyed by defendant (*see Cupp v Murphy*, 412 US 291, 296; *People v Berzups*, 49 NY2d 417, 427).

Contrary to defendant's contention, the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant further contends that the court erred in allowing a witness to testify concerning defendant's prior bad act, i.e., his request to have a third-party "cut up his wife." Even assuming, arguendo, that the court erred in allowing that testimony, we conclude that the error is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242). The circumstantial evidence of defendant's guilt is overwhelming, and there is no significant probability that defendant would have been acquitted but for the error (*see People v Guarino*, 298 AD2d 937, 937, *lv denied* 98 NY2d 768; *see also People v Tyes*, 30 AD3d 1045, 1046, *lv denied* 7 NY3d 795).

Defendant failed to preserve for our review his contention that he was denied a fair trial by prosecutorial misconduct on summation (*see People v Williams*, 128 AD3d 1522, 1524, *lv denied* ___ NY3d ___ [July 13, 2015]) and, in any event, the prosecutor's remarks were either fair response to defense counsel's summation (*see People v Melendez*, 11 AD3d 983, 984, *lv denied* 4 NY3d 888), or fair comment on the evidence (*see People v Graham*, 125 AD3d 1496, 1498). Defendant's belated motion for a mistrial is insufficient to preserve for our review his contention that a detective improperly commented on defendant's right to remain silent (*see People v Woods*, 284 AD2d 995, 996, *lv denied* 96 NY2d 926; *People v Okon*, 184 AD2d 664, 664; *see also People v Harden*, 26 AD3d 887, 888, *lv denied* 6 NY3d 834). In any event, although we agree with defendant that the People's use of defendant's selective silence during the interrogation that occurred

the day after the murder was improper (*see People v Williams*, 25 NY3d 185, 193), we agree with the People that the error is harmless (*see generally id.* at 194).

Defendant's contention that the court erred in denying his CPL 440 motion is not properly before us inasmuch as defendant did not obtain leave to appeal from this Court (*see* CPL 460.15; *People v Jacobs*, 188 AD2d 1032, 1032, *lv denied* 81 NY2d 887). We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1111

KA 13-01341

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DUSK A. TOCHA, DEFENDANT-APPELLANT.

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

JAY D. CARR, SPECIAL PROSECUTOR, OLEAN, FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered September 17, 2012. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]), defendant contends that his sentence is unduly harsh and severe. Although defendant's waiver of his right to appeal does not encompass his challenge to the severity of the sentence "inasmuch as [County] Court did not explain during the course of the allocution concerning the waiver of the right to appeal that he was waiving the right to appeal any issue regarding the severity of the sentence" (*People v Donaldson*, 130 AD3d 1486, 1486), we nevertheless perceive no basis in the record to modify the negotiated sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1112

KA 14-00884

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD J. SHAW, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered June 3, 2013. The judgment convicted defendant, upon his plea of guilty, of rape in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of rape in the third degree (Penal Law § 130.25 [2]). Initially, we agree with defendant that his waiver of the right to appeal was invalid because " 'the minimal inquiry made by County Court was insufficient to establish that the court engage[d] defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Carrasquillo*, 130 AD3d 1498, 1498; *see People v Harris*, 121 AD3d 1423, 1424, *lv denied* 25 NY3d 989). Although defendant's challenge to the voluntariness of his plea would have survived even a valid waiver of the right to appeal (*see People v Adams*, 57 AD3d 1385, 1385, *lv denied* 12 NY3d 780), "defendant did not move to withdraw the plea or to vacate the judgment of conviction and thus failed to preserve his [challenge] for our review" (*People v Dozier*, 59 AD3d 987, 987, *lv denied* 12 NY3d 815). Defendant also failed to preserve for our review his challenge to the amount of restitution ordered by the court inasmuch as he did not object to the amount of restitution (*see People v Spossey*, 107 AD3d 1420, 1420, *lv denied* 22 NY3d 1159), or to the fact that the court relied exclusively on the presentence report in determining the amount of restitution (*see People v Cooke*, 21 AD3d 1339, 1339).

We reject defendant's contention that he was deprived of effective assistance of counsel. Defendant received an advantageous plea, and "nothing in the record casts doubt on the apparent

effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404; *see generally People v Pitcher*, 126 AD3d 1471, 1473, *lv denied* 25 NY3d 1169).

Finally, we reject defendant's contention that the sentence is unduly harsh and severe.

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1116

KA 12-01356

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KELLY J. KEEGAN, DEFENDANT-APPELLANT.

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

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (WENDY LEHMANN, NEW YORK PROSECUTORS TRAINING INSTITUTE, INC., ALBANY, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Donald E. Todd, A.J.), rendered June 21, 2012. The judgment convicted defendant, upon a jury verdict, of assault in the first degree, assault in the second degree (two counts), assault in the third degree, reckless assault of a child, and endangering the welfare of a child (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of one count each of assault in the first degree (Penal Law § 120.10 [3]), assault in the third degree (§ 120.00 [2]), and reckless assault of a child (§ 120.02 [1]), and two counts each of assault in the second degree (§ 120.05 [8], [9]) and endangering the welfare of a child (§ 260.10 [1]). The convictions arose out of two separate incidents, one in February 2011, in which the infant victim's ears were injured, and a second in March 2011, in which the child, then not yet a year old, suffered a traumatic brain injury and other debilitating permanent injuries.

Contrary to defendant's contention, County Court did not abuse its discretion in denying his motion to sever those counts of the indictment relating to the February 2011 incident from those counts relating to the March 2011 incident. The counts are joinable because they "are defined by the same or similar statutory provisions and consequently are the same or similar in law" (CPL 200.20 [2] [c]), and defendant failed to show good cause for a discretionary severance under CPL 200.20 (3) (*see People v Gaston*, 100 AD3d 1463, 1464-1465; *see generally People v Mahboubian*, 74 NY2d 174, 183).

Defendant further contends that his statements to the police were involuntary because his "emotional state caused his will to be overborne," and that the court therefore erred in refusing to suppress those statements. Inasmuch as defendant failed to seek suppression of the statements on that ground, he failed to preserve that contention for our review (*see generally People v Ricks*, 49 AD3d 1265, 1266, *lv denied* 10 NY3d 869, *reconsideration denied* 11 NY3d 740). In any event, we conclude that "[t]he evidence at the suppression hearing does not establish that defendant's will was overborne or that defendant's capacity for self-determination was critically impaired" (*People v Worth*, 233 AD2d 939, 940-941), and thus defendant's contention lacks merit. By failing to object to the testimony of a police officer concerning his prior dealings with defendant, defendant likewise failed to preserve for our review his contention that the officer's testimony was improper (*see* CPL 470.05 [2]). In any event, the court sua sponte issued a curative instruction, and the court's instruction was "sufficient to alleviate any prejudice to defendant" (*People v Hogan*, 292 AD2d 834, 834, *lv denied* 98 NY2d 676).

We reject defendant's contention that certain photographs of the infant victim were improperly admitted in evidence. In order to prove that defendant committed the offense of assault in the first degree, the People were required to establish that defendant acted recklessly and with a depraved indifference to human life, and thereby caused serious physical injury to the infant victim (*see* Penal Law § 120.10 [3]). Because "the extent of the injuries was a major element in the prosecution's proof that defendant acted with a depraved indifference to human life, the introduction of the photographs cannot be considered to have been solely motivated by a desire to inflame the jury" (*People v Arca*, 72 AD2d 205, 207; *see generally People v Pobliner*, 32 NY2d 356, 369, *rearg denied* 33 NY2d 657, *cert denied* 416 US 905).

Defendant also contends that he was denied his constitutional right to present a defense because a police officer testified inaccurately at trial about a statement made by defendant, and the People failed to notify defendant, pursuant to CPL 710.30, of their intent to offer that inaccurate testimony at trial. We reject that contention. At the hearing on defendant's posttrial motion, the police officer testified that he had inaccurately testified at trial about defendant's statement based on an unfounded assumption about that statement. Inasmuch as the officer's inaccurate testimony was inconsistent with defendant's statement to the police, which was thereafter admitted in evidence at trial, the court properly struck that testimony and instructed the jury to disregard it. In addition, the prosecutor stipulated before the jury that the testimony in question was inaccurate. Under the circumstances, we conclude that the police officer's inaccurate testimony did not deny defendant his constitutional right to present a defense, and the court therefore properly denied defendant's mistrial motion and posttrial motion to set aside the verdict on that ground.

Defendant failed to object to the jury charge as given, and therefore failed to preserve for our review his contention that the

jury charge was improper (*see generally People v Robinson*, 88 NY2d 1001, 1001-1002). In any event, contrary to defendant's contention, the court properly charged the jury that defendant could intend to cause physical injury for purposes of the assault in the second degree count while at the same time "recklessly creat[ing] 'a grave risk that a different, more serious result . . . would ensue from his actions' " for purposes of the assault in the first degree count (*People v Belcher*, 289 AD2d 1039, 1039, *lv denied* 97 NY2d 751, quoting *People v Trappier*, 87 NY2d 55, 59). The court also properly denied defendant's request for an "entire case" circumstantial evidence charge because the evidence adduced at trial was not wholly circumstantial (*see e.g. People v Bryce*, 174 AD2d 945, 946, *lv denied* 79 NY2d 854).

Defendant further contends that the evidence is legally insufficient to support the conviction of assault in the first degree because the People failed to establish that he acted with depraved indifference. We reject that contention. Despite the infliction of serious injuries upon the infant victim, including a traumatic brain injury, defendant failed to seek medical treatment until the infant victim became fully unresponsive. Under these circumstances, the jury "could have rationally found beyond a reasonable doubt that defendant consciously disregarded the substantial and unjustifiable risk that death or serious injury would result" from his actions (*People v Barboni*, 21 NY3d 393, 405). While defendant also contends that the People failed to prove with respect to the March 2011 incident that he alone could have caused the injuries suffered by the infant victim, we conclude that the evidence is legally sufficient to establish that the child was in defendant's sole custody at the time the injuries were inflicted (*see People v Walter*, 128 AD3d 1512, 1512-1513, *lv denied* 25 NY3d 1173). Defendant also contends that the evidence is legally insufficient to support his conviction of assault in the third degree and endangering the welfare of a child with respect to the February 2011 incident, in which the infant victim's ears were injured. We again reject that contention. Based upon the evidence adduced at trial, there is a valid line of reasoning and permissible inferences to lead a rational person to conclude that defendant, knowing that his actions were likely to injure the infant victim, recklessly caused the infant victim physical injury (*see* Penal Law §§ 10.00 [9]; 120.00 [2]; 260.10 [1]; *People v Van Guilder*, 29 AD3d 1226, 1228). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

"[D]efendant's claim of ineffective assistance of counsel, to the extent that it is premised on his attorney's failure to retain and call an expert witness, involves matter dehors the record and, thus, is not properly before us on this direct appeal from the judgment" (*People v Staropoli*, 49 AD3d 568, 568-569, *lv denied* 10 NY3d 871). Despite defendant's further claims of ineffective assistance, we conclude that the record as a whole establishes that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Defendant further contends that the court did not properly inform counsel of a jury note prior to responding to it (*see People v O'Rama*, 78 NY2d 270, 276-278). Because "the court read the note verbatim before the jury, defense counsel, and defendant[, and d]efense counsel raised no objection," defendant failed to preserve his contention for our review (*People v Arnold*, 107 AD3d 1526, 1527, *lv denied* 22 NY3d 953; *see People v Alcide*, 21 NY3d 687, 693-694; *People v Stoutenger*, 121 AD3d 1496, 1498-1499, *lv denied* 25 NY3d 1077). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Bonner*, 79 AD3d 1790, 1790-1791, *lv denied* 17 NY3d 792).

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

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1120

CA 15-00229

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

TOWN OF AMHERST, A MUNICIPAL CORPORATION,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BREWSTER MEWS HOUSING CO., INC., BREWSTER MEWS ASSOCIATES, LP, A PARTNERSHIP,
DEFENDANTS-APPELLANTS,
WILLIAMSVILLE CENTRAL SCHOOL DISTRICT AND
COUNTY OF ERIE, DEFENDANTS-RESPONDENTS.

NESPER, FERBER & DIGIACOMO, LLP, AMHERST (GABRIEL J. FERBER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BENNETT, DIFILIPPO & KURTZHALTS, LLP, HOLLAND (RONALD P. BENNETT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

HODGSON RUSS LLP, BUFFALO (MICHAEL B. RISMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT WILLIAMSVILLE CENTRAL SCHOOL DISTRICT.

BEGNART & DEMARCO, LLP, TONAWANDA (SEAN R. MCDERMOTT OF COUNSEL), FOR DEFENDANT-RESPONDENT COUNTY OF ERIE.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered July 30, 2014. The order, insofar as appealed from, denied in part the motion of defendants Brewster Mews Housing Co., Inc. and Brewster Mews Associates, LP, a Partnership, seeking to dismiss plaintiff's amended complaint against them.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in its entirety and the amended complaint against defendants Brewster Mews Housing Co., Inc. and Brewster Mews Associates, L.P., a Partnership, is dismissed.

Memorandum: Defendants-appellants (defendants) appeal from an order that denied in part their motion to dismiss the amended complaint against them. Defendants own an apartment complex that provides housing to low-income senior citizens. The complex was developed in 1978 pursuant to Private Housing Finance Law § 33. Upon defendants' application, plaintiff adopted a resolution exempting defendants from real property taxation. The parties also executed a payment in lieu of taxes agreement pursuant to which defendants were required to make annual payments of $550 per unit or $118,250, less

special assessments levied against the property. The parties agree that defendants made payments in lieu of taxes every year from 1978 to 2013.

On or about March 4, 1996, defendants entered into an "Amended and Restated Declaration of Interest and Equity Agreement," which provided that defendants would no longer be governed by article 2 of the Private Housing Finance Law, and thereby rendered defendants ineligible for a real property tax exemption under section 33. According to the amended complaint, defendants never advised plaintiff of their reorganization. Thus, plaintiff continued the exemption from 1996 to 2013, and defendants continued to make payments in lieu of taxes. Plaintiff alleged that it discovered in 2013 that defendants no longer qualified for the exemption and, believing that no remedy was available to it through the RPTL, commenced this action seeking the value of the unassessed taxes from 1996 to 2013 based on, inter alia, unjust enrichment and breach of an implied contract.

Defendants moved to dismiss the amended complaint for failure to state a cause of action, contending that plaintiff's exclusive remedy to recover unassessed taxes was pursuant to the RPTL. The court granted defendants' motion with respect to one cause of action, but denied the motion with respect to the remaining two causes of action, for unjust enrichment and breach of implied contract. We agree with defendants that the court should have granted their motion in its entirety.

In deciding a motion to dismiss, the court must "determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88). We conclude that plaintiff may not recover the value of taxes it never assessed from defendants under either a theory of unjust enrichment or breach of an implied contract. "The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in 'equity and good conscience' should be paid to the plaintiff" (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790, *rearg denied* 19 NY3d 937). However, "unjust enrichment is not a catchall cause of action to be used when others fail" (*id.*), and we conclude that plaintiff may not assert an unjust enrichment cause of action as a substitute for assessing and levying taxes in accordance with the RPTL. We note in any event that, contrary to the allegation in the amended complaint that defendants failed to provide notice of their reorganization, the record establishes that defendants submitted a letter from their president to plaintiff's Town Supervisor dated February 29, 1996, advising plaintiff's Town Supervisor that defendants would no longer qualify for the Private Housing Finance Law § 33 exemption as of March 5, 1996.

We further conclude that plaintiff has no cause of action for breach of an implied contract. Although a municipality may be a party to an implied contract under some circumstances, e.g., where it provides a utility to the public (*see Matter of Bond St. & Weatherbest Slip Boathouse Owners v City of N. Tonawanda*, 62 AD2d 1136, 1136-1137), we reject plaintiff's contention that a breach of an implied contract cause of action lies in the circumstances present here.

"Taxes do not rest upon contract, express or implied. They are obligations imposed upon citizens to pay the expenses of government. They are forced contributions, and in no way dependent upon the will or contract, express or implied, of the persons taxed" (*City of Rochester v Bloss*, 185 NY 42, 47-48).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1121.1

CA 14-02175

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

IN THE MATTER OF PATRICK J. UNDERWOOD,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BARBARA J. FIALA, NEW YORK STATE COMMISSIONER
OF MOTOR VEHICLES, RESPONDENT-APPELLANT,
AND ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY
GENERAL, RESPONDENT.
(APPEAL NO. 2.)

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

WILLIAM G. PIXLEY, PITTSFORD, FOR PETITIONER-RESPONDENT.

Appeal from an amended judgment (denominated amended order and judgment) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered June 3, 2014 in a proceeding pursuant to CPLR article 78. The amended judgment, insofar as appealed from, annulled a determination denying petitioner's application for relicensing and directed respondent Barbara J. Fiala, New York State Commissioner of Motor Vehicles, to restore to petitioner full driving privileges without restrictions.

It is hereby ORDERED that the amended judgment insofar as appealed from is unanimously reversed on the law without costs and the petition is dismissed in its entirety.

Memorandum: In this CPLR article 78 proceeding, respondent Barbara J. Fiala, New York State Commissioner of Motor Vehicles (Commissioner), appeals from an amended judgment that, insofar as appealed from, annulled a determination denying petitioner's application for relicensing and directed the Commissioner to restore to petitioner full driving privileges without restrictions. We agree with the Commissioner that Supreme Court erred in granting the petition.

Petitioner's license to drive a motor vehicle was revoked in January 2012 as a result of a conviction of driving while ability impaired (*see* Vehicle and Traffic Law § 1193). In June 2012, petitioner applied for a new license. Pending the adoption of emergency regulations, the Commissioner held petitioner's application in abeyance, along with the applications of other persons with three

or more alcohol- or drug-related driving offenses (*see Matter of Kenny v Fiala*, 127 AD3d 1359, 1359). In January 2013, after the emergency regulations became effective, petitioner's application was denied on the ground that petitioner had "five or more alcohol- or drug-related driving convictions or incidents" (15 NYCRR 136.5 [b] [1]). Following an administrative appeal, petitioner commenced this proceeding, contending in pertinent part that the Commissioner unlawfully applied the emergency regulations retroactively to his relicensing application. The court agreed with that contention, granted the petition, and directed the Commissioner to restore to petitioner full driving privileges without restrictions.

Contrary to the court's determination, there is no merit to petitioner's contention that the Commissioner erred in retroactively applying the amended regulations to his application (*see Matter of Acevedo v New York State Dept. of Motor Veh.*, 132 AD3d 112, ___ [Aug. 6, 2015]; *Kenny*, 127 AD3d at 1359). "[P]etitioner's driver's license is not generally viewed as a vested right, but merely a personal privilege subject to reasonable restrictions and revocation by [the Commissioner] under her discretionary powers . . . Thus, [the Commissioner] remained free to apply her most recent regulations when exercising her discretion in deciding whether to grant or deny petitioner's application for relicensing. This is especially so in light of the rational, seven-month moratorium placed on all similarly-situated applicants for relicensing— i.e., persons with three or more alcohol-related driving convictions" (*Matter of Scism v Fiala*, 122 AD3d 1197, 1198; *see Matter of Klink v Fiala*, 129 AD3d 1685, 1686).

Finally, petitioner failed to exhaust his administrative remedies with respect to his remaining contention, and we therefore do not have the power to review it (*see generally Matter of Nelson v Coughlin*, 188 AD2d 1071, 1071, *appeal dismissed* 81 NY2d 834).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1121

CA 15-00482

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

IN THE MATTER OF PATRICK J. UNDERWOOD,
PETITIONER-RESPONDENT,

V ORDER

BARBARA J. FIALA, NEW YORK STATE COMMISSIONER
OF MOTOR VEHICLES, RESPONDENT-APPELLANT,
AND ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY
GENERAL, RESPONDENT.
(APPEAL NO. 1.)

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

WILLIAM G. PIXLEY, PITTSFORD, FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered March 10, 2014 in a proceeding pursuant to CPLR article 78. The judgment, insofar as appealed from, annulled a determination denying petitioner's application for relicensing and directed that petitioner's New York State driver's license be restored without restrictions.

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

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1122

CA 15-00719

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

WESTOVER CAR RENTAL, LLC, DOING BUSINESS AS DOLLAR/THRIFTY CAR RENTAL, AND WESTOVER CAR RENTAL, LLC, DOING BUSINESS AS THRIFTY AIRPORT PARKING, PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

NIAGARA FRONTIER TRANSPORTATION AUTHORITY, DEFENDANT-RESPONDENT-APPELLANT.

PALADINO CAVAN QUINLIVAN & PIERCE, BUFFALO (SHANNON M. HENEGHAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (HEATH J. SZYMCZAK OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered June 11, 2014. The order, among other things, granted in part and denied in part the motion of defendant to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting defendant's motion in its entirety and dismissing the complaint and as modified the order is affirmed without costs.

