SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JUNE 29, 2018

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. BRIAN F. DEJOSEPH

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

1207

KA 16-02210

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

M. ROBERT NEULANDER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

SHAPIRO ARATO LLP, NEW YORK CITY (ALEXANDRA A.E. SHAPIRO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered July 30, 2015. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and tampering with physical evidence.

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

Memorandum: These consolidated appeals arise from the death of defendant's wife in 2012. In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and tampering with physical evidence (§ 215.40 [2]). In appeal No. 2, defendant appeals from an order denying his CPL article 440 motion to vacate the judgment of conviction.

In appeal No. 1, defendant contends that the conviction is not supported by legally sufficient evidence and that the verdict is contrary to the weight of the evidence with respect to both counts. "Inasmuch as defendant made only a general motion for a trial order of dismissal [with respect to the murder count], he failed to preserve for our review his challenge to the legal sufficiency of the evidence" with respect to that count (*People v Taylor*, 136 AD3d 1331, 1332 [4th Dept 2016], *lv denied* 27 NY3d 1075 [2016]; *see People v Gray*, 86 NY2d 10, 19 [1995]). In any event, we conclude that defendant's contention lacks merit with respect to both counts. "It is well settled that, even in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the [jury] on the basis of the evidence at trial, viewed in the light most favorable to the People" (*People v*

Hines, 97 NY2d 56, 62 [2001], *rearg denied* 97 NY2d 678 [2001] [internal quotation marks omitted]; *see People v Reed*, 22 NY3d 530, 534 [2014], *rearg denied* 23 NY3d 1009 [2014]; *see generally People v Danielson*, 9 NY3d 342, 349 [2007]).

Here, the evidence establishes that the victim died of a complex, comminuted skull fracture. The Medical Examiner testified at trial that he initially determined that the victim's death was the result of a fall in the shower. The Medical Examiner further testified, however, that he changed his opinion after reviewing the evidence and discussing the case with other pathologists and the prosecution, and that he now opined that the victim's death was a homicide. In addition, the prosecution introduced the testimony of several experts who opined that the victim's head injury was caused by multiple blows, and by more force than would be expected if the victim had simply fallen from a standing position in the shower. The prosecution further established that the victim sustained numerous other injuries that could not be explained by a simple fall, including bruises on her nose, fingers and arms and abrasions on both sides of her face. Also, the hallway and bedroom into which defendant admitted that he carried the victim contained numerous blood spatters on various surfaces and objects, including some spatters on a sloped ceiling over six feet above the ground.

The prosecution's experts opined that the evidence was consistent with the prosecution's theory of the case that defendant intentionally attacked the victim, hit her in the head several times with an unknown object, moved her body to the shower to make it appear that the injuries were caused by an accident that occurred at that location, and then woke his daughter so that she could observe him moving the victim's body back to her bedroom. The prosecution also introduced evidence establishing that defendant disposed of an item of clothing that he was wearing at the time of the incident and several pieces of bedding, which, along with the evidence that defendant moved the victim's body, supported the inference that defendant was acting to conceal evidence of the crime. We conclude that, viewing the evidence in the light most favorable to the People, there is a "valid line of reasoning and permissible inferences [that] could lead a rational person to the conclusion reached by the [factfinder] on the basis of the evidence at trial" (*People v Williams*, 84 NY2d 925, 926 [1994]; *see Danielson*, 9 NY3d at 349), and thus that the evidence is legally sufficient with respect to both counts of the indictment (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see Danielson*, 9 NY3d at 349), we reject defendant's contention in appeal No. 1 that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). "Even assuming, arguendo, that a different verdict would not have been unreasonable, [we note that] 'the jury was in the best position to assess the credibility of the witnesses and, on this record, it cannot be said that the jury failed to give the evidence the weight it should be accorded' " (*People v Chelley*, 121 AD3d 1505, 1506 [4th Dept 2014], *lv denied* 24 NY3d 1218 [2015], *reconsideration*

denied 25 NY3d 1070 [2015]). Contrary to defendant's contention, the testimony of his experts, who opined that the evidence was consistent with the defense theory that the victim accidentally slipped and fell in the shower, does not require a different result. "The jury was presented with conflicting expert testimony regarding the cause of death, and the record supports its decision to credit the People's expert testimony" (*People v Fields*, 16 AD3d 142, 142 [1st Dept 2005], *lv denied* 4 NY3d 886 [2005]; *see People v Pratcher*, 134 AD3d 1522, 1525 [4th Dept 2015], *lv denied 27* NY3d 1154 [2016]; *see generally People v Miller*, 91 NY2d 372, 380 [1998]).

Defendant further contends in appeal No. 1 that the court abused its discretion in denying his motion to set aside the verdict pursuant to CPL 330.30 (2) based on allegations of juror misconduct. We agree with defendant, and we therefore reverse the judgment in appeal No. 1, grant the motion and grant a new trial.

CPL 330.30 (2) provides that a verdict may be set aside on the ground "[t]hat during the trial there occurred, out of the presence of the court, improper conduct by a juror, or improper conduct by another person in relation to a juror, which *may* have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict" (emphasis added). Upon a hearing pursuant to CPL 330.30, "the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion" (CPL 330.40 [2] [g]). When determining a motion to set aside a jury verdict based upon juror misconduct, "the facts must be examined to determine . . . the likelihood that prejudice would be engendered" (*People v Brown*, 48 NY2d 388, 394 [1979]; *see People v Maragh*, 94 NY2d 569, 573-574 [2000]). Thus, similar to the statutory language in CPL 210.35 (5) with respect to a motion to dismiss an indictment based upon a defect in the grand jury proceedings (*see People v Huston*, 88 NY2d 400, 409 [1996]; *People v Sayavong*, 83 NY2d 702, 709-711 [1994]), the plain language of CPL 330.30 (2) does not require a defendant to establish actual prejudice.

We begin by noting that, at the hearing on the CPL 330.30 motion, defendant established that during the trial juror number 12 engaged in text messaging with third parties about the trial. Indeed, after being selected to serve on the jury, juror number 12 received a text message from her father that stated: "Make sure he's guilty!" During the trial, juror number 12 received a text message from a friend asking if she had seen the "scary person" yet. Juror number 12 responded: "I've seen him since day 1." Juror number 12 admitted at the subsequent hearing into her misconduct that she knew that the moniker "scary person" was a reference to defendant. Another friend sent juror number 12 a text message during the trial that stated: "I'm so anxious to hear someone testify against Jenna [defendant's daughter]." Juror number 12 responded: "No one will testify against her! The prosecution has already given all of his witnesses, we are on the defense side now! The prosecutor can cross examine her once she is done testifying for the defense." Later that night, the same friend replied via text message: "My mind is blown that the daughter [Jenna] isn't a suspect." Although instructed by the court numerous

times to report any such communication to the court, juror number 12 repeatedly failed to do so.

After the verdict, a discharged alternate juror reported to defense counsel that juror number 12 had engaged in prohibited communications during the trial. Defendant moved pursuant to CPL 330.30 (2) to set aside the verdict on the ground of juror misconduct that was not known by defendant prior to the verdict. During the prosecution's preparation of its opposition to the motion, the prosecution met with juror number 12 but she did not disclose any of the above improper communications to the prosecutor, although this clearly was an opportunity to do so. Indeed, juror number 12 specifically provided some innocuous text messages as attachments to her affidavit in opposition to the motion. The improper text messages, however, were not provided to the prosecution or the court and were in fact deleted by juror number 12 some time before she was ordered to turn over her phone for forensic examination. Notably, juror number 12 stated *under oath* in her affidavit in opposition to defendant's motion that: "At all times throughout the trial and throughout the deliberative process I followed Judge Miller's instructions." This statement was patently untruthful. Moreover, when juror number 12's cell phone was the subject of a judicial subpoena duces tecum, she moved to quash the subpoena.

Forensic examination of her cell phone revealed that juror number 12 had selectively deleted scores of messages or parts thereof and that she had deleted her entire web browsing history. At the hearing, juror number 12 was unable to provide any explanation for why she had done that. Indeed, the trial court found that her selective deletion of certain text messages demonstrated "a consciousness that she had engaged in misconduct, in violation of the Court's admonitions." The trial court further concluded that "[i]t is worthy of note that Juror #12 deleted other messages which demonstrated that she understood the prohibition on speaking about this case with third parties." Nonetheless, the trial court concluded that there was no basis in the record to find a likelihood that juror number 12's "missteps, individually or collectively, created a substantial risk of prejudice to the defendant."

We observe that, had this juror's misconduct been discovered during voir dire or during the trial, rather than after the verdict, the weight of authority under CPL 270.35 would have compelled her discharge on the ground that she was grossly unqualified and/or had engaged in misconduct of a substantial nature (*see People v Havner*, 19 AD3d 508, 508 [2d Dept 2005], *lv denied* 5 NY3d 789 [2005] ["the trial court properly discharged a juror pursuant to CPL 270.35 after determining, based on a thorough inquiry, that the juror had disregarded its instructions by discussing the case outside the courtroom and then lied when questioned about the substance of the discussion"]; *People v Pineda*, 269 AD2d 610, 611 [2d Dept 2000], *lv denied* 95 NY2d 802 [2000]; *People v Robertson*, 217 AD2d 989, 990 [4th Dept 1995], *lv denied* 86 NY2d 846 [1995]; *People v Fox*, 172 AD2d 218, 219-220 [1st Dept 1991], *lv denied* 78 NY2d 966 [1991]). Here, due to juror number 12's flagrant failure to follow the court's instructions

and her concealment of that substantial misconduct, defendant, through no fault of his own, was denied the opportunity to seek her discharge during trial on the ground that she was grossly unqualified and/or had engaged in substantial misconduct.

We reject our dissenting colleagues' attempt to characterize this as a "speculative discussion of what might have happened if the juror's misconduct had been discovered earlier." Our focus is not on the time of discovery of the misconduct. Instead, our focus is juror number 12's failure to follow the court's instructions, her failure to report her own misconduct and the improper communications that she received from others, and her concealment of that misconduct and the improper communications, evidencing a consciousness that she had engaged in misconduct, which denied defendant the *opportunity* to pursue a remedy under CPL 270.35. Under the dissent's approach, a juror's flagrant disregard of court rules and admonitions and her active concealment of her own misconduct becomes "speculative" in the context of a CPL 330.30 motion because the juror was successful in deliberately concealing and withholding the misconduct from the court and defendant until after the verdict. We conclude that there is nothing speculative about the denial of defendant's substantial right and concrete *opportunity* to pursue a remedy under CPL 270.35 based on the juror misconduct that is patent on this record.

Even assuming, arguendo, that the court was correct in determining that juror number 12's "intentions were pure," we conclude that the juror's intentions are not relevant to the analysis. "[E]ven well-intentioned jury conduct" may create a substantial risk of prejudice to the rights of the defendant (*Brown*, 48 NY2d at 393). Moreover, it was not necessary for defendant to show that the juror's conduct during the trial influenced the verdict inasmuch as, "[i]f it was likely to do so, it was sufficient to warrant the granting of the motion" (*People v Pauley*, 281 App Div 223, 226 [4th Dept 1953]).

In summary, the evidence at the hearing established, inter alia, that juror number 12 received a message from her father that arguably implored her to ensure defendant's conviction, repeatedly disregarded the court's instructions, and actively concealed and was untruthful about her numerous violations of the court's instructions. These facts were not controverted at the hearing. We conclude that every defendant has a right to be tried by jurors who follow the court's instructions, do not lie in sworn affidavits about their misconduct during the trial, and do not make substantial efforts to conceal and erase their misconduct when the court conducts an inquiry with respect thereto. These rights are substantial and fundamental to the fair and impartial administration of a criminal trial. Presented with the totality of the circumstances here, we thus conclude that defendant established by a preponderance of the evidence that juror number 12 engaged in substantial misconduct that "created a significant risk that a substantial right of . . . defendant was prejudiced" (*People v Giarletta*, 72 AD3d 838, 839 [2d Dept 2010], *lv denied* 15 NY3d 750 [2010]). As a result, the judgment must be reversed and a new trial granted.

Contrary to the dissent's characterization of our holding, we do not fashion a rule that "a conviction must be reversed any time that a juror's family member or friend mentions a trial to that juror." However, we do conclude that, in this case, a new trial is required because juror number 12 received a message during the trial from her father imploring her to "Make sure [defendant's] guilty!," and there were numerous other *improper* communications between juror number 12 and her friends directly concerning specific issues in the trial, which juror number 12 failed to report and then actively concealed and lied about under oath during the court's inquiry into the misconduct.

In light of our determination, we do not address defendant's remaining contentions in appeal No. 1, and we dismiss as moot defendant's appeal from the order in appeal No. 2 (*see People v Dealmeida*, 124 AD3d 1405, 1407 [4th Dept 2015]).

All concur except SMITH and WINSLOW, JJ., who dissent and vote to affirm in the following memorandum: We disagree with the majority's conclusion in appeal No. 1 that a new trial is required on the ground that County Court erred in denying defendant's motion to set aside the verdict pursuant to CPL article 330 based on allegations of juror misconduct. Inasmuch as we have considered defendant's remaining contentions in appeal No. 1 and conclude that they do not require reversal or modification of the judgment, we respectfully dissent and vote to affirm in that appeal.

The Criminal Procedure Law provides that a verdict may be set aside or modified on the ground "[t]hat during the trial there occurred, out of the presence of the court, improper conduct by a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict" (CPL 330.30 [2]). It is well settled, however, that " 'not every misstep by a juror rises to the inherently prejudicial level at which reversal is required automatically' " (*People v Clark*, 81 NY2d 913, 914 [1993], quoting *People v Brown*, 48 NY2d 388, 394 [1979]). Whether reversal is required is a "fact-intensive" issue, and the trial court is "vested with discretion in deciding CPL 330.30 (2) motions" (*People v Rodriguez*, 100 NY2d 30, 35 [2003]). Finally, and of paramount importance, "[a]bsent a showing of prejudice to a substantial right, . . . proof of juror misconduct does not entitle a defendant to a new trial" (*People v Irizarry*, 83 NY2d 557, 561 [1994]).

Here, the court conducted a thorough hearing on defendant's motion, and we agree with the majority and defendant that the evidence at the hearing established that juror number 12 failed to follow the court's instructions concerning communicating with outside parties about the case prior to rendering a verdict by sending and receiving text messages regarding the trial and the events surrounding it, and by misrepresenting her actions when questioned about them. In addition, the evidence at the hearing established that juror number 12 deleted the browser history and some of the text messages on her cell phone, and we agree with the court that she did so in an attempt to cover up those communications. Contrary to defendant's further

contention and the majority's conclusion, however, the court did not abuse its discretion in denying the motion to set aside the verdict based on juror number 12's conduct. The People performed a forensic evaluation of the juror's cell phone and were able to retrieve the deleted messages. Those messages, and the undeleted ones that were also introduced in evidence at the hearing, included messages in which juror number 12 told others that she was nervous because the case was so serious, and another in which she said that "in reality someone's life is in our hands! It's our decision to say if he is guilty or not! We could send an innocent man to prison or put a murderer away!" In addition, the juror repeatedly refused to discuss the case in her texts, she indicated that she would not do so until the trial ended, and she expressed her commitment to hearing all the evidence before reaching any conclusion. Furthermore, there is no evidence that the juror was exposed to any evidence that was excluded from the trial.

We agree with the majority that juror number 12 unquestionably attempted to hide these interactions and then testified under oath that she did not violate the court's directives not to discuss the case. Nevertheless, the court concluded that, although the juror engaged in misconduct, the evidence established that she "took her role as a juror seriously," and decided the case "based on the evidence alone." In addition, the evidence at the hearing established that the juror received communications that may be "characterize[d] as 'inflammatory.' [Juror number 12, h]owever, . . . testified unequivocally that she was not affected by these comments, that she did not discuss the[facts of the] case with anyone during the trial, and that she had decided the case impartially, based only on the evidence" (*People v Wilson*, 93 AD3d 483, 485 [1st Dept 2012], *lv denied* 19 NY3d 978 [2012]). We perceive no reason to disturb the court's credibility determinations, and we agree with its conclusion that reversal is not required here because defendant failed to establish any prejudice, or likelihood of prejudice, from the juror's misconduct (*see Rodriguez*, 100 NY2d at 36; *People v Richardson*, 185 AD2d 1001, 1002 [2d Dept 1992], *lv denied* 80 NY2d 976 [1992]). The misconduct of the juror does not require setting aside or modifying the verdict unless it "may have affected a substantial right of the defendant" (CPL 330.30 [2]). Here, only speculation supports the conclusion that the juror's misconduct had such an impact and, indeed, all of the evidence indicates that juror number 12 decided the case solely on the evidence.

We respectfully reject the majority's speculative discussion of what might have happened if the juror's misconduct had been discovered earlier, and we instead confine our review to the facts in the record. Criminal Procedure Law § 270.35 (1) applies only to conduct occurring "before the rendition of [the] verdict." Consequently, because the active concealment and misrepresentation by juror number 12 upon which the majority relies occurred after the trial, it cannot support the conclusion that defendant was somehow deprived of an opportunity to move to discharge the juror pursuant to that statute. The majority's conclusion that juror number 12 concealed the misconduct of others is not supported by the record. There is no indication of misconduct by anyone else, and none of those who communicated with the juror is

alleged to have violated any law or court directive. In addition, we note that the majority's determination creates a rule that a conviction must be reversed any time that a juror's family member or friend mentions a trial to that juror, and will place a duty on every juror to report their family and friends to the court for mentioning the trial to a juror.

Finally, we respectfully reject the majority's reliance upon the premise that there was no need to demonstrate that the juror's misconduct influenced the verdict, and that, " '[i]f it was likely to do so, it was sufficient to warrant the granting of the motion' (*People v Pauley*, 281 App Div 223, 226 [4th Dept 1953])." Here, inasmuch as we conclude that there is simply no evidence that the juror's misconduct caused prejudice or that it "*may* have affected a substantial right of the defendant" (CPL 330.30 [2] [emphasis added]), we further conclude that "it was [not] likely to do so, [and thus it is in]sufficient to warrant the granting of the motion" (*Pauley*, 281 App Div at 226).

Inasmuch as we vote to affirm the judgment in appeal No. 1, we have reviewed defendant's contentions in appeal No. 2 and conclude that they do not warrant reversal or modification of the order in that appeal. Consequently, we would affirm the order in that appeal as well.

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

1208

KA 16-01293

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

M. ROBERT NEULANDER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

SHAPIRO ARATO LLP, NEW YORK CITY (ALEXANDRA A.E. SHAPIRO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Onondaga County Court (Thomas J. Miller, J.), dated June 27, 2016. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that said appeal is dismissed.

Same memorandum as in *People v Neulander* ([appeal No. 1] — AD3d — [June 29, 2018] [4th Dept 2018]).

All concur except SMITH and WINSLOW, JJ., who dissent and vote to affirm in accordance with the same dissenting memorandum as in *People v Neulander* ([appeal No. 1] — AD3d — [June 29, 2018] [4th Dept 2018]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

1391

KA 11-02609

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SCOTT L. PESCARA, 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 (James J. Piampiano, J.), rendered October 21, 2011. The judgment convicted defendant, upon a jury verdict, of attempted aggravated assault upon a police officer or a peace officer, assault in the second degree and reckless endangerment in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted on counts one, three and five of the indictment.

Memorandum: On appeal from a judgment convicting him following a jury trial of attempted aggravated assault upon a police officer or a peace officer (Penal Law §§ 110.00, 120.11), assault in the second degree (§ 120.05 [2]), and reckless endangerment in the first degree (§ 120.25), defendant contends, inter alia, that the prosecutor's peremptory challenges to multiple African-American prospective jurors constituted *Batson* violations, and that County Court, in denying defendant's *Batson* claims, failed to follow the proper procedures. We agree with defendant, and we therefore reverse the judgment and grant him a new trial on counts one, three and five of the indictment.

In determining whether a party has used peremptory challenges to exclude prospective jurors based on race, trial courts must follow the now-familiar three-step process set forth in *Batson v Kentucky* (476 US 79, 96-98 [1986]). "At step one, the movant must make a prima facie showing that the peremptory strike was used to discriminate; at step two, if that showing is made, the burden shifts to the opposing party to articulate a non-discriminatory reason for striking the juror; and finally, at step three, the trial court must determine, based on the arguments presented by the parties, whether the proffered reason for the peremptory strike was pretextual and whether the movant has shown purposeful discrimination" (*People v Bridgeforth*, 28 NY3d 567, 571

[2016]; *see People v Hecker*, 15 NY3d 625, 634-635 [2010]).

Here, the prosecutor exercised peremptory challenges to six African-American prospective jurors. Defendant raised a *Batson* claim each time, and the prosecutor, in response, offered facially race-neutral explanations for five of the six challenges. With respect to the challenge for which no race-neutral explanation was proffered, the prosecutor asserted that the prospective juror in question, who had been assigned number 10, was not African-American as defense counsel had claimed. Although the court stated that it did not know whether prospective juror number 10 was African-American, it nevertheless denied the *Batson* claim without explanation.

Shortly thereafter, the court, at defense counsel's request, questioned prospective juror number 10 at the bench with respect to his race. Prospective juror number 10 stated that he was "African-American black, Caribbean black," explaining that both of his parents were of Caribbean descent and that he considered himself "black culturally." Defense counsel thereafter referred to his prior *Batson* claim and stated that it was now clear that prospective juror number 10 was African-American. The court disagreed, stating that prospective juror number 10 was "Carribean," not African-American. After stating that prospective juror number 10's skin color was black, defense counsel noted that there was no race-neutral reason offered by the prosecutor for striking him. The court responded, "Actually, I thought there [was], but the record will stand."

The record establishes that the prosecutor never offered a race-neutral reason for the peremptory challenge of prospective juror number 10. Although the court evidently was under the misapprehension that a race-neutral reason had been offered, it did not determine whether such reason was pretextual, as required by *Batson* and its progeny.

On appeal, the People do not specifically dispute that prospective juror number 10 is African-American, and we note in any event that "a *Batson* challenge may be based on color" (*Bridgeforth*, 28 NY3d at 572). Thus, even assuming, arguendo, that prospective juror number 10 was not African-American, we conclude that he was nevertheless entitled to protection under *Batson* based on the color of his skin. According to the People, however, the court properly denied defendant's *Batson* claim because defendant failed to meet his initial burden of establishing a prima facie case of discrimination under *People v Childress* (81 NY2d 263, 267 [1993]). The People raise that contention for the first time on appeal, and it therefore is unpreserved for our review (*see* CPL 470.05 [2]). Regardless of the lack of preservation, we note that the court did not deny the *Batson* claim on the ground that defendant failed to meet his initial burden of proof, and we are thus precluded from affirming the judgment on that ground (*see People v Concepcion*, 17 NY3d 192, 197-198 [2011]; *People v LaFontaine*, 92 NY2d 470, 474 [1998]).

In any event, we conclude that defendant did in fact meet his initial burden, thereby shifting the burden to the People to offer a

race-neutral explanation for the peremptory challenge. "[T]he first-step burden in a *Batson* challenge is not intended to be onerous" and is met when " 'the totality of the relevant facts gives rise to an inference of discriminatory purpose' " (*Hecker*, 15 NY3d at 651, quoting *Batson,* 476 US at 94). Here, at the time that defense counsel requested that prospective juror number 10 be questioned at the bench about his race, the prosecutor had challenged all four African-American prospective jurors who thus far had been subject to voir dire. Moreover, the prosecutor did not ask any substantive questions of prospective juror number 10 during voir dire, "and County Court's general questioning of the panel raised no issues that would distinguish [him] from the other prospective jurors," thereby raising an inference of discrimination (*People v Davis*, 153 AD3d 1631, 1632 [4th Dept 2017]). The burden of proof thus shifted to the People to offer a race-neutral explanation for striking the prospective juror, and the People failed to do so.

With respect to another of defendant's *Batson* claims, arising from the prosecutor's subsequent use of a peremptory challenge to prospective juror number 13, the court failed to follow the three-step procedure set forth in *Batson*. Prospective juror number 13 is a female African-American who, at the time of trial, was attending nursing school. When the prosecutor struck prospective juror number 13, defense counsel raised a *Batson* claim, asserting that the prospective juror had never been involved in the criminal justice system in any way and that she unequivocally stated that she could be fair and impartial. In response, the prosecutor explained that he struck prospective juror number 13 because she was in nursing school and stated on her juror questionnaire that she was going to school because she wanted to help people, which in the prosecutor's view indicated that she may be sympathetic to defendant.

Instead of determining whether the race-neutral explanation offered by the prosecutor was pretextual, the court engaged defense counsel in an extended colloquy during which the court asked how defendant, as a Caucasian, could assert a *Batson* claim with respect to an African-American prospective juror. Defense counsel answered, correctly, that a defendant need not be the same race as the stricken prospective juror (*see Powers v Ohio*, 499 US 400, 402 [1991]). The court then noted that defense counsel himself previously struck an African-American prospective juror, which is not a proper basis for denying a *Batson* claim, and the prosecutor added that there were already two African-Americans seated on the jury. Of course, the fact that African-Americans were seated on the jury does not mean that a party is free to discriminate against other African-American prospective jurors (*see People v Jenkins*, 75 NY2d 550, 557 [1990]). Although defense counsel contested the reason offered by the prosecutor for striking prospective juror number 13, the court stated that it did not see "it as a *Batson* issue for all the reasons we talked about." As in *People v Morgan* (75 AD3d 1050, 1053 [4th Dept 2010], *lv denied* 15 NY3d 894 [2010]), where we granted a new trial on *Batson* grounds, "the court failed to make *any* determination on the record with respect to the issue of pretext."