Memorandum: Defendant is a public benefit corporation that operates the Buffalo Niagara International Airport. Plaintiffs own and operate businesses located across the street from the airport that provide airport parking, car rentals, and a shuttle service to and from the airport. Pursuant to 21 NYCRR 1160.21, operators of car rental businesses and off-airport parking lots such as plaintiffs are charged a tariff or access fee for access to the airport property. The access fee is calculated as a percentage of the gross revenue of the car rental business or off-airport parking lot, with a minimum fee of 4% of any gross revenue under $500,000, and a maximum fee of 10% of any gross revenue over $1,500,000 (*see* 21 NYCRR 1160.21). Plaintiffs commenced this action seeking, inter alia, an order determining that defendant's business practices are unlawful and that the imposition of the access fees violates plaintiffs' rights under the constitutions of the United States and the State of New York. Plaintiffs appeal and defendant cross-appeals from an order that granted in part defendant's CPLR 3211 (a) (7) motion by dismissing the complaint with the exception of the fourth cause of action.

On appeal, plaintiffs contend that Supreme Court erred in granting defendant's motion with respect to the first and third causes of action because plaintiffs properly stated claims for violations of their right to due process. We reject that contention. In order to establish that they were denied substantive due process, plaintiffs "must establish a cognizable property interest, meaning a vested property interest" and "must show that the governmental action was wholly without legal justification" (*Bower Assoc. v Town of Pleasant Val.*, 2 NY3d 617, 627). Here, plaintiffs' allegations in the complaint that the fees imposed for access to the airport "unreasonably interfere[] with [plaintiffs'] vested property right to make a profit" do not implicate a cognizable property interest inasmuch as "*the activity of doing business*, or *the activity of making a profit* is not property in the ordinary sense" (*College Sav. Bank v Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 US 666, 675). We further conclude that plaintiffs failed to allege facts establishing that "there is absolutely no reasonable relationship to be perceived between the regulation and a legitimate governmental purpose" (*Brightonian Nursing Home v Daines*, 21 NY3d 570, 576; *see Transport Limousine of Long Is., Inc. v Port Auth. of N.Y. & N.J.*, 571 F Supp 576, 584; *see generally Bower Assoc.*, 2 NY3d at 628-629).

We likewise reject plaintiffs' contention that the court erred in granting defendant's motion with respect to the second cause of action, for unfair business practices. A cause of action for unfair business practices requires a showing of "the bad faith misappropriation of a commercial advantage belonging to another by infringement or dilution of a trademark or trade name or by exploitation of proprietary information or trade secrets" (*Eagle Comtronics v Pico Prods.*, 256 AD2d 1202, 1203; *see Macy's Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 56). Here, the allegations set forth in the complaint lack the requisite elements to set forth such a cause of action inasmuch as "plaintiffs did not allege that the defendant[] misappropriated their labors, skills, expenditures, or good will or otherwise attempted to capitalize on [plaintiffs'] name or reputation in the [car parking or rental] business" (*Abe's Rooms, Inc. v Space Hunters, Inc.*, 38 AD3d 690, 693; *see Eagle Comtronics*, 256 AD2d at 1203).

In addition, we reject plaintiffs' contention that the court erred in granting defendant's motion with respect to the sixth cause of action, which alleges that the access fees imposed upon plaintiffs violated the Commerce Clause. Even assuming, arguendo, that defendant acts as a market regulator and not a market participant and is therefore subject to the restraints of the Commerce Clause (*see Airline Car Rental, Inc. v Shreveport Airport Auth.*, 667 F Supp 303, 305-306; *see generally Reeves, Inc. v Stake*, 447 US 429, 436-437), we conclude that the access fees imposed upon plaintiffs pursuant to 21 NYCRR 1160.21 of no more than 10% of gross revenues "[are] a reasonable levy and [do] not constitute an objectionable burden on interstate commerce" (*Toye Bros., Yellow Cab Co. v Irby*, 437 F2d 806, 811; *see Airline Car Rental, Inc.*, 667 F Supp at 313-314; *Transport Limousine*, 571 F Supp at 583).

We agree with defendant on its cross appeal, however, that the court erred in denying its motion with respect to the fourth cause of action, alleging an equal protection violation. We therefore modify the order by granting defendant's motion in its entirety and dismissing the complaint. To state a cause of action for violation of equal protection based upon a claim of selective enforcement of a statute or regulation, the plaintiff must allege that "*first*, a person (compared with others similarly situated) is selectively treated and *second*, such treatment is based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person" (*Bower Assoc.*, 2 NY3d at 631; *see Masi Mgt. v Town of Ogden* [appeal No. 3], 273 AD2d 837, 838). Here, plaintiffs do not allege that any purported selective treatment was based upon race, religion, or an attempt to punish them for exercising a constitutional right (*see Bower Assoc.*, 2 NY3d at 631), nor have plaintiffs alleged "that 'defendant[] maliciously singled out [plaintiffs] with the intent to injure [them]' " (*Masi Mgt.*, 273 AD2d at 838, quoting *Crowley v Courville*, 76 F3d 47, 53). Contrary to plaintiffs' contention, allegations that plaintiffs were treated differently from a similarly situated business are not sufficient to state a claim for an equal protection violation inasmuch as "a demonstration of different treatment from persons [or businesses] similarly situated, without more, [will not] establish malice or bad faith" (*Crowley*, 76 F3d at 53).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1126

CA 15-00230

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

TOWN OF AMHERST, A MUNICIPAL CORPORATION, AND SWEETHOME CENTRAL SCHOOL DISTRICT, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

PEPPER TREE HEIGHTS HOUSING CO., INC., PEPPER TREE HEIGHTS ASSOCIATES, L.P, DEFENDANTS-APPELLANTS, AND COUNTY OF ERIE, DEFENDANT-RESPONDENT.

NESPER, FERBER & DIGIACOMO, LLP, AMHERST (GABRIEL J. FERBER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BENNETT, DIFILIPPO & KURTZHALTS, LLP, HOLLAND (RONALD P. BENNETT OF COUNSEL), FOR PLAINTIFF-RESPONDENT TOWN OF AMHERST, A MUNICIPAL CORPORATION.

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (JOHN K. ROTTARIS OF COUNSEL), FOR PLAINTIFF-RESPONDENT SWEET HOME CENTRAL SCHOOL DISTRICT.

BENGART & DEMARCO, LLP, TONAWANDA (SEAN R. MCDERMOTT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered July 30, 2014. The order, insofar as appealed from, denied in part the motion of defendants Pepper Tree Heights Housing Co., Inc. and Pepper Tree Heights Associates, L.P. seeking to dismiss plaintiffs' amended complaint against them.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in its entirety, and the amended complaint against defendants Pepper Tree Heights Housing Co., Inc. and Pepper Tree Heights Associates, L.P. is dismissed.

Memorandum: Defendants-appellants (defendants) appeal from an order that denied in part their motion to dismiss the amended complaint against them. We reverse the order insofar as appealed from based on the reasoning set forth in our decision in *Town of Amherst v Brewster Mews Hous. Co., Inc.* (___ AD3d ___ [Nov. 20, 2015]).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1128

CA 14-02154

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

CARLA L. MURA, NOW KNOWN AS CARLA L. PICCARRETO,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID JAMES MURA, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANK A. ALOI, ROCHESTER, FOR DEFENDANT-APPELLANT.

MAUREEN A. PINEAU, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment and order (one paper) of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered February 14, 2014 in a divorce action. The judgment and order, inter alia, determined the amount of defendant's child support arrears.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment and order that, inter alia, awarded plaintiff a money judgment against defendant in the amount of $489,635.04 for child support arrears. In appeal No. 2, defendant appeals from an order denying his motion for leave to renew his opposition to plaintiff's application for child support arrears.

In appeal No. 1, defendant advances contentions relating to determinations in an order entered November 20, 2012 concerning an unentered order and an oral stipulation. Defendant failed to perfect his appeal from the November 20, 2012 order, however, and the appeal was therefore deemed abandoned and dismissed pursuant to 22 NYCRR 1000.12 (b). " '[A] prior dismissal for want of prosecution acts as a bar to a subsequent appeal as to all questions that were presented on the earlier appeal' " (*Chiappone v William Penn Life Ins. Co. of N.Y.*, 96 AD3d 1627, 1628, quoting *Bray v Cox*, 38 NY2d 350, 353), and we decline to exercise our discretion to review the merits of defendant's contentions (*see Rubeo v National Grange Mut. Ins. Co.*, 93 NY2d 750, 756; *Chiappone*, 96 AD3d at 1628).

Also in appeal No. 1, defendant contends that, at the hearing on postjudgment child support arrears, Supreme Court erred in refusing to admit in evidence a transcript of a deposition of plaintiff. We reject that contention. "Extrinsic evidence may not be used to

impeach credibility on a collateral issue" (*Lichtman v Gibbons*, 30 AD3d 319, 319; *see Cor Can. Rd. Co., LLC v Dunn & Sgromo Engrs., PLLC*, 34 AD3d 1364, 1365). Here, the record establishes that the deposition transcript concerns prejudgment support payments and thus was collateral to the issue before the court.

Contrary to defendant's contention in appeal No. 2, the court did not abuse its discretion in denying defendant's motion for leave to renew. Although a court has discretion to grant leave to renew, in the interest of justice, upon facts that were known to the movant at the time the original motion was made, "it may not exercise that discretion unless the movant establishes a 'reasonable justification for the failure to present such facts on the prior motion' " (*Robinson v Consolidated Rail Corp.*, 8 AD3d 1080, 1080, quoting CPLR 2221 [e] [3]; *see DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp.*, 120 AD3d 909, 911), and here defendant failed to provide a reasonable justification (*see DiPizio Constr. Co., Inc.*, 120 AD3d at 911; *Chiappone*, 96 AD3d at 1628).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1129

CA 14-02155

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

CARLA L. MURA, NOW KNOWN AS CARLA L. PICCARRETO,
PLAINTIFF-RESPONDENT.

V MEMORANDUM AND ORDER

DAVID JAMES MURA, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FRANK A. ALOI, ROCHESTER, FOR DEFENDANT-APPELLANT.

MAUREEN A. PINEAU, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered May 30, 2014 in a divorce action. The order denied defendant's motion seeking, inter alia, leave to renew his opposition to plaintiff's application for child support arrears.

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

Same memorandum as in *Mura v Mura* ([appeal No. 1] ___ AD3d ___ [Nov. 20, 2015]).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1136

KA 12-01260

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY BOOKER, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CHRISTINE M. COOK OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (VICTORIA M. WHITE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered June 7, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). The conviction was based on defendant's possession of various narcotics that were found by parole officers during a search of defendant's residence following a parole violation. Defendant's assigned counsel filed a motion to suppress the seized evidence. On the date of the scheduled suppression hearing, defendant complained to County Court, for the first time, about the quality of assigned counsel's representation and sought to relieve assigned counsel. In expressing his dissatisfaction with assigned counsel, defendant requested that he be allowed to proceed pro se and, upon the court's refusal to relieve assigned counsel, defendant requested an adjournment to permit him to retain new counsel. The court noted that defendant had previously appeared before the court on numerous occasions, but had never mentioned a desire to retain new counsel because of dissatisfaction with assigned counsel. The court also noted that it had not received any correspondence from the new counsel that defendant claimed to have contacted. The court thus denied defendant's request for an adjournment and, following the suppression hearing at which defendant was represented by assigned counsel, the court denied the suppression motion. Defendant thereafter retained new counsel and entered a guilty plea. We affirm.

Contrary to defendant's contention, he was not denied his constitutional right to proceed pro se. Defendant's request to proceed pro se " 'was made in the context of a claim expressing his dissatisfaction with his attorney and was not unequivocal' " (*People v White*, 114 AD3d 1256, 1257, *lv denied* 23 NY3d 1026; *see People v Gillian*, 8 NY3d 85, 88; *People v Alexander*, 109 AD3d 1083, 1084). In any event, we note that defendant thereafter " 'abandoned his request to proceed pro se and, instead, requested [an adjournment to retain] new counsel' " (*White*, 114 AD3d at 1257; *see People v Hayden*, 250 AD2d 937, 938, *lv denied* 92 NY2d 879, *reconsideration denied* 92 NY2d 982, *cert denied* 526 US 1028). Although defendant's contention that the court abused its discretion in denying his request for an adjournment to permit him to retain new counsel survives his guilty plea inasmuch as the right to counsel of one's choosing "is so deeply intertwined with the integrity of the process in [the court] that defendant's guilty plea is no bar to appellate review" (*People v Griffin*, 20 NY3d 626, 630; *see generally People v Hansen*, 95 NY2d 227, 230-231), we reject that contention. We note that " 'good cause [for an adjournment to permit a defendant to retain new counsel] does not exist [where, as here,] defendant[] [is] guilty of delaying tactics' " (*People v Santiago*, 111 AD3d 1383, 1384, *lv denied* 23 NY3d 1025, quoting *People v Linares*, 2 NY3d 507, 511). We thus conclude that, under the circumstances of this case, "defendant was not denied his right to retain counsel of his own choosing and the . . . court did not abuse its discretion in denying defendant's request to delay the [hearing]" (*People v Michalek*, 195 AD2d 1007, 1008, *lv denied* 82 NY2d 807).

Defendant's further contention that he was denied effective assistance of counsel based on an alleged conflict of interest with assigned counsel "does not survive [his] plea[] of guilty where, as here, '[t]here is no showing that the plea bargaining process was infected by any allegedly ineffective assistance or that defendant entered the plea[] because of [assigned counsel's] allegedly poor performance' " (*People v Watkins*, 2 AD3d 1391, 1391, *lv denied* 2 NY3d 747).

We have examined defendant's remaining contention and, to the extent that it is properly before us in the context of his plea of guilty, we conclude that it does not require modification or reversal of the judgment.

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1138

OP 15-00589

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

IN THE MATTER OF FRANCIS LIBORDI, PETITIONER,

V MEMORANDUM AND ORDER

KENNETH ISAMAN, INDIVIDUALLY, AND TOWN OF HORNELLSVILLE, RESPONDENTS.

FRANCIS LIBORDI, PETITIONER PRO SE.

PATRICK F. MCALLISTER, WAYLAND, FOR RESPONDENTS.

Proceeding pursuant to Public Officers Law § 36 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) for the removal of respondent Kenneth Isaman from the public office of Town Supervisor of the Town of Hornellsville.

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

Memorandum: Petitioner commenced this original proceeding pursuant to Public Officers Law § 36 seeking removal of Kenneth Isaman (respondent) from the public office of Town Supervisor of respondent Town of Hornellsville (Town). In his answer, respondent sought dismissal of the petition on various grounds, including the ground that he had not engaged in conduct that would warrant such removal. "[R]emoval from office pursuant to Public Officers Law § 36 is an extreme remedy reserved for officials engaged in self-dealing, corrupt activities, conflict of interest, moral turpitude, intentional wrongdoing or violation of a public trust" (*Matter of McCarthy v Sanford*, 24 AD3d 1168, 1168-1169 [internal quotation marks omitted]; *see Matter of Reszka v Collins*, 109 AD3d 1134, 1134).

Here, petitioner alleged self-dealing and a conflict of interest arising from respondent's employment with an insurance agency that did business with the Town during respondent's tenure as Town Supervisor. We conclude, however, that respondent "conclusively refuted those allegations, and petitioner failed to present evidence . . . to raise a triable issue of fact" (*Reszka*, 109 AD3d at 1134-1135; *see Matter of Young v Costantino*, 281 AD2d 988, 988; *cf. Matter of West v Grant*, 243 AD2d 815, 815-816).

Petitioner alleged a further conflict of interest arising from respondent's votes at Town Board meetings in favor of appointing respondent's wife to positions with the Town Board, and approving the

salaries for her positions. Respondent admitted that he should have abstained from those votes, and we conclude, under the circumstances, that his failure to do so "does not constitute the type of conduct that would warrant removal from office" (*Reszka*, 109 AD3d at 1135; *see Matter of Salvador v Ross*, 61 AD3d 1163, 1164).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1141

CA 15-00591

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

WAYNE ANTINORE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOHN IVISON, DEFENDANT-RESPONDENT.

CELLINO & BARNES, P.C., ROCHESTER (SEAN P. KELLEY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), entered June 6, 2014. The order granted 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 when he collided with a dog owned by defendant while riding his bicycle in front of defendant's house. Supreme Court properly granted defendant's motion for summary judgment dismissing the complaint. As the Court of Appeals recently reaffirmed, a cause of action for ordinary negligence does not lie against the owner of a dog that causes injury, and thus the court properly granted defendant's motion for summary judgment dismissing the complaint to the extent that it was premised on defendant's purported negligence in handling his dog (*see Doerr v Goldsmith*, 25 NY3d 1114, 1116; *see also Smith v Reilly*, 17 NY3d 895, 896; *Petrone v Fernandez*, 12 NY3d 546, 547-551; *Collier v Zambito*, 1 NY3d 444, 446). Further, we conclude that the court properly granted defendant's motion with respect to plaintiff's strict liability claim. Defendant met his initial burden by establishing that he lacked actual or constructive knowledge that the dog had a propensity to interfere with traffic on the road (*see Myers v MacCrea*, 61 AD3d 1385, 1386; *see also Doerr*, 25 NY3d at 1116; *Smith*, 17 NY3d at 896; *Buicko v Neto*, 112 AD3d 1046, 1046-1047), and plaintiff failed to raise a triable issue of fact (*see Buicko*, 112 AD3d at 1046-1047; *Myers*, 61 AD3d at 1386; *see also Smith*, 17 NY3d at 896; *Collier*, 1 NY3d at 447).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1146

CA 15-00561

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

D&M CONCRETE, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WEGMANS FOOD MARKETS, INC., DEFENDANT-RESPONDENT.

WOODS OVIATT GILMAN LLP, ROCHESTER (ROBERT D. HOOKS OF COUNSEL), AND MCKAIN LAW FIRM, P.C., FOR PLAINTIFF-APPELLANT.

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER (TONY R. SEARS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered June 23, 2014. The order and judgment granted the motion of defendant for summary judgment and dismissed the complaint.

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

Memorandum: In this action for breach of contract and related relief, plaintiff appeals from an order and judgment granting defendant's motion for summary judgment dismissing the complaint. We conclude that Supreme Court properly granted the motion.

Initially, we note that plaintiff does not raise any issues concerning the dismissal of the second, third, and fourth causes of action and has therefore abandoned any contentions with respect thereto (*see Accadia Site Contr., Inc. v Erie County Water Auth.*, 115 AD3d 1351, 1351; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984). Plaintiff contends that defendant did not plead with sufficient specificity and particularity its affirmative defense that plaintiff failed to comply with a condition precedent by not exhausting the dispute resolution procedures in the parties' contract. We agree. Defendant asserted as its second affirmative defense only that "[plaintiff's] claims fail because [defendant] has fully performed its obligations pursuant to its agreement with [plaintiff] as modified and in light of the failure of [plaintiff] to perform its obligations and/or the failure of one or more conditions precedent." We conclude that such language lacks the specificity and particularity required by CPLR 3015 (a) (*see Nassau County v Metropolitan Transp. Auth.*, 99 AD3d 617, 618, *lv dismissed in part and denied in part* 21 NY3d 921). We nevertheless conclude that "defendant's failure to plead that defense in its answer with sufficient specificity does not preclude an award

of summary judgment based on that defense" (*Accadia*, 115 AD3d at 1352). "[A] court may grant summary judgment based upon an unpleaded defense where . . . reliance upon that defense neither surprises nor prejudices the plaintiff" (*id.* [internal quotation marks omitted]; *see Schaefer v Town of Victor*, 77 AD3d 1346, 1347; *see generally Foley v D'Agostino*, 21 AD2d 60, 65). Here, defendant's reliance on the asserted defense could not have surprised or prejudiced plaintiff inasmuch as plaintiff "was already aware of the facts which constituted the defense" (*Herbert F. Darling, Inc. v City of Niagara Falls*, 69 AD2d 989, 990, *affd* 49 NY2d 855), i.e., the dispute resolution procedures contained in the contract executed by plaintiff (*see generally Blanar v State Farm Ins. Cos.*, 34 AD3d 1333, 1333-1334). Inasmuch as there is no dispute that plaintiff failed to comply with the contractual dispute resolution procedures, and that compliance was a condition precedent to commencing a lawsuit, we conclude that defendant established its entitlement to judgment as a matter of law (*see Acme Supply Co., Ltd. v City of New York*, 39 AD3d 331, 332, *lv denied* 12 NY3d 701).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1150

CA 14-02065

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

JAMES J. SMISLOFF, PLAINTIFF-RESPONDENT,

V ORDER

DAVID P. STOTT, JR., 1390 PITTSFORD-MENDON ROAD, LLC, AND NORTHCOAST WINDOW CLEANING LIMITED LIABILITY COMPANY, DEFENDANTS-APPELLANTS.

DAVID P. STOTT, JR., AND 1390 PITTSFORD-MENDON ROAD, LLC, THIRD-PARTY PLAINTIFFS-APPELLANTS,

V

GREGG SMISLOFF, THIRD-PARTY DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

ELLIOTT STERN CALABRESE, LLP, ROCHESTER (DAVID S. STERN OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND THIRD-PARTY PLAINTIFFS-APPELLANTS.

LECLAIR KORONA GIORDANO COLE LLP, ROCHESTER (JEREMY M. SHER OF COUNSEL), FOR PLAINTIFF-RESPONDENT AND THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered August 14, 2014. The order, inter alia, dismissed defendants' counterclaims and dismissed the third-party complaint.

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

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1151

CA 14-02066

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

JAMES J. SMISLOFF, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID P. STOTT, JR., 1390 PITTSFORD-MENDON ROAD, LLC, AND NORTHCOAST WINDOW CLEANING LIMITED LIABILITY COMPANY, DEFENDANTS-APPELLANTS.

DAVID P. STOTT, JR., AND 1390 PITTSFORD-MENDON ROAD, LLC, THIRD-PARTY PLAINTIFFS-APPELLANTS,

V

GREGG SMISLOFF, THIRD-PARTY DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

ELLIOTT STERN CALABRESE, LLP, ROCHESTER (DAVID S. STERN OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND THIRD-PARTY PLAINTIFFS-APPELLANTS.

LECLAIR KORONA GIORDANO COLE LLP, ROCHESTER (JEREMY M. SHER OF COUNSEL), FOR PLAINTIFF-RESPONDENT AND THIRD-PARTY DEFENDANT RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered August 14, 2014. The judgment awarded plaintiff money damages of $72,800, plus interest, costs and disbursements.

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

Memorandum: Defendants-third-party plaintiffs (defendants) appeal from a judgment that, inter alia, dismissed pursuant to CPLR 3211 (a) (7) their third-party "counter-claim[s] and cause[s] of action" (counterclaims) asserting tortious interference of contract and conversion. Inasmuch as defendants failed to oppose that part of plaintiff's and third-party defendant's motion seeking to dismiss those counterclaims, defendants' contentions with respect thereto are not preserved for our review (*see Ladd v Hudson Val. Ambulance Serv.*, 142 AD2d 17, 21; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1161

KA 14-00224

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH G. EDMONDS, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (James J. Piampiano, J.), entered January 7, 2014. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court erred in assessing 20 points against him under the risk factor for a continuing course of sexual misconduct. We agree. Although the People presented evidence that defendant engaged in acts of sexual contact with the victim on more than one occasion, they failed to establish "when these acts occurred relative to each other" (*People v Redcross*, 54 AD3d 1116, 1117).

Reducing defendant's score on the risk assessment instrument by 20 points results in a total risk factor score of 95 points, placing defendant within the range of a presumptive level two risk. The court, however, properly concluded in the alternative that defendant is a level three risk based on the presumptive override for a prior conviction of a felony sex crime (*see People v Erving*, 124 AD3d 447, 447, *lv denied* 25 NY3d 905; Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 3-4 [2006]). We reject defendant's contention that the presumptive override for prior felony sex crime convictions was held unconstitutional or otherwise invalid in *People v Moss* (22 NY3d 1094) or *People v Moore* (115 AD3d 1360). In *Moss*, the Court of Appeals stated only that, "[a]s conceded by the People, no basis in law exists for . . . [the] conclusion that an automatic override increased [the] defendant's presumptive risk level

two designation to risk level three" (*id.* at 1095). In *Moore*, this Court quoted that language from *Moss* and held that the court "erred in increasing [the] defendant's risk level based on its determination that there was an automatic override" (*id.* at 1361). *Moore* supports the well-established principle that the application of the override for a prior felony sex crime is presumptive, not mandatory or automatic (*see People v Edney*, 111 AD3d 612, 612; *People v Reynolds*, 68 AD3d 955, 956; *see also People v Pace*, 121 AD3d 1315, 1316, *lv denied* 24 NY3d 914) and, contrary to defendant's contention, it should not be interpreted as holding that the presumptive override for a prior felony sex crime conviction is per se invalid.

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1165

CAF 14-01873

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

IN THE MATTER OF AMANDA MACRI AND ANTHONY MACRI, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

LISA BROWN, RESPONDENT-APPELLANT.

JOHN J. RASPANTE, UTICA, FOR RESPONDENT-APPELLANT.

LAW OFFICES OF EISENHUT & EISENHUT, UTICA (CLIFFORD C. EISENHUT OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Family Court, Herkimer County (John J. Brennan, J.), entered October 8, 2014 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, terminated respondent's visitation with the subject child.

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

Memorandum: Respondent is the subject child's maternal grandmother, and petitioners are his adoptive parents. Petitioners were awarded custody of the child in December 2012 after the child's mother forfeited her parental rights, subject to the condition that respondent would "have supervised visitation as can be mutually agreed upon by and between the parties." Petitioners' adoption of the child was finalized in June 2013. In August 2013, upon respondent's petition, Family Court ordered that respondent would have one hour of supervised visitation with the child every two weeks. Petitioners thereafter sought termination of respondent's visitation, and the court issued two temporary orders, in January and March 2014, directing respondent to refrain from bringing any food or drinks to visitation, to refrain from undressing or disrobing the child at visitation, and to refrain from contacting the child outside of visitation. Respondent appeals from an order that, inter alia, terminated her visitation following a hearing. We affirm.

"Once a visitation order is entered, it may be modified only 'upon a showing that there has been a subsequent change of circumstances and modification is required' . . . Extraordinary circumstances are not a prerequisite to obtaining a modification; rather, the 'standard ultimately to be applied remains the best interests of the child when all of the applicable factors are considered' " (*Matter of Wilson v McGlinchey*, 2 NY3d 375, 380-381). A

court's "determination concerning whether to award visitation depends to a great extent upon its assessment of the credibility of the witnesses and upon the assessments of character, temperament, and sincerity of the parents and grandparents" (*Matter of Hilgenberg v Hertel*, 100 AD3d 1432, 1434 [internal quotation marks omitted]). Thus, "[t]he court's determination concerning visitation will not be disturbed unless it lacks a sound and substantial basis in the record" (*id.*).

Contrary to respondent's contention, the court properly determined that it is not in the child's best interests to continue visitation with respondent (*see generally Wilson*, 2 NY3d at 382). The record supports the court's determination that a change of circumstances had occurred and that it was in the best interests of the child to terminate respondent's visitation in view of, inter alia, respondent's failure to abide by court orders concerning her conduct during visitation, her refusal to refer to the child by the name given to him by petitioners, and, as explained by petitioners' expert, the negative impact that continued visitation with respondent could have on the child's relationship with petitioners (*see generally Matter of Ordona v Campbell*, ___ AD3d ___, ___ [Oct. 2, 2015]). Additionally, we conclude that respondent's important interest in having a relationship with the child "must yield . . . where the circumstances of the child's family--including the worsening relations between the litigants and the strenuous objection to grandparent visitation by both parents--render the continuation of visitation with the grandparent[] not in the child's best interest[s]" (*Wilson*, 2 NY3d at 382).

Finally, contrary to respondent's alternative contention, the court adequately set forth the facts it deemed essential to its decision to terminate respondent's visitation.

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1166

CA 14-02249

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

IN THE MATTER OF ROBERT REED,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

ROBERT I. REED, PETITIONER-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered October 2, 2014 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner, an inmate in the custody of respondent New York State Department of Corrections and Community Services (DOCCS), commenced this CPLR article 78 proceeding challenging his commitment to the custody of DOCCS on the ground that it was not authorized by the sentencing court, i.e., Niagara County Court. Supreme Court properly dismissed the petition. It is of no consequence that the sentencing court, in imposing petitioner's sentence, did not explicitly commit him to the custody of DOCCS, inasmuch "as the imposed sentence could only be served in a state facility" (*People ex rel. Hurley v Jubert*, 56 AD3d 915, 915, *lv denied* 12 NY3d 703, citing Penal Law § 70.20 [1] [a]). In addition, we agree with DOCCS that the petition was subject to dismissal on the further ground that petitioner failed to join Niagara County Court as a necessary party, inasmuch as DOCCS had no authority to alter the commitment order (*see Matter of Reed v Fischer*, 79 AD3d 1517, 1517-1518; *Matter of Reed v Travis*, 19 AD3d 829, 830, *lv denied* 5 NY3d 708).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1167

CA 15-00386

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

JAMES SPACHT AND MELODY SPACHT,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

COUNTY OF CHAUTAUQUA, DEFENDANT-RESPONDENT.

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (HARRY J. FORREST OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (John T. Ward, A.J.), entered October 2, 2014. The order granted the motion of defendant for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by James Spacht (plaintiff) when he slipped and fell on snow and ice in a parking lot located on property owned by defendant. Defendant leased the premises to plaintiffs, who operated a bakery and café there. We agree with plaintiffs that Supreme Court erred in granting defendant's motion for summary judgment dismissing the complaint. Defendant contended in support of its motion that it had no duty to maintain the property where plaintiff fell, but defendant failed to meet its initial burden with respect to that contention (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Here, the provisions of the lease specifically required defendant to "provide snow plowing and shoveling services for [plaintiffs], to be completed by 8:00 a.m. Monday through Friday, and as needed on weekends" (*see Santerre v Golub Corp.*, 11 AD3d 945, 946; *see also Coyle v Gerritsen Ave. Shopping Ctr.*, 176 AD2d 232, 232). Defendant also contended in support of its motion that its failure to clear snow from the premises was not a proximate cause of plaintiff's fall, but defendant failed to meet its initial burden with respect to that contention as well, inasmuch as "conclusory [and speculative] assertions are insufficient to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063; *see Jeune v O.T. Trans Mix Corp.*, 29 AD3d 635, 636). Here, there is no dispute that defendant failed to clear any snow from the premises on the date

of the accident and, in its moving papers, defendant relies on pure speculation to conclude that it would not have been able to clear snow in between vehicles in the parking lot where plaintiff fell. Finally, we note that defendant improperly contended for the first time in its reply papers that it did not create the alleged dangerous condition or have actual or constructive notice of it, and those contentions therefore were not properly before the court (*see Azzopardi v American Blower Corp.*, 192 AD2d 453, 454; *see also DiPizio v DiPizio*, 81 AD3d 1369, 1370).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1171

CA 15-00035

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

IN THE MATTER OF ROBERT REED,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION AND CHRISTOPHER MOSS, CHEMUNG COUNTY SHERIFF, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 2.)

ROBERT REED, PETITIONER-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENT-RESPONDENT ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION.

BARCLAY DAMON, LLP, ELMIRA (MATTHEW J. ROSNO OF COUNSEL), FOR RESPONDENT-RESPONDENT CHRISTOPHER MOSS, CHEMUNG COUNTY SHERIFF.

Appeal from a judgment (denominated order) of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered November 17, 2014 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner, an inmate in the custody of respondent New York State Department of Corrections and Community Supervision (DOCCS), commenced this CPLR article 78 proceeding challenging the computation of his sentence. Petitioner seeks, inter alia, exclusion of the sentence imposed by Niagara County Court upon his conviction of two counts of rape in the first degree (*People v Reed*, 212 AD2d 962, *lv denied* 86 NY2d 739), contending that he was erroneously sentenced for crimes of which he was allegedly acquitted. We agree with petitioner that Supreme Court erred in sua sponte joining the Chemung County Sheriff as a party without petitioner's consent (*see New Medico Assoc. v Empire Blue Cross & Blue Shield*, 267 AD2d 757, 758-759), and that the motion of DOCCS to dismiss the petition was untimely (*see* CPLR 2103 [b] [2]). We nevertheless conclude that the court properly considered the merits of the untimely motion (*see Mohen v Stepanov*, 59

AD3d 502, 504), and declined to grant petitioner relief based upon the failure of DOCCS to file its motion in a timely manner (*see Matter of Posada v New York State Dept. of Health*, 75 AD3d 880, 884, *lv denied* 15 NY3d 712). The court also properly dismissed the petition. "[A] proceeding pursuant to CPLR article 78 generally does not lie to review errors claimed to have occurred in a criminal proceeding or to challenge a judgment of conviction rendered by a criminal court" (*Matter of Garcha v City Ct. [City of Beacon]*, 39 AD3d 645, 646; *see Matter of Hennessy v Gorman*, 58 NY2d 806, 807).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1172

CA 15-00125

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

LISA KELLEY AND KEITH FLEURY, AS PARENTS AND NATURAL GUARDIANS OF KATLYN FLEURY, AN INFANT, CLAIMANTS-APPELLANTS,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT. (CLAIM NO. 118050.)

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Nicholas V. Midey, Jr., J.), entered April 2, 2014. The order granted in part defendant's motion for summary judgment.

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

Memorandum: Claimants commenced this action seeking damages for injuries sustained by their 15-year-old daughter when the vehicle in which she was a passenger collided with a minivan at an intersection in the Town of Cicero. The intersection was controlled by a flashing yellow signal for traffic on State Route 11 and a flashing red signal for traffic on Mud Mill Road. Prior to the accident, in 1996, the New York State Department of Transportation (DOT) determined that a flashing light should be installed at the intersection. Thereafter, in 1998, 2000, 2005, and 2007, the DOT determined that the flashing signal was still appropriate and that a three-color signal was not necessary. After a study in March 2009, however, the DOT determined that a three-color signal was needed. Despite this approval, the three-color signal was not installed prior to the subject accident, which occurred on May 20, 2009.

Claimants commenced this action alleging that defendant was negligent in, inter alia, failing to conduct proper evaluations of traffic patterns and failing to install appropriate and necessary traffic control devices. Defendant moved for summary judgment dismissing the claim based on its affirmative defense of qualified immunity. The Court of Claims granted the motion in part, determining that defendant was entitled to qualified immunity insofar as claimants

alleged that defendant was negligent in its decision-making process. The court denied the motion insofar as claimants alleged that the safety plan developed by the DOT was not implemented in a timely manner, determining that it was unable to conclude as a matter of law that the delay in installing the three-color signal was "reasonable and justified." The sole issue before us on this appeal by claimants is whether the court erred in granting that part of the motion with respect to defendant's decision-making process. We affirm.

"Under [the] doctrine of qualified immunity, a governmental body may be held liable when its study of a traffic condition is plainly inadequate or there is no reasonable basis for its traffic plan" (*Friedman v State of New York*, 67 NY2d 271, 284; *see Weiss v Fote*, 7 NY2d 579, 589, *rearg denied* 8 NY2d 934). Contrary to claimants' contention, defendant met its initial burden by establishing that it conducted a total of five traffic studies of the intersection before the May 2009 accident, and claimants failed to raise a triable issue of fact. It is well established that "something more than a mere choice between conflicting opinions of experts" is required to raise an issue of fact with respect to defendant's liability for its traffic planning decisions (*Weiss*, 7 NY2d at 588). We reject claimants' contention that defendant's failure to conduct a study of the intersection in 2002 demonstrates that defendant did not adequately study the intersection. Defendant established that it completed studies of the intersection in 1998, 2000, 2005, 2007, and 2009, all prior to the subject accident. Additionally, it would be improper to speculate what such a study in 2002 might have revealed "with the benefit of hindsight" (*Friedman*, 67 NY2d at 285-286).

Claimants' contention that defendant's 2005 "Highway Safety Investigation" of the intersection should be discounted because it did not include a "signal warrant study" and did not consider whether "the flashing light was adequately performing its intended function" is improperly raised for the first time on appeal (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985) and, in any event, lacks merit. Even if we discounted the 2005 study, we would conclude that defendant's other studies of the intersection were adequate (*see generally Kosoff-Boda v County of Wayne*, 45 AD3d 1337, 1338).

Finally, we reject claimants' contention that the State's 2007 study was inadequate and/or lacked a reasonable basis. In our view, defendant established that the 2007 study was the product of careful review (*see generally Friedman*, 67 NY2d at 285-286).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1175

CA 15-00440

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

RICHARD P. JEANETTI, ET AL., PLAINTIFFS,

V MEMORANDUM AND ORDER

CASLER MASONRY, INC., BY AND THROUGH ITS AGENTS, OFFICERS AND/OR EMPLOYEES, DEFENDANT.

CASLER MASONRY, INC., BY AND THROUGH ITS AGENTS, OFFICERS AND/OR EMPLOYEES, THIRD-PARTY PLAINTIFF-RESPONDENT-APPELLANT,

V

BARR & BARR, INC., THIRD-PARTY DEFENDANT-APPELLANT-RESPONDENT.

MARONEY & O'CONNOR LLP, NEW YORK CITY (JAMES P. O'CONNOR OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT-RESPONDENT.

BENDER & BENDER, LLP, BUFFALO (THOMAS W. BENDER OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered May 12, 2014. The order, among other things, granted in part and denied in part the motion of third-party defendant for summary judgment dismissing the third-party complaint and denied the cross motion of third-party plaintiff for summary judgment in the third-party action.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in its entirety and dismissing the third-party complaint and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries sustained by Richard P. Jeanetti (plaintiff) while participating in the rescue of an employee of defendant-third-party plaintiff, Casler Masonry, Inc., by and through its agents, officers and/or employees (Casler), at a construction job site. At the time of plaintiff's alleged injuries, third-party defendant, Barr & Barr, Inc. (Barr), was engaged as construction manager for the project pursuant to a contract with the owner, Colgate University. Casler was performing masonry work on the project under a subcontract with Barr. The subcontract included an

additional Scaffolding Indemnity Agreement that, inter alia, permitted Barr to use Casler's scaffolding "for the purpose of performing miscellaneous tasks during masonry operations" at the project.

Casler's employee was injured in the course of his employment with Casler when a large concrete beam fell on him while he was working on Casler scaffolding. Plaintiff was present at the work site as a Barr employee, in his capacity as superintendent of labor. Plaintiff, along with emergency responders, climbed the scaffolding to assist in the rescue and transfer of Casler's employee from the scaffolding to the ground. Plaintiff allegedly injured his back in the process.

Plaintiffs' complaint is founded upon the "danger invites rescue" doctrine (*see generally Provenzo v Sam*, 23 NY2d 256, 260). After interposing an answer to the complaint, Casler commenced a third-party action against Barr, asserting causes of action for common-law indemnification and contractual indemnification. The latter cause of action was predicated upon provisions in the Scaffolding Indemnity Agreement requiring Barr to defend and indemnify Casler for any claims and expenses "arising out of or resulting from [Barr's] use, negligence, fault or omission in maintenance, handling, or operation of the Scaffolding." Barr moved for summary judgment dismissing the third-party complaint, and Casler cross-moved for summary judgment on the issue of contractual indemnification. Supreme Court granted Barr's motion with respect to common-law indemnification, and denied the motion and cross motion with respect to contractual indemnification. We conclude that the court should have granted Barr's motion in its entirety, and we therefore modify the order accordingly.

We agree with Barr that it owes no contractual duty to indemnify Casler. Where, as here, "a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491). Moreover, the language of an indemnity agreement "should not be extended to include damages which are neither expressly within its terms nor of such character that it is reasonable to infer that they were intended to be covered under the contract" (*Niagara Frontier Transp. Auth. v Tri-Delta Constr. Corp.*, 107 AD2d 450, 453, *affd* 65 NY2d 1038; *see Zanghi v Laborers' Intl. Union of N. Am., AFL-CIO*, 21 AD3d 1370, 1372). Here, plaintiff was allegedly injured in a rescue operation of Casler's employee resulting from Casler's masonry work. We conclude that "no contractual duty to indemnify under such circumstances is either expressly imposed [by] or reasonably to be inferred" from the language of the Scaffolding Indemnity Agreement (*Zanghi*, 21 AD3d at 1373).

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

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1177

CA 15-00662

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

SUSAN M. WEICHERT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROY A. BROWN, DEFENDANT-RESPONDENT.

SUSAN M. WEICHERT, PLAINTIFF-APPELLANT PRO SE.

JEFFREY DEROBERTS, SYRACUSE, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered June 23, 2014. The order granted defendant's motion to vacate a default judgment.

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

Memorandum: Plaintiff appeals from an order granting defendant's motion to vacate a default judgment pursuant to CPLR 5015 (a) (1), contending that defendant was never in default and thus that Supreme Court erred in entertaining defendant's motion. We reject that contention, inasmuch as the record establishes that defendant did not appear at the inquest on damages, which resulted in the entry of the amended judgment that was the subject of defendant's motion. Also contrary to plaintiff's contention, the court did not abuse its discretion in granting defendant's motion, upon determining that defendant established "a reasonable excuse for the default as well as a meritorious defense" (*Calaci v Allied Interstate, Inc.* [appeal No. 2], 108 AD3d 1127, 1128; *see Matter of Reilly v City of Rome*, 114 AD3d 1255, 1256). Here, after granting plaintiff's motion for partial summary judgment on liability and prior to the inquest on damages at which defendant failed to appear, the court sua sponte relieved defendant's counsel without providing notice to defendant that it had done so, and it is undisputed that defendant was unaware that he was no longer represented or required to appear at the damages inquest. Defendant also demonstrated a meritorious defense to the amount of damages sought by plaintiff. Plaintiff sought and was awarded nearly $250,000 based on damages to her rental property caused by defendant, but defendant demonstrated that he at one time had an option to purchase that rental property for $65,000. As the court noted in granting defendant's motion, it was "quite obvious that the award [was] excessive and disproportionate to the value of the property and it may well appear that plaintiff's uncontested proof was quite a bit

exaggerated."