The People nevertheless contend that, because the court ultimately denied defendant's *Batson* claim, we may conclude that it implicitly determined that the race-neutral reason offered by the prosecutor for striking prospective juror number 13 was not pretextual. Although there are cases in which we have held that the trial court, by ultimately denying a *Batson* claim, implicitly determined that the race-neutral explanation offered by the People was not pretextual (*see e.g. People v Jiles*, 158 AD3d 75, 78 [4th Dept 2017]; *People v Ramos*, 124 AD3d 1286, 1287 [4th Dept 2015], *lv denied* 25 NY3d 1076 [2015], *reconsideration denied* 26 NY3d 933 [2015]), the court here stated that it was denying the *Batson* claim with respect to prospective juror number 13 for "all the reasons we talked about," none of which is a proper basis for the ruling. We therefore cannot assume that the court implicitly determined the issue of pretext in the People's favor, particularly in view of the fact that the court did not make a ruling on that issue on any of the five *Batson* claims for which the prosecutor offered a race-neutral explanation for striking African-American prospective jurors.

We therefore conclude that, based on the court's wholesale failure to comply with the *Batson* protocol with respect to multiple African-American prospective jurors who were the subject of peremptory challenges by the People, defendant is entitled to a new trial (*see Morgan*, 75 AD3d at 1053). We have reviewed defendant's remaining contentions and conclude that they lack merit.

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

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CA 17-01451

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

ROBERT KIPP, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

MARINUS HOMES, INC., DEFENDANT,
GREENWAY APARTMENTS, LLC, AND CARKNER
CONSTRUCTION, LLC,
DEFENDANTS-RESPONDENTS-APPELLANTS.

GREENWAY APARTMENTS, LLC, AND CARKNER
CONSTRUCTION, LLC,
THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V

GERALD OAKLEY, INDIVIDUALLY, AND DOING
BUSINESS AS XLH CONSTRUCTION, THIRD-PARTY
DEFENDANT-APPELLANT-RESPONDENT.

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

LONGSTREET & BERRY, LLP, FAYETTEVILLE (MARTHA L. BERRY OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (STEPHEN A. DAVOLI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS AND THIRD-PARTY PLAINTIFFS-RESPONDENTS.

Appeal and cross appeals from an order of the Supreme Court, Oneida County (Norman I. Siegel, J.), entered April 28, 2017. The order denied the motion of plaintiff for partial summary judgment on liability under Labor Law § 240 (1), granted in part and denied in part the motion of defendants-third-party plaintiffs and the cross motion of third-party defendant for summary judgment dismissing the second amended complaint against defendants-third-party plaintiffs and denied the motion of third-party defendant for summary judgment dismissing the second third-party complaint.

It is hereby ORDERED that the order so appealed from is modified on the law by granting defendants-third-party plaintiffs' motion and third-party defendant's cross motion in their entirety, dismissing the second amended complaint against defendants-third-party plaintiffs, and dismissing the motion of third-party defendant as moot and as

modified the order is affirmed without costs.

Memorandum: While working on a construction project, plaintiff fell from a ladder that he had placed adjacent to his work area. Plaintiff subsequently commenced this action seeking damages for the injuries that he sustained from his fall. In his second amended complaint, plaintiff alleged that his injuries were caused by, inter alia, the violation of Labor Law § 240 (1) by defendants-third-party plaintiffs, Greenway Apartments, LLC, the property owner, and Carkner Construction, LLC, the general contractor (defendants). Defendants thereafter commenced a third-party action seeking contractual indemnification and a defense from third-party defendant, plaintiff's employer.

Plaintiff thereafter moved for partial summary judgment on the issue of liability under Labor Law § 240 (1). Defendants moved and third-party defendant cross-moved for summary judgment dismissing the second amended complaint against defendants, and third-party defendant separately moved for summary judgment dismissing the second third-party complaint. Third-party defendant appeals and plaintiff and defendants cross-appeal from an order that, inter alia, denied plaintiff's motion in its entirety, denied those parts of defendants' motion and third-party defendant's cross motion seeking dismissal of plaintiff's Labor Law § 240 (1) claim against defendants, and denied third-party defendant's motion against the second third-party complaint. We now modify the order by granting those parts of defendants' motion and third-party defendant's cross motion with respect to the section 240 (1) claim, and dismissing the motion of third-party defendant as moot and otherwise affirm.

"Where a 'plaintiff's actions [are] the sole proximate cause of his injuries, . . . liability under Labor Law § 240 (1) [does] not attach' " (*Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]; *see generally Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 288 [2003]). To sustain a cause of action under section 240 (1), the plaintiff must establish that the defendant breached "the statutory duty . . . to provide a worker with adequate safety devices, and this breach must proximately cause the worker's injuries" (*Robinson*, 6 NY3d at 554). "[I]f adequate safety devices are available at the job site, but the worker either does not use or misuses them," then the plaintiff cannot sustain a cause of action under Labor Law § 240 (1) (*id.*; *see generally Kuntz v WNYG Hous. Dev. Fund Co. Inc.*, 104 AD3d 1337, 1338 [4th Dept 2013]).

Here, we agree with defendants and third-party defendant that Supreme Court erred in denying those parts of their respective motion and cross motion seeking summary judgment dismissing plaintiff's Labor Law § 240 (1) claim against defendants. Plaintiff alleged in his second amended complaint that he fell due to the placement of the ladder, and he admitted in his deposition testimony that he had placed the ladder himself. Plaintiff's theory of liability is that the ladder was not an adequate safety device because it could not be placed directly below his work site. Defendants, however, submitted photographs and a video recording from their safety expert that

depicted the expert placing the ladder directly under the work site and standing on it. Furthermore, plaintiff conceded in his deposition testimony that other safety devices were available at the site, and that he asked if they were available before using the ladder. Thus, we conclude that defendants established as a matter of law that the ladder was an adequate safety device and that plaintiff's own conduct was the sole proximate cause of his injuries.

In opposition, plaintiff relied only on his own speculation, in his deposition, that the ladder was not an adequate safety device, and that other, unavailable safety devices were necessary to prevent his injuries. It is well settled, however, that "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a triable question of material fact sufficient to defeat a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

We reject plaintiff's contention, on his cross appeal, that he cannot be the sole proximate cause of his own injuries in the absence of egregious misconduct or intentional misuse of the safety equipment. Rather, a plaintiff's mere negligence may constitute the sole proximate cause of his or her injuries (*see Blake*, 1 NY3d at 290; *see also Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]). Contrary to plaintiff's further contention, the rule that comparative fault is unavailable to defendants in Labor Law § 240 (1) cases is unavailing, because here, as in *Blake*, "we are not dealing here with comparative fault . . .[;] the fault was entirely plaintiff's. The ladder afforded him proper protection. Plaintiff's conduct (here, his negligence) was the sole proximate cause of [his injuries]" (*id.* at 289-290). Contrary to the dissent's conclusion, this is the rare case where there are no allegations that the ladder tilted, tipped, shifted, moved, or otherwise failed. Instead, plaintiff himself admits that the sole cause of his fall was his own act of pulling on the soffit and getting less resistance than expected, thereby causing him to lose his balance and fall.

In light of our determination, we dismiss as moot third-party defendant's motion for summary judgment dismissing the third-party complaint (*see Wilson v Walgreen Drug Store*, 42 AD3d 899, 901 [4th Dept 2007]).

All concur except WHALEN, P.J., who dissents and votes to affirm in the following memorandum: I respectfully dissent. The majority concludes that plaintiff's conduct was the sole proximate cause of his accident as a matter of law because the accident was caused by the location of the ladder and plaintiff admitted in his deposition testimony that he placed the ladder himself. Contrary to the majority's conclusion, however, " 'the nondelegable duty imposed upon the owner and general contractor under Labor Law § 240 (1) is not met merely by providing safety instructions or by making [a] safety device[] available, but by furnishing, *placing* and operating such devices so as to give [a worker] proper protection' " (*Luna v Zoological Socy. of Buffalo, Inc.*, 101 AD3d 1745, 1746 [4th Dept 2012] [emphasis added]; *see Long v Cellino & Barnes, P.C.*, 68 AD3d 1706,

1707 [4th Dept 2009]).

The cases relied on by the majority do not change that statutory obligation. In *Blake v Neighborhood Hous. Servs. of N.Y. City*, the jury expressly found that the ladder used by the injured plaintiff had in fact been "so constructed[and] operated as to give proper protection to plaintiff" (1 NY3d 280, 284 [2003]). Here, however, defendants' own expert averred that plaintiff's accident resulted because the ladder was improperly placed, and "it is conceptually impossible for [that] statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause of the injury" (*id.* at 290). Thus, while plaintiff may have been negligent in leaning the ladder adjacent to his work area rather than directly underneath it, " 'plaintiff's conduct cannot be considered the sole proximate cause of his injuries' " (*Whalen v ExxonMobil Oil Corp.*, 50 AD3d 1553, 1554 [4th Dept 2008]).

Blake and its progeny stand for the proposition that liability under Labor Law § 240 (1) does not attach where safety devices sufficient to provide a plaintiff adequate protection are readily available on a work site, and the plaintiff knows that he or she is expected to use them "but for no good reason [chooses] not to do so, causing an accident" (*Gallagher v New York Post*, 14 NY3d 83, 88 [2010]; *see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]). Contrary to the conclusion of the majority, defendants failed to establish as a matter of law that plaintiff improperly placed the ladder "for no good reason" (*Gallagher*, 14 NY3d at 88). Plaintiff testified that he attempted to place the ladder directly underneath the overhang of the roof where he was to work, but the size of the window located below this work area prevented him from resting the ladder against the building itself, and he was concerned that resting the ladder against the window while he performed his work might damage the window. The photographs and video of defendants' expert referenced by the majority show a ladder leaning, not directly against the building between the window and the work area, but on the frame of the window that plaintiff was attempting to avoid damaging. It therefore cannot be concluded as a matter of law that plaintiff knew that the ladder could be safely placed against the building directly underneath his work area at an appropriate angle without damaging the window, but nonetheless chose not to do so (*see Kin v State of New York*, 101 AD3d 1606, 1608 [4th Dept 2012]; *cf. Robinson*, 6 NY3d at 554-555). I would therefore affirm the order.

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

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CA 17-00421

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

CARRIANN RAY, PLAINTIFF-RESPONDENT,

V ORDER

VICTORIA J.G. STOCKTON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

O'HARA, O'CONNELL & CIOTOLI, FAYETTEVILLE (STEPHEN CIOTOLI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered September 26, 2016. The order, among other things, denied defendant's motion to set aside a jury verdict.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435 [2d Dept 1989]; *see also* CPLR 5501 [a] [1], [2]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

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CA 17-00423

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

CARRIANN RAY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

VICTORIA J.G. STOCKTON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

O'HARA, O'CONNELL & CIOTOLI, FAYETTEVILLE (STEPHEN CIOTOLI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered November 16, 2016. The judgment awarded plaintiff the sum of $5,151,892.33 as against defendant.

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

Memorandum: From 2006 until her termination in August 2012, plaintiff served as superintendent of the New York State School for the Deaf (NYSSD) in Rome, New York. Defendant was a longtime music and Latin teacher at NYSSD, as well as the local union president of the New York State Public Employees' Federation (PEF), a union that represents the teachers at NYSSD. In 2012, defendant wrote a letter to the New York State Education Department (SED) accusing plaintiff of, among other things, financial impropriety. Defendant did not indicate in any way in her letter that she was acting in her union representative capacity, and she never filed a grievance or otherwise pursued a remedy pursuant to a collective bargaining agreement. After a request for more information from SED, defendant submitted a petition with teachers' signatures requesting an "immediate review of [plaintiff's] practices" as well as statements documenting allegations of "unprofessional conduct, abuse of positional power and potential illegal actions taken by [plaintiff]." Defendant, along with several teachers and staff members, visited the office of SED to discuss the allegations. Thereafter, SED terminated plaintiff's employment.

Plaintiff commenced an action for tortious interference with prospective economic advantage, tortious interference with economic relations, and prima facie tort against Annette Franchini, individually and as Director of Human Resources of SED, and we

affirmed the order and judgment granting Franchini's motion to dismiss the complaint (*Ray v Franchini*, 133 AD3d 1235, 1235 [4th Dept 2015]). Plaintiff then commenced the instant action against defendant asserting, inter alia, a cause of action for tortious interference with prospective economic advantage on the theory that defendant, "acting solely out of malice, bad faith and retaliatory motives and entirely outside the scope of her employment duties, intentionally interfered with the economic relationship between Plaintiff and the SED by spreading false statements and rumors, and by exerting her influence to pressure teachers and staff to sign a petition to terminate Plaintiff's employment." A jury trial was held, after which plaintiff was awarded approximately $5 million in damages, and Supreme Court denied defendant's posttrial motion to set aside the verdict.

On appeal, defendant argues, among other things, that the jury verdict is not supported by legally sufficient evidence inasmuch as the evidence did not support a finding that she acted either with the sole purpose of inflicting harm on plaintiff or via "wrongful means," a necessary element of the tortious interference with prospective economic advantage cause of action. Alternatively, defendant contends that the court should have granted her posttrial motion to the extent that she sought to set aside the verdict and sought a new trial on the ground that the court's erroneous legal instructions on the cause of action permitted the jury to find wrongful means from nothing more than the fact that defendant had made a false statement. We agree with defendant that the court's jury instructions were erroneous and, as a result, we conclude that the court erred in denying defendant's motion to set aside the verdict and for a new trial.

To state a cause of action for tortious interference with prospective economic advantage, "a plaintiff must plead that the defendant directly interfered with a third party and that the defendant either employed wrongful means or acted for the sole purpose of inflicting intentional harm on plaintiff[]" (*Posner v Lewis*, 18 NY3d 566, 570 n 2 [2012] [internal quotation marks omitted]; *see Carvel Corp. v Noonan*, 3 NY3d 182, 189-191 [2004]; *NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 621 [1996]; *KAM Constr. Corp. v Bergey*, 151 AD3d 1706, 1707 [4th Dept 2017]; *Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 108 [1st Dept 2009], *lv denied* 15 NY3d 703 [2010]). The term "[w]rongful means" has been defined by the Court of Appeals as conduct amounting "to a crime or an independent tort" (*Carvel Corp.*, 3 NY3d at 190). This definition was a refinement to the Court's previous description of the standard, which required "more culpable conduct on the part of the defendant" for the interference when there is no breach of an existing contract (*NBT Bancorp*, 87 NY2d at 621). The *Carvel* Court also defined " 'more culpable' conduct" as including the "wrongful means" described earlier by the Court in *Guard-Life Corp. v Parker Hardware Mfg. Corp.* (50 NY2d 183, 191 [1980]). The *Carvel* Court wrote, "Continuing to draw on the Restatement, we added in *Guard-Life*: Wrongful means include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract ([Restatement (Second) of Torts] § 768,

Comment *e*; § 767, Comment *c*)" (*id.* at 191 [internal quotation marks omitted]).

The *Carvel* Court further recognized that an exception exists to the requirement of "a crime or an independent tort" for conduct engaged in " 'for the sole purpose of inflicting intentional harm on plaintiff[]' " (*id.* at 190, quoting *NBT Bancorp*, 215 AD2d 990, 990 [3d Dept 1995], *affd* 87 NY2d 614).

Here, plaintiff does not allege that the "wrongful means" amounted to any crime. Rather, plaintiff's cause of action is premised on the theory that defendant committed a "wrongful act" by way of an independent tort and/or that defendant acted solely for the purpose of inflicting intentional harm on her.

At the close of the proof, the court made a finding of what would constitute "wrongful means" when it instructed the jury that, for plaintiff to recover, she must prove that, inter alia, defendant "used wrongful means, in that she made fraudulent claims to [SED] about [plaintiff], misrepresented plaintiff's work performance to [SED], and that she persuaded and encouraged others to likewise make these claims to [SED], or, [plaintiff must prove that defendant's] actions [were] for the sole purpose of harming [plaintiff]." In other words, the court determined as a matter of law that the "wrongful means" employed by defendant were as described in the jury instruction and instructed the jury that its role was to determine whether defendant had engaged in the forms of the court-defined "wrongful means."

We recognize that the court, in doing so, adhered to the pattern jury instruction and the form jury verdict sheet provided for in PJI 3:57, along with the accompanying comment to that section. The comment states, in relevant part: "In most cases, the use of 'wrongful means,' i.e., conduct amounting to a crime or an independent tort, is an essential element of a cause of action for tortious interference with prospective economic relations [citing *Carvel Corp.*]. *However, determining whether particular conduct amounts to a crime or an independent tort involves a legal analysis and is not an appropriate function for a jury*. For that reason, the pattern charge asks the jury to consider only whether defendant actually engaged in the specific alleged acts constituting the claimed 'wrongful means.' *Whether, as a matter of law, those acts rise to the level of 'wrongful means' remains a question of law for the court to decide*" (2A NY PJI3d 3:57 at 604 [2018] [emphasis added]).

In our view, however, the comment's instruction is an erroneous statement of the law. As an initial matter, there is no support for the so-called threshold determination by a court "[w]hether, as a matter of law, [the alleged] acts rise to the level of 'wrongful means' " (*id.*). Rather, the determination whether particular facts constitute the independent tort is almost always a factual determination best left to the jury. Thus, while the court should evaluate the evidence to decide which independent tort(s) fits the fact pattern presented, the disputed underlying elements of the independent tort should still be charged to the jury. Indeed, this

approach has been taken by at least one other state (*see Korea Supply Co. v Lockheed Martin Corp.*, 29 Cal 4th 1134, 1153-1154, 63 P3d 937, 950 [2003]; Cal Jury Instr–Civ 7.82, 7-86.1).

In this case, defendant's attorney requested at trial that the underlying elements of the independent tort of defamation be charged to the jury. While the dissent assigns error to the court's independent finding of defamation, defendant no longer argues that defamation is the independent tort that should have been charged to the jury, but rather, argues that the elements of fraud should have been charged (*see* PJI 3:20, 3:20.1). Thus, to the extent that defendant no longer relies on the independent tort of defamation, any argument concerning that tort is deemed abandoned and should not be considered by this Court (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). The dissent also erroneously relies on its own findings of fact when concluding that defendant's statements were either "pure opinion" or otherwise privileged, thereby negating an action for defamation. Those arguments were likewise not made by defendant on this appeal. Moreover, by making that determination, the dissent only perpetuates the error of the trial court. The jury should be given the opportunity to consider issues pertaining to the independent tort(s), and like the trial court, the dissent's determination deprives the parties of a jury's evaluation of the facts of the underlying tort(s) in the context of a proper instruction from the court. By determining as a matter of law the elements of the independent tort it unilaterally chooses to address, and by doing so upon a jury's verdict, the dissent exceeds the power of this Court to act in this case (*see generally Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 498-499 [1978]). Thus, we agree with defendant that it was error for the trial court to refuse to provide a jury instruction that charged the disputed elements of an independent tort.

Additionally, inasmuch as we conclude that the court erred in its jury instructions with respect to "wrongful means," we cannot reach the sufficiency of the evidence on that element because the jury was not given the opportunity to consider the disputed issues of material fact with respect to the underlying tort. In other words, we cannot evaluate whether the jury was presented with sufficient evidence of "wrongful means" without taking away from the jury a factual determination of whether the tort was committed, and this Court is not permitted to perform such a task (*see Killon v Parrotta*, 28 NY3d 101, 108 [2016]). Nor can we evaluate the jury's verdict in light of the elements charged because, at least with respect to "wrongful means," it is undisputed that defendant objected to the court's charge, and thus, the instructions did not become the law of the case (*cf. id.* at 108-109).

We further conclude that the jury's finding that defendant acted with the sole purpose of inflicting intentional harm on plaintiff may have been affected by the court's erroneous instructions on wrongful means. The dissent concludes that, inasmuch as there was conflicting evidence on whether defendant's sole purpose was to harm plaintiff, the jury's verdict is "utterly irrational" and must be set aside as a

matter of law (*id*. at 108). This conclusion, however, wrongfully assumes that the jury was required to accept the evidence of "other purposes" submitted by defendant and rejects what the dissent acknowledges is sufficient evidence of intent to harm plaintiff. It was within the jury's province to weigh the credibility of the evidence on that issue and, by reaching a different conclusion, the dissent is engaging in a weight of the evidence review, not an insufficiency analysis (*see generally Cohen*, 45 NY2d at 498-499). Thus, even under the dissent's weight review, the parties would be entitled to a new trial (*see id*. at 498).

In addition, a proper jury instruction with respect to the independent tort may have impacted the jury's measure of damages. Thus, for these reasons, we conclude that the proper remedy on this appeal is to reverse the judgment, grant defendant's motion to set aside the verdict and for a new trial.

Finally, defendant's contention that plaintiff, as an at-will employee, may not raise a tortious interference claim is unpreserved for review (*see generally Ciesinski*, 202 AD2d at 985) and without merit (*see Guard-Life Corp.*, 50 NY2d at 194; *Hobler v Hussain*, 111 AD3d 1006, 1008 [3d Dept 2013]). We have considered defendant's remaining contentions and conclude that they are without merit.

All concur except SMITH, J.P., and PERADOTTO, J., who dissent and vote to reverse in accordance with the following memorandum: We agree with defendant that the evidence is legally insufficient to support the verdict, which awarded plaintiff damages on the cause of action for tortious interference with prospective economic advantage, and thus we would reverse the judgment, grant defendant's motion to set aside the verdict based on legally insufficient evidence, and dismiss the complaint. Consequently, we respectfully dissent.

Defendant initially contends that plaintiff, as an at-will employee, may not maintain a cause of action for tortious interference with prospective economic advantage, and that the cause of action must be dismissed on that ground. That contention is raised for the first time on appeal, however, and therefore is not preserved for our review (*see Matter of Small Smiles Litig.*, 125 AD3d 1531, 1532 [4th Dept 2015]; *Crandall v Wright Wisner Distrib. Corp.*, 66 AD3d 1515, 1517 [4th Dept 2009]).

Nevertheless, we agree with defendant that the evidence is legally insufficient. It is well settled that, in order to succeed on a claim that the evidence at a trial was legally insufficient to support a verdict in favor of a plaintiff, the defendant must establish " 'that there [was] simply no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial' " (*Winiarski v Harris* [appeal No. 2], 78 AD3d 1556, 1557 [4th Dept 2010], quoting *Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]; *see Mazella v Beals*, 27 NY3d 694, 705 [2016]).

Here, the verdict was in favor of plaintiff on her cause of

action for tortious interference with prospective economic advantage. It is well established that, "where there is an existing, enforceable contract and a defendant's deliberate interference results in a breach of that contract, a plaintiff may recover damages for tortious interference with contractual relations even if the defendant was engaged in lawful behavior . . . Where[, as here], there has been no breach of an existing contract, but only interference with prospective contract rights, however, plaintiff must show more culpable conduct on the part of the defendant" (*NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 621 [1996]; *see Carvel Corp. v Noonan*, 3 NY3d 182, 189-191 [2004]). Thus, in order to make out a prima facie case on this cause of action, plaintiff was required to establish that "the defendant directly interfered with a third party and that the defendant either employed wrongful means or acted for the sole purpose of inflicting intentional harm on plaintiff[]" (*Posner v Lewis*, 18 NY3d 566, 570 n 2 [2012] [internal quotation marks omitted]). "Wrongful means include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone" (*Carvel Corp.*, 3 NY3d at 191 [internal quotation marks omitted]; *see NBT Bancorp*, 87 NY2d at 624; *Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 191 [1980]; *KAM Constr. Corp. v Bergey*, 151 AD3d 1706, 1707 [4th Dept 2017]).

The evidence that plaintiff submitted at trial is legally insufficient to meet those requirements. With respect to the prong of the standard that allows recovery where the defendant's sole purpose was to inflict harm on the plaintiff, we agree with plaintiff that there was sufficient evidence from which the jury could have concluded that defendant acted with the intent to injure plaintiff. Nevertheless, it is undisputed that defendant was the head of a union that represented employees under plaintiff's supervision, and thus defendant's duties required that she address grievances between those employees and plaintiff, by bringing those grievances to plaintiff's supervisors where necessary. All of the allegations that defendant presented to investigators from the New York State Education Department involved plaintiff's actions in the workplace, and were supported by statements made by other employees (*see Hoesten v Best*, 34 AD3d 143, 158-159 [1st Dept 2006]). Thus, the evidence is insufficient to support this cause of action inasmuch as the evidence establishes that the statements of defendant and the other employees to plaintiff's supervisors amounted to no more than "relating their legitimate concerns about [plaintiff]'s ability to perform the job" (*Moulton Paving, LLC v Town of Poughkeepsie*, 98 AD3d 1009, 1013 [2d Dept 2012]). Consequently, no cause of action "lies for tortious interference with prospective economic advantage because, as noted, [plaintiff] has no tenable claim that [defendant] acted for the sole purpose of harming her" (*Estate of Steingart v Hoffman*, 33 AD3d 465, 466 [1st Dept 2006]).

Furthermore, we agree with defendant that the evidence is insufficient to establish that she acted by wrongful means. Plaintiff's contention that defendant engaged in wrongful means, to wit, defamation, to bring about her termination is unsupported by the

evidence. Even assuming, arguendo, that defamation may constitute the requisite wrongful means to support this cause of action, we conclude that the statements at issue were either "pure opinion" that are not actionable because "[e]xpressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation" (*Mann v Abel*, 10 NY3d 271, 276 [2008], *cert denied* 555 US 1170 [2009]; *see Davis v Boeheim*, 24 NY3d 262, 269 [2014]), or were encompassed by the "qualified privilege where the communication is made to persons who have some common interest in the subject matter" (*Foster v Churchill*, 87 NY2d 744, 751 [1996]; *see Wilcox v Newark Val. Cent. Sch. Dist.*, 107 AD3d 1127, 1129 [3d Dept 2013]). Furthermore, although "[t]he shield provided by a qualified privilege may be dissolved if plaintiff can demonstrate that defendant spoke with 'malice' " (*Liberman v Gelstein*, 80 NY2d 429, 437 [1992]), "[i]f the defendant's statements were made to further the interest protected by the privilege, it matters not that defendant *also* despised plaintiff. Thus, a triable issue is raised only if a jury could reasonably conclude that 'malice was the one and only cause for the' " allegedly defamatory statements (*id.* at 439). For the reasons discussed, the evidence is legally insufficient to establish that defendant's one and only purpose was to harm plaintiff, and thus the evidence was not legally sufficient to support the verdict.