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1180

TP 15-00674

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

IN THE MATTER OF JAMES E. BUDD, PETITIONER,

V MEMORANDUM AND ORDER

STATE UNIVERSITY OF NEW YORK AT GENESEO,
RESPONDENT.

LAW OFFICE OF PETER K. SKIVINGTON PLLC, GENESEO (DANIEL R. MAGILL OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (BRIAN D. GINSBERG 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 an order of the Supreme Court, Livingston County [Robert B. Wiggins, A.J.], entered April 17, 2015) to review a determination of respondent. The determination, among other things, expelled petitioner as a student at the State University of New York at Geneseo.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding, transferred to this Court pursuant to CPLR 7804 (g), seeking to annul the determination of respondent to expel him as an undergraduate student. Petitioner on four prior occasions had been subject to discipline, including a year-long suspension, for violating respondent's Student Code of Conduct (Code). He was subsequently expelled after respondent determined that he violated two sections of the Code, one proscribing physical assaults and a second prohibiting deliberate incitement of others to engage in Code-violating conduct. At the hearing on those charges, respondent relied in pertinent part on a police report and supporting depositions describing how petitioner tackled a man to the ground, pursued the man to a nearby apartment with other students, and punched the man in the face.

Our review of respondent's determination "is limited to determining whether the university substantially adhered to its own published rules and guidelines for disciplinary proceedings so as to ascertain whether its actions were arbitrary or capricious" (*Matter of Rensselaer Socy. of Engrs. v Rensselaer Polytechnic Inst.*, 260 AD2d 992, 993). A public university such as respondent must "provide its

students with the full panoply of due process guarantees . . . [, which] requires that [students] be given the names of the witnesses against them, the opportunity to present a defense, and the results and finding of the hearing" (*Nawaz v State Univ. of N.Y. Univ. at Buffalo School of Dental Medicine*, 295 AD2d 944, 944 [internal quotation marks omitted]).

Here, the record demonstrates that respondent "substantially adhered to its grievance procedures and that its determination is neither arbitrary nor capricious" (*Matter of Krysty v State Univ. of N.Y. at Buffalo*, 39 AD3d 1220, 1220), and that petitioner was provided with the "full panoply of due process guarantees" to which he was entitled (*Nawaz*, 295 AD2d at 944). We reject petitioner's contention that respondent's failure to provide him certain documents through prehearing discovery denied him due process. It is clear from the record that petitioner possessed the relevant documents, and therefore he was not prejudiced by any failure on the part of respondent to provide those documents to him (*see generally Matter of Kaur v New York State Urban Dev. Corp.*, 15 NY3d 235, 259-261). Contrary to petitioner's further contention, he was not deprived of due process by any improper combination of roles of the hearing chairperson (*see Matter of Amos v Board of Educ. of Cheektowaga-Sloan Union Free Sch. Dist.*, 54 AD2d 297, 304, *affd* 43 NY2d 706).

We reject petitioner's contention that respondent's written determination denied him due process by failing to set forth detailed factual findings with respect to his violation of the Code's "deliberate incitement" provision. "In a disciplinary proceeding at a public institution of higher education, due process entitles a student accused of misconduct to a statement detailing the factual findings and the evidence relied upon by the decision-maker in reaching the determination of guilt" sufficient "to permit the student to effectively challenge the determination in administrative appeals and in the courts and to ensure that the decision was based on evidence in the record" (*Matter of Boyd v State Univ. of N.Y. at Cortland*, 110 AD3d 1174, 1175 [internal quotation marks omitted]). In our view, respondent's determination, which described the evidence on which respondent relied and described petitioner's deliberate incitement of other students to join his pursuit and engage in an altercation, satisfies that standard.

Petitioner contends that he was denied due process during his administrative appeal because the determination of that appeal improperly relied on documents concerning his "past conduct record" that were not part of the administrative record. Petitioner also contends that those documents should be stricken from the record. We reject both contentions. The Code directs that "an appeal shall be limited to review of the verbatim record of the initial review . . . *and supporting documents*" (emphasis added) and, because the Code also directs that "[a] student's past conduct record shall be considered in the determination of appropriate sanctions," we conclude that the challenged documents are the type of "supporting documents" that were properly reviewed as part of petitioner's administrative appeal.

Finally, we reject petitioner's further contention that he was denied due process because his disciplinary hearing consisted solely of hearsay evidence and he was denied the opportunity to confront live witnesses. "[T]he rights at stake in a school disciplinary hearing may be fairly determined upon the 'hearsay' evidence of school administrators charged with the duty of investigating the incidents" (*Boykins v Fairfield Bd. of Educ.*, 492 F2d 697, 701, *cert denied* 420 US 962), and "[t]he lack of confrontation [does] not violate the [Code], which provide[s] for a nonadversarial fact-finding hearing 'without being unnecessarily formal or legalistic' " (*Matter of Ebert v Yeshiva Univ.*, 28 AD3d 315, 316).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1181

TP 15-00707

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

IN THE MATTER OF FREDERICK W. SARKIS, II,
PETITIONER,

V MEMORANDUM AND ORDER

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
DEPARTMENT OF LAW, CHILDREN'S SERVICES UNIT
AND NEW YORK STATE CENTRAL REGISTER OF CHILD
ABUSE AND MALTREATMENT, RESPONDENTS.

KRISTINA KARLE, ROCHESTER, FOR PETITIONER.

MERIDETH H. SMITH, COUNTY ATTORNEY, ROCHESTER (PETER A. ESSLEY OF COUNSEL), FOR RESPONDENT MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, DEPARTMENT OF LAW, CHILDREN'S SERVICES UNIT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE), FOR RESPONDENT NEW YORK STATE CENTRAL REGISTER OF CHILD ABUSE AND MALTREATMENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [Renee Forgensi Minarik, A.J.], entered April 23, 2015 to review a determination of respondents. The determination sustained an indicated report of maltreatment.

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 to review a determination made after a fair hearing that, inter alia, denied his request to amend an indicated report of maltreatment with respect to his daughter to an unfounded report, and to seal it (*see* Social Services Law § 422 [8] [a] [v]; [c] [ii]). At the outset, we note that, although the petition raised an issue of substantial evidence, petitioner has not raised that issue in his brief, and we therefore deem the issue abandoned (*see Matter of Alvarez v Fischer*, 94 AD3d 1404, 1405).

Contrary to petitioner's contention, "it was not 'improper for the fact-finding determination to be made by a person who did not preside at the . . . hearing' . . . [,] and petitioner was not deprived of due process thereby" (*Matter of Pluta v New York State*

Off. of Children & Family Servs., 17 AD3d 1126, 1127, *lv denied* 5 NY3d 715; *see Matter of Seemangal v New York State Off. of Children & Family Servs.*, 49 AD3d 460, 460-461; *Matter of Theresa G. v Johnson*, 26 AD3d 726, 727).

Petitioner further contends that he was denied due process because the Administrative Law Judge presiding over the hearing improperly limited his ability to present evidence and cross-examine witnesses. We reject that contention. The record establishes that "[p]etitioner had 'a meaningful opportunity to present evidence on his behalf and cross-examine opposing witnesses' " (*Matter of Wiley v Hiller*, 277 AD2d 1024, 1025; *see Matter of Emes Heating & Plumbing Contrs. v McGowen*, 279 AD2d 819, 821).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1185

KA 12-00250

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTEN DOWDELL, DEFENDANT-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (SPENCER L. DURLAND OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered December 5, 2011. 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 reversed on the law and a new trial is granted.

Memorandum: Defendant was convicted following a jury trial of assault in the second degree (Penal Law § 120.05 [3]) for causing physical injury to a police officer who attempted to arrest him on a parole warrant inside a crowded bar. The arresting officer broke a bone in his hand while punching defendant repeatedly in the head and face, but only after defendant had punched him first and resisted arrest on the warrant. Another officer joined the fray and defendant was eventually handcuffed and placed under arrest. We conclude that Supreme Court made two erroneous evidentiary rulings that deprived defendant of his right to a fair trial.

As a preliminary matter, we reject defendant's contention that the court erred in admitting evidence of certain prior bad acts, i.e., possession of a handgun, scuffling with a police officer, and fleeing from another police officer. We conclude that the court properly admitted that evidence as necessary "background information to explain the police actions" in this case (*People v Morris*, 21 NY3d 588, 595; *see generally People v Tosca*, 98 NY2d 660, 661). Without the evidence in question, the jurors would have wondered why the arresting officer, who had personal knowledge of the prior bad acts, felt it necessary to assemble 20 police officers to arrest defendant on the parole warrant inside the bar.

We agree, however, with defendant's further contention that,

although the court properly permitted the People to present evidence of the fact that he was on parole at the time of his arrest, the court erred in permitting the People to detail that he was on parole for a conviction of attempted criminal possession of a controlled substance in the third degree. The specific crime of which defendant was convicted does not constitute necessary background information, and it does not fit within any other recognized exception to the *Molineux* rule, i.e., motive, intent, identity, absence of mistake, or common plan or scheme (*see generally People v Allweiss*, 48 NY2d 40, 46-47).

In addition, we agree with defendant that the court erred in ruling that defense counsel opened the door to the admission of additional evidence of uncharged crimes and prior bad acts that the court had initially precluded by an earlier determination. During his direct examination, the arresting officer testified without objection that he had seen defendant more than "a hundred times" prior to the night in question, and that he had between 50 and 75 interactions with defendant. On cross-examination, defense counsel asked the officer whether he had prepared Field Information Forms (FIFs) with respect to his interactions with defendant, as purportedly required by a general order of the Rochester Police Department, and the officer answered that he had not, but with an explanation. Upon the People's request, the court thereafter allowed the officer to testify on redirect examination as to the specific nature of his interactions with defendant, ruling that defense counsel had opened the door to such evidence. The officer then testified to various illegal activities in which he believed defendant to have been engaged at the time of those interactions.

Contrary to the People's contention, defense counsel did not challenge on cross-examination the officer's credibility on the issue whether such prior interactions with defendant took place, thereby permitting the officer to fully explain the nature of the interactions (*see generally People v Melendez*, 55 NY2d 445, 451-452; *People v Regina*, 19 NY2d 65, 78). Instead, the record establishes that defense counsel's line of questioning about the FIFs was meant to show the jury that the officer failed to follow proper police procedure with respect to his prior interactions with defendant, which supported the overall defense theory that the officer failed to follow proper police procedure when he arrested defendant on the parole warrant. Because the officer explained on cross-examination why he did not complete FIFs with respect to his prior interactions with defendant, the court erred in ruling that defense counsel opened the door to further explanation of the interactions on redirect examination (*see generally People v Johnson*, 51 AD3d 508, 509, *lv denied* 11 NY3d 738; *People v Ramos*, 27 AD3d 1073, 1074, *lv denied* 6 NY3d 897).

Finally, we conclude that the above two errors cannot be deemed harmless inasmuch as the proof of guilt was not overwhelming (*see generally People v Grant*, 7 NY3d 421, 424; *People v Crimmins*, 36 NY2d 230, 241-242).

In light of our determination, we need not address defendant's remaining contentions, none of which, if meritorious, would result in

dismissal of the indictment.

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1187

CAF 14-00050

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

IN THE MATTER OF DAYSHAUN W., SHAKIMAH W.
AND ANASTASIA M.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JASMINE G., (ALSO KNOWN AS FELICIA V., ALSO KNOWN AS FELICIA M.), RESPONDENT-APPELLANT.

RICKEY L.W., INTERVENOR-RESPONDENT.
(APPEAL NO. 1.)

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

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

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR INTERVENOR-RESPONDENT.

TANYA J. CONLEY, ATTORNEY FOR THE CHILDREN, ROCHESTER.

Appeal from an order of the Family Court, Monroe County (Joan S. Kohout, J.), entered December 9, 2013 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject children.

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

Memorandum: These consolidated appeals arise from a neglect proceeding pursuant to Family Court Act article 10 and a custody proceeding pursuant to Family Court Act article 6. Both proceedings concern the children of Rickey L.W. (father), intervenor in the neglect proceeding and petitioner in the custody proceeding, and Linda M., respondent in the custody proceeding. The children, upon the consent of the parents, had been in custody of a nonrelative, Jasmine G. (respondent), respondent in both proceedings. In appeal No. 1, respondent appeals from an order that, inter alia, adjudged that the children, Dayshaun W., Shakimah W., and Anastasia M., had been neglected by her. In appeal No. 2, respondent appeals from an order that, inter alia, awarded sole custody of Dayshaun and Shakimah to the father. Sole custody of Anastasia was previously awarded to the father in an order affirmed by this Court on appeal (*Matter of Wilson*

v McCray, 125 AD3d 1512, *lv denied* 25 NY3d 908).

We reject the contention of respondent in appeal No. 1 that petitioner, Monroe County Department of Human Services (DHS), failed to establish educational and medical neglect with respect to Dayshaun by a preponderance of the evidence. "Unrebutted evidence of excessive school absences [is] sufficient to establish . . . educational neglect" (*Matter of Gabriella G. [Jeannine G.]*, 104 AD3d 1136, 1137 [internal quotation marks omitted]). DHS presented evidence establishing "a significant, unexcused absentee rate that ha[d] a detrimental effect on the child's education" (*Matter of Ember R.*, 285 AD2d 757, 758, *lv denied* 97 NY2d 604), and respondent failed to establish a reasonable justification for Dayshaun's absences or otherwise rebut the prima facie evidence of educational neglect (*see Gabriella G.*, 104 AD3d at 1137). DHS also established a prima facie case of medical neglect by presenting evidence of respondent's failure to follow treatment recommendations for Dayshaun upon his discharges from psychiatric hospitalizations, and respondent failed to rebut the agency's prima facie case (*see Matter of Samuel DD. [Margaret DD.]*, 81 AD3d 1120, 1124; *Matter of Dustin P.*, 57 AD3d 1480, 1480-1481). Finally, in appeal No. 1, we conclude that Family Court properly determined that the evidence of neglect with respect to Dayshaun "demonstrates such an impaired level of . . . judgment as to create a substantial risk of harm for any child in respondent's care" (*Matter of Daniella HH.*, 236 AD2d 715, 716), thus warranting a finding of derivative neglect with respect to Shakimah and Anastasia (*see Matter of Jovon J.*, 51 AD3d 1395, 1396).

We reject respondent's contention in appeal No. 2 that the court erred in awarding sole custody of Dayshaun and Shakimah to the father. Contrary to respondent's contention, we conclude that she failed to meet her burden of establishing that the father relinquished his superior right to custody because of "surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances" (*Matter of Bennett v Jeffreys*, 40 NY2d 543, 544; *see Matter of Jody H. v Lynn M.*, 43 AD3d 1318, 1319). "[I]t therefore was unnecessary for the court to engage in a best interests analysis before awarding custody of the child[ren] to him" (*Jody H.*, 43 AD3d at 1318).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1188

CAF 14-00138

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

IN THE MATTER OF RICKEY L.W.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LINDA M., RESPONDENT-RESPONDENT,
AND JASMINE G., FORMERLY KNOWN AS FELICIA M.-V.,
FORMERLY KNOWN AS FELICIA V., FORMERLY KNOWN AS
FELICIA M., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR PETITIONER-RESPONDENT.

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

TANYA J. CONLEY, ATTORNEY FOR THE CHILDREN, ROCHESTER.

Appeal from an order of the Family Court, Monroe County (Joan S. Kohout, J.), entered November 26, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole custody of the subject children.

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

Same memorandum as in *Matter of Dayshaun W.* ([appeal No. 1] ___ AD3d ___ [Nov. 20, 2015]).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1191

CA 15-00147

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

IN THE MATTER OF ARBITRATION BETWEEN CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, A.F.L.-C.I.O. ONONDAGA LOCAL 834, SYRACUSE CITY SCHOOL DISTRICT UNIT 6, AND PETER RYAN, PETITIONERS-RESPONDENTS,

AND MEMORANDUM AND ORDER

BOARD OF EDUCATION OF SYRACUSE CITY SCHOOL DISTRICT, HONORABLE PATRICIA BODY, PRESIDENT, AND SHARON L. CONTRERAS, SUPERINTENDENT OF SCHOOLS, RESPONDENTS-APPELLANTS.

FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C., EAST SYRACUSE (CRAIG M. ATLAS OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

D. JEFFREY GOSCH, SYRACUSE, FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered May 7, 2014 in a proceeding pursuant to CPLR article 75. The order, inter alia, granted the application to confirm an arbitration award.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the award of attorneys' fees and as modified the order is affirmed without costs.

Memorandum: Respondents in this CPLR article 75 proceeding appeal from an order granting the application of petitioners to confirm an arbitration award in their favor, denying respondents' cross motion to vacate the award, and directing respondents to pay petitioners' attorneys' fees. The arbitrator determined following a hearing that respondents had violated the parties' collective bargaining agreement by terminating the employment of Peter Ryan (petitioner) in July 2011 and, as a remedy, the arbitrator directed respondents to reinstate petitioner to his prior position, credit him with the seniority to which he would have been entitled had his employment not been wrongly terminated, and pay him "back pay for the salary and other benefits [he] lost as a result of [his] improper termination," retroactive to 30 days before he filed his grievance.

Respondents contend that the award is not final and definite, and thus subject to vacatur under CPLR 7511 (b) (1) (iii), because the arbitrator did not specify whether respondents are entitled to an

offset based on funds petitioner received following his termination from unemployment insurance and other employment. We reject that contention. An arbitration award is nonfinal or indefinite "only if it leaves the parties unable to determine their rights and obligations, if it does not resolve the controversy submitted or if it creates a new controversy" (*Matter of Meisels v Uhr*, 79 NY2d 526, 536; *see Yoonessi v Givens*, 78 AD3d 1622, 1622-1623, *lv denied* 17 NY3d 718). Here, the award sufficiently defined the parties' rights and obligations notwithstanding its failure to address the offset issue (*see Matter of Civil Serv. Empls. Assn., Local 1000, AFSCME, AFL-CIO [State of New York]*, 223 AD2d 890, 891-892). We note that there is no indication in the record that respondents asked the arbitrator for an offset at the hearing, and that, although the arbitrator retained jurisdiction "with respect to the remedy until April 1, 2013," which was approximately six weeks after the award was rendered, respondents did not seek clarification of the award before that date.

We conclude, however, that Supreme Court erred in awarding attorneys' fees to petitioners as a sanction for frivolous conduct without issuing a written decision setting forth the conduct on which the award is based and the reasons why the court found that conduct to be frivolous, as required by 22 NYCRR 130-1.2 (*see Matter of Bedworth-Holgado v Holgado*, 85 AD3d 1589, 1590; *Matter of Gigliotti v Bianco*, 82 AD3d 1636, 1638). We therefore modify the order by vacating the award of attorneys' fees.

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1195

CA 15-00532

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

JANICE A. MCDONELL AND WILLIAM J. MCDONELL, JR.,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

WAL-MART STORES, INC., WAL-MART STORES EAST, LP,
WAL-MART REAL ESTATE BUSINESS TRUST AND WALMART
REALTY COMPANY, DEFENDANTS-APPELLANTS.

BROWN HUTCHINSON LLP, ROCHESTER (KIMBERLY J. CAMPBELL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MURPHY MEYERS, LLP, ORCHARD PARK, LAW OFFICE OF LAURIE A. BAKER (LAURIE A. BAKER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), entered May 20, 2014. The order, insofar as appealed from, denied the motion of defendants for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Janice A. McDonell (plaintiff) when she slipped and fell on water near the junction of the indoor and outdoor sections of the garden department in defendants' store. Supreme Court, inter alia, denied defendants' motion for summary judgment dismissing the complaint. As limited by their brief, the only issue before us on appeal is whether defendants met their initial burden on their motion of establishing that they did not have actual or constructive notice of the allegedly dangerous condition. We conclude that defendants failed to meet their burden with respect to actual notice inasmuch as they failed to establish that they were unaware of the water in the location of plaintiff's accident prior to her fall (*see Hilsman v Sarwil Assoc., L.P.*, 13 AD3d 692, 695; *Atkinson v Golub Corp. Co.*, 278 AD2d 905, 906; *cf. Navetta v Onondaga Galleries LLC*, 106 AD3d 1468, 1469). We further conclude that defendants failed to meet their burden with respect to constructive notice inasmuch as their submissions raise issues of fact whether the wet floor "was visible and apparent and existed for a sufficient length of time prior to plaintiff's fall to permit [defendants'] employees to discover and remedy it" (*King v Sam's E., Inc.*, 81 AD3d

1414, 1415; *see Navetta*, 106 AD3d at 1469-1470).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1196

CA 15-00507

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
LOUIS YOURDON, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

PAROLE OFFICER MARTIN SEMRAU, NEW YORK STATE DIVISION OF PAROLE, TINA M. STANFORD, CHAIRWOMAN OF PAROLE BOARD, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, AND PAUL CHAPPIUS, SUPERINTENDENT, ELMIRA CORRECTIONAL FACILITY, RESPONDENTS-RESPONDENTS.