We also respectfully disagree with the majority's conclusion that there was an error in the jury instructions with respect to the issue of wrongful means, and that the error infected the jury's review of the court's instructions on the issue of sole purpose. In light of the insufficiency of the evidence with respect to the issues of sole purpose and wrongful means, "any possible error resulting from the instruction given was rendered harmless" (*Mossidus v Hartley*, 106 AD2d 805, 806 [3d Dept 1984]; *see Askin v City of New York*, 56 AD3d 394, 395 [1st Dept 2008], *lv dismissed* 12 NY3d 769 [2009]; *see also Browne v Prime Contr. Design Corp.*, 308 AD2d 372, 373 [1st Dept 2003], *lv denied* 2 NY3d 702 [2004]; *see generally Padilla v Freelund*, 7 AD3d 258, 259 [1st Dept 2004]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

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CA 17-01257

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

CARRIANN RAY, PLAINTIFF-RESPONDENT,

V ORDER

VICTORIA J.G. STOCKTON, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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

O'HARA, O'CONNELL & CIOTOLI, FAYETTEVILLE (STEPHEN CIOTOLI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered June 19, 2017. The order denied defendant's motion for relief from judgment.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Brown v Patterson*, 108 AD3d 1131, 1132 [4th Dept 2013]; *see generally Davidson v Straight Line Contrs., Inc.*, 75 AD3d 1143, 1145 [4th Dept 2010]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

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KA 14-01872

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMUEL J. SMITH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered August 6, 2014. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree, assault in the first degree and criminal use of a firearm in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]). On appeal, defendant contends that his trial attorney rendered ineffective assistance and that Supreme Court erred in denying his request for a missing witness charge. Defendant does not, however, challenge the weight of the evidence underlying his convictions. For the reasons that follow, we reject defendant's contentions and affirm the judgment.

We address first defendant's ineffective assistance claim, which we are unanimous in rejecting. Contrary to defendant's contention, defense counsel's failure to more forcefully challenge the admissibility of evidence concerning a recent murder, in which defendant was not implicated, was consistent with counsel's misidentification defense on the instant charges. Indeed, defense counsel used that evidence to defendant's advantage at various points during the trial. Thus, defense counsel's actions constituted a legitimate trial strategy and cannot be characterized as ineffective (*see People v Beaty*, 231 AD2d 909, 909 [4th Dept 1996], *lv denied* 89 NY2d 919 [1996]; *see also People v Blair*, 121 AD3d 1570, 1570-1571 [4th Dept 2014]; *see generally People v Benevento*, 91 NY2d 708, 712 [1998]). Contrary to defendant's further contention, even if some of the prosecutor's comments during summation were improper, her conduct

was not so egregious that it deprived defendant of a fair trial. As such, defense counsel's failure to object to those comments does not constitute ineffective assistance (*see People v Nicholson*, 118 AD3d 1423, 1425 [4th Dept 2014], *affd* 26 NY3d 813 [2016]; *Blair*, 121 AD3d at 1571).

We address next the issue that divides us, namely, the court's denial of defendant's request for a missing witness charge. In the First, Second, and Third Departments, it is well established that the proponent of such a charge has the " '*initial burden* of proving,' " inter alia, that the missing witness has " 'noncumulative' " testimony to offer on behalf of the opposing party (*People v Roseboro*, 127 AD3d 998, 998-999 [2d Dept 2015], *lv denied* 26 NY3d 934 [2015] [emphasis added]; *see People v Townsley*, 240 AD2d 955, 958 [3d Dept 1997], *lv denied* 90 NY2d 943 [1997], *reconsideration denied* 90 NY2d 1014 [1997]; *People v Hill*, 165 AD2d 691, 692 [1st Dept 1990], *lv denied* 76 NY2d 987 [1990]). That rule has been explicitly and consistently reiterated by our sister appellate courts (*see e.g. People v Chestnut*, 149 AD3d 772, 773 [2d Dept 2017], *lv denied* 29 NY3d 1077 [2017]; *People v Kass*, 59 AD3d 77, 89 [2d Dept 2008]; *People v Johnson*, 279 AD2d 294, 295 [1st Dept 2001], *lv denied* 96 NY2d 830 [2001]; *People v McBride*, 272 AD2d 200, 200 [1st Dept 2000], *lv denied* 95 NY2d 868 [2000]; *People v Kilgore*, 254 AD2d 635, 638 [3d Dept 1998], *lv denied* 93 NY2d 875 [1999]; *People v Smith*, 240 AD2d 949, 949 [3d Dept 1997], *lv denied* 91 NY2d 880 [1997]).

We have never held otherwise. In other words, we have never held that a movant could satisfy its initial burden with respect to a missing witness charge without first making a prima facie showing of noncumulative testimony. To the contrary, although we have not explicitly articulated the initial burden as to noncumulative testimony as frequently as the other Departments, we did once hold that two criminal defendants "were not entitled to a missing witness charge because they failed to make the *initial showing* that the uncalled witness 'would naturally be expected to provide *noncumulative* testimony favorable to the [prosecution]' " (*People v Williams*, 202 AD2d 1004, 1004 [4th Dept 1994], quoting *People v Kitching*, 78 NY2d 532, 536 [1991] [emphasis added]). Our later cases frequently uphold the denial of a missing witness charge where the movant failed to "demonstrate" or "establish" noncumulative testimony (*see e.g. People v Cehfus*, 140 AD3d 1644, 1644 [4th Dept 2016], *lv denied* 28 NY3d 969 [2016], *lv denied* 30 NY3d 1059 [2017]; *People v Muscarella*, 132 AD3d 1288, 1290 [4th Dept 2015], *lv denied* 26 NY3d 1147 [2016]; *People v May*, 125 AD3d 1465, 1466 [4th Dept 2015], *lv denied* 25 NY3d 1204 [2015], citing, inter alia, *Williams*, 202 AD2d at 1004). That later phraseology is entirely consistent with the more detailed language used in *Williams* and the cases from the other Departments, and we now join our sister appellate courts in reiterating what we said in *Williams*: when seeking a missing witness instruction, the movant has the initial, prima facie burden of showing that the testimony of the uncalled witness would not be cumulative of the testimony already given. In other words, it is the movant's burden to establish, prima facie, that the missing witness's testimony would not be "consistent

with the other witnesses" (*People v Rivera*, 249 AD2d 141, 142 [1st Dept 1998], *lv denied* 92 NY2d 904 [1998]).

The dissent contends that our reiteration of the initial burden with respect to noncumulative testimony is inconsistent with *People v Gonzalez* (68 NY2d 424 [1986]). We respectfully disagree. In *Gonzalez*, the Court of Appeals wrote that, in order to secure a missing witness charge, "it must be *shown* that the uncalled witness is knowledgeable about a material issue upon which evidence is already in the case; that the witness would naturally be expected to provide *noncumulative* testimony favorable to the party who has not called him [or her], and that the witness is available to such party" (*id.* at 427 [emphasis added]). In a subsequent passage highlighted by the dissent, the Court of Appeals explained that the movant's prima facie showing can be rebutted with evidence that the missing witness's testimony would be cumulative (*see id.* at 428). In our view, our holding is entirely consistent with *Gonzalez*'s formulation of the missing witness standard: it must be initially "shown" by the movant that the missing witness can offer "noncumulative testimony favorable to the [non-movant]" (*id.* at 427), but that showing can naturally be rebutted with evidence that the missing testimony would, in fact, be cumulative (*see id.* at 428). Put simply, the fact that an initial showing of "A" can be defeated with proof directly negating "A" does not displace the movant's initial obligation to show "A" in the first instance.

If we are misconstruing *Gonzalez* now, then so did the other Appellate Divisions in *Chestnut*, *Kass*, *Kilgore*, *Townsley*, *Smith*, and *Hill*—each of which cited *Gonzalez* in holding explicitly that the initial burden of proving noncumulative testimony lay with the proponent of the missing witness charge (*Chestnut*, 149 AD3d at 773; *Kass*, 59 AD3d at 89; *Kilgore*, 254 AD2d at 638; *Smith*, 240 AD2d at 949; *Townsley*, 240 AD2d at 958; *Hill*, 165 AD2d at 692). Indeed, the only explicit authority for the dissent's position is a Second Department case from 1993, which held that the movant "did not have the initial burden of demonstrating that [the uncalled witness's] testimony would not have been cumulative" (*People v Rodriquez*, 191 AD2d 654, 655 [2d Dept 1993]). *Rodriquez* has never been cited by any subsequent case, and it lacks persuasive value.

Any lingering doubt about the consensus interpretation of *Gonzalez* was eliminated, in our view, by *People v Edwards* (14 NY3d 733 [2010]), which cited *Gonzalez* to uphold the denial of a missing witness charge because the movant "did not demonstrate that [the missing witness's] testimony would have been noncumulative" (*id.* at 734). Unlike the dissent, we read *Edwards,* and the other missing witness cases from the Court of Appeals, in the straightforward manner best suited to the fast-moving pace of a criminal trial: there are various conditions for a missing witness charge that the proponent must initially establish; if and when the proponent meets that initial burden on those conditions, the opponent is afforded an opportunity to rebut the proponent's showing before the trial court makes its ultimate determination on the missing witness application. Viewed in

that light, there is no difference, as the dissent claims, between the proponent's "initial burden" and "overall burden" in connection with a missing witness charge.

Here, defendant—as the proponent of the missing witness charge—failed to meet his initial burden of proving, prima facie, that the missing witness had noncumulative testimony to offer on the People's behalf (*see Townsley*, 240 AD2d at 957-958; *People v Pierre*, 149 AD2d 740, 741 [2d Dept 1989], *lv denied* 74 NY2d 745 [1989]). Neither defendant nor the dissent claim otherwise; instead, they argue only that defendant had no such initial burden and, as discussed above, we reject that view of the law. Further, although our holding does not rest on this point, we note our disagreement with the dissent that defendant met his initial burden of demonstrating that the uncalled witness would have testified *favorably* to the People.

Finally, the dissent identifies various purported infirmities in the sole eyewitness identification in this case and states that, as a result, "we cannot conclude that the uncalled witness's testimony would have been cumulative." But the alleged deficiencies are not relevant to the question of *cumulativeness*, which requires a comparison of the uncalled witness's likely testimony against the evidence adduced at trial to determine whether the missing testimony would have " 'contradicted or added' to the testimony of the other witnesses" (*People v Williams*, 186 AD2d 469, 470 [1st Dept 1992], *lv denied* 81 NY2d 849 [1993], quoting *People v Almodovar*, 62 NY2d 126, 133 [1984]). The cumulativeness analysis, put differently, does not contemplate an assessment of the relative strength of the respective accounts of the testifying witness and the missing witness. To that point, we reiterate the First Department's observation that "[a] party is not entitled to a missing witness charge if the testimony of the uncalled witness would be merely cumulative . . . , *even if the opposing party has called only one witness to testify on a given material issue*" (*People v Williams*, 10 AD3d 213, 217 [1st Dept 2004], *affd* 5 NY3d 732 [2005] [emphasis added]). In short, without an initial, prima facie showing by defendant that the uncalled witness would have testified noncumulatively, i.e., differently than the eyewitness who did take the stand, it simply cannot be said that the court abused its discretion in denying defendant's request for a missing witness charge.

All concur except CARNI, J.P., and LINDLEY, J., who dissent and vote to reverse in accordance with the following memorandum: We respectfully dissent. Although we agree with the majority that defendant was not deprived of his right to effective assistance of counsel, we conclude that Supreme Court erred in denying his request at trial for a missing witness charge. We would therefore reverse the judgment and grant defendant a new trial.

In its seminal case addressing missing witness instructions, the Court of Appeals articulated the parties' respective burdens of proof with respect to a request for a missing witness charge in *People v Gonzalez* (68 NY2d 424 [1986]), writing: "The burden, in the first instance, is upon the party seeking the charge to promptly notify the

court that there is an uncalled witness believed to be knowledgeable about a material issue pending in the case, that such witness can be expected to testify favorably to the opposing party and that such party has failed to call him to testify . . . Once the party seeking the charge has established prima facie that an uncalled witness is knowledgeable about a pending material issue and that such witness would be expected to testify favorably to the opposing party, it becomes incumbent *upon the opposing party*, in order to defeat the request to charge, to account for the witness' absence or otherwise demonstrate that the charge would not be appropriate. This burden can be met by demonstrating that the witness is not knowledgeable about the issue, that the issue is not material or relevant, that although the issue is material or relevant, *the testimony would be cumulative to other evidence*, that the witness is not 'available', or that the witness is not under the party's 'control' such that [the witness] would not be expected to testify in his or her favor" (*id.* at 427-428 [emphasis added]).

Despite language to the contrary in Appellate Division decisions cited by the majority, the Court of Appeals has never altered that burden-shifting framework set forth in *Gonzalez* (*see People v Keen*, 94 NY2d 533, 539 [2000]; *People v Macana*, 84 NY2d 173, 177 [1994]; *People v Kitching*, 78 NY2d 532, 536-537 [1991]; *People v Fields*, 76 NY2d 761, 763 [1990]; *People v Erts*, 73 NY2d 872, 874 [1988]; *see also People v Carr*, 59 AD3d 945, 946 [4th Dept 2009], *affd* 14 NY3d 808 [2010]).

The majority concludes that the party seeking the charge has the " ' *"initial burden* of proving," ' inter alia, that the missing witness has ' "noncumulative" ' testimony to offer on behalf of the opposing party." We cannot agree. The Court of Appeals has made it clear that a party meets its "prima facie showing of entitlement to the charge" when it proves " '[1] that [the] uncalled witness[ ] [was] knowledgeable about a material issue pending in the case, [2] that such witness[ ] [could] be expected to testify favorably to the opposing party and [3] that such party has failed to call [him or her] to testify' " (*Fields*, 76 NY2d at 763; *see Macana*, 84 NY2d at 177; *Kitching*, 78 NY2d at 536; *Erts*, 73 NY2d at 874; *Gonzalez*, 68 NY2d at 427).

Once the party seeking the charge has met his or her "initial burden of making a prima facie showing of entitlement" (*Erts*, 73 NY2d at 874), it then becomes incumbent on the party opposing the request " 'to account for the witness' absence or otherwise demonstrate that the charge would not be appropriate' " (*Macana*, 84 NY2d at 177; *see Keen*, 94 NY2d at 539; *Kitching*, 78 NY2d at 536-537; *Fields*, 76 NY2d at 763; *Erts*, 73 NY2d at 874; *Gonzalez*, 68 NY2d at 428). Only then does the issue whether testimony would be cumulative arise. The Court of Appeals has stated that a party seeking *to defeat* a prima facie showing of entitlement to the charge may do so by demonstrating, inter alia, that " 'the testimony would be cumulative to other evidence' " (*Kitching*, 78 NY2d at 537; *see Keen*, 94 NY2d at 539; *Macana*, 84 NY2d at 177; *Fields*, 76 NY2d at 763; *Erts*, 73 NY2d at 874; *Gonzalez*, 68 NY2d at 428).

While we agree with the majority that there are myriad Appellate Division cases, including cases from this Department, stating that the party seeking the charge must make an initial showing that the uncalled witness would naturally be expected to provide noncumulative testimony favorable to the opposing party (*see e.g. People v Chestnut*, 149 AD3d 772, 773 [2d Dept 2017], *lv denied* 29 NY3d 1077 [2017]; *People v Johnson*, 279 AD2d 294, 295 [1st Dept 2001], *lv denied* 96 NY2d 830 [2001]; *People v Smith*, 240 AD2d 949, 949 [3d Dept 1997], *lv denied* 91 NY2d 880 [1997]; *People v Williams*, 202 AD2d 1004, 1004 [4th Dept 1994]), those cases are relying on the statement in *Gonzalez*, as reiterated in subsequent cases, discussing the *overall* showing that must be made before an instruction is given.

In *Gonzalez*, the Court of Appeals wrote: "Of course, the mere failure to produce a witness at trial, standing alone, is insufficient to justify the charge. Rather, it must be shown that the uncalled witness is knowledgeable about a material issue upon which evidence is already in the case; that *the witness would naturally be expected to provide noncumulative testimony favorable to the party who has not called him [or her]*, and that the witness is available to such party" (*id.* at 427 [emphasis added]). It is not until the paragraph following that statement that the Court of Appeals devised the burden-shifting framework by which such a showing could be made (*see id.* at 427-428).

To our knowledge, the Court of Appeals has never required the party seeking the missing witness instruction to make an initial showing that the testimony would not be cumulative within the *Gonzalez* framework. As noted above, the issue whether testimony would be cumulative is one means for a party opposing the instruction to *defeat* a prima facie showing of entitlement. Thereafter, the party seeking the instruction must *rebut* a showing that testimony would be cumulative and thereby meet the overall burden of establishing that it would not be cumulative.

Indeed, it would make no sense to require the moving party to establish that the missing witness's testimony is not cumulative in view of the fact that the missing witness, by definition, is not in the control of the moving party, and the moving party cannot be expected to know the substance of the missing witness's testimony, should he or she take the stand. We also note that the Court of Appeals held in *People v Carr* (14 NY3d 808 [2010]) that the defendant's request for a missing witness charge was untimely because it was made a week after the People had submitted their witness list *"and after the People had rested their case-in-chief"* (emphasis added). It would seem difficult, if not impossible at times, for the defendant, as the moving party, to know whether a missing witness's testimony is cumulative until he or she hears the testimony of all the People's witnesses, i.e., until the People have rested, at which point the request for a missing witness charge would be untimely.

The majority quotes from *People v Edwards* (14 NY3d 733, 734 [2010]) in determining that the Court of Appeals has crafted a single,

initial burden by which the party seeking the instruction must make an initial prima facie showing that the missing witness's testimony " 'would have been noncumulative.' " We do not agree. First, the Court of Appeals in *Edwards* cited to both *Macana* and *Gonzalez*, prior Court of Appeals cases discussing the burden-shifting framework to reach the overall burden for entitlement to the instruction. Second, the Court in *Edwards* did not state that the defendant failed to meet an initial burden of demonstrating that the testimony would not be cumulative. Rather, the Court reaffirmed its position that " '[t]he party seeking the missing witness charge must sustain an initial burden of showing that the opposing party has failed to call a witness who could be expected to have knowledge regarding a material issue in the case and to provide testimony favorable to the opposing party' " (*id.* at 734). In the end, however, the charge was not warranted because the defendant did not meet the overall burden of demonstrating that the testimony would be noncumulative (*see id.*).

To the extent that our decisions, and the decisions of the other Departments, have conflated the overall showing that must be made before the instruction may be given with the initial burden of the *Gonzalez* framework, we conclude that those decisions should no longer be followed.

Here, we agree with defendant that he " 'sustain[ed] [his] initial burden of showing that the opposing party[, i.e., the People] ha[d] failed to call a witness who could be expected to have knowledge regarding a material issue in the case and to provide testimony favorable to the opposing party' " (*Edwards*, 14 NY3d at 734). The uncalled witness was the victim's then-paramour, he was with the victim when she was shot, and he appeared to have been the actual target of the shooter. It also appears from the record that the uncalled witness saw the shooter before any shots were fired because he warned the victim and tried, unsuccessfully, to push her out of the way. Defendant thus established that the uncalled witness was a person " 'who could be expected to have knowledge regarding a material issue in the case and to provide testimony favorable' " to the People (*id.*). The burden thus shifted to the People to demonstrate that the charge was not appropriate.

In opposing defendant's request, the prosecutor argued that it was untimely—the People concede on appeal that the request was timely—and that, in any event, the testimony of the uncalled witness would be cumulative. The prosecutor did not, however, explain how or why the testimony would be cumulative, nor did the prosecutor say what she thought the testimony would be. She did not refer to any statements the uncalled witness may have made to the police or any testimony he may have given to the grand jury. Instead, the prosecutor simply stated in conclusory fashion that the testimony would be cumulative. The court denied defendant's request without explanation, which in our view was error.

We note that, aside from the victim and the uncalled witness, there were no other witnesses to the shooting. The victim initially told the police that she could not identify the shooter, and her

description of the shooter was vague. Although the victim identified defendant at trial as the shooter, she testified that he was a stranger to her and she did not know why he shot her. Considering the questions surrounding the victim's identification of defendant, and in the absence of any indication of what the testimony of the uncalled witness would have been, we cannot conclude that the uncalled witness's testimony would have been cumulative (*see People v Onyia*, 70 AD3d 1202, 1204-1205 [3d Dept 2010]; *see also People v Davydov*, 144 AD3d 1170, 1173 [2d Dept 2016], *lv denied* 29 NY3d 996 [2017]), or that the court's error in refusing to give the charge is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

519

CA 17-01685

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

GARY STIEGMAN, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

THE BARDEN & ROBESON CORPORATION, INDIVIDUALLY AND DOING BUSINESS AS BARDEN HOMES, B&H CARPENTRY, DEFENDANTS-RESPONDENTS-APPELLANTS, ET AL., DEFENDANTS. (APPEAL NO. 1.)

BROWN CHIARI LLP, BUFFALO (BRIAN R. HOGAN OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (THOMAS P. CUNNINGHAM OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT THE BARDEN & ROBESON CORPORATION, INDIVIDUALLY AND DOING BUSINESS AS BARDEN HOMES.

OSBORN, REED & BURKE, LLP, ROCHESTER (JEFFREY P. DIPALMA OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT B&H CARPENTRY.

Appeal and cross appeals from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered December 13, 2016. The order, among other things, denied plaintiff's motion for partial summary judgment and denied in part the cross motions of defendants The Barden & Robeson Corporation, individually and doing business as Barden Homes and B&H Carpentry seeking summary judgment.

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

Same memorandum as in *Stiegman v The Barden & Robeson Corp.* ([appeal No. 2] — AD3d — [June 29, 2018] [4th Dept 2018]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

520

CA 17-01805

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

GARY STIEGMAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THE BARDEN & ROBESON CORPORATION, INDIVIDUALLY AND DOING BUSINESS AS BARDEN HOMES, B&H CARPENTRY, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS. (APPEAL NO. 2.)

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (THOMAS P. CUNNINGHAM OF COUNSEL), FOR DEFENDANT-APPELLANT THE BARDEN & ROBESON CORPORATION, INDIVIDUALLY AND DOING BUSINESS AS BARDEN HOMES.

OSBORN, REED & BURKE, LLP, ROCHESTER (JEFFREY P. DIPALMA OF COUNSEL), FOR DEFENDANT-APPELLANT B&H CARPENTRY.

BROWN CHIARI LLP, BUFFALO (BRIAN R. HOGAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered July 14, 2017. The order granted plaintiff's motion for leave to reargue and, upon reargument, adjudged that a question of fact exists for jury determination concerning whether the subject stairs were temporary or permanent.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of defendant B&H Carpentry's cross motion for summary judgment dismissing the Labor Law §§ 240 (1) and 241 (6) causes of action against it and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that he sustained when the staircase leading to the basement of a home under construction collapsed, and his second amended complaint asserts causes of action for common-law negligence and the violation of Labor Law §§ 200, 240 (1), and 241 (6). The home under construction was owned by Scott and Debra Gribben (Gribbens). Plaintiff, a certified electrician, was employed by DJ Gerling Enterprises, Inc. Defendant The Barden & Robeson Corporation, individually and doing business as Barden Homes (Barden) was the self-proclaimed "project manager" and "supplier of material" for the home construction, while defendant B&H Carpentry (B&H) was retained to frame the house, which included the installation of the subject

basement staircase.

Plaintiff moved for partial summary judgment on his Labor Law § 240 (1) cause of action, and B&H and Barden separately cross-moved for summary judgment dismissing the second amended complaint against them. In the order in appeal No. 1, Supreme Court denied plaintiff's motion, granted the cross motions with respect to the Labor Law §§ 240 (1) and 241 (6) causes of action, granted B&H's cross motion and denied Barden's cross motion with respect to the Labor Law § 200 cause of action, and denied both cross motions with respect to the common-law negligence cause of action. Notably, the court determined that defendants were entitled to summary judgment dismissing the section 240 (1) cause of action and the section 241 (6) cause of action insofar as it was based on alleged violations of 12 NYCRR 23-2.7 (b) and 23-1.11 because the subject staircase was a permanent structure, and thus was not a safety device (*see* § 240 [1]), or a temporary structure (*see* 12 NYCRR 23-1.11; 23-2.7 [b]). The court further determined that the sole remaining regulation that formed the basis of the section 241 (6) cause of action, 12 NYCRR 23-1.7 (b) (1), was not applicable because the staircase was not a hazardous opening.

In the order in appeal No. 2, the court granted plaintiff's motion for leave to reargue and, upon reargument, modified its prior order "to reflect that a question of fact exists for jury determination concerning whether the subject stairs were temporary or permanent." Thus, although not explicitly stated in the order, the court's determination on reargument has the effect of denying the cross motions of B&H and Barden with respect to the Labor Law § 240 (1) cause of action and the Labor Law § 241 (6) cause of action insofar as it is based on alleged violations of 12 NYCRR 23-2.7 (b) and 23-1.11, and reinstating those causes of action against B&H and Barden.