LOUIS ROSADO, BUFFALO, FOR PETITIONER-APPELLANT.

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

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Livingston County (Dennis S. Cohen, A.J.) entered December 18, 2014 in a habeas corpus proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his petition for a writ of habeas corpus in which he sought release from state prison on various grounds. While this appeal was pending, however, petitioner was released to parole supervision, thereby rendering this appeal moot (*see People ex rel. Anderson v James*, 125 AD3d 1329, 1330; *People ex rel. Moore v Lempke*, 101 AD3d 1665, 1665-1666, *lv denied* 20 NY3d 863). Contrary to petitioner's contention, the exception to the mootness doctrine does not apply (*see People ex rel. Baron v New York State Dept. of Corr.*, 94 AD3d 1410, 1410, *lv denied* 19 NY3d 807; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1199

CA 14-02172

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

YONGMI ODDO AND SALVATORE ODDO,
PLAINTIFFS-RESPONDENTS,

V ORDER

ALC OF WILLIAMSVILLE, LLC, AND SUCHITRA KONERU, M.D., DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

COLUCCI & GALLAHER P.C., BUFFALO (MARYLOU K. ROSHIA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

STAMM LAW FIRM, WILLIAMSVILLE, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Jeremiah J. Moriarty, III, J.), entered May 29, 2014. The order, among other things, denied defendants' motion to set aside the finding of liability against defendant Suchitra Koneru, M.D.

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: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1200

CA 14-02173

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

YONGMI ODDO AND SALVATORE ODDO,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ALC OF WILLIAMSVILLE, LLC, AND SUCHITRA KONERU, M.D., DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

COLUCCI & GALLAHER, P.C., BUFFALO (MARYLOU K. ROSHIA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

STAMM LAW FIRM, WILLIAMSVILLE, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Jeremiah J. Moriarty, III, J.), entered June 25, 2014. The judgment, among other things, awarded plaintiff Yongmi Oddo money damages as against defendants.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Yongmi Oddo (plaintiff) during a laser hair removal procedure at defendant ALC of Williamsville, LLC (ALC). At the time of the procedure, Suchitra Koneru, M.D. (defendant), was a joint owner and vice-president of ALC, and she was employed as its medical director. She was not present during the procedure, which was performed by an ALC technician. In their amended complaint, plaintiffs alleged, inter alia, negligence and medical malpractice against defendant.

Contrary to the contention of defendants, we conclude that Supreme Court properly granted plaintiffs' motion for a directed verdict on the issue of defendant's vicarious liability for the negligence of the technician. The evidence at trial established that defendant, in her capacity as medical director of ALC, was responsible for training the technicians, specifically with respect to the settings on the laser, and for supervising the laser procedures. The evidence further established that plaintiff suffered serious burns during the procedure because the setting on the laser was not appropriate for her. The court properly concluded that "there was no rational process by which the fact trier could base a finding in favor

of [defendant]" on the issue of defendant's vicarious liability (*West v Hogan*, 88 AD3d 1247, 1248, *affd* 19 NY3d 1073 [internal quotation marks omitted]). "In [her] capacity of employee and supervisor, [defendant was] subject to liability for the acts of a fellow employee where, under the circumstances, there [was] an unreasonable risk of physical harm to others" (*Yaniv v Taub*, 256 AD2d 273, 274-275 [internal quotation marks omitted]).

Defendants' further contention that plaintiffs failed to plead a theory of vicarious liability against defendant is belied by the record on appeal. "A complaint is deemed to allege whatever can be implied from its statements by fair and reasonable intendment" and, here, the amended complaint may be fairly interpreted to allege a theory of vicarious liability against defendant (*Tuffley v City of Syracuse*, 82 AD2d 110, 113). "Moreover, a court will look to the bill of particulars when determining the sufficiency of a complaint," and plaintiffs' bill of particulars expressly states that plaintiffs' allegations against defendant include a theory of vicarious liability (*id.*).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1210

CAF 14-01279

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

IN THE MATTER OF DAILA W., DANIEL W. AND DAIANA W.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DANIELLE W., RESPONDENT-APPELLANT, AND DANIEL P., RESPONDENT-RESPONDENT. (APPEAL NO. 1.)

CARA A. WALDMAN, FAIRPORT, FOR RESPONDENT-APPELLANT.

KIMBERLY A. KOLCH, UTICA, FOR PETITIONER-RESPONDENT.

JESSICA REYNOLDS-AMUSO, ATTORNEY FOR THE CHILDREN, CLINTON.

PAUL M. DEEP, UTICA, FOR RESPONDENT-RESPONDENT.

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

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered May 27, 2014 in a proceeding pursuant to Family Court Act article 10. The order, among other things, returned Daniel W. and Daiana W. to the care and custody of respondent Daniel P.

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

Memorandum: These consolidated appeals arise from a neglect proceeding pursuant to Family Court Act article 10 and a custody proceeding pursuant to Family Court Act article 6. Both proceedings concern Daniel W. and Daiana W., the children of Danielle W. (mother), respondent in both proceedings, and Daniel P. (father), respondent in the neglect proceeding and petitioner in the custody proceeding. During the pendency of the neglect proceeding, the children were placed temporarily with the paternal grandmother. In appeal No. 1, the mother appeals from the order of disposition in the neglect proceeding that, inter alia, returned the children to the care and custody of the father. In appeal No. 2, the mother appeals from the order in the custody proceeding that, inter alia, awarded sole custody of the children to the father.

As a preliminary matter, we reject the father’s contention that these appeals were rendered moot by subsequent orders that modified

the visitation provisions of the order in appeal No. 2. The subsequent proceedings did not address the custody of the children, and the orders in those proceedings therefore did not "render [these] appeal[s] on the issue of custody meaningless" (*Matter of Karen PP. v Clyde QQ.*, 197 AD2d 753, 754).

We reject the mother's contention that Family Court erred in modifying the existing custody arrangement by awarding custody of the children to the father. As the mother correctly concedes, "the parties' acrimonious relationship and inability to communicate with each other render[ed] the existing joint custody arrangement inappropriate" (*Matter of Ingersoll v Platt*, 72 AD3d 1560, 1561). The mother also correctly concedes that the father established "the requisite change in circumstances to warrant an inquiry into whether the best interests of the child[ren] would be served by modifying the existing custody arrangement" (*Matter of Mercado v Frye*, 104 AD3d 1340, 1341, *lv denied* 21 NY3d 859). Contrary to the mother's contention, we conclude that the court's determination regarding the best interests of the children 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 Eschbach v Eschbach*, 56 NY2d 167, 171-172; *Matter of Olufsen v Plummer*, 105 AD3d 1418, 1418). "Giving due deference to the court's 'superior ability to evaluate the character and credibility of the witnesses . . . , we perceive no basis to disturb its award of custody to the father' " (*Matter of Tarrant v Ostrowski*, 96 AD3d 1580, 1582, *lv denied* 20 NY3d 855).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1211

CAF 14-01143

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

IN THE MATTER OF DANIEL P., PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DANIELLE W., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

CARA A. WALDMAN, FAIRPORT, FOR RESPONDENT-APPELLANT.

JESSICA REYNOLDS-AMUSO, ATTORNEY FOR THE CHILD, CLINTON.

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

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered June 2, 2014 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole custody of the subject children.

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

Same memorandum as in *Matter of Daila W.* ([appeal No. 1] ___ AD3d ___ [Nov. 20, 2015]).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1212

CAF 14-01584

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

IN THE MATTER OF MICHELE DAVIS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN L. WILLIAMS, RESPONDENT-APPELLANT.

LOVALLO & WILLIAMS, BUFFALO (TIMOTHY R. LOVALLO OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered July 15, 2014 in a proceeding pursuant to Family Court Act article 4. The order revoked a suspended sentence and committed respondent to jail for a period of six months.

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

Memorandum: Respondent father appeals from an order of commitment revoking a suspended sentence and committing him to jail for a period of six months. Inasmuch as respondent has served his sentence, his appeal from the order of commitment is moot (*see Matter of Ontario County Support Collection Unit v Falconer*, ___ AD3d ___, ___ [Oct. 9, 2015]). To the extent that respondent contends that his appeal is not moot because "a finding of contempt [and willful violation] may have significant collateral consequences," we note that he failed to appeal from the order finding him in willful violation of the order requiring him to pay child support (*see Matter of St. Lawrence County Support Collection Unit v Pratt*, 24 AD3d 1050, 1050). Similarly, respondent's remaining contentions that his support obligations should be reduced and his arrears capped were not addressed by the order appealed from and, in any event, are improperly raised for the first time on appeal (*see Matter of Kasprowicz v Osgood*, 101 AD3d 1760, 1761, *lv denied* 20 NY3d 863; *Matter of Commissioner of Social Servs. v Turner*, 99 AD3d 1244, 1245).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1216

CA 15-00699

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

STEVEN J. CRACCHIOLA AND KIM CRACCHIOLA,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

BRYAN SAUSNER AND JOHN W. DANFORTH COMPANY,
DEFENDANTS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (ROBERT D. LEARY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CELLINO & BARNES, P.C., BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered August 15, 2014. The order denied in part the motion of defendants for summary judgment dismissing the complaint and granted the cross motion of plaintiffs for partial summary judgment on the issue of negligence.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the cross motion, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Steven J. Cracchiola (plaintiff) when the vehicle he was driving was rear-ended by a vehicle driven by defendant Bryan Sausner and owned by Sausner's employer, defendant John W. Danforth Company. Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury in the accident (*see* Insurance Law § 5102 [d]), and plaintiffs cross-moved for partial summary judgment on the issue of negligence. Supreme Court granted defendants' motion only in part, denying the motion with respect to two categories of serious injury, and the court granted plaintiffs' cross motion. We note at the outset that plaintiffs did not cross-appeal from the order insofar as it granted defendants' motion in part (*see Campbell v County of Suffolk*, 57 AD3d 821, 822). We further note that we agree with defendants that plaintiffs' cross motion was untimely, inasmuch as it was made more than 120 days after the note of issue was filed, and plaintiffs did not seek leave to file a late motion or show good cause for their delay pursuant to CPLR 3212 (a). Contrary to plaintiffs' contention, the cross motion was not " 'made on nearly identical grounds' as defendants' timely motion," and thus the cross motion was not properly

before the court (*Covert v Samuel*, 53 AD3d 1147, 1148). We therefore modify the order accordingly.

By failing to object to defendants' submissions at the motion court, plaintiffs failed to preserve for our review their contention that defendants improperly submitted unsworn medical records that were obtained pursuant to authorizations rather than directly from plaintiffs' counsel (*see Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 351 n 3; *Shinn v Catanzaro*, 1 AD3d 195, 197-198), and that contention lacks merit in any event (*see Houston v Geerlings*, 83 AD3d 1448, 1448). We agree with plaintiffs, however, that the court properly denied defendants' motion with respect to the two remaining categories of serious injury, i.e., permanent consequential limitation of use and significant limitation of use, because defendants failed to establish their entitlement to judgment as a matter of law (*see Summers v Spada*, 109 AD3d 1192, 1192-1193; *Strong v ADF Constr. Corp.*, 41 AD3d 1209, 1210). Although defendants submitted medical reports from defendants' examining physicians concluding that plaintiff's injuries were inconsequential, transient, and attributable to preexisting degenerative conditions, they also submitted medical reports from plaintiff's treating physician and an examining chiropractor concluding that plaintiff's injuries were "significant, permanent, and causally related to the accident" (*Vitez v Shelton*, 6 AD3d 1180, 1182). Because defendants failed to meet their initial burden on the motion with respect to those two categories of serious injury, we need not consider the sufficiency of plaintiffs' opposing papers (*see Gonyou v McLaughlin*, 82 AD3d 1626, 1627).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1217

CA 15-00698

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

LEE WILLIAMS, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK AND SUNY AT BUFFALO,
RESPONDENTS-RESPONDENTS.

DOLCE PANEPINTO, P.C., BUFFALO (PHILLIP URBAN OF COUNSEL), FOR CLAIMANT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (DANIEL HUNTER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Court of Claims (Michael E. Hudson, J.), entered July 18, 2014. The order denied the motion of claimant seeking leave to file a late claim.

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

Memorandum: We affirm for reasons stated in the decision at the Court of Claims. We write only to note that we reject claimant's contention that merit alone should have warranted granting his motion for leave to file a late claim pursuant to Court of Claims Act § 10 (6). "Nothing in the statute makes the presence or absence of any one factor determinative" (*Bay Terrace Coop. Section IV v New York State Empls. Retirement Sys. Policemen's & Firemen's Retirement Sys.*, 55 NY2d 979, 981) and, in any event, we agree with the court that claimant did not "adequately set forth sufficient facts demonstrating that his claim was meritorious" (*Olsen v State of New York*, 45 AD3d 824, 824).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1219

CA 15-00546

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

IN THE MATTER OF ARBITRATION BETWEEN
CITY OF ROCHESTER,
PETITIONER-RESPONDENT-RESPONDENT,

AND MEMORANDUM AND ORDER

ROCHESTER POLICE LOCUST CLUB,
RESPONDENT-PETITIONER-APPELLANT.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (ERIC M. DOLAN OF COUNSEL), FOR RESPONDENT-PETITIONER-APPELLANT.

T. ANDREW BROWN, CORPORATION COUNSEL, ROCHESTER (YVETTE CHANCELLOR GREEN OF COUNSEL), FOR PETITIONER-RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered June 23, 2014 in a proceeding pursuant to CPLR article 75. The order granted the petition and vacated an arbitration award.

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

Memorandum: This CPLR article 75 proceeding arises from a determination by petitioner-respondent City of Rochester (City) denying a police sergeant's request for a vehicle to use on the job and take home. The City denied a grievance that respondent-petitioner Rochester Police Locust Club (Union) filed on behalf of the sergeant, and the matter proceeded to arbitration. The contractual provision in the collective bargaining agreement (CBA) governing arbitration provides in relevant part that "[t]he authority of the arbitrator shall be limited to matters of interpretation or application of the express provisions of this Agreement and the arbitrator shall have no power or authority to alter, add to or subtract from or otherwise modify the terms of this Agreement as written." After the arbitrator issued an award directing the City to provide the sergeant with a vehicle, the City commenced this proceeding seeking to vacate the arbitration award, and the Union cross-petitioned to confirm the award. The Union appeals from an order granting the petition and vacating the award. We affirm.

" 'It is well settled that an arbitration award may be vacated if it exceeds a specifically enumerated limitation on an arbitrator's power[, and that] an arbitrator exceeds his or her authority by

granting a benefit not recognized under a governing collective bargaining agreement' " (*Matter of Buffalo Teachers Fedn., Inc. v Board of Educ. of City Sch. Dist. of City of Buffalo*, 50 AD3d 1503, 1507, *lv denied* 11 NY3d 708; *see Matter of Buffalo Professional Firefighters Assn., Inc., Local 282, IAFF, AFL-CIO-CLC v City of Buffalo*, 57 AD3d 1476, 1476). Here, the provision at issue is contained in a memorandum of agreement between the City and the Union, which requires that the City provide a vehicle to, inter alia, police "investigator[s] who are assigned to the Major Crimes Unit." It is undisputed that the police sergeant who requested the vehicle is not an investigator, and that he is not assigned to the Major Crimes Unit. Nevertheless, the arbitrator concluded that the City must provide him with a take-home vehicle based solely on the City's past practice, which included providing such a vehicle to the two predecessors in his position. That was error. "Although '[p]ast practices may be considered by an arbitrator . . . when interpreting a specific contractual provision . . . [, a]n arbitrator may not rewrite a contract by adding a new clause based upon past practices' " (*Matter of Monroe County Sheriff's Off. [Monroe County Deputy Sheriffs' Assn., Inc.]*, 79 AD3d 1797, 1798).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1221

CA 15-00626

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

IN THE MATTER OF ARBITRATION BETWEEN
CITY OF LOCKPORT, PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

LOCKPORT PROFESSIONAL FIREFIGHTERS
ASSOCIATION, INC., LOCAL 963, IAFF, AFL-CIO,
RESPONDENT-APPELLANT.

THE SAMMARCO LAW FIRM, LLP, BUFFALO (ANDREA L. SAMMARCO OF COUNSEL), FOR RESPONDENT-APPELLANT.

GOLDBERGER AND KREMER, ALBANY (BRIAN S. KREMER OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered July 2, 2014 in a proceeding pursuant to CPLR article 75. The order, insofar as appealed from, granted the petition of petitioner seeking a permanent stay of arbitration and denied the cross motion of respondent to compel arbitration.

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

Memorandum: Petitioner and respondent are parties to a collective bargaining agreement (CBA) that defines grievance as including "all claimed violations of any contract existing between [petitioner] and the employees covered by" the CBA. After petitioner's Civil Service Commission (Commission) created a new position within the Lockport Fire Department, i.e., Municipal Training Officer (MTO), respondent and petitioner negotiated the terms and conditions of employment and the job duties applicable to that position. The product of their negotiations was a Memorandum of Agreement (MOA) that provided, inter alia, that employees in the position of MTO "shall only be eligible for future promotional consideration to a Line Officer's position pursuant to existing civil service rules, regulations, and procedure beginning with Fire Lieutenant." The Commission thereafter amended the job specifications for Fire Chief to make the MTO eligible for promotion to Fire Chief. Respondent filed a grievance and a demand for arbitration based upon petitioner's alleged violation of the MOA, and petitioner commenced this proceeding seeking a permanent stay of arbitration.

Supreme Court erred in granting the petition and denying respondent's cross motion to compel arbitration. At the outset, we note that petitioner did not previously raise its present contention that arbitration of the dispute is contrary to the Civil Service Law and public policy. Although that contention may be raised for the first time on appeal (*see Matter of Niagara Wheatfield Adm'rs Assn. [Niagara Wheatfield Cent. Sch. Dist.]*, 44 NY2d 68, 72), we conclude that it lacks merit. This State has a strong public policy favoring arbitration of public sector labor disputes (*see Matter of County of Chautauqua v Civil Serv. Employs. Assn., Local 1000, AFSCME, AFL-CIO, County of Chautauqua Unit 6300, Chautauqua County Local 807*, 8 NY3d 513, 519), and "judicial intervention on public policy grounds constitutes a narrow exception to the otherwise broad power of parties to agree to arbitrate all of the disputes arising out of their juridical relationships" (*Matter of New York City Tr. Auth. v Transport Workers Union of Am., Local 100, AFL-CIO*, 99 NY2d 1, 6-7; *see Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City Sch. Dist. of City of N.Y.*, 1 NY3d 72, 82). The instant dispute does not fall within the narrow scope of that exception, inasmuch as the provision of the MOA at issue concerns promotion, a term or condition of employment that is a proper subject for negotiation and agreement between the parties (*see Matter of Professional, Clerical Tech. Empls. Assn. [Buffalo Bd. of Educ.]*, 90 NY2d 364, 372).

We reject petitioner's contention that granting the remedy sought by respondent, i.e., enforcement of the MOA, would violate public policy and conflict with the Civil Service Law because it would interfere with the Commission's authority to establish the qualifications for the position of Fire Chief. "While the [Commission] undoubtedly had the authority to establish minimum qualifications for job titles in [City] government (*see* Civil Service Law §§ 50, 52), it does not follow that such determinations are immune from oversight or review" in an arbitration proceeding (*Matter of Ulster County Sheriff's Empls. Assn., CWA Local 1105 [Ulster County Sheriff's Dept.]*, 100 AD3d 1327, 1329, *lv denied* 20 NY3d 859). Contrary to petitioner's further contention, we conclude that submitting the parties' dispute to arbitration does not violate the public policy underlying the Civil Service Law, inasmuch as a determination in favor of respondent would not compel petitioner to hire an unqualified candidate for the position of Fire Chief (*see United Fedn. of Teachers, Local 2, AFT, AFL-CIO*, 1 NY3d at 80-81). Finally, petitioner's original contention, i.e., that respondent's dispute is with the Commission, which cannot be bound by an arbitration award, goes to " 'the merits of the grievance[, which] are not the court[']s concern' " (*Matter of Board of Trustees of Cayuga County Community Coll. [Cayuga County Community Coll. Faculty Assn.]*, 299 AD2d 907, 908).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1222

CA 15-00122

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

TRAVELERS INSURANCE COMPANY, AS SUCCESSOR IN INTEREST BY MERGER TO GULF INSURANCE COMPANY, PLAINTIFF-RESPONDENT,

V ORDER

BENDERSON DEVELOPMENT COMPANY, LLC, DANFB, LLC, BENDERSON DEVELOPMENT COMPANY, INC., BENDERSON PROPERTIES, INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.
(APPEAL NO. 1.)

GALBO & ASSOCIATES, BUFFALO (RICHARD A. GALBO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

KATZ & RYCHIK P.C., NEW YORK CITY (ABE M. RYCHIK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered August 25, 2014. The order, among other things, granted plaintiff's motion for summary judgment on the amended complaint and for summary judgment dismissing the counterclaim.

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

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1223

CA 15-00123

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

TRAVELERS INSURANCE COMPANY, AS SUCCESSOR IN INTEREST BY MERGER TO GULF INSURANCE COMPANY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BENDERSON DEVELOPMENT COMPANY, LLC, DANFB, LLC, BENDERSON DEVELOPMENT COMPANY, INC., BENDERSON PROPERTIES, INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.
(APPEAL NO. 2.)

GALBO & ASSOCIATES, BUFFALO (RICHARD A. GALBO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

KATZ & RYCHIK P.C., NEW YORK CITY (ABE M. RYCHIK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered August 25, 2014. The judgment, among other things, awarded plaintiff the sum of $190,068.79 as against defendant Benderson Development Company, Inc., now known as Benderson Properties, Inc.

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

Memorandum: Plaintiff commenced this action seeking the amount of $190,068.79 from defendants under a policy of insurance provided by plaintiff to defendants. As relevant here, defendants are in the business of owning, leasing, managing, and maintaining commercial properties. For the policy period of March 31, 2003 through March 31, 2004, defendants were covered by an excess commercial general liability insurance policy issued by plaintiff. The policy included a $100,000 Self-Insured Retention (SIR) Endorsement and a $100,000 Insured’s Contribution (IC) Endorsement. Before the policy limits would be applied toward any covered event, defendants were obligated to pay $100,000 under each of the endorsements, for a total of $200,000.

In July 2002, defendants retained Lancer Glass Company (Lancer) as a contractor, and defendants were added as an additional insured on a Lancer policy. The Lancer policy provided $1,000,000 in primary coverage as well as additional, excess coverage. In 2003, a Lancer

employee was injured and brought an action against defendants (Lancer litigation), which settled for $1,800,000. Lancer's primary coverage was $1,000,000 and its excess coverage was $400,000. After covering the remaining $400,000, plaintiff demanded that defendants reimburse plaintiff $190,068.79, which represented the $100,000 obligation under each endorsement minus a credit owed to defendants. Defendants refused, contending that the additional insured coverage provided by the Lancer policy satisfied defendants' obligations under the SIR and IC endorsements.

Similarly, in 2003 defendants were an additional insured on a liability insurance policy owned by a tenant in one of defendants' properties, Sally Beauty Systems Group (Sally Beauty). In 2003, a Sally Beauty employee was injured on that property and brought an action against defendants (Sally litigation). That action settled for $1,600,000, and the Sally Beauty policy paid $1,000,000. Plaintiff paid $400,000 of the $600,000 balance, but refused to pay the remaining $200,000, citing defendants' obligations under the endorsements.

Plaintiff commenced this action against defendants for the outstanding $190,068.79 from the Lancer litigation, and defendants counterclaimed for the $200,000 they paid as a result of the Sally litigation. Supreme Court granted plaintiff's motion seeking summary judgment on the amended complaint and summary judgment dismissing the counterclaim. We affirm.

"To be entitled to summary judgment, the moving party has the burden of establishing that its construction of the [contract] is the only construction which can fairly be placed thereon" (*Nancy Rose Stormer, P.C. v County of Oneida*, 66 AD3d 1449, 1450 [internal quotation marks omitted]). Here, plaintiff met that burden. Pursuant to the plain and unambiguous language of the SIR endorsement, defendants agreed "not to insure the 'self-insured retention' without [plaintiff's] knowledge and permission," and plaintiff submitted proof establishing that no such permission was requested. Defendants failed even to contend that permission was granted in regard to either the Lancer or Sally litigation and thus failed to raise a triable issue of fact with respect thereto. Without such permission, the plain terms of the policy prohibit additional insured coverage from satisfying the SIR endorsement. Likewise, pursuant to the plain and unambiguous terms of the IC endorsement, that endorsement, as plainly stated in the policy, applies to the policy limits. Because the policy is an excess rather than a primary insurance policy, the policy limits are not applied until all additional insured coverage has been exhausted. Consequently, any additional insured coverage would necessarily be exhausted before defendants' obligation under the IC endorsement was triggered.

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1225

TP 15-00597

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

IN THE MATTER OF GABRIEL M. WILLIAMS, PETITIONER,

V MEMORANDUM AND ORDER

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

GABRIEL M. WILLIAMS, PETITIONER PRO SE.

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, Erie County [M. William Boller, A.J.], entered April 9, 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 so appealed from is unanimously modified on the law and the petition is granted in part by annulling that part of the determination finding that petitioner violated inmate rule 101.22 (7 NYCRR 270.2 [B] [2] [v]) and vacating the recommended loss of good time, and as modified the determination is confirmed without costs, respondent is directed to expunge from petitioner's institutional record all references to the violation of that rule, and the matter is remitted to respondent for further proceedings in accordance with the following memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking review of a determination, following a tier III disciplinary hearing, that he violated inmate rules 101.22 (7 NYCRR 270.2 [B] [2] [v] [stalking]), 103.20 (7 NYCRR 270.2 [B] [4] [ii] [soliciting]), and 121.12 (7 NYCRR 270.2 [B] [22] [iii] [telephone program violation]). To the extent that petitioner contends that the determination finding that he violated inmate rule 121.12 is not supported by substantial evidence, we note that his plea of guilty to that violation precludes our review of his contention (*see Matter of Edwards v Fischer*, 87 AD3d 1328, 1329). We further conclude that there is substantial evidence to support the determination with respect to inmate rule 103.20 (*see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139).

As respondent correctly concedes, however, the determination with respect to inmate rule 101.22 is not supported by substantial evidence

(*see Matter of Monroe v Fischer*, 87 AD3d 1300, 1301), and we therefore modify the determination accordingly. Inasmuch as the record establishes that petitioner has served his administrative penalty, we direct respondent to expunge from petitioner's institutional record all references to the violation of that inmate rule (*see Matter of Stewart v Fischer*, 109 AD3d 1122, 1123, *lv denied* 22 NY3d 858). Although there is no need to remit the matter to respondent for reconsideration of those parts of the penalty already served by petitioner, we note that the Hearing Officer also recommended nine months' loss of good time, and the record does not reflect the relationship between the violations and that recommendation (*see Monroe*, 87 AD3d at 1301). We therefore further modify the determination by vacating the recommended loss of good time, and we remit the matter to respondent for reconsideration of that recommendation in light of our decision with respect to inmate rule 101.22 (*see id.*).

We have reviewed petitioner's remaining contentions and conclude that none warrants reversal or further modification.

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1227

KA 13-01904

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRENDA M. NEWKIRK, DEFENDANT-APPELLANT.

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

BRENDA M. NEWKIRK, DEFENDANT-APPELLANT PRO SE.

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 August 15, 2013. The judgment convicted defendant, upon her plea of guilty, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her guilty plea of murder in the second degree (Penal Law § 125.25 [1]). We reject defendant's contentions in her main and pro se supplemental briefs that County Court abused its discretion in denying her request to withdraw the guilty plea. " 'Permission to withdraw a guilty plea rests solely within the court's discretion . . . , and refusal to permit withdrawal does not constitute an abuse of that discretion unless there is some evidence of innocence, fraud, or mistake in inducing the plea' " (*People v Pillich*, 48 AD3d 1061, 1061, *lv denied* 11 NY3d 793). Although defendant contends in her main brief that she was innocent, the record establishes that she admitted the elements of murder in the second degree during the plea allocution and did not make any claim to the court at that time that she was innocent (*see People v Hobby*, 83 AD3d 1536, 1536, *lv denied* 17 NY3d 859; *People v Sparcino*, 78 AD3d 1508, 1509, *lv denied* 16 NY3d 746). Defendant's contention in her pro se supplemental brief that defense counsel coerced her into pleading guilty "is belied by defendant's statement during the plea colloquy that the plea was not the result of any threats, pressure or coercion" (*People v Campbell*, 62 AD3d 1265, 1266, *lv denied* 13 NY3d 795; *see Sparcino*, 78 AD3d at 1509).

Defendant further contends in her main and pro se supplemental briefs that her plea was not knowingly, intelligently, or voluntarily entered. We reject that contention. "Although the initial statements

of defendant during the factual allocution may have negated the essential element of [her] intent to cause death, [her] further statements removed any doubt regarding that intent" (*People v Trinidad*, 23 AD3d 1060, 1061, *lv denied* 6 NY3d 760; *see People v Theall*, 109 AD3d 1107, 1108, *lv denied* 22 NY3d 1159).

Contrary to defendant's contention in her pro se supplemental brief, she was not deprived of the effective assistance of counsel. Defendant received an advantageous plea, and "nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404; *see People v Pitcher*, 126 AD3d 1471, 1473, *lv denied* 25 NY3d 1169).

Defendant's challenge in her pro se supplemental brief to the sufficiency of the evidence before the grand jury is forfeited by her guilty plea (*see People v Milliman*, 122 AD3d 1437, 1438; *People v Dickerson*, 66 AD3d 1371, 1372, *lv denied* 13 NY3d 859), as is her challenge to evidentiary errors during the grand jury proceeding (*see People v Hansen*, 95 NY2d 227, 231).

Defendant's contention in her pro se supplemental brief that the People failed to disclose *Brady* material survives her guilty plea (*see People v DeLaRosa*, 48 AD3d 1098, 1098-1099, *lv denied* 10 NY3d 861), but we nevertheless conclude that her contention is without merit inasmuch as she has failed to identify any evidence that was not disclosed (*see generally People v Johnson*, 60 AD3d 1496, 1497, *lv denied* 12 NY3d 926; *People v Terry*, 19 AD3d 1039, 1040, *lv denied* 5 NY3d 833).

Defendant contends in her pro se supplemental brief that the court should have granted her motion to suppress her statements and evidence seized during the search of her computer. We conclude that those contentions were forfeited by defendant's guilty plea inasmuch as she "pleaded guilty before the court issued a decision on [her] suppression motion" (*People v Gillett*, 105 AD3d 1444; *see* CPL 710.70 [2]). We reject defendant's contention in her pro se supplemental brief that the sentence is unduly harsh and severe.

Finally, we have reviewed the remaining contentions in defendant's pro se supplemental brief and, to the extent that they are properly before us in the context of defendant's guilty plea, we conclude that they are without merit.

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1228

KA 13-01487

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AWET GEBREYESUS, 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 (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered June 3, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted murder 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 attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), defendant contends that his waiver of the right to appeal is invalid. We reject that contention. The record establishes that defendant waived his right to appeal as a condition of a negotiated plea bargain and sentence (*see People v Mercedes*, 171 AD2d 1044, 1044, *lv denied* 77 NY2d 998). To the extent that defendant contends that his waiver of the right to appeal is invalid because the court did not conduct an "in-depth examination . . . concerning the potential language barriers," we note that an interpreter was present and assisted defendant throughout the plea and sentencing proceedings (*see id.*; *see also People v Rosa-Sanchez*, 267 AD2d 981, 981, *lv denied* 95 NY2d 938). Moreover, the record establishes that defendant reviewed the written waiver of the right to appeal with his attorney, stated that he understood it completely, and had no questions for the court with respect to it. Defendant's waiver of the right to appeal forecloses review of defendant's remaining contentions, and we therefore do not reach them (*see generally People v Lopez*, 6 NY3d 248, 255).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1229

KA 14-00630

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEREMY J. ROTHMUND, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered March 3, 2014. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [3]). We agree with defendant that his waiver of the right to appeal does not encompass his challenge to the severity of the sentence because "no mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal his conviction that he was also waiving his right to appeal the harshness of his sentence" (*People v Pimentel*, 108 AD3d 861, 862, *lv denied* 21 NY3d 1076; *see People v Maracle*, 19 NY3d 925, 928). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1230

KA 11-00545

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAYMOND V. GAUSE, ALSO KNOWN AS RAYMOND VON GAUSE,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Stephen T. Miller, A.J.), rendered January 20, 2011. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [2]), defendant contends that his plea was not knowingly, voluntarily, and intelligently entered because County Court failed to advise him of all the rights he would be forfeiting upon pleading guilty (*see generally Boykin v Alabama*, 395 US 238, 243; *People v Tyrell*, 22 NY3d 359, 361). By failing to move to withdraw his plea or to vacate the judgment of conviction, however, defendant failed to preserve his contention for our review (*see* CPL 470.05 [2]; *People v Landry*, ___ AD3d ___, ___ [Oct. 9, 2015]), and the "narrow exception" to the preservation rule does not apply here inasmuch as defendant did not say anything during the plea colloquy that cast significant doubt on his guilt, or otherwise called into question the voluntariness of his plea (*People v Lopez*, 71 NY2d 662, 666; *see Landry*, ___ AD3d at ___). As we recently noted, "[a]lthough the Court of Appeals in *Tyrell* vacated a guilty plea based on an unpreserved *Boykin*[] 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" (*Landry*, ___ AD3d at ___; *see Tyrell*, 22 NY3d at 364). Here, in contrast, "defendant was sentenced more than [a] month[] after he entered his guilty plea[], thus affording him ample time to bring a

motion" (*Landry*, ___ AD3d at ___).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1231

KAH 14-01747

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
VALAVE GREEN, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (LAURA ETLINGER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered June 24, 2014 in a habeas corpus proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner, an inmate in state prison, commenced this proceeding seeking a writ of habeas corpus, alleging that he was denied due process because, inter alia, respondent failed to afford him a preliminary or final parole revocation hearing. We conclude that Supreme Court properly dismissed the petition. As respondent points out, petitioner was not entitled to a revocation hearing because a parole warrant was not issued against him (*see* Executive Law § 259-i [3] [a] [i]). In any event, petitioner was convicted of two felonies he committed while released on parole, and he was sentenced to indeterminate terms of imprisonment on those new felonies, whereupon his parole was revoked by operation of law pursuant to Executive Law § 259-i (3) (d) (iii) (*see People ex rel. Daniels v Beaver*, 303 AD2d 1025, 1025; *Matter of Adams v New York State Div. of Parole*, 278 AD2d 621, 621). Because petitioner's parole was revoked by operation of law, "a parole revocation hearing was not required" (*People ex rel. Williams v Kirkpatrick*, 111 AD3d 1327, 1327-1328; *see People ex rel. Stevenson v Beaver*, 309 AD2d 1171, 1172, *lv denied* 1 NY3d 506).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1232

CAF 14-00880

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

IN THE MATTER OF ZARHIANNA K.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

FRANK K., RESPONDENT-APPELLANT.

JOHN J. RASPANTE, UTICA, FOR RESPONDENT-APPELLANT.

LISA P. DENMAN, UTICA, FOR PETITIONER-RESPONDENT.

PAUL SKAVINA, ATTORNEY FOR THE CHILD, ROME.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered March 21, 2014 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent abused the subject child.

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

Memorandum: In this proceeding pursuant to article 10 of the Family Court Act, respondent father appeals from an order determining, inter alia, that he abused the subject child. Contrary to the father's contention, we conclude that Family Court's determination is supported by a preponderance of the evidence. Petitioner established a prima facie case of child abuse by submitting evidence that the child sustained injuries that "would ordinarily not occur absent an act or omission of [the father], and . . . that [the father was] the caretaker[] of the child at the time the injury occurred" (*Matter of Philip M.*, 82 NY2d 238, 243; *see* Family Ct Act § 1046 [a] [ii]), and the father failed to rebut the presumption that he was responsible for the child's injuries (*see Matter of Devre S. [Carlee C.]*, 74 AD3d 1848, 1849; *Matter of Damien S.*, 45 AD3d 1384, 1384, *lv denied* 10 NY3d 701).

The father contends that the order on appeal is ambiguous and does not clearly state whether there was a finding of abuse. We reject that contention. The order unambiguously states that the court determined that the subject child was "abused . . . as defined in section 1012 (e) (i) of the Family Court Act by [the father]." Contrary to the father's further contention, we conclude that the court's decision properly set forth the grounds for its determination (*see Matter of Jose L.I.*, 46 NY2d 1024, 1025-1026; *Matter of Dezarae*

T. [Lee V.], 110 AD3d 1396, 1399).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1233

CAF 14-02269

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

IN THE MATTER OF KATHLEEN MARTIN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES J. FLYNN, RESPONDENT-APPELLANT.

MUSCATO & SHATKIN, LLP, BUFFALO (MARC SHATKIN OF COUNSEL), FOR RESPONDENT-APPELLANT.

ZDARSKY SAWICKI & AGOSTINELLI LLP, BUFFALO (DAVID E. GUTOWSKI OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Brenda M. Freedman, R.), entered September 19, 2014 in a proceeding pursuant to Family Court Act article 8. The order, among other things, granted the petition, directed respondent to observe the conditions of behavior specified in an order of protection, placed respondent on probation for one year, and ordered respondent to obtain a mental health evaluation and to follow any treatment recommendations.

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

Memorandum: Respondent appeals from an order finding that he committed the family offense of harassment in the second degree (Family Ct Act § 821 [1] [a]; Penal Law § 240.26 [3]). Family Court issued a five-year order of protection in favor of petitioner, placed respondent on probation for a period of one year, and ordered that respondent obtain a mental health evaluation. We reject respondent's contention that the court improperly admitted evidence of conduct not alleged in the family offense petition, and we conclude that, upon petitioner's motion, the court properly exercised its discretion to amend the allegations of the petition to conform to the proof (*see* CPLR 3025 [c]; *Matter of Barton v Barton*, 111 AD3d 1348, 1349; *Matter of Ariel C.W.-H. [Christine W.]*, 89 AD3d 1438, 1438-1439).

We reject respondent's further contention that the evidence adduced at the hearing did not establish harassment in the second degree. The determination whether respondent committed a family offense was a factual issue for the court to resolve, and "[the] court's determination regarding the credibility of witnesses is entitled to great weight on appeal and will not be disturbed if

supported by the record" (*Matter of Richardson v Richardson*, 80 AD3d 32, 44; *see generally Matter of Arlene E. v Ralph E.*, 17 AD3d 1104, 1104). Based on the evidence presented at the hearing, we conclude that the court properly determined that respondent committed the family offense of harassment in the second degree.

Contrary to respondent's contention, Penal Law § 240.26 (3) does not unconstitutionally restrict his freedom of speech. Section 240.26 (3), by its own terms, prohibits "a course of conduct" aimed at harassing another. That clause "excludes constitutionally protected speech from its reach [and] plainly distinguishes [the] statute from those which impose criminal liability for 'pure speech' " (*People v Shack*, 86 NY2d 529, 535).

We reject respondent's further contention that the court exceeded its authority by placing respondent on one year of probation and issuing a five-year order of protection. The Family Court Act explicitly grants the court the authority to place a respondent on probation for a period of up to one year (*see* Family Ct Act § 841 [c]). Similarly, upon the court's finding that respondent had violated a prior order of protection, it was authorized to issue a new order of protection for a period of up to five years (*see* Family Ct Act § 842).

We agree with respondent, however, that the court erred in ordering him to obtain a mental health evaluation. The court did not order the evaluation as a condition "necessary to further the purposes of" the order of protection (Family Ct Act § 842 [k]), and the court was not otherwise authorized to order the evaluation pursuant to Family Court Act § 841. We therefore modify the order by vacating the ordering paragraph directing respondent to obtain a mental health evaluation.

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1236

CA 14-02021

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

FRANCES A. MARIGLIO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BERTHEL FISHER & COMPANY FINANCIAL SERVICES, INC., AND THOMAS J. BERTHEL, DEFENDANTS-RESPONDENTS.

JOANNE A. SCHULTZ, WILLIAMSVILLE, FOR PLAINTIFF-APPELLANT.

BOND SCHOENECK & KING, PLLC, BUFFALO (STEPHEN A. SHARKEY OF COUNSEL), AND ANTHONY OSTLUND BAER & LOUWEGIE P.A., MINNEAPOLIS, MINNESOTA, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered June 26, 2014. The order, inter alia, granted defendants' cross motion to compel arbitration.