We note at the outset that plaintiff's appeal and B&H's and Barden's cross appeals from the order in appeal No. 1 must be dismissed (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985 [4th Dept 1990]). We further note that B&H and Barden appeal from the order in appeal No. 2, but plaintiff did not file a notice of appeal with respect to that order.

In appeal No. 2, contrary to the contentions of B&H and Barden, we conclude that the court properly determined, upon reargument, that there is a triable question of fact whether the subject stairs were temporary or permanent. "A temporary staircase that is used for access to and from the upper levels of a house under construction is the 'functional equivalent of a ladder' and falls within the designation of 'other devices' within the meaning of Labor Law § 240 (1)" (*Frank v Meadowlakes Dev. Corp.*, 256 AD2d 1141, 1142 [4th Dept 1998]). Nevertheless, "it has repeatedly been held that a stairway which is, or is intended to be, permanent--even one that has not yet been anchored or secured in its designated location . . . , or completely constructed . . . --cannot be considered the functional equivalent of a ladder or other device as contemplated by section 240 (1)" (*Williams v City of Albany*, 245 AD2d 916, 917 [3d Dept 1997],

appeal dismissed 91 NY2d 957 [1998] [internal quotation marks omitted]; *see Sponholz v Benderson Prop. Dev.*, 266 AD2d 815, 815 [4th Dept 1999], *appeal dismissed* 94 NY2d 899 [2000]; *Pennacchio v Tednick Corp.*, 200 AD2d 809, 810 [3d Dept 1994]). Although there is evidence in the record that the staircase was temporary because the Gribbens intended to replace it at some point in the future, there is a triable issue of fact whether the stairs were temporary or permanent inasmuch as the record also includes the original plans for the home along with the new home selection sheet, which provided that only the subject stairs, referred to as knock-down stairs, would be installed, and that the "[o]wner may purchase finished stairs later." Additionally, even assuming, arguendo, that plaintiff's contention is properly before us, we reject his contention that he established that the subject stairs were temporary for the same reasons.

Contrary to Barden's contention, it is not entitled to summary judgment dismissing the Labor Law §§ 240 (1) and 241 (6) causes of action against it inasmuch as there are triable issues of fact whether it had the authority to supervise or control the injury-producing work, and thus whether it may be liable as a general contractor or an agent of the owner pursuant to those statutes. " 'An entity is a contractor within the meaning of Labor Law § 240 (1) and § 241 (6) if it had the power to enforce safety standards and choose responsible subcontractors . . . , and an entity is a general contractor if, in addition thereto, it was responsible for coordinating and supervising the . . . project' " (*Robinson v Spragues Wash. Sq., LLC*, 158 AD3d 1318, 1319 [4th Dept 2018]). While a construction manager "is generally not considered a 'contractor' or 'owner' within the meaning of section 240 (1) or section 241" (*Lodato v Greyhawk N. Am., LLC*, 39 AD3d 491, 493 [2d Dept 2007]), a construction manager may nevertheless be "vicariously liable as an agent of the property owner . . . where the manager had the ability to control the activity which brought about the injury" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *see Bausenwein v Allison*, 126 AD3d 1466, 1468 [4th Dept 2015]; *Reed v NEA Residential, Inc.*, 64 AD3d 1148, 1149 [4th Dept 2009]). "The label given a defendant, whether 'construction manager' or 'general contractor,' is not determinative . . . [inasmuch as] the core inquiry is whether the defendant had the 'authority to supervise or control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition' " (*Myles v Claxton*, 115 AD3d 654, 655 [2d Dept 2014]). Similarly, even assuming, arguendo, that plaintiff's contention that he is entitled to summary judgment with respect to Barden's liability pursuant to Labor Law § 240 (1) is properly before us, we reject that contention inasmuch as he failed to establish as a matter of law that Barden was the general contractor or the agent of the Gribbens.

With respect to the Labor Law § 200 and common-law negligence causes of action against Barden, we conclude that, contrary to Barden's contention, "it failed to eliminate triable issues of fact whether it had control over the work site and [created or had] actual or constructive notice of the dangerous condition that allegedly caused plaintiff's injuries" (*Robinson*, 158 AD3d at 1320 [internal quotation marks omitted]; *see Burns v Lecesse Constr. Servs. LLC*, 130

AD3d 1429, 1434 [4th Dept 2015]).

We agree with B&H that the court erred in denying that part of its cross motion with respect to the Labor Law §§ 240 (1) and 241 (6) causes of action, and we therefore modify the order in appeal No. 2 accordingly. B&H "established its entitlement to summary judgment on those [causes of action] by submitting evidence that it had completed its work and was not at the work site at the time of plaintiff's injury; and, that as a subcontractor, it did not have the 'authority to supervise or control the work that caused the plaintiff's injury' " (*Foots v Consolidated Bldg. Contrs., Inc.*, 119 AD3d 1324, 1326-1327 [4th Dept 2014]; *see Burns*, 130 AD3d at 1432). In opposition, plaintiff did "not raise an issue of fact whether [B&H] had the requisite authority to supervise or control the work site or the work that resulted in plaintiff's injuries" (*Foots*, 119 AD3d at 1327; *see Burns*, 130 AD3d at 1432). Even assuming, arguendo, that plaintiff's contention that the court erred in granting that part of B&H's cross motion with respect to the Labor Law § 200 cause of action is properly before us, we reject that contention. B&H, "as [a] subcontractor[] without control of plaintiff's work or ongoing control of the area in which he was injured, cannot be held liable under Labor Law § 200" (*Burns*, 130 AD3d at 1433; *see Tomyuk v Junefield Assoc.*, 57 AD3d 518, 521 [2d Dept 2008]).

Contrary to B&H's contention, however, the court properly denied that part of its cross motion with respect to the common-law negligence cause of action. In contrast to liability imposed pursuant to Labor Law § 200, a subcontractor such as B&H "may be held liable for negligence where the work it performed created the condition that caused the plaintiff's injury even if it did not possess any authority to supervise and control the plaintiff's work or work area" (*Burns*, 130 AD3d at 1433-1434 [internal quotation marks omitted]). Here, B&H failed to meet its burden of establishing as a matter of law that it did not create the condition that caused plaintiff's injury (*see id.* at 1434). B&H's contention that the entire staircase that it had installed was removed by an unknown entity after it departed from the work site and was then reinstalled by an unknown entity prior to the date of the accident is not properly before us because it was raised for the first time in its reply brief (*see O'Sullivan v O'Sullivan*, 206 AD2d 960, 960-961 [4th Dept 1994]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

530

KA 17-01061

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL C. JANOWSKY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered August 17, 2015. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Janowsky* ([appeal No. 2] — AD3d — [June 29, 2018] [4th Dept 2018]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

531

KA 15-01854

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL C. JANOWSKY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered August 17, 2015. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: In these consolidated appeals, defendant appeals, in appeal No. 1, from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]). In appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of assault in the second degree (§ 120.05 [3]). Initially, we note that defendant does not raise any contention with respect to the judgment in appeal No. 1, and thus we dismiss the appeal therefrom (*see People v Bertollini* [appeal No. 2], 141 AD3d 1163, 1164 [4th Dept 2016]). Contrary to defendant's contention in appeal No. 2, we conclude that he knowingly, voluntarily and intelligently waived his right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]), and that valid waiver forecloses his challenge to the severity of the sentence in appeal No. 2 (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

537

CAF 16-01195

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

IN THE MATTER OF RAVEN F.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

NICHOLAS F., RESPONDENT-APPELLANT,
AND ANGELA C., RESPONDENT.
(APPEAL NO. 1.)

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

JAMES E. BROWN, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), dated June 28, 2016 in a proceeding pursuant to Family Court Act article 10. The order adjudged that the subject child was neglected.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the finding that respondent Nicholas F. neglected the subject child by engaging in a pattern of domestic violence in the child's presence, and as modified the order is affirmed without costs.

Memorandum: These consolidated appeals arise from two related child protective proceedings pursuant to article 10 of the Family Court Act. In appeal No. 1, respondent father appeals from an order of fact-finding determining that he neglected the subject child (*see generally* § 1112 [a]). In appeal No. 2, the father appeals from an order that granted petitioner's motion for summary judgment on the petition, which alleged that the father derivatively neglected his younger child.

In appeal No. 1, we agree with the father that petitioner failed to establish by a preponderance of the evidence that he neglected the older child on the ground that he engaged in misconduct constituting a pattern of domestic violence when the child was "presumably present" (*see Matter of Ilona H. [Elton H.]*, 93 AD3d 1165, 1166-1167 [4th Dept 2012]; *see generally* Family Ct Act § 1046 [b] [i]), and we therefore modify the order accordingly. In light of that determination, the father's contentions regarding various evidentiary rulings by Family

Court with respect to that ground are academic. We reject, however, the father's further contention that petitioner failed to establish by a preponderance of the evidence that he neglected the older child based on the father's long-standing history of mental illness and erratic and aggressive behavior (*see Matter of Mesiah Elijah B. [Taneez B.]*, 132 AD3d 456, 456 [1st Dept 2015]; *Matter of Harmony S.*, 22 AD3d 972, 973 [3d Dept 2005]; *see generally* § 1046 [b] [i]).

We reject the father's contention in appeal No. 2 that petitioner failed to meet its initial burden of establishing derivative neglect with respect to the younger child (*see generally Matter of Xiomara D. [Madelyn D.]*, 96 AD3d 1239, 1240-1241 [3d Dept 2012]). We conclude that the court properly determined that petitioner's submissions established an impairment of the father's parental judgment to the point that it created a substantial risk of harm for any child left in the father's care (*see Matter of Devre S. [Carlee C.]*, 74 AD3d 1848, 1849 [4th Dept 2010]), and that the neglect determination in appeal No. 1 was sufficiently proximate in time to support a reasonable conclusion that the problematic conditions continued to exist (*see Matter of Tradale CC.*, 52 AD3d 900, 901 [3d Dept 2008]). The father failed to raise an issue of fact in opposition, and we therefore conclude that the court properly granted the motion (*see generally Matter of Suffolk County Dept. of Social Servs. v James M.*, 83 NY2d 178, 182-183 [1994]). We have reviewed the father's remaining contentions in appeal No. 2 and conclude that none require reversal or modification of the order in that appeal.

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

538

CAF 16-01996

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

IN THE MATTER OF ISIS R.L.F.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

NICHOLAS F., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

JAMES E. BROWN, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered October 13, 2016 in a proceeding pursuant to Family Court Act article 10. The order granted the motion of petitioner for summary judgment.

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

Same memorandum as in *Matter of Raven F.* ([appeal No. 1]) — AD3d — [June 29, 2018] [4th Dept 2018]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

556

CA 17-01952

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, AND NEMOYER, JJ.

SADASHIV S. SHENOY, M.D., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KALEIDA HEALTH, ET AL., DEFENDANTS,
UB/MD, INC., DOING BUSINESS AS UB MD NEUROLOGY
AND/OR JACOBS NEUROLOGIC INSTITUTE, AND ROBERT N.
SAWYER, JR., M.D., DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

BOND, SCHOENECK & KING, PLLC, BUFFALO (STEPHEN A. SHARKEY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GARVEY & GARVEY, BUFFALO (MATTHEW J. GARVEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered March 2, 2017. The order denied the motion of defendants UB/MD, Inc., doing business as UB MD Neurology and/or Jacobs Neurologic Institute and Robert N. Sawyer, Jr., M.D., to dismiss plaintiff's complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the first, fourth, and fifth causes of action and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action alleging, inter alia, causes of action for defamation, injurious falsehood, and tortious interference with business relations against defendant Robert N. Sawyer, Jr., M.D. Plaintiff also asserted a cause of action for defamation against defendant UB/MD, Inc., doing business as UB MD Neurology and/or Jacobs Neurologic Institute (Jacobs). The cause of action against Jacobs alleges that it is liable on a theory of respondeat superior for purportedly defamatory statements made by Sawyer and defendant Ralph Benedict, M.D. Sawyer and Jacobs (defendants) now appeal from an order that denied their motion to dismiss the complaint against them.

Contrary to defendants' contention, the court properly denied their motion insofar as it sought to dismiss the tortious interference claim against Sawyer (*see Smith v Meridian Tech., Inc.*, 52 AD3d 685, 686-687 [2d Dept 2008]). We agree with defendants, however, that Sawyer's allegedly defamatory statements constitute expressions of

pure opinion and are therefore not actionable (*see Mann v Abel*, 10 NY3d 271, 276 [2008], *cert denied* 555 US 1170 [2009]; *Steinhilber v Alphonse*, 68 NY2d 283, 289 [1986]; *Balderman v American Broadcasting Cos.*, 292 AD2d 67, 72-73 [4th Dept 2002], *lv denied* 98 NY2d 613 [2002]). We likewise agree with defendants that Sawyer's "expression of opinion . . . cannot serve as the basis for plaintiff's injurious falsehood claim" (*Vitro S.A.B. de C.V. v Aurelius Capital Mgt., L.P.*, 99 AD3d 564, 565 [1st Dept 2012], *lv denied* 21 NY3d 852 [2013]). The court therefore erred in denying the motion insofar as it sought to dismiss the defamation and injurious falsehood claims against Sawyer, and we modify the order accordingly.

Our dismissal of the defamation claim against Sawyer, along with our prior dismissal of the defamation claim against Benedict (*Shenoy v Kaleida Health*, 158 AD3d 1323, 1323-1324 [4th Dept 2018]), necessarily requires the dismissal of the defamation claim against Jacobs inasmuch as "an employer cannot be held vicariously liable for the acts of an employee if there has been a determination, on the merits, that the employee [is] not [liable]" for those acts (*Wright v Shapiro*, 35 AD3d 1253, 1254 [4th Dept 2006]; *see Escobar v New York Hosp.*, 111 AD2d 128, 129 [1st Dept 1985]). We thus agree with defendants that the court additionally erred in denying their motion insofar as it sought to dismiss the defamation claim against Jacobs, and we therefore further modify the order accordingly.

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

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

562

CA 17-02092

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, AND NEMOYER, JJ.

SADASHIV S. SHENOY, M.D., PLAINTIFF-RESPONDENT,

V ORDER

KALEIDA HEALTH, ET AL., DEFENDANTS,
UB/MD, INC., DOING BUSINESS AS UB MD NEUROLOGY
AND/OR JACOBS NEUROLOGIC INSTITUTE, AND ROBERT N.
SAWYER, JR., M.D., DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

BOND, SCHOENECK & KING, PLLC, BUFFALO (STEPHEN A. SHARKEY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GARVEY & GARVEY, BUFFALO (MATTHEW J. GARVEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered February 9, 2017. The order granted the motion of plaintiff to compel certain disclosure from defendants UB/MD, Inc. doing business as UB MD Neurology, and/or Jacobs Neurologic Institute, and Robert N. Sawyer, Jr., M.D.

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

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

567

CA 17-02117

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, AND NEMOYER, JJ.

SADASHIV S. SHENOY, M.D., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KALEIDA HEALTH, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.
(APPEAL NO. 3.)

HODGSON RUSS LLP, BUFFALO (CYNTHIA GIGANTI LUDWIG OF COUNSEL), FOR DEFENDANT-APPELLANT.

GARVEY & GARVEY, BUFFALO (MATTHEW J. GARVEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered March 1, 2017. The order denied the motion of defendant Kaleida Health for summary judgment dismissing the complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted and the complaint is dismissed against defendant Kaleida Health.

Memorandum: Plaintiff commenced this action asserting causes of action against various defendants, including one against Kaleida Health (defendant) for tortious interference with business relations. We agree with defendant that Supreme Court erred in denying its motion to dismiss the complaint against it because "plaintiff did not adequately plead a cause of action for tortious interference with [business relations]. In such an action '[t]he motive for the interference must be solely malicious, and the plaintiff has the burden of proving this fact' . . . Plaintiff, however, does not demonstrate any factual basis for [his] allegations of malice, other than suspicion. This conclusory allegation of malice is therefore insufficient to support such cause of action" (*John R. Loftus, Inc. v White*, 150 AD2d 857, 860 [3d Dept 1989]; *see Hersh v Cohen*, 131 AD3d 1117, 1119 [2d Dept 2015]; *Maas v Cornell Univ.*, 245 AD2d 728, 731 [3d Dept 1997]). We therefore reverse the order, grant the motion, and dismiss the complaint against defendant. In light of our determination, defendant's remaining contentions are academic.

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

569

TP 17-01878

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

IN THE MATTER OF THOMAS CORDWAY, PETITIONER,

V MEMORANDUM AND ORDER

CAYUGA COUNTY, CAYUGA COUNTY SHERIFF'S OFFICE AND DAVID S. GOULD, AS CAYUGA COUNTY SHERIFF, RESPONDENTS.

ENNIO J. CORSI, GENERAL COUNSEL, NEW YORK STATE ENFORCEMENT OFFICERS UNION, COUNCIL 82, AFSCME, AFL-CIO, ALBANY (A. ANDRE DALBEC OF COUNSEL), FOR PETITIONER.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (SUZANNE O. GALBATO OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court, Cayuga County [Mark H. Fandrich, A.J.], entered October 16, 2017) to review a determination of respondents. The determination terminated benefits petitioner was receiving pursuant to General Municipal Law § 207-c.

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

Memorandum: Petitioner, a deputy sheriff, commenced this CPLR article 78 proceeding challenging the determination that terminated the disability benefits he had been receiving under General Municipal Law § 207-c. The Hearing Officer issued a report recommending that petitioner's continued receipt of benefits be terminated. Contrary to petitioner's contention, we see no basis to disturb the Hearing Officer's determination terminating the benefits.

We conclude that the Hearing Officer's determination is supported by substantial evidence (*see Matter of Quintana v City of Buffalo*, 114 AD3d 1222, 1223-1224 [4th Dept 2014], *lv denied* 23 NY3d 902 [2014]). Here, although petitioner presented evidence that his alleged injuries and ailments were causally related to the work-related slip and fall, respondents presented evidence to the contrary. "[T]he Hearing Officer was entitled to weigh the parties' conflicting medical evidence and to assess the credibility of the witnesses, and [w]e may not weigh the evidence or reject [the Hearing Officer's] choice where the evidence is conflicting and room for a choice exists" (*Matter of Erie County Sheriff's Police Benevolent Assn., Inc. v County of Erie*,

159 AD3d 1561, 1562 [4th Dept 2018] [internal quotation marks omitted]).

Contrary to petitioner's remaining contention, respondents' initial award of section 207-c benefits does not require the continuation of such benefits inasmuch as "[t]he continued receipt of section 207-c disability payments is not absolute" (*Matter of Park v Kapica*, 8 NY3d 302, 310 [2007]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

614

TP 17-01949

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

IN THE MATTER OF JOHN NOTMAN, EXECUTOR OF THE ESTATE OF FLORENCE NOTMAN, DECEASED, MEDICAID RECIPIENT, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF HEALTH AND COMMISSIONER HOWARD ZUCKER, RESPONDENTS.

CERIO LAW OFFICES, SYRACUSE (DAVID W. HERKALA OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court, Onondaga County [Spencer J. Ludington, A.J.], entered October 31, 2016) to review a determination denying petitioner's request for a fair hearing.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination denying as untimely his request for a fair hearing to review the net adjusted monthly income (NAMI) attributed to petitioner's decedent for Medicaid purposes in 2013. A request for a fair hearing must be made "within sixty days of the action or failure to act complained of" (Social Services Law § 22 [4] [a]; *see* 18 NYCRR 358-3.5 [b] [1]), and the failure to do so deprives an agency of authority to review any challenge thereto (*cf. Matter of Bryant v Perales*, 161 AD2d 1186, 1186-1187 [4th Dept 1990], *lv denied* 76 NY2d 710 [1990]). Here, petitioner confirmed multiple times before the Administrative Law Judge (ALJ) that he was seeking review of the December 12, 2012 NAMI determination made by the Onondaga County Department of Social Services on behalf of respondent New York State Department of Health, and there is no dispute that petitioner's request for a fair hearing was made over a year after that determination. Petitioner contends that his request for a fair hearing was timely because it was made within 60 days of an alleged April 2014 telephonic denial of a NAMI recalculation. Although during the proceedings before the ALJ petitioner referenced the April 2014 phone call in support of his argument that the applicable statute of

limitations should be tolled, the contention that this phone call constituted a separate and distinct determination is raised for the first time in his CPLR article 78 petition. A new contention " 'may not be raised for the first time before the courts in [a CPLR] article 78 proceeding' " (*Matter of Peckham v Calogero*, 12 NY3d 424, 430 [2009]; *see Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000]; *Matter of Krall v Kelly*, 142 AD2d 951, 951-952 [4th Dept 1988]). Petitioner's failure to raise that issue before the ALJ deprived "the administrative agency of the opportunity to prepare a record reflective of its expertise and judgment" with respect to whether the April 2014 telephone conversation constituted an application by petitioner for a NAMI recalculation and a denial thereof on which petitioner was entitled to a fair hearing (*Yarbough*, 95 NY2d at 347 [internal quotation marks omitted]; *see* Social Services Law § 22 [1], [5]), and thus petitioner has yet to exhaust his administrative remedies with respect to that issue.

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

635

CA 17-01934

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

MARY WYZYKOWSKI, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 125390.)

BROWN CHIARI LLP, BUFFALO (ANGELO S. GAMBINO OF COUNSEL), FOR CLAIMANT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PATRICK A. WOODS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Renee Forgensi Minarik, J.), entered January 3, 2017. The order granted the motion of defendant for summary judgment dismissing the claim.

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

Memorandum: Claimant commenced this action seeking damages for injuries that she sustained when she fell while ice skating on a rink owned and operated by defendant at the State University of New York at Brockport. The Court of Claims granted defendant's motion for summary judgment dismissing the claim on the ground that there was not a dangerous condition on the ice and, even if a dangerous condition existed, the claim is barred by the doctrine of assumption of the risk. We reverse.

Initially, even assuming, arguendo, that defendant met its initial burden on the issue whether a dangerous condition existed at the time of claimant's fall and was created as a result of defendant's allegedly negligent maintenance of the ice surface (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), we agree with claimant that she raised triable issues of fact in opposition to the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

We further agree with claimant that her claim is not barred by the doctrine of assumption of the risk. It is well settled that "[a claimant] will not be held to have assumed those risks that are not inherent . . . , i.e., not ordinary and necessary in the sport" (*Lamey v Foley*, 188 AD2d 157, 164 [4th Dept 1993] [internal quotation marks

omitted]). Although the risk of falling while ice skating is " 'inherent in and arise[s] out of the nature of the sport generally' " (*Custodi v Town of Amherst*, 20 NY3d 83, 88 [2012], quoting *Morgan v State of New York*, 90 NY2d 471, 484 [1997]), we conclude that skating on a negligently maintained ice surface is not a risk that is inherent in the sport. Contrary to defendant's contention, under the circumstances presented here, claimant's awareness of the poor ice conditions and her decision to continue skating for some period of time, apparently to have a photograph taken, relate only to the issue of her comparative fault, if any (*cf. Rossman v RCPI Landmark Props., L.L.C.*, 41 AD3d 318, 318 [1st Dept 2007]; *Gillett v County of Westchester*, 274 AD2d 547, 547 [2d Dept 2000]).

Mark W. Bennett

Entered: June 29, 2018

Clerk of the Court

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

644

CA 18-00076

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

IN THE MATTER OF JERRY WEIKEL, SR.,
PLAINTIFF-PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF WEST TURIN AND RICHARD FAILING, IN HIS
CAPACITY AS SUPERINTENDENT OF HIGHWAYS FOR TOWN
OF WEST TURIN, DEFENDANTS-RESPONDENTS-APPELLANTS.

HRABCHAK & GEBO, P.C., WATERTOWN (MARK G. GEBO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

CAMPANY, MCARDLE & RANDALL, PLLC, LOWVILLE (KEVIN M. MCARDLE OF COUNSEL), FOR PLAINTIFF-PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Lewis County (James P. McClusky, J.), entered June 27, 2017 in a CPLR article 78 proceeding and declaratory judgment action. The judgment, insofar as appealed from, granted in part the motion of plaintiff-petitioner for summary judgment and declared that the Town of West Turin Local Law No. 1 of 1997 is invalid.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in its entirety, the declaration is vacated, and defendants-respondents are granted summary judgment dismissing the second cause of action to the extent it seeks declaratory relief.

Memorandum: Defendant-respondent Town of West Turin (Town) enacted Local Law No. 1 of 1997 (Local Law), which allowed the Town to classify certain roads as "minimum maintenance roads" and granted the superintendent of highways the authority to determine the amount of maintenance provided to such roads, including snow plowing. In August 2004, plaintiff-petitioner (plaintiff) purchased property along Bower Road, also known as Bauer Road. After several years of development pursuant to various applications that were granted by the Town and Lewis County (County), including a "certificate of occupancy/compliance" issued by the County in June 2008 indicating that a single family dwelling constructed on the property conformed to the approved plans and applicable provisions of law, plaintiff decided in 2014 to relocate permanently to the property and requested that the Town assume responsibility to plow Bower Road. Following certain proceedings not directly relevant on this appeal, the Town declined to remove the classification and to plow Bower Road, which, according to

defendant-respondent Richard Failing, the Town's superintendent of highways, is essentially a one-lane, substandard dirt road of limited width that has never received winter maintenance.

Plaintiff thereafter commenced this hybrid declaratory judgment action and CPLR article 78 proceeding seeking various forms of relief, including a declaration that the Local Law is invalid. In their answer, defendants-respondents (defendants) asserted several affirmative defenses, including that plaintiff's challenge to the validity of the Local Law was untimely. Plaintiff eventually moved for summary judgment contending, among other things, that Highway Law § 140 imposes a duty upon the superintendent of highways to remove snow that obstructs all town highways, including Bower Road, and that the Local Law was invalid under state law. Supreme Court determined that plaintiff's challenge to the Local Law was not time-barred and granted plaintiff's motion in part by declaring that the Local Law is invalid on the ground that it conflicts with Highway Law § 140. Defendants appeal.

We agree with defendants that plaintiff's challenge to the validity of the Local Law is untimely, and we therefore reverse the judgment insofar as appealed from and deny plaintiff's motion in its entirety. Furthermore, although defendants did not cross-move for summary judgment dismissing as time-barred plaintiff's second cause of action to the extent that it seeks a declaration that the Local Law is invalid, we search the record and grant summary judgment to defendants dismissing the second cause of action to that extent where, as here, the affirmative defense was "the subject of the motion[] before the court" (*Dunham v Hilco Constr. Co.*, 89 NY2d 425, 430 [1996]; *see* CPLR 3212 [b]; *Delaine v Finger Lakes Fire & Cas. Co.*, 23 AD3d 1143, 1144 [4th Dept 2005]). Contrary to plaintiff's contention and the court's determination, to the extent that plaintiff seeks a declaration that the presumptively valid Local Law is invalid (*see* NY Const art IX, § 2 [c] [ii] [6]; Municipal Home Rule Law § 10 [1] [ii] [a] [6]; *Holt v County of Tioga*, 56 NY2d 414, 417-418 [1982]), plaintiff's challenge is to the substance of the Local Law and is therefore subject to the six-year statute of limitations pursuant to CPLR 213 (1) (*see Miranda Holdings, Inc. v Town Bd. of Town of Orchard Park*, 152 AD3d 1234, 1235 [4th Dept 2017], *lv denied* 30 NY3d 905 [2017]; *Matter of McCarthy v Zoning Bd. of Appeals of Town of Niskayuna*, 283 AD2d 857, 858 [3d Dept 2001]; *Almor Assoc. v Town of Skaneateles*, 231 AD2d 863, 863 [4th Dept 1996]). "As a general principle, the statute of limitations begins to run when a cause of action accrues (*see* CPLR 203 [a]), that is, 'when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court' " (*Hahn Automotive Warehouse, Inc. v American Zurich Ins. Co.*, 18 NY3d 765, 770 [2012]). Here, plaintiff could have sought a declaration that the Local Law was invalid in August 2004 when he purchased the property on Bower Road that was subject to the "minimum maintenance road" classification under the Local Law (*see Atlas Henrietta, LLC v Town of Henrietta Zoning Bd. of Appeals*, 46 Misc 3d 325, 339 [Sup Ct, Monroe County 2013], *affd* 120 AD3d 1606 [4th Dept 2014]; *see generally* CPLR 3001; *Zwarycz v Marnia Constr., Inc.*, 102 AD3d 774, 776 [2d Dept 2013]). Plaintiff's second cause of action to the extent that it

seeks a declaration was brought well after the expiration of the six-year limitations period and is therefore untimely.

In light of our determination, we do not consider defendants' remaining contentions. Finally, we note that plaintiff did not take a cross appeal from that part of the judgment denying his motion to the extent that it sought relief pursuant to CPLR article 78, and thus his contentions regarding such relief are not properly before us (*see Harris v Eastman Kodak Co.*, 83 AD3d 1563, 1564 [4th Dept 2011]; *Ames v Norstar Bldg. Corp.*, 19 AD3d 1016, 1017 [4th Dept 2005]; *see generally* CPLR 5515 [1]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

646

CA 17-02176

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

IN THE MATTER OF NICHOLAS L. BUSCAGLIA,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ASSESSOR, TOWN OF HAMBURG AND THE
BOARD OF ASSESSMENT REVIEW OF THE
TOWN OF HAMBURG, RESPONDENTS-RESPONDENTS.

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

WILLIAM J. TRASK, BLASDELL, FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Sharon S. Townsend, J.), entered February 24, 2017 in proceedings pursuant to RPTL article 7. The order dismissed the petitions.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petitions are reinstated and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Petitioner commenced these proceedings pursuant to RPTL article 7, seeking to challenge the tax assessments on a waterfront parcel of real property located in the Town of Hamburg, on Lake Erie. The residence on the property was originally built in 1938 and underwent extensive remodeling in 1980 and during the last decade. In separate petitions, petitioner challenged the tax assessments for the 2013-2014, 2014-2015, 2015-2016, and 2016-2017 years, and the matter proceeded to trial. Petitioner and respondents stipulated to the admission in evidence of their respective appraisal reports, and the parties' attorneys presented arguments thereupon. There was no evidence before Supreme Court other than the two appraisals. The court agreed with respondents that petitioner failed to overcome the legal presumption that respondents' assessment was valid by introducing substantial evidence that the property was overvalued, and dismissed the petitions on that ground. We reverse.

It is well settled that, "[i]n an RPTL article 7 proceeding, a rebuttable presumption of validity attaches to the valuation of property made by the taxing authority," and "a petitioner challenging the accuracy of a tax valuation has the initial burden to rebut the presumption by introducing substantial evidence that the property was overvalued" (*Matter of Roth v City of Syracuse*, 21 NY3d 411, 417

[2013]; *see Matter of Canandaigua Natl. Bank & Trust Co. v Brown*, 137 AD3d 1627, 1629 [4th Dept 2016]). "[T]he 'substantial evidence' standard merely requires that petitioner demonstrate the existence of a valid and credible dispute regarding valuation. The ultimate strength, credibility or persuasiveness of petitioner's arguments are not germane during this threshold inquiry" (*Matter of FMC Corp. [Peroxygen Chems. Div.] v Unmack,* 92 NY2d 179, 188 [1998]). This burden, which is lower than "proof by 'a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable doubt' " (*id.*, quoting *300 Gramatan Ave. Assocs. v State Div. of Human Rights,* 45 NY2d 176, 180 [1978]), is most often attempted to be met by a taxpayer by the submission of a " 'detailed, competent appraisal based on standard, accepted appraisal techniques and prepared by a qualified appraiser' " (*Matter of Board of Mgrs. of French Oaks Condominium v Town of Amherst,* 23 NY3d 168, 175 [2014], quoting *Matter of Niagara Mohawk Power Corp. v Assessor of Town of Geddes,* 92 NY2d 192, 196 [1998]). An appraisal "should be disregarded[, however,] when a party violates [22 NYCRR] 202.59 (g) (2) by failing to adequately 'set forth the facts, figures and calculations supporting the appraiser's conclusions' " (*id.* at 176, quoting *Pritchard v Ontario County Indus. Dev. Agency,* 248 AD2d 974, 974 [4th Dept 1998], *lv denied* 92 NY2d 803 [1998]).

Here, the court did not conclude that petitioner's appraisal was facially insufficient under section 202.59 (g) (2), and there was no finding by the court that the "sales, leases or other transactions involving comparable properties . . . relied on . . . [were not] set forth with sufficient particularity as to permit the transaction to be readily identified" (*id.*; *see Board of Mgrs. of French Oaks Condominium,* 23 NY3d at 175-176). The court, relying on respondents' allegation that petitioner's appraiser had misidentified the types of transactions underlying each comparable and the import thereof, determined that dismissal of the petitions was warranted "[b]ecause there was no other evidence presented by Petitioner to support his arguments and substantiate [his] appraisal report to overcome the legal presumption that the Assessor's valuation is accurate." That was error.

The appraisal reports stipulated in evidence by the parties presented "a valid and credible dispute regarding valuation" (*FMC Corp. [Peroxygen Chems. Div.],* 92 NY2d at 188; *see Board of Mgrs. of French Oaks Condominium,* 23 NY3d at 175), and the court ruled that it would consider only those appraisal reports. Therefore, petitioner in meeting his threshold burden had no obligation to come forward with additional evidence to rebut the unsworn allegations of respondents' counsel disputing the validity of petitioner's comparables. Thus, we reverse the order, reinstate the petitions and remit the matter to Supreme Court to "weigh the entire record, including evidence of claimed deficiencies in the assessment, to determine whether petitioner has established by a preponderance of the evidence that

[his] property has been overvalued" (*FMC Corp. [Peroxygen Chems. Div.],* 92 NY2d at 188).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

653

CA 17-02199

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

IN THE MATTER OF ARBITRATION BETWEEN
ONONDAGA COMMUNITY COLLEGE,
PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

THE PROFESSIONAL ADMINISTRATORS OF ONONDAGA
COMMUNITY COLLEGE FEDERATION OF TEACHERS AND
ADMINISTRATORS, RESPONDENT-APPELLANT.

ROBERT T. REILLY, LATHAM (MATTHEW E. BERGERON OF COUNSEL), FOR RESPONDENT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (PETER A. JONES OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered March 17, 2017 in a proceeding pursuant to CPLR article 75. The order, insofar as appealed from, granted that part of the petition seeking to stay the instant 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 in its entirety, and the cross motion is granted.

Memorandum: Respondent, the collective bargaining representative for all professional administrators employed by petitioner, filed a grievance on behalf of one of its members after petitioner served the member with a letter notifying her that her position was being retrenched, i.e., eliminated. In its grievance and subsequent demand for arbitration, respondent alleged that petitioner violated, misinterpreted, and/or inequitably applied the parties' collective bargaining agreement (CBA), including the provision providing that dismissal of an employee on a continuing appointment "shall be for just cause and subject to" the grievance procedure of the CBA, so as to deprive the member of work and benefits without just cause "by constructively discharg[ing] her in the guise of a 'retrenchment.' " Petitioner commenced this proceeding pursuant to CPLR article 75, seeking a permanent stay of arbitration on the ground that the parties did not agree to arbitrate the type of grievance in dispute. Respondent appeals from an order that, inter alia, granted the petition insofar as it sought a permanent stay of the instant

arbitration and denied its cross motion to compel arbitration. We conclude that Supreme Court should have denied the petition in its entirety and granted the cross motion.

"It is well settled that, in deciding an application to stay or compel arbitration under CPLR 7503, the court is concerned only with the threshold determination of arbitrability, and not with the merits of the underlying claim" (*Matter of Alden Cent. Sch. Dist. [Alden Cent. Schs. Administrators' Assn.]*, 115 AD3d 1340, 1340 [4th Dept 2014]). The Court of Appeals has set forth a two-step test to determine "whether a grievance is arbitrable" (*Matter of City of Johnstown [Johnstown Police Benevolent Assn.]*, 99 NY2d 273, 278 [2002] [*Johnstown*]; *see Matter of Board of Educ. of Watertown City Sch. Dist. [Watertown Educ. Assn.]*, 93 NY2d 132, 143 [1999] [*Watertown*]; *Matter of Acting Supt. of Schs. of Liverpool Cent. Sch. Dist. [United Liverpool Faculty Assn.]*, 42 NY2d 509, 513 [1977] [*Liverpool*]). "First, a court must determine whether there is any statutory, constitutional or public policy prohibition against arbitration of the grievance" (*Matter of Mariano v Town of Orchard Park*, 92 AD3d 1232, 1233 [4th Dept 2012] [internal quotation marks omitted]). "If the court determines that there is no such prohibition and thus that the parties have the authority to arbitrate the grievance, it proceeds to the second step, in which it must determine whether that authority was in fact exercised, i.e., whether the CBA demonstrates that the parties agreed to refer this type of dispute to arbitration" (*Matter of Kenmore-Town of Tonawanda Union Free Sch. Dist. [Ken-Ton Sch. Empls. Assn.]*, 110 AD3d 1494, 1495 [4th Dept 2013]; *see Johnstown*, 99 NY2d at 278).

Here, petitioner correctly concedes that arbitration of the grievance is not prohibited under the first step, and thus "[t]he sole question presented on this appeal is whether the parties have 'agreed to arbitrate the dispute at issue' " under the second step of the test (*Matter of Niagara Frontier Transp. Auth. v Niagara Frontier Transp. Auth. Superior Officers Assn.*, 71 AD3d 1389, 1390 [4th Dept 2010], *lv denied* 14 NY3d 712 [2010], quoting *Johnstown*, 99 NY2d at 278). Contrary to the court's determination, under the current presumption-free framework regarding public sector arbitrability (*see Watertown*, 93 NY2d at 142; *cf. Liverpool*, 42 NY2d at 515), a court's review under the second step "is limited to the language of the grievance and the demand for arbitration, as well as to the reasonable inferences that may be drawn therefrom" (*Niagara Frontier Transp. Auth.*, 71 AD3d at 1390; *see Matter of City of Watertown [Watertown Professional Firefighters' Assn. Local 191]*, 152 AD3d 1231, 1232 [4th Dept 2017], *lv denied* 30 NY3d 908 [2018]). Pursuant to the language of the grievance and the demand for arbitration, respondent alleged that petitioner violated, misinterpreted, and/or inequitably applied the CBA in dismissing the member without just cause "by constructively discharg[ing] her in the guise of a 'retrenchment.' " Inasmuch as respondent alleged that the ostensible retrenchment of the member's position was actually a dismissal without just cause, we agree with respondent that the court erred in concluding that respondent "challenge[d petitioner's] decision to retrench."

We further agree with respondent that the grievance, as properly construed, should be submitted to arbitration. The CBA defines "grievance," in relevant part, as "a claimed violation, misinterpretation or inequitable application of this agreement, except as excluded herein." Pursuant to the CBA, a grievance may be submitted to arbitration if it remains unresolved after the second stage of the grievance procedure. Although the CBA specifies several exclusions from the definition of a "grievance" that are therefore not subject to arbitration, including a decision by petitioner to retrench a position, all other grievances remain subject to arbitration. Contrary to the court's determination, we conclude that the arbitration clause at issue here is broad, despite the existence of such exclusions (*see Johnstown*, 99 NY2d at 277; *City of Watertown*, 152 AD3d at 1232-1234; *Matter of Haessig [Oswego City Sch. Dist.]*, 90 AD3d 1657, 1657-1658 [4th Dept 2011]; *cf. Matter of Massena Cent. Sch. Dist. [Massena Confederated Sch. Employees' Assn., NYSUT, AFL-CIO]*, 82 AD3d 1312, 1313-1316 [3d Dept 2011]; *see generally Matter of New York City Tr. Auth. v Amalgamated Tr. Union of Am., AFL-CIO, Local 1056*, 284 AD2d 466, 468 [2d Dept 2001], *lv denied* 97 NY2d 610 [2002]).

Where, as here, "there is a broad arbitration clause and a reasonable relationship between the subject matter of the dispute and the general subject matter of the parties' [CBA], the court should rule the matter arbitrable, and the arbitrator will then make a more exacting interpretation of the precise scope of the substantive provisions of the [CBA], and whether the subject matter of the dispute fits within them" (*Matter of Lewis County [CSEA Local 1000, AFSCME, AFL-CIO, Lewis County Sheriff's Empls. Unit #7250-03, Lewis County Local 825]*, 153 AD3d 1575, 1576-1577 [4th Dept 2017] [internal quotation marks omitted]). The grievance at issue concerns whether the member was improperly dismissed without just cause under the guise of retrenchment, and a reasonable relationship exists between the subject matter of the grievance and the general subject matter of the CBA (*see id.*; *Matter of Wilson Cent. Sch. Dist. [Wilson Teachers' Assn.]*, 140 AD3d 1789, 1790 [4th Dept 2016]). Thus, " 'it is for the arbitrator to determine whether the subject matter of the dispute falls within the scope of the arbitration provisions of the [CBA]' " (*Lewis County*, 153 AD3d at 1577).

In light of our determination, we do not address respondent's further contention.

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

690

KA 16-01988

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DALILA COLBERT, DEFENDANT-APPELLANT.

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

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (PATRICIA L. DZIUBA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered September 23, 2016. The judgment convicted defendant, upon a jury verdict, of arson in the fourth degree, criminal mischief in the third degree, endangering the welfare of a child (three counts), criminal mischief in the fourth degree, driving while intoxicated, and harassment in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of, inter alia, arson in the fourth degree (Penal Law § 150.05 [1]) and criminal mischief in the third degree (§ 145.05 [2]). Viewing the evidence in light of the elements of the crime of arson in the fourth degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence with respect to that crime (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We agree with defendant, however, that the verdict finding her guilty of criminal mischief in the third degree is against the weight of the evidence. County Court instructed the jurors that defendant was guilty of that crime if they found that she intentionally "damage[d] property of another person in an amount exceeding $250," specifically "a Suzuki motorcycle." The People presented evidence that a motorcycle belonging to defendant's husband was completely destroyed by the fire that defendant allegedly set, a loss valued at over $4,000. No evidence was offered of the value of any damage caused by defendant prior to the fire, and the only evidence of how and why the fire started came from defendant's statements to law enforcement, wherein she stated that she did not know why she started

the fire, but that she was angry at her husband with whom she had been fighting and thought that he would return to the garage to put out the fire. Moreover, defendant told law enforcement that she started the fire by igniting a fleece blanket in a part of the garage different from where the motorcycle was located. Defendant's statements are consistent with the testimony of the fire protection inspector regarding the origin of the fire and are not contradicted by any other evidence in the record. Thus, viewing the evidence in light of the elements of the crime of criminal mischief in the third degree as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that the jury's determination that defendant set the fire with the intention of damaging her husband's motorcycle is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). We therefore modify the judgment by reversing that part convicting defendant of criminal mischief in the third degree and dismissing that count of the indictment.

In light of our decision, defendant's remaining contentions are moot.

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

692

CAF 17-01129

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

IN THE MATTER OF IRINA G. JERRETT,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JEFFREY L. JERRETT, RESPONDENT-RESPONDENT.

IRINA G. JERRETT, PETITIONER-APPELLANT PRO SE.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered May 3, 2017 in a proceeding pursuant to Family Court Act article 4. The order, insofar as appealed from, denied petitioner's objection to that part of an order of the Support Magistrate deviating from the presumptive child support obligation.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, petitioner's objection is granted in part, the petition is granted to the extent that respondent is directed to pay child support in the amount of $172 per week retroactive to January 22, 2015, and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 4, petitioner mother, as limited by her brief, appeals from an order denying her objection to the order of the Support Magistrate that, among other things, granted in part her petition for an upward modification of respondent father's child support obligation but also deviated from the presumptive support obligation calculated pursuant to the Child Support Standards Act ([CSSA] Family Ct Act § 413). We agree with the mother that the Support Magistrate erred in deviating from the presumptive support obligation and that Family Court therefore should have granted the mother's objection with respect to that part of the Support Magistrate's order. We therefore reverse the order insofar as appealed from, grant the mother's objection in part, grant the petition to the extent that the father is directed to pay child support in the amount of $172 per week retroactive to January 22, 2015, and remit the matter to Family Court to calculate the amount of arrears owed to the mother.

It is well established that "[s]hared custody arrangements do not alter the scope and methodology of the CSSA" (*Bast v Rossoff*, 91 NY2d 723, 732 [1998]). Indeed, the Court of Appeals has "explicitly reject[ed] the proportional offset formula" whereby the noncustodial

parent's child support obligation would be reduced based upon the amount of time that he or she actually spends with the child (*id.*). Instead, a court must calculate the basic child support obligation under the CSSA, and then must order the noncustodial parent to pay his or her "pro rata share of the basic child support obligation, unless it finds that amount to be 'unjust or inappropriate' " (*id.* at 727; *see* Family Ct Act § 413 [1] [f], [g]). "If the trial court is satisfied that the amount of basic child support obligation is 'unjust or inappropriate' because of the shared custody arrangement of the parents, the court may then utilize 'paragraph (f)' to fashion an appropriate award" (*Bast*, 91 NY2d at 732; *see* § 413 [1] [f]).

Here, in this shared custody arrangement with the mother as the primary custodial parent, the Support Magistrate erred in determining that the child was spending "a sufficient amount of time" with the father to warrant a downward deviation from the presumptive support obligation inasmuch as that determination "was merely another way of [improperly] applying the proportional offset method" (*Matter of Ryan v Ryan*, 110 AD3d 1176, 1180 [3d Dept 2013]; *see Matter of Gillette v Gillette*, 8 AD3d 1102, 1103 [4th Dept 2004]; *see also Ball v Ball*, 150 AD3d 1566, 1570 [3d Dept 2017]).

Further, to the extent that the Support Magistrate relied upon the factors in Family Court Act § 413 (1) (f) in deviating from the presumptive support obligation, we agree with the mother that the determination lacks support in the record. Although "extraordinary expenses incurred by the non-custodial parent in exercising visitation" with a child not on public assistance may support a finding that the presumptive support obligation is unjust or inappropriate (§ 413 [1] [f] [9] [i]), "[t]he costs of providing suitable housing, clothing and food for [a child] during custodial periods do not qualify as extraordinary expenses so as to justify a deviation from the presumptive amount" (*Ryan*, 110 AD3d at 1180-1181; *see Matter of Mitchell v Mitchell*, 134 AD3d 1213, 1215-1216 [3d Dept 2015]). Thus, contrary to the Support Magistrate's determination, the father's testimony that he incurred household expenses for the benefit of the child in the form of housing, food, clothing, and certain activities does not establish that he incurred any extraordinary expenses that would warrant a deviation from the presumptive support obligation (*see Mitchell*, 134 AD3d at 1215-1216; *Ryan*, 110 AD3d at 1180-1181; *see generally Matter of Kay v Cameron*, 270 AD2d 939, 940 [4th Dept 2000]).

To the extent that the Support Magistrate determined that the mother's expenses were substantially reduced as a result of the father's expenses incurred during extended visitation (*see* Family Ct Act § 413 [1] [f] [9] [ii]), we agree with the mother that there is no support in the record for that determination (*see Juneau v Juneau*, 240 AD2d 858, 859 [3d Dept 1997], *lv denied* 90 NY2d 812 [1997], *rearg denied* 91 NY2d 922 [1998]).

Finally, the Support Magistrate determined that a deviation was justified given "[t]he non-monetary contributions that the parents

will make toward the care and well-being of the child" (Family Ct Act § 413 [1] [f] [5]). We agree with the mother that the Support Magistrate failed to set forth any factual basis to support the application of that factor (*see generally Matter of Miller v Miller*, 55 AD3d 1267, 1268-1269 [4th Dept 2008]), and that none appears in the record. The father's testimony that he incurred ordinary household expenses and paid for some of the child's activities does not constitute evidence of nonmonetary contributions to the care and well-being of the child (*see Matter of Jones v Reese*, 227 AD2d 783, 784 [3d Dept 1996], *lv denied* 88 NY2d 810 [1996]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

701

TP 17-02155

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

IN THE MATTER OF WATERFRONT CENTER FOR REHABILITATION AND HEALTHCARE, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF HEALTH, RESPONDENT.

CORWART DIZZIA LLP, NEW YORK CITY (JENNIFER SWEENEY OF COUNSEL), FOR PETITIONER.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE 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 [Donna M. Siwek, J.], dated December 12, 2017) to review a determination of respondent. The determination denied an application for Medicaid benefits.

It is hereby ORDERED that the determination is unanimously annulled on the law without costs, the petition is granted, and the matter is remitted to Erie County Department of Social Services for further proceedings in accordance with the following memorandum: Petitioner, a skilled nursing facility, commenced this CPLR article 78 proceeding seeking to annul the determination affirming the denial of a medical assistance application filed by petitioner as the designated authorized representative of its former resident (resident). As a preliminary matter, we note that this proceeding was improperly transferred to this Court inasmuch as the petition does not raise an issue of substantial evidence (*see* CPLR 7804 [g]). Nevertheless, we review the merits of the petition in the interest of judicial economy (*see Matter of Zickl v Daines*, 83 AD3d 1582, 1582-1583 [4th Dept 2011]).

In its determination following a fair hearing, respondent found that petitioner's application was properly denied under 18 NYCRR 360-2.3 (a) because the demographic information, assets, and financial resources of the resident's estranged wife, a legally responsible relative, could not be confirmed. We agree with petitioner that the determination is inconsistent with the plain language of the regulation and that the determination therefore lacks a rational basis (*see Matter of Visiting Nurse Serv. of N.Y. Home Care v New York State Dept. of Health*, 5 NY3d 499, 506 [2005]; *Matter of Mid Is. Therapy Assoc., LLC v New York State Educ. Dept.*, 129 AD3d 1173, 1175 [3d Dept

2015]).

Although an agency's interpretation of its own regulation is generally entitled to deference, "courts are not required to embrace a regulatory construction that conflicts with the plain meaning of the promulgated language" (*Visiting Nurse Serv. of N.Y. Home Care*, 5 NY3d at 506; *see Matter of Heinlein v New York State Off. of Children & Family Servs.*, 60 AD3d 1472, 1473 [4th Dept 2009]). Section 360-2.3 (a) (2) provides that a medical assistance "applicant/recipient will not have eligibility denied or discontinued solely because he/she does not possess and cannot obtain information about the income or resources of a nonapplying legally responsible relative who is not living with him/her." Although denial of an application may nonetheless be appropriate under section 360-2.3 (a) (3) if an applicant/recipient refuses to grant permission for the examination of non-public records, here the parties do not dispute that petitioner and the resident cooperated with all efforts to obtain information from the resident's estranged wife.

We reject respondent's contention that the determination should be confirmed because, in the absence of a showing that denial would subject the resident to undue hardship, denial of petitioner's application was permissible pursuant to 18 NYCRR 360-4.10. Regardless of the merits of that contention, we note that " '[i]t is the settled rule that judicial review of an administrative determination is limited to the grounds invoked by the agency' " (*Matter of Monroe Community Hosp. v Commissioner of Health of State of N.Y.*, 289 AD2d 951, 952 [4th Dept 2001], quoting *Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758 [1991]). Respondent never relied on that regulation or the absence of undue hardship as defined therein and, indeed, the challenged determination expressly states that the issue of undue hardship was "not ripe for the Commissioner's review." We therefore annul the determination, grant the petition, and remit the matter to Erie County Department of Social Services for further proceedings.