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

Memorandum: Plaintiff appeals from an order that, inter alia, granted defendants' cross motion to compel arbitration, contending that Supreme Court erred in determining that she failed to demonstrate that she is unable to bear the costs of arbitration. As a preliminary matter, we note that plaintiff failed to apply for a waiver of the arbitration fee charged by the Financial Industry Regulatory Authority, which is a prerequisite for avoidance of arbitration on the ground that it would be financially prohibitive (*see Barone v Haskins*, ___ AD3d ___, ___ [Oct. 9, 2015]). In any event, we reject plaintiff's contention. The party seeking to "invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive . . . bears the burden of showing the likelihood of incurring such costs" (*Green Tree Fin. Corp.–Alabama v Randolph*, 531 US 79, 92; *see Brady v Williams Capital Group, L.P.*, 14 NY3d 459, 466), and the test for determining whether arbitration is prohibitively expensive in a particular case requires an examination of, among other factors, the cost differential between arbitration and litigation, and whether that differential "is so substantial as to deter the bringing of claims in the arbitral forum" (*Brady*, 14 NY3d at 467). Here, plaintiff submitted no evidence concerning the cost of litigating her claims in court, and she thus failed to meet her burden in opposition to defendants' cross motion.

We have reviewed plaintiff's remaining contentions and conclude

that they lack merit.

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1238

CA 15-00612

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

DARREN DAVIS AND SHAQUITA DAVIS,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

RICHARD BRZOSTOWSKI, LINDA BRZOSTOWSKI,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

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

ATHARI & ASSOCIATES, LLC, NEW HARTFORD (ANDREW BOUGHRUM OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), entered January 21, 2015. The order denied the motion of defendants Richard Brzostowski and Linda Brzostowski for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion of defendants-appellants with respect to plaintiff Darren Davis and dismissing the complaint against them to that extent, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs, Darren Davis (Darren) and Shaquita Davis (Shaquita), commenced this action seeking damages for injuries allegedly sustained as a result of their exposure to hazardous lead paint conditions on multiple properties in Buffalo, New York. Defendants-appellants (defendants) moved for summary judgment dismissing the complaint against them. We conclude that Supreme Court properly denied the motion with respect to Shaquita, but erred in denying it with respect to Darren, and we therefore modify the order accordingly.

We agree with defendants that Darren's action against them must be dismissed inasmuch as the two causes of action asserted against them do not allege any injury on behalf of Darren. In any event, even assuming, arguendo, that Darren had asserted a cause of action against defendants herein, we conclude that there is no evidence in the record that Darren had an elevated blood lead level during his tenancy at defendants' premises. Without such evidence, Darren "[can]not prevail" (*Cunningham v Anderson*, 85 AD3d 1370, 1374, *lv dismissed in*

part and denied in part 17 NY3d 948), and the unsupported, conclusory opinion of plaintiffs' expert on this issue was insufficient to raise a triable issue of fact (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544).

Although defendants established as a matter of law that they lacked actual notice of any hazardous lead paint condition on the property they owned, we conclude that there are triable issues of fact whether they had constructive notice of such a hazard. In the absence of proof that an out-of-possession landlord had actual notice of the existence of a hazardous lead paint condition, a plaintiff can establish that the landlord had constructive notice of such condition by showing that the landlord: "(1) retained a right of entry to the premises and assumed a duty to make repairs, (2) knew that the apartment was constructed at a time before lead-based interior paint was banned, (3) was aware that paint was peeling on the premises, (4) knew of the hazards of lead-based paint to young children and (5) knew that a young child lived in the apartment" (*Chapman v Silber*, 97 NY2d 9, 15).

The only factors at issue on appeal are the third and fourth factors. Even assuming, arguendo, that 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, we conclude that Shaquita raised issues of fact with respect to those two factors (*see generally Zuckerman v City of New York*, 45 NY2d 557, 562). Specifically, with respect to the third factor, Shaquita "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, with respect to the fourth factor, "we conclude that [Shaquita] . . . raised an issue of fact whether defendant[s] knew of the hazards of lead-based paint to young children" (*id.*). "Inasmuch as defendant[s] failed to eliminate all triable issues of fact with respect to the five *Chapman* factors, we conclude that the court properly denied the motion" with respect to Shaquita (*id.*). Contrary to defendants' contention, " 'any inconsistency between the [testimony of plaintiffs' mother] . . . and her affidavit [submitted in opposition to the motion] presents a credibility issue to be resolved at trial' " (*Larkin v Rochester Hous. Auth.*, 81 AD3d 1354, 1356).

Contrary to defendants' further contention, the court properly denied that part of the motion seeking summary judgment dismissing Shaquita's claim for negligent abatement of the lead paint hazard inasmuch as there are triable issues of fact whether defendants' abatement work was negligently performed, thereby leading to additional injuries after defendants received notice from the Erie County Department of Health (*see generally Pagan v Rafter*, 107 AD3d 1505, 1506-1507).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1239

CA 15-00592

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

VERLEY DAVIS, JR., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (JEREMY C. TOTH OF COUNSEL), FOR DEFENDANT-APPELLANT.

MUSCATO & SHATKIN, LLP, BUFFALO (MARC SHATKIN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered June 23, 2014 in a personal injury action. The order denied the motion of defendant Erie County Department of Social Services seeking to dismiss the complaint against it.

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: In an action seeking damages for injuries that plaintiff allegedly sustained while participating in the "Enrollment in Work Experience" program, Erie County Department of Social Services (defendant) appeals from an order denying its motion to dismiss the complaint against it on the ground that workers' compensation benefits are plaintiff's exclusive remedy. We conclude that Supreme Court erred in entertaining the motion. It is well settled that "primary jurisdiction with respect to determinations as to the applicability of the Workers' Compensation Law has been vested in the Workers' Compensation Board [(Board)] . . . [I]t is therefore inappropriate for the courts to express views with respect thereto pending determination by" the Board (*Botwinick v Ogden*, 59 NY2d 909, 911). "Where, as here, there is an issue of fact whether an injured plaintiff is an employee within the meaning of the Workers' Compensation Law, he or she 'may not choose the courts as the forum for the resolution' of that issue" (*McGee v Van Erden*, 66 AD3d 1426, 1427, quoting *O'Rourke v Long*, 41 NY2d 219, 228). Thus, the court "should not have entertained [defendant's] motion at this juncture, and the case should have been referred to the Board for a determination" whether plaintiff has a valid cause of action for damages or whether he is limited to benefits under the Workers' Compensation Law (*Gullo v Bellhaven Ctr. for Geriatric &*

Rehabilitative Care, Inc., 114 AD3d 905, 906-907). We therefore reverse the order and remit the matter to Supreme Court to determine the motion after final resolution of a prompt application to the Board to determine plaintiff's rights, if any, to workers' compensation benefits (*see McGee*, 66 AD3d at 1427).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1241

CA 15-00586

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

JACQUE R. GILLIS,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

RODNEY C. BROWN, DEBORAH A. BROWN AND
HALF DUTCH FARMS, A PARTNERSHIP,
DEFENDANTS-RESPONDENTS-APPELLANTS.

THE LAW OFFICE OF ALFRED PANICCIA, JR., BINGHAMTON (ALFRED PANICCIA, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

OSBORN, REED & BURKE, LLP, ROCHESTER (L. DAMIEN COSTANZA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Steuben County (Marianne Furfure, A.J.), entered February 11, 2015. The order, among other things, denied in part defendants' motion for summary judgment and denied plaintiff's cross motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in its entirety except insofar as the complaint alleges a violation of Labor Law § 240 (1) and dismissing the complaint to that extent, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when he fell from a height while securing roofing material to refurbished metal trusses on defendants' barn. At the time of his accident, plaintiff, who had climbed onto the wall header near the eave of the barn, put the weight of his legs on plywood that had been placed in the eave by defendants to block wind and precipitation, and the plywood shifted and fell, causing plaintiff to fall to the ground and sustain injuries. Following discovery, defendants moved for summary judgment dismissing the complaint, and plaintiff cross-moved for partial summary judgment on the issue of liability on his Labor Law § 240 (1) cause of action. Supreme Court granted the motion only to the extent that it sought summary judgment dismissing the Labor Law § 241 (6) cause of action based upon alleged violations of 12 NYCRR 23-1.5 (a), 12 NYCRR 23-1.22 (c) and 12 NYCRR 23-5.1, and denied the cross motion. We conclude that the court erred in denying the motion insofar as it sought summary judgment dismissing the section 241 (6)

cause of action in its entirety and dismissing the section 200 and common-law negligence causes of action, and we therefore modify the order accordingly.

Contrary to the parties' contentions, the court properly denied the motion and cross motion with respect to Labor Law § 240 (1) inasmuch as there are issues of fact whether plaintiff's actions were the sole proximate cause of his injuries (*see generally Gallagher v New York Post*, 14 NY3d 83, 88). Specifically, the evidence submitted by the parties conflicts on the issues whether a so-called "man-lift" was available on the work site for plaintiff's use in performing the injury-producing work, whether plaintiff knew he was expected to use that man-lift "but for no good reason chose not to do so," and whether the man-lift was an adequate safety device for the specific task plaintiff was performing at the time of his accident (*Banks v LPCiminelli, Inc.*, 125 AD3d 1334, 1335).

We further conclude that the court erred in denying the motion with respect to the Labor Law § 241 (6) cause of action insofar as it is based on an alleged violation of 12 NYCRR 23-1.7 (b) (1), which provides in pertinent part that "[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule)." Although that regulation is sufficiently specific to support liability under section 241 (6) (*see Lopez v Fahs Constr. Group, Inc.*, 129 AD3d 1478, 1479; *Frank v Meadowlakes Dev. Corp.*, 256 AD2d 1141, 1142), we conclude that the open space on either side of the header of the barn wall from which plaintiff fell is not the type of "hazardous opening" to which the regulation applies (*see Forschner v Jucca Co.*, 63 AD3d 996, 999). Because the court properly concluded that the other Industrial Code regulations on which plaintiff relies are either insufficiently specific or inapplicable to the facts of this case, defendants are entitled to summary judgment dismissing the section 241 (6) cause of action in its entirety.

Finally, we agree with defendants that the court erred in denying the motion insofar as it sought summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action. "It is settled law that where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under section 200 of the Labor Law" (*Lombardi v Stout*, 80 NY2d 290, 295). Defendants moving for summary judgment on Labor Law § 200 and common-law negligence causes of action may thus show their entitlement to summary judgment "by establishing that plaintiff's accident resulted from the manner in which the work was performed, not from any dangerous condition on the premises, and [that] defendants exercised no supervisory control over the work" (*Zimmer v Town of Lancaster Indus. Dev. Agency*, 125 AD3d 1315, 1316-1317). Here, defendants' placement of plywood along the eaves of the barn as a block to the elements was not a "defective condition;" instead, the alleged defect arose from plaintiff's methods or manner of performing the work. Because it is undisputed that defendants

exercised no supervisory control over the injury-producing work, defendants are also entitled to summary judgment dismissing the section 200 and common-law negligence causes of action (*see Lombardi*, 80 NY2d at 295).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1242

CA 15-00639

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

MARCELLA HAROLD, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SYLVESTER HAROLD, DEFENDANT-RESPONDENT.

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

JOHN P. PIERI, BUFFALO, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered July 30, 2014. The order, inter alia, denied that part of plaintiff's motion seeking equitable distribution of defendant's severance benefits.

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

Memorandum: By amended order to show cause and supporting affidavit, plaintiff wife moved for, inter alia, equitable distribution of severance benefits received by defendant husband after the entry of a judgment of divorce, and defendant cross-moved to modify the maintenance provisions of the judgment of divorce. Insofar as relevant to this appeal, Supreme Court denied that part of plaintiff's motion concerning severance benefits, granted defendant's cross motion, and ordered a hearing on the issue of maintenance.

Contrary to plaintiff's contention, the court did not abuse its discretion in denying that part of her motion seeking equitable distribution of defendant's severance benefits. The record establishes that, in March 2013, and approximately one year after the entry of the judgment of divorce, defendant lost his job and received a severance payment from his employer. Defendant subsequently used the entire severance payment to pay his own living expenses and to pay maintenance to plaintiff through December 2013. We conclude that the severance payments are defendant's separate property inasmuch as his "right to receive those payments did not exist either during the marriage or prior to the commencement of this action, nor did the severance payments constitute compensation for past services" (*Bink v Bink*, 55 AD3d 1244, 1245). In any event, even assuming, arguendo, that the severance payment was marital property, the court's determination was not an abuse of discretion inasmuch as plaintiff had already benefitted from the severance payment in the form of

maintenance (*see generally* Domestic Relations Law § 236 [B] [5] [c]; *Arvantides v Arvantides*, 64 NY2d 1033, 1034). We reject plaintiff's further contention that the court erred in denying her request for attorneys' fees she incurred in seeking equitable distribution of the severance payment. "The evaluation of what constitutes reasonable [attorneys'] fees is a matter within the sound discretion of the trial court" (*Rooney v Rooney* [appeal No. 3], 92 AD3d 1294, 1296, *lv denied* 19 NY3d 810 [internal quotation marks omitted]) and, given our determination concerning the severance payment, we perceive no abuse of the court's discretion here.

Plaintiff also contends that the court should have denied defendant's cross motion to modify maintenance. We reject that contention. Although defendant failed to include a sworn statement of net worth with his cross-moving papers as required by 22 NYCRR 202.16 (k) (2), we conclude that the court did not abuse its discretion in granting defendant's cross motion and ordering a hearing on the issue of maintenance inasmuch as the court would have the opportunity to consider the parties' relative financial circumstances at the hearing (*see generally People v Simmons*, 26 AD3d 883, 884; *Trento v Trento*, 226 AD2d 1104, 1105). Contrary to plaintiff's further contention, the court's order did not retroactively modify defendant's maintenance obligation.

In light of our determinations with respect to the above contentions, we do not address plaintiff's remaining contention concerning damages.

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1243

CA 15-00750

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

GARY MILITELLO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LANDSMAN DEVELOPMENT CORP., DEFENDANT-APPELLANT.

GOLDBERG SEGALLA, LLP, ROCHESTER (CAROL R. FINOCCHIO OF COUNSEL), FOR DEFENDANT-APPELLANT.

GALLO & IACOVANGELO, LLP, ROCHESTER (MICHAEL STEINBERG OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered February 11, 2015. The order, insofar as appealed from, granted the motion of plaintiff for partial summary judgment on liability pursuant to Labor Law § 240 (1) and denied that part of the cross motion of defendant seeking summary judgment dismissing plaintiff's Labor Law § 240 (1) cause of action.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law action seeking damages for injuries he sustained while working on a mobile scaffold. At the time of the accident, plaintiff was standing on the scaffold installing metal studs, hanging drywall, and applying insulation in a building owned by defendant and being renovated by plaintiff's employer, the general contractor. Just prior to the accident, plaintiff was on the scaffold with a screw gun to attach sheets of drywall. According to plaintiff, he pushed forward on the wall to apply a screw, whereupon the scaffold "skidded forward" toward the wall, he lost his balance, and then he fell backwards onto a "riser" of the scaffold that impaled him through the left buttock. Plaintiff was then hanging from the riser while his feet, which did not touch the floor, dangled off the end of the scaffold. Plaintiff never fell to the ground. Plaintiff moved for partial summary judgment on the issue of liability with respect to his Labor Law § 240 (1) cause of action. Defendant cross-moved for summary judgment dismissing the complaint, and plaintiff's attorney advised Supreme Court that plaintiff would not oppose the dismissal of his causes of action pursuant to Labor Law §§ 200 and 241 (6). The court thereafter granted the motion, granted the cross motion with respect to Labor Law §§ 200 and 241 (6), and denied the cross motion with respect to Labor

Law § 240 (1).

Contrary to defendant's initial contention, " 'Labor Law § 240 (1) applies to this accident because it was caused by the failure of a scaffold while plaintiff was working at a height, even though plaintiff did not fall to the ground' " (*Franklin v Dormitory Auth. of State of N.Y.*, 291 AD2d 854, 854). We agree with defendant, however, that the court erred in granting the motion, and we therefore modify the order accordingly. Plaintiff's own submissions raised triable "[i]ssues of fact . . . whether the scaffold from which [plaintiff] fell provided proper protection and whether [plaintiff's] failure to lock the wheels underneath the scaffold was the [sole] proximate cause of the accident" (*Erdman v Dell*, 50 AD3d 627, 628). Furthermore, "[t]he divergent accounts of the accident set forth in plaintiff's papers create triable issues of fact concerning the manner in which the accident occurred" (*Salotti v Wellco, Inc.*, 273 AD2d 862, 862-863; *see Sims v City of Rochester*, 115 AD3d 1355, 1356). Although plaintiff stated in response to interrogatories that the scaffold "suddenly and without warning" skidded when he was applying a screw to the wall—a statement that is not inconsistent with his deposition testimony—his coworker testified that plaintiff told him after the accident that he was moving the scaffold before he lost his balance and fell on the riser. "The two different versions of the accident . . . create questions of fact as to the adequacy of the protective device and as to [plaintiff's] credibility," thereby precluding summary judgment (*Castronovo v Doe*, 274 AD2d 442, 443).

Contrary to defendant's further contention, the court properly denied that part of its cross motion seeking to dismiss the cause of action pursuant to Labor Law § 240 (1). Defendant's submissions on the cross motion did not establish as a matter of law that plaintiff's actions were "the sole proximate cause of [plaintiff's] injuries" (*Wonderling v CSX Transp., Inc.*, 34 AD3d 1244, 1245-1246).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1246

CA 14-01443

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

IN THE MATTER OF ELVIS CASTILLO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

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

Appeal from an amended judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered April 16, 2014 in a proceeding pursuant to CPLR article 78. The amended judgment dismissed the petition.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 challenging respondent's denial of two inmate grievances he filed while he was incarcerated at Attica Correctional Facility and Upstate Correctional Facility. Because petitioner failed to exhaust his administrative remedies, Supreme Court properly dismissed the petition. "It is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law" (*Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57; *see Matter of Bennefield v Annucci*, 122 AD3d 1329, 1331). Moreover, there is no basis in the record for us to conclude that exhaustion is not required because "pursuit of the administrative [process] would have been futile" (*People ex rel. Martinez v Beaver*, 8 AD3d 1095, 1095).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1250

KA 14-00339

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICKEY F. DILLEY, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES 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 Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered January 21, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal contempt in the first degree (Penal Law § 215.51 [b] [v]), defendant contends that his waiver of the right to appeal is unenforceable and that his sentence is unduly harsh and severe. Although we agree with defendant that the waiver of the right to appeal does not encompass his challenge to the severity of his sentence "inasmuch as there is no indication in the record of the plea allocution that defendant was waiving his right to appeal the severity of the sentence[]" (*People v Doblinger*, 117 AD3d 1484, 1485; *see People v Maracle*, 19 NY3d 925, 928), we nevertheless perceive no basis in the record to disturb the sentence. We note that defendant has two prior felony convictions and showed no remorse for his conduct in this case.

We reject defendant's further contention that Supreme Court misstated the facts at sentencing by stating that "this was a very violent event" and that defendant presented "serious safety concerns" for the victim and the community at large. According to the presentence report, which the court reviewed prior to sentencing, the victim stated that defendant yanked her by the hair and caused her head to strike the wall. In her victim impact statement, the victim stated that her "head was split open from [her] left temple to the middle of the top of [her] skull," and that she needed 35 staples and 27 stitches to close the wound. Although defendant told the police

that the victim lost her balance when she “came swinging” at him and then struck her head on the wall, the court was not obligated to accept defendant’s exculpatory version of the incident.

Finally, defendant contends that the court, in setting the expiration date of the orders of protection, failed to give him credit for the time he had served in jail on the charge herein. That contention is unpreserved for our review (*see* CPL 470.05 [2]) and, in any event, it is without merit inasmuch as CPL 530.12 (5) (A) (i) authorized the court to fix the duration of the orders of protection at eight years from the date of sentencing.

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1256

CAF 14-01537

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

IN THE MATTER OF DA'SHUNNA M.H., LILLIANNA E.H.,
AND DE'ANDRE W.H.

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

DELBERT W.H., RESPONDENT-APPELLANT,
AND NICOLE E.H., RESPONDENT.

DELBERT W.H., RESPONDENT-APPELLANT PRO SE.

MICHAEL D. WERNER, WATERTOWN, FOR PETITIONER-RESPONDENT.

RUTHANNE G. SANCHEZ, ATTORNEY FOR THE CHILD, WATERTOWN.

KIMBERLY A. WOOD, ATTORNEY FOR THE CHILD, WATERTOWN.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered August 18, 2014 in a proceeding pursuant to Family Court Act article 10. The order, among other things, sentenced respondent Delbert W.H. to five weekends in the Jefferson County Jail for his willful violation of an order of protection.

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

Memorandum: Delbert W.H. (respondent) appeals from an order determining that he willfully violated an order of protection issued in favor of his son De'Andre. Family Court credited the testimony of De'Andre, who described respondent's intentional contact with him, and rejected the testimony of respondent's alibi witness. "According deference to that credibility determination, as we must, we conclude that petitioner established by clear and convincing evidence that [respondent] willfully violated the . . . order of protection" (*Matter of Duane H. v Tina J.*, 66 AD3d 1148, 1149; *see Matter of Kimberly A.K. v Ronald F.G.*, 266 AD2d 835, 835, *lv denied* 94 NY2d 761).