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

704

CA 17-02204

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

ROBERT WALLACE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SUNY UPSTATE, DEAN MARK SCHMITT AND XIN JIE CHEN,
DEFENDANTS-RESPONDENTS.

KAISER SAURBORN & MAIR, P.C., NEW YORK CITY (HENRY SAURBORN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (JOSEPH M. SPADOLA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered March 6, 2017. The order granted the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking to recover damages resulting from his alleged unlawful termination from defendant SUNY Upstate's College of Graduate Studies. Plaintiff asserted two causes of action, under Executive Law § 296 (1) (a) and the Rehabilitation Act of 1973 ([Rehabilitation Act] 29 USC § 701 *et seq*.) and, as limited by his brief on appeal, he alleges that he was discriminated against based on his posttraumatic stress disorder (PTSD). We conclude that Supreme Court properly granted defendants' motion for summary judgment dismissing the complaint.

We note at the outset that, as recognized by the parties, the court erred in determining that medical documentation supporting the diagnosis of PTSD was required to support plaintiff's Executive Law cause of action, inasmuch as his cause of action is expressly limited to a real or perceived disability (*see Ashker v International Bus. Machs. Corp.*, 168 AD2d 724, 726-727 [3d Dept 1990]).

Contrary to plaintiff's contention, the court properly granted that part of defendants' motion with respect to the Executive Law § 296 (1) (a) cause of action. Defendants met their initial burden by offering legitimate, independent and nonpretextual reasons for their employment decision, and plaintiff in opposition failed to raise a triable issue of fact whether the reasons stated for his discharge were pretextual (*see Tibbetts v Pelham Union Free Sch. Dist.*, 143 AD3d

806, 807-808 [2d Dept 2016]; *Kulaya v Dunbar Armored, Inc.*, 110 AD3d 772, 772-773 [2d Dept 2013]; *see also Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). Specifically, "plaintiff [cannot] avoid summary judgment 'by merely pointing to the inference of causality resulting from the sequence in time of the events' " (*Forrest*, 3 NY3d at 313).

Contrary to plaintiff's further contention, the court properly granted that part of defendants' motion with respect to the Rehabilitation Act cause of action. To state a cause of action for discriminatory termination under the Rehabilitation Act, plaintiff must demonstrate that: " '(1) he has a disability; (2) he is otherwise qualified to perform the job; (3) he was terminated solely because of his disability; and (4) the program or activity receives federal funds' " (*Regan v City of Geneva*, 136 AD3d 1423, 1425 [4th Dept 2016]). Here, defendants met their initial burden by establishing that plaintiff was not terminated solely as a result of any disability (*cf. id.*) and, in opposition, plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562-563 [1980]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

716

CAF 17-01803

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

IN THE MATTER OF JOCELYN J. JONES,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JUSTIN S. JAMIESON, RESPONDENT-RESPONDENT.

J. ADAMS & ASSOCIATES, PLLC, WILLIAMSVILLE (JOAN CASILIO ADAMS OF COUNSEL), FOR PETITIONER-APPELLANT.

KEITH I. KADISH, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Margaret A. Logan, R.), entered December 19, 2016 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, modified the parties' visitation schedule with respect to 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, petitioner mother appeals from an order that, inter alia, modified the visitation schedule for the mother and respondent father with respect to the subject child. We note at the outset that the mother contends that Family Court did not rule on the six violation petitions that she had filed. The record, however, establishes that the court issued five orders that dismissed five of the six violation petitions. Inasmuch as the mother did not appeal from those five orders, we conclude that the mother's contention with respect to those five violation petitions is not properly before us (*see Matter of Kirkpatrick v Kirkpatrick*, 117 AD3d 1575, 1576 [4th Dept 2014]; *Matter of Sharyn PP. v Richard QQ.*, 83 AD3d 1140, 1143 [3d Dept 2011]). Furthermore, in the order from which the mother has appealed, the court ruled in the mother's favor with respect to the sixth violation petition and awarded her $750 in attorney's fees. To the extent that the mother did not obtain all of the relief that she sought in the sixth violation petition, by failing to raise any issues with respect to the court's ruling on that petition in her brief, the mother has abandoned any contentions with respect thereto (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

We reject the mother's contention that the court erred in modifying the visitation schedule. It is well settled that a "court's determination regarding custody and visitation issues, based upon a

first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record" (*Matter of Bryan K.B. v Destiny S.B.*, 43 AD3d 1448, 1449 [4th Dept 2007] [internal quotation marks omitted]). We note that, as modified, the visitation schedule reduces the number of exchanges of the child between the parties, which was a constant source of discord (*see generally Matter of Adams v Bracci*, 91 AD3d 1046, 1049 [3d Dept 2012], *lv denied* 18 NY3d 809 [2012]; *Matter of La Scola v Litz*, 258 AD2d 792, 793 [3d Dept 1999], *lv denied* 93 NY2d 809 [1999]). Contrary to the mother's contention, she failed to establish that reducing the father's visitation time would be in the child's best interests. Thus, we discern no basis for disturbing the court's determination (*see Matter of Rought v Palidar*, 6 AD3d 1112, 1112 [4th Dept 2004]; *see generally Bryan K.B.*, 43 AD3d at 1449). We have reviewed the mother's remaining contention and conclude that it is without merit.

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

734

KA 16-00345

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC OLIVER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (NIKKI KOWALSKI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered July 29, 2014. The judgment convicted defendant, upon his plea of guilty, of sex trafficking.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Oliver* ([appeal No. 2] — AD3d — [June 29, 2018] [4th Dept 2018]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

735

KA 17-01157

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC OLIVER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (NIKKI KOWALSKI OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), dated May 22, 2017. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, the motion is granted, the judgment of conviction is vacated and the matter is remitted to Supreme Court, Onondaga County, for further proceedings on the indictment.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of one count of sex trafficking (Penal Law § 230.34 [1] [a]) in satisfaction of an indictment charging him with several prostitution-related offenses. In appeal No. 2, defendant appeals by permission of this Court from an order denying his motion pursuant to CPL 440.10 seeking to vacate the judgment of conviction. We address first appeal No. 2, in which defendant contends that Supreme Court erred in denying his motion to vacate the judgment because, among other things, he was denied effective assistance of counsel. We agree.

Although the court applied the federal standard (*see Strickland v Washington*, 466 US 668, 694 [1984]), inasmuch as defendant's claim on the motion and on appeal is that he was denied his right to effective assistance of counsel guaranteed by both the Federal and New York State Constitutions, the claim is properly evaluated using the state standard (*see People v Stultz*, 2 NY3d 277, 282-284 [2004], *rearg denied* 3 NY3d 702 [2004]; *People v Henry*, 95 NY2d 563, 565-566 [2000]; *People v Conway*, 148 AD3d 1739, 1741 [4th Dept 2017], *lv denied* 29 NY3d 1077 [2017]; *cf. People v McDonald*, 1 NY3d 109, 114-115 [2003];

see generally People v Baldi, 54 NY2d 137, 147 [1981]). "In New York, the standard for an ineffective assistance of counsel claim is whether the defendant was afforded 'meaningful representation' and, while significant, the prejudice component of an ineffective assistance claim is not necessarily indispensable" (*People v Bank*, 28 NY3d 131, 137 [2016]; *see Stultz*, 2 NY3d at 283-284). Thus, "[w]hile the inquiry focuses on the quality of the representation provided to the accused, the claim of ineffectiveness is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case" (*People v Benevento*, 91 NY2d 708, 714 [1998]; *see Stultz*, 2 NY3d at 284; *Henry*, 95 NY2d at 566). "So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met" (*Baldi*, 54 NY2d at 147). "In the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404 [1995]; *see People v Hoyer*, 119 AD3d 1457, 1458 [4th Dept 2014]).

"The right to effective counsel guarantees the defendant a zealous advocate to safeguard the defendant's interests, gives the defendant essential advice specific to his or her personal circumstances and enables the defendant to make an intelligent choice between a plea and trial" (*People v Peque*, 22 NY3d 168, 190 [2013], *cert denied* 574 US —, 135 S Ct 90 [2014]), and here defendant was deprived of that right. It is undisputed that the evidence adduced at the hearing on the motion to vacate the judgment established that defense counsel erroneously advised defendant during plea negotiations that, if he were convicted after trial, he faced the possibility of consecutive sentences in excess of 75 years of imprisonment. Defense counsel failed to advise defendant that, given the charges and law at the time of the plea, his aggregate sentencing exposure would be capped by operation of law at 15 to 30 years of imprisonment (*see* Penal Law § 70.30 [1] [e] [i]). It is also undisputed that defense counsel erroneously advised defendant that sex trafficking (*see* § 230.34) was not a sex offense for purposes of the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*; *see* § 168-a [2] [a] [i]). Contrary to the People's contention, the record does not support the court's determination that defendant's choice to plead guilty was not influenced by defense counsel's misadvice. The evidence, including a letter from defense counsel to the prosecutor during plea negotiations and the testimony of defendant and defense counsel at the hearing on defendant's motion to vacate the judgment, established that defendant and defense counsel perceived a viable defense to the sex trafficking charges and were leaning toward going to trial, but defendant—under the misapprehension that he risked the possibility of an aggregate maximum term of imprisonment that would be the equivalent of a life sentence for him—relied upon defense counsel's erroneous advice in accepting a plea that addressed his primary concerns by providing the ostensible benefit of greatly reducing his sentencing exposure while also avoiding any SORA implications. We thus conclude on this record that defendant was

denied meaningful representation inasmuch as defense counsel's erroneous advice compromised the fairness of the process as a whole by depriving defendant of the ability to make an intelligent choice between pleading guilty or proceeding to trial (*see People v Perron*, 287 AD2d 808, 808-809 [3d Dept 2001], *lv denied* 97 NY2d 686 [2001]). We therefore reverse the order in appeal No. 2, grant defendant's motion, vacate the judgment of conviction and remit the matter to Supreme Court for further proceedings on the indictment.

In light of our determination in appeal No. 2, we need not address defendant's remaining contention therein, and we dismiss as moot defendant's appeal from the judgment in appeal No. 1 (*see People v Dealmeida*, 124 AD3d 1405, 1407 [4th Dept 2015]; *People v Gayden* [appeal No. 2], 111 AD3d 1388, 1388-1389 [4th Dept 2013]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

736

CA 17-02070

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

ROBERTA AMES, JOSEPHINE BASILIO, RANDALL BASTIAN, BARBARA BORDEAUX, LOUIS CONTE, DORIS DIOGUARDI, JUDY DONEVAN, SUSAN FARRELL, ROBERT HAAK, GAIL HATZ, KATHLEEN HONAN, MARILYN HOROWITZ, SUSAN HOUSMAN, ROBERT HUSSEY, JOYCE KNOPE, MONICA LEWANDOWSKI, PHILIP MANCINI, ADRIENNE MARASCO, PETER NOTO, DENISE PAGE, JOYCE ANN RIVERS, BARBARA SPINKS, CLAIRE VITELLO, DONNA WESTPHAL, DOROTHY WILMER, SUZANNE WOOD, CHARLES YACONO AND CRISTAL ZAFUTO, ON BEHALF OF THEMSELVES AND CERTAIN OTHER RETIRED EMPLOYEES OF COUNTY OF MONROE, FORMERLY IN THE CSEA BARGAINING UNIT, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

COUNTY OF MONROE AND HON. CHERYL M. DINOLFO, AS COUNTY EXECUTIVE OF COUNTY OF MONROE, DEFENDANTS-RESPONDENTS.
(ACTION NO. 1.)

NORRIS VAGG, JR. AND KAREN VAGG, PLAINTIFFS-APPELLANTS,

V

COUNTY OF MONROE, DEFENDANT-RESPONDENT.
(ACTION NO. 2.)

DAREN J. RYLEWICZ, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., ALBANY (JENNIFER C. ZEGARELLI OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HARRIS BEACH PLLC, PITTSFORD (KARLEE S. BOLANOS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Debra A. Martin, A.J.), entered January 13, 2017. The judgment, among other things, granted defendants' motions for summary judgment dismissing the complaints in both actions.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reinstating the complaints insofar as they sought a declaration and granting judgment in favor of

defendants as follows:

> It is ADJUDGED AND DECLARED that, although the collective bargaining agreements in effect at the time of plaintiffs' retirement are binding and enforceable agreements that dictate plaintiffs' rights, the collective bargaining agreements do not require defendant County of Monroe to maintain for each plaintiff fully-paid health insurance coverage equivalent to that in effect at the time such plaintiff retired,

and as modified the judgment is affirmed without costs.

Memorandum: Plaintiffs commenced separate actions that were thereafter consolidated seeking, inter alia, a declaration that the applicable collective bargaining agreements (CBAs) require defendant County of Monroe (County) "to maintain fully-paid health insurance coverage equivalent to that in effect at the time each plaintiff-retiree retired" and that the County has breached those CBAs by failing to do so. After defendants moved to dismiss the complaints under CPLR 3211 (a), Supreme Court, upon notice to the parties, converted the motions into motions for summary judgment, and plaintiffs in action No. 1 thereafter cross-moved for summary judgment on the complaint in that action. Although the court properly determined that defendants are entitled to summary judgment, the court erred in dismissing the complaints in their entirety and in failing to declare the rights of the parties. We therefore modify the judgment by reinstating the complaints insofar as they sought a declaration and making the requisite declaration (*see generally Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954 [1989]).

Even assuming, arguendo, that plaintiffs did not waive their right to challenge the scope and coverage of the County's insurance plan, we agree with defendants that the relevant CBAs do not require the County to maintain for each plaintiff fully-paid health insurance coverage equivalent to that in effect at the time such plaintiff retired. It is well settled that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Generally, the determination "[w]hether a contract is ambiguous is a question of law[,] and extrinsic evidence may not be considered unless the document itself is ambiguous" (*South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 278 [2005], citing *Greenfield*, 98 NY2d at 569). "A contract is unambiguous if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion' " (*Greenfield*, 98 NY2d at 569). Thus, where "contract language is reasonably susceptible of more than one interpretation, . . . extrinsic or parol evidence may be then permitted to determine the parties' intent as to the meaning of that language" (*Non-Instruction Adm'rs & Supervisors Retirees Assn. v School Dist. of City of Niagara Falls*, 118 AD3d 1280, 1282 [4th Dept 2014] [internal quotation marks omitted]).

We agree with defendants that the CBAs at issue are ambiguous with respect to whether retirees who are eligible for or enrolled in Medicare are entitled to fully-paid health insurance coverage equivalent to that in effect at the time those individuals retired. The various CBAs at issue provide "retirees" with certain health insurance benefits, but do not define "retirees." Plaintiffs interpret that to mean all retirees, even those who are eligible for or enrolled in Medicare. That interpretation is supported by other provisions of the CBAs, such as one that provides such benefits to spouses of deceased retirees "for the *lifetime* of the surviving spouse or until remarriage" (emphasis added). Defendants contend that the CBAs do not provide for health insurance for those retirees eligible for or enrolled in Medicare because of the realities of Medicare; the CBAs' prohibition of duplicate coverage; and the fact that the specific insurance plans in effect at the time of the individual plaintiffs' retirement were not available to individuals who were eligible for Medicare.

Inasmuch as the contract language is reasonably susceptible of more than one interpretation, we conclude that the CBAs are ambiguous with respect to whether retirees who are eligible for or enrolled in Medicare are entitled to fully-paid health insurance coverage that is equivalent to the insurance coverage in effect at the time they retired. Thus, we turn to extrinsic evidence to determine the parties' intent with respect to the health insurance coverage to be provided to those retirees who are eligible for or enrolled in Medicare. Where, as here, "a contract is ambiguous, its interpretation remains the exclusive function of the court unless 'determination of the intent of the parties depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence' " (*Town of Eden v American Ref-Fuel Co. of Niagara*, 284 AD2d 85, 88 [4th Dept 2001], *lv denied* 97 NY2d 603 [2001], quoting *Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169, 172 [1973]). We agree with defendants that the interpretation of the CBAs remains the exclusive function of the courts inasmuch as resolution of the issue does not depend on the credibility of the extrinsic evidence and there is only one reasonable inference to be drawn from the extrinsic evidence.

As the court recognized, " '[t]here is no surer way to find out what parties meant, than to see what they have done' " (*Town of Pelham v City of Mount Vernon*, 304 NY 15, 23 [1952], *rearg denied* 304 NY 594 [1952]). For decades, defendants provided retirees who were not yet eligible for Medicare with health insurance benefits, but provided retirees enrolled in Medicare with only Medicare supplement plans. No objection was made and, until recently, the union representing plaintiffs never sought to negotiate any additional benefits for retirees eligible for or enrolled in Medicare. Inasmuch as " '[t]he best evidence of the intent of parties to a contract is their conduct after the contract is formed' " (*T.L.C. W., LLC v Fashion Outlets of Niagara, LLC*, 60 AD3d 1422, 1424 [4th Dept 2009]), we conclude that defendants established as a matter of law that defendants and the union formerly representing plaintiffs did not intend that defendants be required to maintain fully-paid health insurance coverage

equivalent to that in effect at the time of retirement for those retirees who were eligible for or enrolled in Medicare. Plaintiffs did not submit evidentiary facts or materials to rebut defendants' evidence and thus failed to raise a triable issue of fact concerning the parties' intent (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

748

CA 17-01191

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

JEAN MCCARTHY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SIDDHARTHA S. SHAH, M.D., AND GASTROENTEROLOGY ASSOCIATES, LLP, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

CAMPBELL & ASSOCIATES, EDEN (R. COLIN CAMPBELL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (KARA M. EYRE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Eugene F. Pigott, Jr., J.), entered April 25, 2017. The order granted defendants' motion to dismiss plaintiff's cause of action for battery.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied and the cause of action for battery is reinstated.

Memorandum: These consolidated appeals arise from a medical malpractice action in which plaintiff seeks damages for, inter alia, rectal bleeding allegedly arising from a colonoscopy performed upon plaintiff by Siddhartha S. Shah, M.D. (defendant). In appeal No. 1, plaintiff appeals from an order that granted defendants' CPLR 3211 motion to dismiss her battery cause of action. In appeal No. 2, plaintiff appeals from an order that granted defendants' CPLR 3211 motion to dismiss her claim for punitive damages.

In appeal No. 1, we agree with plaintiff that Supreme Court erred in granting defendants' motion to dismiss her battery cause of action. On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law[,] a motion for dismissal will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "[W]here evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to

be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (*Gawrych v Astoria Fed. Sav. & Loan*, 148 AD3d 681, 683 [2d Dept 2017]). Above all, the issue "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

"It is well settled that a medical professional may be deemed to have committed battery, rather than malpractice, if he or she carries out a procedure or treatment to which the patient has provided 'no consent at all' " (*VanBrocklen v Erie County Med. Ctr.*, 96 AD3d 1394, 1394 [4th Dept 2012]; *see Tirado v Koritz*, 156 AD3d 1342, 1343 [4th Dept 2017]). Here, in moving under CPLR 3211 (a) (7), defendants attached all of the pleadings, which alleged, inter alia, that defendants "performed a procedure upon the Plaintiff while she was under general anesthesia without informing her or obtaining any consent, which conduct constituted a battery upon her." Defendants also referenced and provided to the court the informed consent form executed by plaintiff that explicitly authorized the performance of a flexible sigmoidoscopy, but not a colonoscopy. The form further noted in relevant part that, "[i]f any unforeseen condition arises during the procedure calling for, in the physician's judgment, additional procedures, treatments, or operations, [defendant is] authorize[d] . . . to do whatever he . . . deems advisable." We conclude that plaintiff has sufficiently asserted a cause of action sounding in battery by alleging that she provided no consent to the performance of a colonoscopy (*see Tirado*, 156 AD3d at 1343; *Matter of Small Smiles Litig.*, 109 AD3d 1212, 1214 [4th Dept 2013]; *cf. VanBrocklen*, 96 AD3d at 1394-1395), and that the evidentiary submissions considered by the court, including the consent form, do not "establish conclusively that plaintiff has no cause of action" sounding in battery (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]; *cf. Thaw v North Shore Univ. Hosp.*, 129 AD3d 937, 938-939 [2d Dept 2015]).

In view of the foregoing, we conclude in appeal No. 2 that the court erred in granting defendants' motion to dismiss plaintiff's claim for punitive damages (*see generally McDougald v Garber*, 73 NY2d 246, 254 [1989]; *Smith v County of Erie*, 295 AD2d 1010, 1011 [4th Dept 2002]; *Graham v Columbia Presbyt. Med. Ctr.*, 185 AD2d 753, 756 [1st Dept 1992]; *Mullany v Eiseman*, 125 AD2d 457, 458-459 [2d Dept 1986]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

749

CA 17-01192

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

JEAN MCCARTHY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SIDDHARTHA S. SHAH, M.D. AND GASTROENTEROLOGY ASSOCIATES, LLP, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

CAMPBELL & ASSOCIATES, EDEN (R. COLIN CAMPBELL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (KARA M. EYRE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Eugene F. Pigott, Jr., J.), entered April 25, 2017. The order granted defendants' motion to dismiss plaintiff's claim for punitive damages.

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

Same memorandum as in *McCarthy v Shah* ([appeal No. 1] — AD3d — [June 29, 2018] [4th Dept 2018]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

759

KA 16-00455

PRESENT: WHALEN, P.J., CARNI, LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDWARD ATKINS, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (ALPHONSE L. WILLIAMS, III, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered May 21, 2007. The judgment convicted defendant, upon a jury verdict, of grand larceny in the third degree, reckless endangerment of property and removal of trees.

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 grand larceny in the third degree (Penal Law § 155.35 [1]), reckless endangerment of property (§ 145.25), and removal of trees (ECL 9-1501). We reject defendant's contention that the conviction is not supported by legally sufficient evidence. There is a valid line of reasoning and permissible inferences that could lead a rational person to conclude that defendant committed the crimes in question (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Also contrary to defendant's contention, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Contrary to defendant's further contention, we conclude that County Court did not abuse its discretion in denying defendant's request for an adjournment to afford defense counsel additional time to prepare for trial. " '[T]he granting of an adjournment for any purpose is a matter resting within the sound discretion of the trial court' " (*People v Diggins*, 11 NY3d 518, 524 [2008]), and "[t]he court's exercise of discretion in denying a request for an adjournment will not be overturned absent a showing of prejudice" (*People v Arroyo*, 161 AD2d 1127, 1127 [4th Dept 1990], *lv denied* 76 NY2d 852 [1990]). Defendant made no such showing here.

Defendant contends that the court erred in precluding him from

offering the testimony of a witness who was not included on defendant's witness list. We agree with defendant that the proffered testimony of the witness was not inadmissible hearsay and that the court erred in precluding the witness's testimony on that ground, inasmuch as it is well settled that evidence of a statement offered only to prove that the statement was made or for the effect of its utterance but not to prove the truth of its contents is not inadmissible hearsay (*see People v Ricco*, 56 NY2d 320, 328 [1982]; *People v Jordan*, 201 AD2d 961, 961 [4th Dept 1994], *lv denied* 83 NY2d 873 [1994]). We note, however, that the court also precluded the testimony of that witness on the additional ground that the witness was not included on defendant's witness list. Even assuming, arguendo, that the court erred in precluding the testimony of the witness on that ground, we conclude that the error is harmless inasmuch as the evidence of guilt is overwhelming, and there is no reasonable possibility that the error contributed to defendant's conviction (*see generally People v Crimmins*, 36 NY2d 230, 237 [1975]; *People v Arnold*, 147 AD3d 1327, 1328 [4th Dept 2017], *lv denied* 29 NY3d 996 [2017]).

Finally, we reject defendant's contention that he was denied effective assistance of counsel. Viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). The record establishes that the court "did not act as an advocate for either side, or convey any opinion to the jury" based on its participation during the testimony of the victim, who had a limited command of the English language and "had difficulty in comprehending questions and making himself understood" (*People v Martinez*, 35 AD3d 156, 156-157 [1st Dept 2006], *lv denied* 8 NY3d 924 [2007]). Thus, contrary to defendant's contention, defense counsel's failure to object to the court's participation in the testimony of that witness does not constitute ineffective assistance of counsel, inasmuch as any objection would have had "little or no chance of success" (*People v Dashnaw*, 37 AD3d 860, 863 [3d Dept 2007], *lv denied* 8 NY3d 945 [2007] [internal quotation marks omitted]). We further conclude that defense counsel's failure to include all potential witnesses on defendant's witness list was not " 'so egregious and prejudicial' as to deprive defendant of a fair trial" (*People v Cummings*, 16 NY3d 784, 785 [2011], *cert denied* 565 US 862 [2011]; *see generally People v Thompson*, 21 NY3d 555, 561 [2013]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

762

CA 17-01046

PRESENT: WHALEN, P.J., CARNI, LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

JENNIFER L. RECH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL B. RECH, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

EVANS FOX LLP, ROCHESTER (MATTHEW M. PISTON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Supreme Court, Monroe County (John M. Owens, A.J.), entered November 3, 2016. The order, among other things, found defendant in civil contempt of court.

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

Memorandum: In appeal No. 1, defendant appeals from an order that, inter alia, held him in civil contempt for failing to comply with an order that set forth the terms of his visitation with the parties' child, directed him to pay a fine, and modified his visitation with the child. In appeal No. 3, defendant appeals from an order denying his motion for leave to renew and reargue the motion and cross motion underlying the order in appeal No. 1. In appeal No. 2, defendant appeals from an order that granted in part plaintiff's motion seeking an order directing Janus Services LLC (Janus) to release to plaintiff funds held by Janus in the name of defendant in partial satisfaction of defendant's alleged indebtedness to her.

We reject defendant's contention in appeal No. 1 that Supreme Court erred in holding him in civil contempt and in punishing him with a fine. " 'A motion to punish a party for civil contempt is addressed to the sound discretion of the [hearing] court,' " and we conclude that the court did not abuse its discretion here (*Matter of Moreno v Elliott*, 155 AD3d 1561, 1562 [4th Dept 2017], *lv dismissed in part and denied in part* 30 NY3d 1098 [2018]). Plaintiff met her burden of establishing, by clear and convincing evidence (*see El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]), that defendant violated the custody and visitation order then in effect, which required him to have

visitation at the home of his mother, not to remove the child from Erie County under any circumstances, and to return the child to plaintiff at a designated time and location. The evidence further established that defendant's violation of the order unjustifiably impaired plaintiff's custodial rights (*see generally Moreno*, 155 AD3d at 1562). The court thus properly determined that defendant violated a lawful and unequivocal mandate of the court and thereby prejudiced plaintiff's rights (*see Belkhir v Amrane-Belkhir*, 128 AD3d 1382, 1382 [4th Dept 2015]). According due deference to the hearing court's credibility determinations, we conclude that the record supports the court's rejection of the defenses based on defendant's alleged inability to comply with the order or his alleged justification for failing to do so (*see generally Cutroneo v Cutroneo*, 140 AD3d 1006, 1008-1009 [2d Dept 2016]). Defendant's challenge to the amount of the fine is not preserved for our review inasmuch as defendant did not object at the hearing to the amount of fees requested or awarded (*see generally Thompson v McQueeney*, 56 AD3d 1254, 1259 [4th Dept 2008]).

Contrary to defendant's contention, the court properly determined in appeal No. 1 that the best interests of the child would be served by modifying defendant's visitation schedule and by providing that visitation be supervised at an agency (*see Matter of Procopio v Procopio*, 132 AD3d 1243, 1244-1245 [4th Dept 2015], *lv denied* 26 NY3d 915 [2015]; *Matter of Brown v Gandy*, 125 AD3d 1389, 1390 [4th Dept 2015]).

The order in appeal No. 3 is not appealable insofar as it denied that part of defendant's motion seeking leave to reargue (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]). The court properly denied the motion to the extent that it sought leave to renew, inasmuch as defendant failed to submit any new material that "would change the prior determination" (CPLR 2221 [e] [2]; *see Bruno v Gosy*, 48 AD3d 1147, 1148 [4th Dept 2008]).

We agree with defendant's contention in appeal No. 2 that the court erred in granting in part plaintiff's motion for an order directing Janus to release to plaintiff funds held in defendant's name. The funds at issue are held by Janus in individual retirement accounts, and thus are exempt from application to satisfy a money judgment (*see* CPLR 5205 [c] [2]; *Matter of Bank Leumi Trust Co. of N.Y. v Dime Sav. Bank of N.Y.*, 85 NY2d 925, 926 [1995]; *Friedman v Turner*, 135 AD3d 487, 487 [1st Dept 2016]). We therefore reverse the order in appeal No. 2 and deny plaintiff's motion.

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

763

CA 17-01602

PRESENT: WHALEN, P.J., CARNI, LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

JENNIFER L. RECH, NOW KNOWN AS JENNIFER L. SZCZUBLEWSKI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL B. RECH, DEFENDANT-APPELLANT. (APPEAL NO. 2.)

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

EVANS FOX LLP, ROCHESTER (MATTHEW M. PISTON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Supreme Court, Monroe County (John M. Owens, A.J.), entered April 26, 2017. The order granted in part plaintiff's motion seeking to direct that Janus Services LLC pay the plaintiff the entirety of the sum of money currently held by Janus Services LLC, in the name of defendant to be applied against money currently due and owing to plaintiff.

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

Same memorandum as in *Rech v Rech* ([appeal No. 1] — AD3d — [June 29, 2018] [4th Dept 2018]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

764

CA 17-01603

PRESENT: WHALEN, P.J., CARNI, LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

JENNIFER SZCZUBLEWSKI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL B. RECH, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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

EVANS FOX LLP, ROCHESTER (MATTHEW M. PISTON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Supreme Court, Monroe County (John M. Owens, A.J.), entered May 17, 2017. The order, among other things, denied defendant's motion for leave to renew and reargue.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed and the order is affirmed without costs.

Same memorandum as in *Rech v Rech* ([appeal No. 1] — AD3d — [June 29, 2018] [4th Dept 2018]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

765

CAF 16-02310

PRESENT: WHALEN, P.J., CARNI, LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

IN THE MATTER OF MIRABELLA H.

CAYUGA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ANGELA I., RESPONDENT-APPELLANT.

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

ADAM H. VAN BUSKIRK, AUBURN, FOR PETITIONER-RESPONDENT.

JILL L. TERRY, WEEDSPORT, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Cayuga County (Thomas G. Leone, J.), entered October 14, 2016 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred the guardianship and custody of the subject child to petitioner.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to the subject child on the ground of permanent neglect. We affirm.

We reject the mother's contention that reversal is required because petitioner failed to properly notify the child's maternal uncle of the instant proceeding. Even assuming, arguendo, that petitioner failed to fulfill its statutory duty to notify the uncle of the pendency of the proceeding and of the opportunity for becoming a foster parent or for seeking custody of the child (*see* Social Services Law § 384-a [1-a]; *see generally* Family Ct Act § 1017 [1] [a]), we conclude that the record establishes that the uncle was aware of the fact that the child was in foster care. Indeed, the uncle filed a custody petition with respect to the child, but that proceeding was dismissed as a result of the uncle's failure to appear and the uncle did not appeal from the order dismissing his petition. Thus, it cannot be said that the uncle was prejudiced by any failure to notify him of this proceeding (*see Matter of Elizabeth YY. v Albany County Dept. of Social Servs.*, 229 AD2d 618, 620-621 [3d Dept 1996]).

We also reject the mother's contention that Family Court erred in determining that she permanently neglected the child. Although the mother participated in some of the services offered by petitioner, petitioner established that the mother's progress was insufficient to warrant the return of the child to her care inasmuch as she failed to " 'address or gain insight into the problems that led to the removal of the child[ ] and continued to prevent the child['s] safe return' " (*Matter of Burke H. [Richard H.]*, 134 AD3d 1499, 1501 [4th Dept 2015]; *see Matter of Tiara B. [Torrence B.]*, 70 AD3d 1307, 1307 [4th Dept 2010], *lv denied* 14 NY3d 709 [2010]). Contrary to the mother's further contention, the court did not abuse its discretion in terminating the mother's parental rights rather than granting a suspended judgment (*see Matter of Jose R.*, 32 AD3d 1284, 1285 [4th Dept 2006], *lv denied* 7 NY3d 718 [2006]). The evidence in the record supports the court's determination that termination of the mother's parental rights is in the best interests of the child, and that the mother's progress in addressing the issues that led to the child's removal from her custody was " 'not sufficient to warrant any further prolongation of the child's unsettled familial status' " (*Matter of Alexander M. [Michael A.M.]*, 106 AD3d 1524, 1525 [4th Dept 2013]; *see Matter of Joanna P. [Patricia M.]*, 101 AD3d 1751, 1752 [4th Dept 2012], *lv denied* 20 NY3d 863 [2013]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

769

CA 17-02233

PRESENT: WHALEN, P.J., CARNI, LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

ASIA BALL, AS PARENT AND NATURAL GUARDIAN
OF INFANT A.K, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ORLANDO CAESAR, DEFENDANT,
KELLI SMITH AND KELLI'S LITTLE ONE-Z
CHILDCARE, INC., DEFENDANTS-APPELLANTS.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (JOAN M. RICHTER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

THE WRIGHT LAW FIRM, LLC, ROCHESTER (RON F. WRIGHT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered August 3, 2017. The order denied the motion of defendants Kelli Smith and Kelli's Little One-Z Childcare, Inc. seeking summary judgment dismissing the complaint against them, and granted plaintiff's cross motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the cross motion is denied, the motion is granted and the complaint is dismissed against defendants Kelli Smith and Kelli's Little One-Z Childcare, Inc.

Memorandum: Plaintiff commenced this action seeking damages for injuries sustained by her infant son in a motor vehicle accident. At the time of the accident, the child was in the care and custody of Kelli Smith and Kelli's Little One-Z Childcare, Inc. (collectively, defendants), and was a passenger in a vehicle owned and operated by Smith. It is undisputed that the accident occurred when Smith's vehicle, which had the right-of-way, entered an intersection and the vehicle of defendant Orlando Caesar struck the side of her vehicle after failing to stop at a stop sign.

Supreme Court erred in denying defendants' motion seeking summary judgment dismissing the complaint against them and granting plaintiff's cross motion for summary judgment on the issue of defendants' negligence. Defendants met their initial burden of demonstrating that Smith was not negligent in the operation of her vehicle by submitting evidence establishing that the sole proximate cause of the accident was Caesar's failure to yield the right-of-way at the intersection (*see* Vehicle and Traffic Law §§ 1142 [a]; 1172

[a]; *Rolls v State of New York*, 129 AD3d 1638, 1638 [4th Dept 2015]). Defendants also submitted evidence that Smith was traveling at or below the speed limit, she was not distracted, and her vehicle had entered the intersection when Caesar's vehicle ran the stop sign and struck her vehicle (*see Jenkins v Alexander*, 9 AD3d 286, 287 [1st Dept 2004]). Plaintiff failed to raise a triable issue of fact whether Smith " 'was at fault in the happening of the accident or whether [s]he could have done anything to avoid the collision' " (*Wallace v Kuhn*, 23 AD3d 1042, 1043 [4th Dept 2005]).

The court erred in concluding that defendants breached a duty that they assumed through a consent form, which was signed by plaintiff, that permitted defendants to transport the child "while transporting other children to and from school." Even assuming, arguendo, that defendants breached such a duty by exceeding the scope of plaintiff's consent when Smith transported the child, as noted above, defendants established as a matter of law that Caesar was the sole proximate cause of the accident (*see Gallaway v Town of N. Collins*, 129 AD3d 1669, 1670 [4th Dept 2015]; *Swauger v White*, 1 AD3d 918, 919-920 [4th Dept 2003]), and thus they were entitled to summary judgment. Further, we agree with defendants that the court erred in considering plaintiff's contention that defendants were negligent in transporting the child in an improperly installed car seat (*see Smith v Kinsey*, 50 AD3d 1456, 1458 [4th Dept 2008]; *Baker v Keller*, 241 AD2d 947, 947 [4th Dept 1997]).

In view of our decision, we do not address defendants' contention that the court erred in denying their alternative request to bifurcate the trial on the issues of liability and damages.

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

771

CA 17-00387

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

RICHARD BIANCHI, ANGELO BIANCHI AND JOSEPH ERRIGO, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MIDTOWN REPORTING SERVICE, INC., DOING BUSINESS AS MIDTOWN REPORTING SERVICE, DEFENDANT-APPELLANT, AND GARY POOLER, INTERVENOR-APPELLANT.
(APPEAL NO. 1.)

ERNSTROM & DRESTE, LLP, ROCHESTER (TIMOTHY D. BOLDT OF COUNSEL), FOR DEFENDANT-APPELLANT.

ERNSTROM & DRESTE, LLP, ROCHESTER (MARTHA A. CONNOLLY OF COUNSEL), FOR INTERVENOR-APPELLANT.

SCHIANO LAW OFFICE, P.C., ROCHESTER (CHARLES A. SCHIANO, SR., OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered January 25, 2017. The order awarded plaintiffs a judgment totaling $162,391.19 against defendant and Gary Pooler.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion for a trial order of dismissal is granted and the amended complaint is dismissed.

Memorandum: Plaintiffs operated a court reporting partnership from 1975 to 1999. Upon dissolution of the partnership, they agreed to consolidate their business with defendant, an existing court reporting corporation that was owned by intervenor Gary Pooler. Although after the consolidation various written agreements were proposed concerning plaintiffs' ownership stake in defendant, none of those agreements were executed. Instead, the parties operated in accordance with the terms of an unsigned partnership agreement from 2002, which provided that plaintiffs were to receive annual distributions. Pooler eventually stopped making those distributions, however, and plaintiffs commenced this action against defendant, asserting causes of action for fraud, breach of contract, and an accounting.

On a prior appeal, this Court modified an order denying defendant's motion for summary judgment dismissing the amended complaint by granting the motion in part and dismissing the cause of

action for fraud (*Bianchi v Midtown Reporting Serv., Inc.*, 103 AD3d 1261, 1262 [4th Dept 2013]). Thereafter, this matter proceeded to trial, and defendant moved for a trial order of dismissal on the ground that plaintiffs failed to establish the existence of a valid partnership. After reserving decision, Supreme Court, in effect, denied the motion and entered an order awarding a money judgment against both defendant and Pooler. Defendant then moved to vacate the order and plaintiffs' statement for judgment on the ground that the court lacked personal jurisdiction over Pooler and lacked subject matter jurisdiction to issue a judgment against defendant. The court, in effect, granted the motion in part and vacated the statement for judgment. In appeal No. 1, defendant and Pooler appeal from the order awarding a money judgment and, in appeal No. 2, defendant appeals from the order vacating the statement for judgment. Although Pooler was not a named defendant in this action, we granted him permission to intervene in appeal No. 1.

With respect to appeal No. 1, we agree with defendant and Pooler that the court erred in denying defendant's motion for a trial order of dismissal. Plaintiffs' theory of the case and their testimony at trial conclusively establishes that they intended to form a partnership with Pooler only and not defendant, and that the partnership would operate through the existing corporate defendant. We agree with defendant that a party "cannot recover on a claim that he [or she] and [another individual] entered into a joint venture to be set up and run through the corporate . . . structure" (*Lombard & Co., Inc. v De La Roche*, 46 AD3d 393, 393 [1st Dept 2007], *lv dismissed* 11 NY3d 782 [2008], *rearg denied* 11 NY3d 846 [2008]; *see Weisman v Awnair Corp. of Am.*, 3 NY2d 444, 449 [1957]). "[A]s a general rule, a partnership may not exist where the business is conducted in a corporate form, as each is governed by a separate body of law . . . Parties may not be partners between themselves while using the corporate shield to protect themselves against personal liability" (*Berke v Hamby*, 279 AD2d 491, 492 [2d Dept 2001]; *see Sanders v Boelke*, 172 AD2d 1014, 1015-1016 [4th Dept 1991]). Although that rule has been qualified "so as not to preclude members of a preexisting joint venture from 'acting as partners between themselves and as a corporation to the rest of the world,' " that qualification is inapplicable here because defendant was formed before the partnership was allegedly created by an oral agreement (*Lombard & Co., Inc.*, 46 AD3d at 393-394). In other words, "there was no preexisting joint venture that later spawned the creation of a corporation in which aspects of the joint venture could survive" (*id.* at 394).

In light of our determination, the remaining contentions in appeal No. 1 and defendant's appeal from the order in appeal No. 2 are academic. We therefore dismiss defendant's appeal from the order in appeal No. 2 (*see Matter of Jakubowicz v Village of Fredonia*, 159 AD3d 1540, 1541-1542 [4th Dept 2018]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

772

CA 18-00216

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

RICHARD BIANCHI, ANGELO BIANCHI AND JOSEPH ERRIGO, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MIDTOWN REPORTING SERVICE, INC., DOING BUSINESS AS MIDTOWN REPORTING SERVICE, DEFENDANT-APPELLANT. (APPEAL NO. 2.)

ERNSTROM & DRESTE, LLP, ROCHESTER (TIMOTHY D. BOLDT OF COUNSEL), FOR DEFENDANT-APPELLANT.

SCHIANO LAW OFFICE, P.C., ROCHESTER (CHARLES A. SCHIANO, SR., OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), dated June 13, 2017. The order vacated a statement for judgment.

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

Same memorandum as in *Bianchi v Midtown Reporting Serv., Inc.*, ([appeal No. 1] — AD3d — [June 29, 2018] [4th Dept 2018]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

774

CA 18-00097

PRESENT: WHALEN, P.J., CARNI, LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

RONALD BUND, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID P. HIGGINS, LINDA M. HIGGINS,
DEFENDANTS-APPELLANTS,
AND RAYMOND M. DEVORE, DOING BUSINESS AS
RAY DEVORE PROFESSIONAL ROOFING SERVICE,
DEFENDANT-RESPONDENT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (KATE L. HARTMAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

LAW OFFICE OF JOSEPH G. MAKOWSKI, LLC, BUFFALO (JOSEPH G. MAKOWSKI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered September 22, 2017. The order, insofar as appealed from, denied the amended motion of defendants David P. Higgins and Linda M. Higgins for summary judgment dismissing the complaint against them.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the amended motion is granted, and the complaint is dismissed against defendants David P. Higgins and Linda M. Higgins.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when he fell from a roof. Plaintiff was working as an independent contractor for defendant Raymond M. Devore, doing business as Ray Devore Professional Roofing Service (Devore), who was hired by David P. Higgins and Linda M. Higgins (defendants) to install a roof on their newly constructed, single-family home. Defendants filed an amended motion for summary judgment dismissing the complaint against them, and they now appeal from an order that, inter alia, denied that motion.

We agree with defendants that Supreme Court erred in denying their amended motion with respect to the Labor Law §§ 240 (1) and 241 (6) claims. As the owners of a one-family dwelling who contracted for but did not direct or control the work, defendants are exempt from

liability under Labor Law §§ 240 and 241 (*see generally Bartoo v Buell*, 87 NY2d 362, 367-368 [1996]; *Luthringer v Luthringer*, 59 AD3d 1028, 1029 [4th Dept 2009]). "Whether an owner's conduct amounts to directing or controlling the work depends upon the degree of supervision exercised over the method and manner in which the work is performed" (*Ennis v Hayes*, 152 AD2d 914, 915 [4th Dept 1989]; *see Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847, 849 [2d Dept 2006], *lv dismissed* 8 NY3d 841 [2007]; *Schultz v Noeller*, 11 AD3d 964, 965 [4th Dept 2004]). Here, although defendants acted as general contractors on the construction of their home by obtaining the necessary permits, purchasing roofing materials, and hiring contractors to perform the construction work, defendants met their initial burden of demonstrating that they did not supervise or control the method or manner of plaintiff's work (*see McNabb v Oot Bros., Inc.*, 64 AD3d 1237, 1239 [4th Dept 2009]). Specifically, defendants submitted their own deposition testimony establishing that they did not perform any of the construction work or provide any of the equipment or tools used in the construction, and that they were not present at the site when plaintiff performed the roofing work. Defendants also submitted the deposition testimony of Devore, who stated that he was responsible for the safety of his workers, and the deposition testimony of plaintiff, who admitted that he had never met defendants. In opposition to defendants' motion, plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

We also conclude that the court erred in denying the amended motion with respect to the common-law negligence cause of action and Labor Law § 200 claim. "Where[, as here,] 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 Labor Law § 200" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). As noted, defendants established as a matter of law that they neither supervised nor controlled plaintiff's work. Thus, defendants met their initial burden with respect to the common-law negligence cause of action and the Labor Law § 200 claim, and plaintiff failed to raise a triable issue of fact in opposition (*see Knab v Robertson*, 155 AD3d 1565, 1566 [4th Dept 2017]). We therefore reverse the order insofar as appealed from, grant the amended motion, and dismiss the complaint against defendants.

In light of our determination, we do not consider defendants' alternative contention.

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

780

KA 16-01982

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH A. MCCALLUM, DEFENDANT-APPELLANT.

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

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH (JOHN C. TUNNEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.), rendered May 4, 2016. The judgment convicted defendant, upon a jury verdict, of burglary in the third degree, robbery in the second degree and possession of burglar's tools.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, count four of the indictment is dismissed and a new trial is granted on counts one and three of the indictment.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of burglary in the third degree (Penal Law § 140.20), robbery in the second degree (§ 160.10 [1]), and possession of burglar's tools (§ 140.35), defendant contends that the conviction with respect to the latter count is not supported by legally sufficient evidence, and that the verdict with respect to that count is against the weight of the evidence. Although the People do not address defendant's challenge to the sufficiency of the evidence in their brief, we note that they concede that the verdict with respect to that count is against the weight of the evidence. We conclude that the conviction of possession of burglar's tools is not supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]), and we therefore reverse that part of the judgment and dismiss the fourth count of the indictment.

Defendant further contends that he was deprived of effective assistance of counsel by several actions or failures to act on the part of his attorney, including diminishing the burden of proof, allowing improper considerations to be placed before the jury during voir dire and summation, and failing to object to the court's instructions to the jury. It is well settled that, in order " '[t]o prevail on a claim of ineffective assistance of counsel, it is

incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations' for defense counsel's allegedly deficient conduct" (*People v Atkins*, 107 AD3d 1465, 1465 [4th Dept 2013], *lv denied* 21 NY3d 1040 [2013]). In addition, "a court must consider whether defense counsel's actions at trial constituted egregious and prejudicial error such that defendant did not receive a fair trial" (*People v Oathout*, 21 NY3d 127, 131 [2013] [internal quotation marks omitted]). Here, we agree with defendant that certain actions by his attorney deprived him of a fair trial, and we therefore reverse the judgment of conviction and grant a new trial on counts one and three of the indictment.

Defense counsel repeatedly stated to the jury during voir dire that the trial was to be "a search for the truth." It is settled that a "prosecutor's characterization of [a] trial as a 'search for the truth' [is] indeed improper" (*People v Ward*, 107 AD3d 1605, 1606 [4th Dept 2013], *lv denied* 21 NY3d 1078 [2013]), inasmuch as it is a way of "proposing that the jury might convict even in the absence of proof beyond a reasonable doubt so long as the jury concluded that its verdict represented the truth" (*People v Rivera*, 116 AD2d 371, 375-376 [1st Dept 1986]). Here, by making that statement to the jury during voir dire then repeating it at least three times during summation, defense counsel improperly diminished the People's burden of proof.

Furthermore, it is also well settled that, when a defendant testifies and is cross-examined regarding his prior convictions, he or she is entitled to have the court "charge the jury that such prior convictions could only be used in evaluating defendant's credibility, and that they could not be used as evidence of defendant's guilt" (*People v Moorer*, 77 AD2d 575, 577 [2d Dept 1980]). Here, counsel requested such a charge, the prosecutor conceded that the charge should be given, and the court agreed to give it. Nevertheless, the court's instructions indicated that the jury may rely upon evidence of a previous conviction in evaluating the credibility of the witnesses, including defendant, but the court did not instruct the jury that they may not consider the prior conviction as evidence of defendant's guilt. Defense counsel did not object or otherwise bring the omission to the court's attention. Inasmuch as defense counsel had already asked for the instruction and the court had agreed to give it, we perceive no possible strategic or other valid reason for defense counsel's failure to act (*cf. People v DeCapua*, 151 AD3d 1746, 1748 [4th Dept 2017], *lv denied* 29 NY3d 1125 [2017]). Furthermore, defense counsel exacerbated the harmful impact of defendant's prior convictions during the cross-examination of the People's fingerprint expert by eliciting evidence that gave the impression that defendant had 10 or more prior arrests and/or convictions. When coupled with the failure to obtain the requisite limiting instruction concerning the appropriate use of prior convictions and the comments that diminished the prosecution's burden of proof, defense counsel's actions deprived defendant of a fair trial.

Defendant's remaining contentions are academic in light of our

determination.

Mark W. Bennett

Entered: June 29, 2018

Clerk of the Court

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

783

CAF 17-00730

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

IN THE MATTER OF AHMED Z. ABDO,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MALLOCHE A. AHMED, RESPONDENT-APPELLANT.

DEBORAH J. SCINTA, ORCHARD PARK, FOR RESPONDENT-APPELLANT.

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

MICHELE A. BROWN, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered March 14, 2017 in a proceeding pursuant to Family Court Act article 6. The order granted sole custody of the subject children to petitioner.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the phrase "on default" in the caption and the phrase "and Respondent having failed to appear" preceding the ordering paragraphs, and as modified the order is affirmed without costs.

Memorandum: Respondent mother appeals from an order that granted sole custody of the subject children to petitioner father with supervised visitation to the mother. We agree with the mother that Family Court erred in entering the order upon the mother's default based on her failure to appear in court. The record establishes that the mother "was represented by counsel, and we have previously determined that, '[w]here a party fails to appear [in court on a scheduled date] but is represented by counsel, the order is not one entered upon the default of the aggrieved party and appeal is not precluded' " (*Matter of Pollard v Pollard*, 63 AD3d 1628, 1628 [4th Dept 2009]; *see Matter of Kwasi S.*, 221 AD2d 1029, 1030 [4th Dept 1995]). We therefore modify the order accordingly.

The mother's contention that she did not receive notice of the hearing is not preserved for our review and, in any event, the record establishes that the notice was properly served upon the mother's attorney, who represented the mother at the hearing (*see generally Nuepert v Nuepert*, 145 AD3d 1643, 1643 [4th Dept 2016]).

Finally, we conclude that the court did not err in awarding the

father sole custody of the children with supervised visitation to the mother. "A custody determination by the trial court must be accorded great deference . . . and should not be disturbed where . . . it is supported by a sound and substantial basis in the record" (*Matter of Green v Mitchell*, 266 AD2d 884, 884 [4th Dept 1999]; *see generally Eschbach v Eschbach*, 56 NY2d 167, 173-174 [1982]). Here, the court's determination is supported by a sound and substantial basis in the record.

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

784

CAF 18-00033

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

MARGARET BAXTER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

FRANKLIN R. BAXTER, DEFENDANT-RESPONDENT.

FINUCANE & HARTZELL, LLP, PITTSFORD, MICHAEL STEINBERG, ROCHESTER, FOR PLAINTIFF-APPELLANT.

MULDOON, GETZ & RESTON, ROCHESTER (GARY MULDOON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Daniel P. Majchrzak, Jr., R.), entered August 28, 2017. The order, inter alia, directed defendant to pay temporary monthly child support.