Respondent further contends that the court erred in precluding him from impeaching De'Andre's testimony with two reports of prior sexual abuse that petitioner determined to be unfounded. That contention lacks merit. Social Services Law § 422 (5) (b) (i) allows such reports to be introduced into evidence "by the subject of the report where such subject is a respondent in a proceeding" pursuant to

Family Court Act article 10, and the reports therefore could have been introduced if they were relevant to the proceeding. Respondent concedes, however, that the prior reports of abuse, which were not made by De'Andre, were determined to be unfounded in part because De'Andre had asserted that no abuse had occurred. Thus, contrary to respondent's contention, the unfounded reports were not relevant to De'Andre's credibility or to any other issue, and the court thus properly refused to allow respondent to introduce them into evidence. Further, inasmuch as those unfounded reports were not admissible, respondent's counsel was not ineffective in failing to articulate the statutory basis for their admission.

Finally, we reject respondent's contention that he was denied effective assistance of counsel by counsel's failure to conduct a redirect examination of his alibi witness about an alleged inaccuracy in the testimony of that witness on cross-examination. Respondent made no showing that his alibi witness's testimony was inaccurate or that counsel's redirect examination would have elicited testimony favorable to respondent. Therefore, respondent's 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; *see also Matter of Amodea D. [Jason D.]*, 112 AD3d 1367, 1368).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1257

CAF 14-01014

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

IN THE MATTER OF BRANDON P. SAUNDERS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JENNIFER M. STULL, RESPONDENT-APPELLANT.

LAW OFFICE OF WENDY LEE GOULD, BATH (RUTH A. CHAFFEE OF COUNSEL), FOR RESPONDENT-APPELLANT.

SHULTS AND SHULTS, HORNELL (JOAN MERRY OF COUNSEL), FOR PETITIONER-RESPONDENT.

LYLE T. HAJDU, ATTORNEY FOR THE CHILD, LAKEWOOD.

Appeal from an order of the Family Court, Steuben County (Gerard J. Alonzo, Jr., J.H.O.), entered May 16, 2014 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner sole custody of the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that, inter alia, granted petitioner father sole custody of the parties' child, with visitation to the mother. The mother contends that Family Court did not give proper consideration to the father's history of domestic violence. We reject that contention. The record establishes that the court fully considered the evidence that the father committed an act of domestic violence against the mother (*see* Domestic Relations Law § 240 [1] [a]; *Matter of LaMay v Staves*, 128 AD3d 1485, 1486), and we agree with the court that it is in the child's best interests to remain in the custody of the father despite the evidence of domestic violence (*see LaMay*, 128 AD3d at 1486; *Matter of Booth v Booth*, 8 AD3d 1104, 1105, *lv denied* 3 NY3d 607; *see also Matter of Viscuso v Viscuso*, 129 AD3d 1679, 1681-1682).

Contrary to the mother's further contentions, the court properly determined that an award of sole custody to the father was in the child's best interests. " 'Generally, a court's determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless

it lacks an evidentiary basis in the record' " (*Matter of Dubuque v Bremiller*, 79 AD3d 1743, 1744). Here, the court's determination that the father is better able to provide for the child's needs is supported by a sound and substantial basis in the record and thus will not be disturbed (*see Matter of Flint v Ely*, 96 AD3d 1681, 1682; *Matter of Fox v Coleman*, 93 AD3d 1187, 1188). Although the award of sole custody to the father will limit the amount of time the child will spend with his half-siblings, and "sibling relationships should not be disrupted unless there is some overwhelming need to do so" (*Matter of O'Connell v O'Connell*, 105 AD3d 1367, 1368 [internal quotation marks omitted]), we note that the visitation schedule fashioned by the court is a countervailing benefit inasmuch as the child will be able to spend a substantial amount of time with his half-siblings during the summer (*see generally id.* at 1368-1369). Moreover, we conclude that sole custody to the father is the most appropriate result in this case in light of the evidence at the hearing that the mother was attempting to exclude the father from the child's life while the father was willing to foster a relationship between the child and the mother (*see Matter of McTighe v Pearl*, 8 AD3d 951, 951-952, *lv dismissed* 4 NY3d 739; *Matter of Erck v Erck*, 147 AD2d 921, 921-922; *see generally Matter of Koch v Koch*, 121 AD3d 1201, 1203).

The mother further contends that the court erred in determining that portions of her hearing testimony were not credible. We reject that contention. The court's " 'determination regarding the credibility of witnesses is entitled to great weight on appeal, and will not be disturbed if supported by the record' " (*Matter of Burke H. [Tiffany H.]*, 117 AD3d 1568, 1568), and we conclude that the court's credibility determinations are supported by the record.

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1265

CA 15-00693

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

GEORGE J. ROBERTS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL J. ANDERSON, MICHAEL SCHRADER AND TOWN OF AMHERST, DEFENDANTS-RESPONDENTS.

SHAW & SHAW, P.C., HAMBURG (JACOB A. PIORKOWSKI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered December 23, 2014. The order, among other things, granted the motion of defendants for summary judgment and dismissed 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 when he was struck by the wing blade of a snowplow while he was clearing snow from his driveway. The snowplow was operated by defendants Michael J. Anderson and Michael Schrader, who were employed by defendant Town of Amherst. We conclude that Supreme Court properly granted defendants' motion for summary judgment dismissing the complaint. Defendants established in support of their motion that Anderson and Schrader were clearing snow from the road in front of plaintiff's driveway, and they thus met their initial burden of establishing that the snowplow was a vehicle "actually engaged in work on a highway" that was exempt from the rules of the road except to the extent that those operating the snowplow acted with "reckless disregard for the safety of others" (Vehicle and Traffic Law § 1103 [b]; *see Riley v County of Broome*, 95 NY2d 455, 462-463; *Catanzaro v Town of Lewiston*, 73 AD3d 1449, 1449). Defendants further established that Anderson and Schrader took several safety precautions before reversing the snowplow, including checking both side mirrors and sounding the horn as a warning, as well as ensuring that the snowplow's backup lights and "beeping" alert were activated while the vehicle was traveling in reverse at a slow speed. Schrader, whose view was partially obstructed by the snowplow's raised wing blade, nevertheless informed Anderson that he was clear to reverse the snowplow, and he failed to warn Anderson of plaintiff's presence in

the street just beyond the apron of the driveway. We conclude that defendants established that the conduct of Anderson and Schrader in striking plaintiff with the snowplow "did not rise to the level of recklessness required for the imposition of liability" (*Ferreri v Town of Penfield*, 34 AD3d 1243, 1243; *see Primeau v Town of Amherst*, 17 AD3d 1003, 1003-1005, *affd* 5 NY3d 844; *Catanzaro*, 73 AD3d at 1449). Plaintiff failed to raise a triable issue of fact in opposition to the motion (*see Catanzaro*, 73 AD3d at 1449; *Ferreri*, 34 AD3d at 1243-1244).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1266

CA 14-02242

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

JEFFREY WEBB, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

THOMAS S. SCANLON, M.D., FACP,
DEFENDANT-RESPONDENT.

JUSTIN S. WHITE, WILLIAMSVILLE, FOR PLAINTIFF-APPELLANT.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (J. MARK GRUBER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered September 29, 2014. The order granted the motion of defendant for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this medical malpractice action alleging that defendant, his primary care physician, was negligent in prescribing him various pain medications to treat pain that plaintiff reported experiencing in his arm and shoulder. Although plaintiff admits that he falsified symptoms so that he could obtain the pain medication prescriptions from defendant, the complaint, as amplified by the bill of particulars, alleges, inter alia, that defendant should have performed diagnostic testing to determine whether plaintiff actually needed the medications. We conclude that Supreme Court properly granted defendant's motion for summary judgment dismissing the complaint.

In order to meet his initial burden on his summary judgment motion in this medical malpractice action, defendant was required to "present factual proof, generally consisting of affidavits, deposition testimony and medical records, to rebut the claim of malpractice by establishing that [he] complied with the accepted standard of care or did not cause any injury to the patient" (*Cole v Champlain Val. Physicians' Hosp. Med. Ctr.*, 116 AD3d 1283, 1285; *see Lake v Kaleida Health*, 59 AD3d 966, 966). A defendant physician may submit his or her own affidavit to meet that burden, but that affidavit must be "detailed, specific and factual in nature" (*Toomey v Adirondack Surgical Assoc.*, 280 AD2d 754, 755; *see Cole*, 116 AD3d at 1285), and must "address each of the specific factual claims of negligence raised in [the] plaintiff's bill of particulars" (*Wulbrecht v Jehle*, 89 AD3d

1470, 1471 [internal quotation marks omitted]).

Here, in support of his motion, defendant submitted plaintiff's deposition testimony in which plaintiff admitted that he lied to defendant about his subjective complaints of pain in order to "manipulate[defendant] into prescribing drugs" for him. Defendant also submitted his own affidavit, with accompanying medical records, wherein he described his physical examinations of plaintiff and plaintiff's complaints of pain and reduced range of motion. Defendant opined that his treatment of plaintiff complied with the accepted standard of medical care because he performed physical examinations when they were called for, plaintiff was instructed on the medication's proper use when prescribed, and the medications were properly prescribed based upon plaintiff's history, his complaints, and the physical examinations performed by defendant and other physicians. Defendant's affidavit was sufficiently detailed and specific, and defendant thus established his entitlement to judgment as a matter of law (*see Suib v Keller*, 6 AD3d 805, 806; *Toomey*, 280 AD2d at 755). In order to raise an issue of fact to defeat defendant's motion, plaintiff was required to submit "evidentiary facts or materials to rebut the prima facie showing by the defendant physician" beyond mere "[g]eneral allegations of medical malpractice" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324-325). It is well settled that "[e]xpert opinion evidence from a party defendant in a medical malpractice action which is otherwise sufficient to show entitlement to summary judgment 'requires some expert response from plaintiff on the question of alleged deviation from proper and approved medical practice' " (*Maust v Arseneau*, 116 AD2d 1012, 1012; *see Bills v Africano*, 132 AD2d 935, 935). Here, plaintiff failed to submit the requisite expert medical response in opposition to the motion (*see Maust*, 116 AD2d at 1012; *see also Brown v Soldiers & Sailors Mem. Hosp.*, 193 AD2d 1077, 1078), and "[t]he affidavit of plaintiff's attorney was insufficient to raise a triable issue of fact" (*Bills*, 132 AD2d at 935).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1267

CA 15-00380

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

ADAM GIACOMETTI, PLAINTIFF-RESPONDENT-APPELLANT,

V ORDER

JACOB B. FARRELL, COUNTY OF ERIE, TIMOTHY B. HOWARD, IN HIS CAPACITY AS ERIE COUNTY SHERIFF, DEPUTY THOMAS WAS, BUFFALO BILLS INC., DEFENDANTS-RESPONDENTS-RESPONDENTS, ET AL., DEFENDANTS.
(ACTION NO. 1.)

COUNTY OF ERIE AND BUFFALO BILLS INC., THIRD-PARTY PLAINTIFFS,

V

CONTEMPORARY SERVICES CORPORATION AND EXECUTIVE SECURITY MANAGEMENT, INC. DOING BUSINESS AS THE APEX GROUP, THIRD-PARTY DEFENDANTS.

ADAM GIACOMETTI, PLAINTIFF-RESPONDENT-APPELLANT,

V

CONTEMPORARY SERVICES CORPORATION, DEFENDANT, AND EXECUTIVE SECURITY MANAGEMENT, INC. DOING BUSINESS AS THE APEX GROUP, DEFENDANT-APPELLANT-RESPONDENT.
(ACTION NO. 2.)
(APPEAL NO. 1.)

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

SMITH, MINER, O'SHEA & SMITH, LLP, BUFFALO (CARRIE L. SMITH OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (TROY S. FLASCHER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-RESPONDENTS COUNTY OF ERIE AND BUFFALO BILLS INC.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered June 30, 2014. The order, among other things, granted the motion of defendants County of Erie

and Buffalo Bills Inc. for summary judgment dismissing the complaint and cross claims against them and denied in part the cross motion of defendant Executive Security Management, Inc. doing business as The Apex Group, for summary judgment.

It is hereby ORDERED that said appeal and cross appeal are unanimously dismissed without costs (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1268

CA 15-00381

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

ADAM GIACOMETTI, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

JACOB B. FARRELL, COUNTY OF ERIE, TIMOTHY B. HOWARD, IN HIS CAPACITY AS ERIE COUNTY SHERIFF, DEPUTY THOMAS WAS, BUFFALO BILLS INC., DEFENDANTS-RESPONDENTS-RESPONDENTS, ET AL., DEFENDANTS.
(ACTION NO. 1.)

COUNTY OF ERIE AND BUFFALO BILLS INC., THIRD-PARTY PLAINTIFFS,

V

CONTEMPORARY SERVICES CORPORATION AND EXECUTIVE SECURITY MANAGEMENT, INC. DOING BUSINESS AS THE APEX GROUP, THIRD-PARTY DEFENDANTS.

ADAM GIACOMETTI, PLAINTIFF-RESPONDENT-APPELLANT,

V

CONTEMPORARY SERVICES CORPORATION, DEFENDANT, AND EXECUTIVE SECURITY MANAGEMENT, INC. DOING BUSINESS AS THE APEX GROUP, DEFENDANT-APPELLANT-RESPONDENT.
(ACTION NO. 2.)
(APPEAL NO. 2.)

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

SMITH, MINER, O'SHEA & SMITH, LLP, BUFFALO (CARRIE L. SMITH OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (TROY S. FLASCHER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-RESPONDENTS COUNTY OF ERIE AND BUFFALO BILLS INC.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered October 21, 2014. The order, among other things, granted the motions of plaintiff and defendant

Executive Security Management, Inc. doing business as The Apex Group, for leave to reargue and, upon reargument, the court adhered to its prior determination.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion of defendants County of Erie and Buffalo Bills Inc. for summary judgment dismissing the complaint against them and reinstating the complaint against those defendants, and denying that part of the cross motion of defendant Executive Security Management, Inc. doing business as the Apex Group, for summary judgment dismissing the complaint to the extent that plaintiff alleges that its employees were negligent or reckless in pursuing defendant Jacob B. Farrell and reinstating the complaint against that defendant in its entirety, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced these actions seeking damages for injuries sustained when he was struck by a vehicle driven by defendant Jacob B. Farrell. The accident occurred while plaintiff was walking from a parking lot to an adjacent stadium to watch a football game. The parking lot was owned by defendant County of Erie (County) and leased by defendant Buffalo Bills Inc. (Bills). The Bills contracted with defendant Executive Security Management, Inc. doing business as the Apex Group (Apex), to provide security in the parking lot on days when football games were played in the stadium. According to plaintiff and several eyewitnesses, employees of Apex were in pursuit of Farrell's vehicle at the time of the accident and, immediately before striking plaintiff, Farrell's vehicle swerved to avoid a burning log that was partially obstructing a lane in the parking lot.

The County and the Bills (hereafter, Bills defendants) moved for, inter alia, summary judgment dismissing the complaint against them, and Apex cross-moved for, inter alia, summary judgment dismissing the complaint against it. Apex appeals and plaintiff cross-appeals from an order that, inter alia, upon reargument adhered to a prior determination granting that part of the motion of the Bills defendants for summary judgment dismissing the complaint against them, and granting that part of Apex's cross motion for summary judgment dismissing the complaint against it to the extent that plaintiff alleges that its employees were negligent or reckless in pursuing Farrell. Apex contends on appeal that Supreme Court erred in failing to grant its cross motion in its entirety and that the court erred in granting the motion of the Bills defendants, and plaintiff contends on his cross appeal that the court erred in granting the motion of the Bills defendants and in granting Apex's cross motion in part. We agree with Apex and plaintiff that the court erred in granting the motion of the Bills defendants, and we agree with plaintiff that the court erred in granting Apex's cross motion in part. We therefore modify the order accordingly.

Addressing first the cross motion of Apex, we note that Apex contends that the court erred in refusing to grant the cross motion in its entirety because plaintiff improperly asserted a new theory of

liability in opposition to the cross motion for summary judgment by submitting the affidavit of a nonparty witness who asserted that, prior to the accident, Farrell was involved in a fight, taken into custody by Apex employees, and then released by Apex. We reject that contention, inasmuch as the affidavit did not assert a new theory of liability. Rather, the affidavit provided support for plaintiff's allegations in the complaint and bill of particulars that Apex negligently failed to furnish adequate security and crowd control in the parking lot (*cf. Darrisaw v Strong Mem. Hosp.*, 16 NY3d 729, 731). Contrary to Apex's further contention, the nonparty witness's identification of Farrell as the person in the custody of Apex employees was in admissible form inasmuch as the statement of a witness that he or she "subsequently learned [another party's] name does not constitute inadmissible hearsay" (*People v Cedeno*, 252 AD2d 307, 310, *lv dismissed* 93 NY2d 1015). Apex also contends that the affidavit of the nonparty witness was not properly before the court because plaintiff had previously failed to disclose the name of the nonparty witness. We reject that contention. There is no evidence in the record that the failure to disclose the name of the witness was " 'the result of willful, deliberate, and contumacious conduct' . . . , or [that] the moving party [was] prejudiced by the late disclosure" (*McLeod v Taccone*, 122 AD3d 1410, 1412). Contrary to Apex's contention, we conclude that the court properly determined that there are triable issues of fact whether Apex was negligent in allowing the burning log to partially obstruct the lane in the parking lot (*see O'Neill v City of Port Jervis*, 253 NY 423, 431-432; *DiNatale v State Farm Mut. Auto. Ins. Co.*, 5 AD3d 1123, 1125, *lv denied* 3 NY3d 607), and whether that negligence was a proximate cause of the accident (*see DiNatale*, 5 AD3d at 1125; *Fonzi v Beishline*, 270 AD2d 912, 913).

Also with respect to the cross motion, we agree with plaintiff on his cross appeal that Apex did not establish as a matter of law that its employees were not negligent or reckless in their pursuit of Farrell through the parking lot, and that the court therefore erred in granting the cross motion of Apex to that extent. Apex submitted evidence that Farrell was intoxicated and was driving too quickly for the conditions in the crowded parking lot, but Apex failed to submit any evidence that would establish that the conduct of its employees during the pursuit of Farrell "was reasonable and did not show a reckless disregard for the safety of others as a matter of law" (*Friel v Town of Brighton*, 206 AD2d 863, 863; *see generally Palella v State of New York*, 141 AD2d 999, 1000).

With respect to the motion of the Bills defendants, we agree with Apex and plaintiff that the Bills defendants failed to establish as a matter of law that they satisfied their duty to maintain a safe premises. We thus conclude that the court erred in granting that part of their motion for summary judgment dismissing the complaint against them. Although the Bills contracted with Apex to provide security in the parking lot, we conclude that the Bills defendants are "vicariously liable for [Apex's] negligence based on [their] nondelegable duty to keep the premises safe" (*Gerbino v Tinseltown USA*, 13 AD3d 1068, 1071; *see Thomassen v J & K Diner*, 152 AD2d 421,

424, *appeal dismissed* 76 NY2d 771, *rearg denied* 76 NY2d 889).

We further conclude that the Bills defendants failed to establish as a matter of law that Apex had entirely displaced their duty to maintain the premises safely. "[A] party who enters into a contract to render services may be said to have assumed a duty of care--and thus be potentially liable in tort--to third persons . . . where[, inter alia,] the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140). Although the Bills defendants submitted the deposition testimony of the vice president of Apex in which he stated that Apex was responsible for security in the parking lot, the Bills defendants also submitted the Bills' contract with Apex, which provided that Apex would follow guidelines and procedures promulgated by the Bills and that the Bills "reserve[d] the right to utilize its own employees to provide security services." The Bills defendants further submitted evidence that an employee of the Bills drafted a Stadium Guide that was distributed to all Apex employees as a handbook; the Bills held briefings for Apex employees before every football game; the Bills determined Apex's staffing levels; and the Bills determined where Apex employees would be stationed in the parking lot. Moreover, the Bills defendants submitted the deposition testimony of the Bills' former director of operations and event services, who testified that he instructed Apex to concentrate on "underage drinking or other rowdiness type issues" in the parking lot. They also submitted the deposition testimony of a person employed by Apex as a security guard, who testified that removing the burning log from the roadway "wasn't high on our priority list" because security personnel was focused on "underage drinking and just drunk, obnoxious fans." On this record, the Bills defendants failed to meet their burden of establishing as a matter of law that Apex had "entirely absorb[ed]" the duty to maintain safe conditions on the subject premises (*id.* at 141; *see Rahim v Sottile Sec. Co.*, 32 AD3d 77, 82).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court