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

Memorandum: In this action for divorce and ancillary relief, plaintiff, as limited by her brief, appeals from that part of a temporary order that imputed income to her for the purposes of calculating child support and directed defendant to pay pendente lite child support. We note that the temporary order directs defendant to pay a basic monthly amount of child support and to contribute to the statutory add-on expenses (*see* Domestic Relations Law § 240 [1-b] [c] [4], [5]). We affirm. The best remedy for "any claimed inequity in awards of temporary alimony, child support or maintenance is a speedy trial where the respective finances of the parties can be ascertained and a permanent award based on the evidence may be made" (*Tabor v Tabor*, 39 AD2d 640, 640 [4th Dept 1972] [internal quotation marks omitted]; *see Annexstein v Annexstein*, 202 AD2d 1060, 1061 [4th Dept 1994]; *Frost v Frost*, 38 AD2d 786, 787 [4th Dept 1972]). "Absent compelling circumstances, parties to a matrimonial action should not seek review of an order for temporary support" (*Newman v Newman*, 89 AD2d 1058, 1058 [4th Dept 1982]; *see Hageman v Hageman*, 154 AD2d 948, 948-949 [4th Dept 1989]). Plaintiff has failed to allege the existence of compelling circumstances warranting review of the award of pendente lite child support (*see generally Newman*, 89 AD2d at 1058).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

800

KA 16-00188

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH J. MARVIN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Stephen D. Aronson, A.J.), rendered December 3, 2015. The judgment convicted defendant, upon a jury verdict, of felony driving while intoxicated, aggravated driving while intoxicated, reckless driving, criminal mischief in the fourth degree and leaving the scene of a property damage incident without reporting.

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, felony driving while intoxicated (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i] [A]) and aggravated driving while intoxicated (§ 1192 [2-a] [a]). Defendant's contention that County Court should have precluded certain statements of defendant because they were not included in the People's CPL 710.30 notice is unpreserved for our review because defendant did not object to the admission of those statements on that ground (*see People v Davis*, 118 AD3d 1264, 1266 [4th Dept 2014], *lv denied* 24 NY3d 1083 [2014]). In any event, defendant moved for and was granted a hearing on the noticed statements, and during the hearing a deputy testified about the unnoticed statements at issue on appeal. Defendant therefore " 'waived preclusion on the ground of lack of notice because [he] was given a full opportunity to be heard on the voluntariness of [those] statement[s] at the suppression hearing' " (*id*.).

Defendant's contention that he was denied a fair trial because the prosecutor's questioning of a prosecution witness improperly implied that defendant had a duty to prove his innocence by naming someone other than himself as the driver of the vehicle is also unpreserved for our review (*see* CPL 470.05 [2]). The court sustained defense counsel's objections to the prosecutor's questions and

provided a curative instruction "that, in the absence of further objection or a request for a mistrial, 'must be deemed to have corrected the error[] to the defendant's satisfaction' " (*People v Terborg*, 156 AD3d 1320, 1321 [4th Dept 2017], *lv denied* 31 NY3d 1018 [2018], quoting *People v Heide*, 84 NY2d 943, 944 [1994]). Further, the jury is presumed to have followed the court's curative instructions (*see People v Allen*, 78 AD3d 1521, 1521 [4th Dept 2010], *lv denied* 16 NY3d 827 [2011]).

We reject defendant's contention that the evidence is legally insufficient to establish that he was operating the vehicle while he was in an intoxicated condition. The standard on appeal for determining whether a conviction is supported by legally sufficient evidence "is the same for circumstantial and non-circumstantial cases – whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (*People v Grassi*, 92 NY2d 695, 697 [1999], *rearg denied* 94 NY2d 900 [2000]; *see People v Reed*, 22 NY3d 530, 534 [2014], *rearg denied* 23 NY3d 1009 [2014]; *People v Clark*, 142 AD3d 1339, 1340 [4th Dept 2016], *lv denied* 28 NY3d 1143 [2017]). Here, a sheriff's deputy discovered defendant in an intoxicated state walking along a road shortly after 5:00 a.m. less than a mile from his recently operated vehicle in an area where no other traffic or pedestrians had been observed. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the jury could have reasonably inferred that defendant operated the vehicle while intoxicated. The jury was also entitled to construe defendant's false or evasive statements to law enforcement, including that the deputy "never caught him driving," as evidence of his consciousness of guilt (*see People v Ficarrota*, 91 NY2d 244, 249-250 [1997]; *People v Jackson*, 118 AD3d 635, 636 [1st Dept 2014], *lv denied* 24 NY3d 1044 [2014]; *People v Koestler*, 176 AD2d 1207, 1208 [4th Dept 1991]). Thus, the "jury could rationally have excluded innocent explanations of the evidence offered by . . . defendant," specifically that someone other than defendant was operating the vehicle (*Reed*, 22 NY3d at 535).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

810

CA 18-00016

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

FRANCES J. TAITT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THE SHIPWRECK TAVERN, INC., DEFENDANT-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, CAMILLUS (DONALD DIBENEDETTO OF COUNSEL), FOR DEFENDANT-APPELLANT.

BOUSQUET HOLSTEIN, PLLC, SYRACUSE (RYAN S. SUSER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered April 19, 2017. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries that she sustained when she fell through a hole in a deck located on premises owned by defendant and leased to her employer. Supreme Court properly denied defendant's motion for summary judgment dismissing the complaint. Contrary to its contention, defendant failed to meet its initial burden of establishing that it did not affirmatively create the dangerous condition that resulted in plaintiff's injury, and, in any event, plaintiff raised an issue of fact (*see Boice v PCK Dev. Co., LLC*, 121 AD3d 1246, 1248-1249 [3d Dept 2014]). Contrary to its alternative contention, defendant failed to meet its initial burden of establishing that it functioned as an alter ego of plaintiff's employer (*see Cleary v Walden Galleria LLC*, 145 AD3d 1524, 1525 [4th Dept 2016]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

815

KA 17-00290

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERMAINE A. JAMES, DEFENDANT-APPELLANT.

JEFFREY WICKS, PLLC, ROCHESTER (CHARLES D. STEINMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Thomas R. Morse, A.J.), rendered June 30, 2015. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of robbery in the second degree (Penal Law § 160.10 [1]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see People v Sommerville*, 159 AD3d 1515, 1515-1516 [4th Dept 2018]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Contrary to defendant's contention, County Court's handling of two jury notes provides no basis for reversal. As the People correctly observe, the jury notes at issue related solely to charges of which defendant was acquitted. Thus, defendant was not prejudiced by any alleged error in the court's handling of those jury notes (*see People v Neree*, 142 AD3d 1026, 1027 [2d Dept 2016], *lv denied* 28 NY3d 1074 [2016]; *see generally People v Mays*, 20 NY3d 969, 970-971 [2012]). Moreover, the court provided the parties with notice of the jury notes and an opportunity to suggest a response (*see generally People v O'Rama*, 78 NY2d 270, 276-278 [1991]), and defendant was not prejudiced by the fact that the *O'Rama* steps may have occurred out of sequence (*see People v McMahon*, 275 AD2d 670, 670 [1st Dept 2000], *lv denied* 96 NY2d 761 [2001]; *see also People v Sykes*, 135 AD3d 535, 535 [1st Dept 2016], *lv denied* 27 NY3d 969 [2016]). Finally, defendant's contention that the court erred by marshaling only the evidence introduced by the prosecution during its response to the jury notes is raised for the first time in his reply brief and is thus not properly

before us (*see People v Daigler*, 148 AD3d 1685, 1686 [4th Dept 2017], *lv denied* 30 NY3d 1018 [2017]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

822

CAF 17-00800

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

IN THE MATTER OF RICKY A., KARA A., AND KADE G.

WAYNE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

BARRY A., RESPONDENT-APPELLANT,
AND SUZANNE C., RESPONDENT.

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

HEATHER MAURE, LYONS, FOR PETITIONER-RESPONDENT.

SARA E. ROOK, ROCHESTER, ATTORNEY FOR THE CHILD.

PETER G. CHAMBERS, NEWARK, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Wayne County (John B. Nesbitt, J.), entered April 10, 2017 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent Barry A. had neglected the subject children.

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 that he neglected the subject children. Contrary to the father's contention, Family Court's determination is supported by a preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]; *see generally Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]). "In reviewing a determination of neglect, we must accord great weight and deference to the determination of Family Court, including its drawing of inferences and assessment of credibility, and we should not disturb its determination unless clearly unsupported by the record" (*Matter of Shaylee R.*, 13 AD3d 1106, 1106 [4th Dept 2004]).

Here, the testimony presented at the fact-finding hearing established that the father suffers from untreated posttraumatic stress and substance abuse disorders. On one occasion, the father returned home after drinking liquor and beer and displayed increasingly erratic behavior in the presence of the children. The father engaged in a verbal altercation with respondent mother, which became physical, and he threw his phone into a fire that he had started in the backyard. The father then left the home with the

mother, leaving the children alone in the home, and they did not return for more than 24 hours. Having witnessed the domestic violence between respondents, as well as the father's intoxication and erratic behavior, the children became afraid when respondents did not return home or contact them after so many hours had passed. The children had no way to contact respondents, and respondents never checked in on the children or had another adult do so. The children eventually contacted their older sister through Facebook, and then waited two hours for her to travel from Utica to their home in Wayne County. The children's older sibling called 911 and reported respondents as missing persons and the police responded to the residence, where the children had been alone for approximately 20 hours. Meanwhile, respondents drove past the house while police cars were parked outside and chose not to return home for another four hours. We conclude that the children's proximity to the domestic violence between respondents, combined with the father's failure to address his mental health and substance abuse issues and respondents' failure to provide adequate supervision, placed the children in imminent danger of physical, emotional, or mental impairment (*see* Family Ct Act § 1012 [f] [i] [B]; *Matter of Trinity E. [Robert E.]*, 137 AD3d 1590, 1591 [4th Dept 2016]; *Matter of Raven B. [Melissa K.N.]*, 115 AD3d 1276, 1278-1279 [4th Dept 2014]; *see generally Nicholson*, 3 NY3d at 370).

Contrary to the father's further contention, the out-of-court statements of the children were sufficiently corroborated by the father's testimony as well as the testimony of the police officers who responded to the 911 call, and there was sufficient cross-corroboration of each child's statement with the statements of the other children (*see* Family Ct Act § 1046 [a] [vi]; *Matter of Isaiah S.*, 63 AD3d 948, 949 [4th Dept 2009]; *Matter of Nicholas L.*, 50 AD3d 1141, 1142 [4th Dept 2008]). We have considered the father's remaining contentions and conclude that they lack merit.

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

826

CA 17-01756

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

MICHELLE M. DZIEDZIC AND ANTHONY W. DZIEDZIC,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

RICHARD WIRTH, INDIVIDUALLY AND DOING BUSINESS
AS J&S PAVING, DEFENDANT,
MARK DONABELLA AND MEGHAN DONABELLA,
DEFENDANTS-RESPONDENTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (BRADY J. O'MALLEY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BARCLAY DAMON LLP, SYRACUSE (ALAN R. PETERMAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered June 28, 2017. The order, inter alia, granted the motion of defendants Mark Donabella and Meghan Donabella for summary judgment dismissing the complaint against them.

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

Memorandum: Plaintiffs commenced this action seeking to recover damages for injuries sustained by Michelle M. Dziedzic (plaintiff) when she tripped and fell over a string that was suspended across a sidewalk. The owners of the premises adjacent to the sidewalk, Mark Donabella and Meghan Donabella (defendants), hired an independent contractor, defendant Richard Wirth, doing business as J&S Paving (contractor), to pave the driveway. The contractor in turn hired a subcontractor, whose job included cleaning up the edge of the driveway. While the contractor was transporting debris offsite, the subcontractor placed the string across the sidewalk as a guide to the location of the edge of the driveway. The contractor did not see the string until he returned but, by that time, plaintiff had already tripped over it. In his deposition testimony, the contractor testified that the string was an obvious tripping hazard, and that its placement across the sidewalk was a mistake owing to the subcontractor's inexperience. It is undisputed that defendants lacked knowledge of the placement of the string. Supreme Court granted defendants' motion for summary judgment dismissing the complaint against them. We affirm.

"Generally, 'a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts,' " (*Brothers v New York State Elec. & Gas Corp.*, 11 NY3d 251, 257 [2008]; *see Raja v Big Geyser, Inc.*, 144 AD3d 1123, 1124 [2d Dept 2016]). There are, however, exceptions to that general rule (*see Brothers*, 11 NY3d at 258). A party may be vicariously liable for the negligence of an independent contractor in performing " '[n]on-delegable duties . . . arising out of some relation toward the public or the particular plaintiff' " (*id.*; *see Hosmer v Kubricky Const. Corp.*, 88 AD3d 1234, 1235 [3d Dept 2011], *lv dismissed* 19 NY3d 839 [2012]). In that vein, a party may be vicariously liable where it assigns work to an independent contractor that " 'involves special dangers inherent in the work or dangers which should have been anticipated' " by that party (*Brothers*, 11 NY3d at 258; *see Hildebrand v Kazmierczak*, 25 AD2d 603, 603 [4th Dept 1966]). To determine whether a nondelegable duty exists, the court must conduct " 'a *sui generis* inquiry' . . . because 'the [court's] conclusion rests on policy considerations' " (*Brothers*, 11 NY3d at 258; *see Hosmer*, 88 AD3d at 1235).

Contrary to plaintiffs' contention, the court properly determined that defendants are not vicariously liable for the subcontractor's alleged negligence inasmuch as the work to be performed did not involve a nondelegable duty (*see generally Hildebrand*, 25 AD2d at 603). The work that defendants assigned to the contractor was to be performed on private property to which members of the public did not have access, and it did not involve any " 'special dangers' " (*Brothers*, 11 NY3d at 258). Moreover, the placement of the string that caused the accident was an unusual act born of the subcontractor's inexperience, and thus it was not inherent in the work to be performed. Finally, although a nondelegable duty may be imposed by statute or regulation (*see Hosmer*, 88 AD3d at 1235-1236), there were no violations of the sections of the Oswego City Code upon which plaintiffs rely.

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

833

TP 18-00269

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

IN THE MATTER OF JUNIOR COLLINS, PETITIONER,

V ORDER

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

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

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered February 13, 2018) 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 said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996, 996 [4th Dept 1996]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

834

KA 16-01696

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ZAIRE ALLISON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered August 26, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [3]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily, and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]). The valid waiver of the right to appeal encompasses defendant's challenge to the severity of the sentence (*see People v Hidalgo*, 91 NY2d 733, 737 [1998]; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

835

KA 17-00610

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT E. MACLEOD, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAROLINE A. WOJTASZEK, 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 March 24, 2017. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree (two counts) and sexual abuse in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law and as a matter of discretion in the interest of justice by reversing that part convicting defendant of robbery in the second degree under count one of the indictment and dismissing that count and by directing that the sentences imposed on counts two and three shall run concurrently with respect to each other and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him following a jury trial of robbery in the second degree (Penal Law § 160.10 [2] [a]), robbery in the second degree as a sexually motivated felony (§§ 130.91, 160.10 [2] [a]), and sexual abuse in the first degree (§ 130.65 [1]), defendant contends that County Court abused its discretion in allowing defendant's former coworker to testify that defendant had previously made numerous statements indicating a desire to abduct and sexually assault Asian women. Even assuming, arguendo, that the statements constitute *Molineux* evidence, we conclude that they were properly admitted to establish the sexual motivation for the commission of this robbery of an Asian woman (*see People v Ramsaran*, 154 AD3d 1051, 1054 [3d Dept 2017], *lv denied* 30 NY3d 1063 [2017]; *People v Evans*, 259 AD2d 629, 629 [2d Dept 1999], *lv denied* 93 NY2d 924 [1999]; *cf. People v Leonard*, 29 NY3d 1, 7-8 [2017]), and the probative value of such evidence "outweighed its tendency to demonstrate defendant's criminal propensity" (*People v Kirkey*, 248 AD2d 979, 980 [4th Dept 1998], *lv denied* 92 NY2d 900 [1998]).

We agree with defendant that the conviction of count one of the

indictment, charging him with robbery in the second degree, must be reversed and that count dismissed as an inclusory concurrent count of count two, charging him with robbery in the second degree as a sexually motivated felony (*see* CPL 300.30 [4]; 300.40 [3] [b]; *People v Perez*, 93 AD3d 1032, 1039 [3d Dept 2012], *lv denied* 19 NY3d 1000 [2012]; *see also People v Jackson*, 144 AD3d 945, 946 [2d Dept 2016], *lv denied* 28 NY3d 1185 [2017]; *People v Dallas*, 119 AD3d 1362, 1364-1365 [4th Dept 2014], *lv denied* 24 NY3d 1083 [2014]). We therefore modify the judgment accordingly.

Finally, although we reject defendant's contention that the court erred in directing that the sentence for the sexual abuse count run consecutively to the sentences imposed on the robbery counts (*see People v Smith*, 269 AD2d 778, 778 [4th Dept 2000], *lv denied* 95 NY2d 804 [2000]; *People v Jones*, 137 AD2d 766, 767-768 [2d Dept 1988], *lv denied* 72 NY2d 862 [1988]), we conclude that the imposition of consecutive sentences renders the sentence unduly harsh and severe under the circumstances of this case. We therefore further modify the judgment, as a matter of discretion in the interest of justice, by directing that the sentences imposed on counts two and three shall run concurrently with respect to each other (*see* CPL 470.15 [6] [b]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

836

KA 18-00096

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN SEELEY PHILLIPS, JR., DEFENDANT-APPELLANT.

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

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (PATRICIA L. DZIUBA OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Jefferson County Court (Kim H. Martusewicz, J.), entered August 14, 2007. The order determined that defendant is a level two 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 two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.), defendant contends that County Court erred in assessing points under risk factor 11 of the risk assessment instrument. Defendant's contention is not preserved for our review (*see People v Saraceni*, 153 AD3d 1561, 1561 [4th Dept 2017], *lv denied* 30 NY3d 1119 [2018]). In any event, we conclude that the court properly assessed 15 points under risk factor 11 for a history of drug or alcohol abuse inasmuch as " '[t]he SORA guidelines justify the addition of 15 points under risk factor 11 if an offender has a substance abuse history *or* was abusing drugs [and/or] alcohol at the time of the offense' " (*People v Kunz*, 150 AD3d 1696, 1697 [4th Dept 2017], *lv denied* 29 NY3d 916 [2017]).

Defendant also failed to preserve for our review his contention that he was entitled to a downward departure (*see People v Puff*, 151 AD3d 1965, 1966 [4th Dept 2017], *lv denied* 30 NY3d 904 [2017]). In any event, we conclude that " 'defendant failed to establish his entitlement to a downward departure from his presumptive risk level inasmuch as he failed to establish the existence of a mitigating factor by the requisite preponderance of the evidence' " (*id*.).

Finally, we reject defendant's contention that he was denied the right to effective assistance of counsel (*see People v Allport*, 145

AD3d 1545, 1545-1546 [4th Dept 2016]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

837

KA 17-01639

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN E. CASTRO, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (THERESA L. PREZIOSO OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered June 19, 2017. The judgment convicted defendant, upon his plea of guilty, of attempted sexual abuse 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 attempted sexual abuse in the first degree (Penal Law §§ 110.00, 130.65 [1]), defendant contends that his waiver of the right to appeal is invalid. We reject that contention. County Court did not conflate the right to appeal with those rights automatically forfeited upon a plea of guilty (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]). Defendant's valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see id.* at 255; *People v Lasher*, 151 AD3d 1774, 1775 [4th Dept 2017], *lv denied* 29 NY3d 1129 [2017]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

838.1

KA 12-01596

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARRELL HOFFMAN, ALSO KNOWN AS DURRELL,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered May 16, 2012. The appeal was held by this Court by order entered June 10, 2016, decision was reserved and the matter was remitted to Supreme Court, Monroe County, for further proceedings (140 AD3d 1604).

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

Memorandum: We previously held this case, reserved decision, and remitted the matter to Supreme Court for a hearing pursuant to *People v Rodriguez* (79 NY2d 445, 451-453 [1992]) to determine whether "Witness #1" was sufficiently familiar with defendant in order to render the single photo identification of defendant by that witness "truly confirmatory in nature" (*People v Hoffman*, 140 AD3d 1604, 1605 [4th Dept 2016]). We conclude that the court properly determined upon remittal that such a hearing was unnecessary inasmuch as defense counsel advised the court that "Witness #1" is the brother of defendant, thereby rendering his identification of defendant merely confirmatory (*see generally People v Rodriguez*, 47 AD3d 417, 417 [1st Dept 2008], *lv denied* 10 NY3d 816 [2008]). We reject defendant's contention that the court was required to obtain the waiver of such hearing directly from him. "[A] defendant who has a lawyer relegates control of much of the case to the lawyer except as to certain fundamental decisions reserved to the client," such as "deciding whether to plead guilty, whether to waive a jury, whether to testify at trial, and whether to take an appeal" (*People v Ferguson*, 67 NY2d 383, 390 [1986]). "With respect to strategic and tactical decisions concerning the conduct of trials, by contrast, defendants are deemed to repose decision-making authority in their lawyers" (*People v Colon*, 90 NY2d 824, 826 [1997]). "By accepting counseled representation, a

defendant assigns control of much of the case to the lawyer, who, by reason of training and experience, is entrusted with sifting out weak arguments, charting strategy and making day-to-day decisions over the course of the proceedings" (*People v Rodriguez*, 95 NY2d 497, 501-502 [2000]).

Here, defense counsel's decision to forego a *Rodriguez* hearing as superfluous "is precisely the type of day-to-day decision making over which an attorney, in his or her professional judgment, retains sole authority" (*People v Parker*, 290 AD2d 650, 651 [3d Dept 2002], *lv denied* 97 NY2d 759 [2002], *reconsideration denied* 98 NY2d 679 [2002]; *see Colon*, 90 NY2d at 825-826; *Ferguson*, 67 NY2d at 390-391; *People v Trepasso*, 197 AD2d 891, 891 [4th Dept 1993], *lv denied* 82 NY2d 854 [1993]). Furthermore, in making his decision to waive the hearing, defense counsel stated that he had "discussed this with [defendant]." Although defendant was present, he did not protest defense counsel's decision. There is thus "no indication in the record that defense counsel's position differed from that of" defendant (*People v Gottsche*, 118 AD3d 1303, 1304 [4th Dept 2014], *lv denied* 24 NY3d 1084 [2014]; *see People v Hartle*, 122 AD3d 1290, 1292 [4th Dept 2014], *lv denied* 25 NY3d 1164 [2015]).

We reject defendant's contention that the court erred in refusing to suppress identifications made by "Witness #2" and a codefendant on the ground that the photo array was unduly suggestive. "A photo array is unduly suggestive where some characteristic of one picture draws the viewer's attention to it, indicating that the police have made a particular selection" (*People v Smiley*, 49 AD3d 1299, 1300 [4th Dept 2008], *lv denied* 10 NY3d 870 [2008] [internal quotation marks omitted]). Here, the photographs in the array depict African-American males of similar age, with similar hairstyles, clothing, and physical features. Furthermore, all of the photographs are roughly the same size. Thus, "[t]he subjects depicted in the array were sufficiently similar in appearance so that the viewer's eye was not drawn to a particular photo in such a way as to indicate that the police were urging a particular selection" (*People v Alston*, 101 AD3d 1672, 1673 [4th Dept 2012] [internal quotation marks omitted]). The court therefore properly determined that "the People met their initial burden of establishing that the police conduct with respect to the photo array procedure was reasonable and that defendant failed to meet his ultimate burden of proving that the photo array was unduly suggestive" (*id.*). "Nor was there any evidence at the *Wade* hearing indicating that the identification procedures [otherwise] employed by the police were unduly suggestive" (*People v Linder*, 114 AD3d 1200, 1201 [4th Dept 2014], *lv denied* 23 NY3d 1022 [2014]).

We reject defendant's further contention that the People failed to establish that his statements were freely and voluntarily given. At the hybrid *Huntley/Wade* hearing, the People presented evidence that defendant's handcuffs were removed immediately at the outset of the interrogation and that defendant could read and write. Defendant was read his *Miranda* rights verbatim from a *Miranda* warnings card and, after being read those rights, defendant did not request an attorney or that those rights be further explained. Thereafter, defendant

agreed to speak to the officers and waive his rights. Thus, "[t]he record of the suppression hearing supports the court's determination that the waiver by defendant of his *Miranda* rights was knowing, voluntary and intelligent" (*People v Marvin*, 68 AD3d 1729, 1729 [4th Dept 2009], *lv denied* 14 NY3d 842 [2010]).

In his supplemental brief, defendant contends that he was deprived of effective assistance of counsel because defense counsel waived the *Rodriguez* hearing. Defendant failed, however, to " 'demonstrate the absence of strategic or other legitimate explanations for counsel's failure to request [that] hearing. Absent such a showing, it will be presumed that counsel acted in a competent manner and exercised professional judgment in not pursuing a hearing' " (*People v Parker*, 148 AD3d 1583, 1584 [4th Dept 2017], *lv denied* 29 NY3d 1084 [2017], quoting *People v Rivera*, 71 NY2d 705, 709 [1988]). Defendant also contends that he was deprived of effective assistance of counsel because defense counsel did not expressly state that he sought suppression of defendant's statements based on a lack of probable cause to arrest him. Defendant relies, however, upon matters outside the record in contending that he had a "colorable" claim to suppress those statements on the ground that he was arrested without probable cause. Thus, that contention "must be raised by way of a motion pursuant to CPL article 440" (*People v Edwards*, 151 AD3d 1832, 1833 [4th Dept 2017], *lv denied* 30 NY3d 949 [2017]).

Finally, we conclude that defendant's sentence is not unduly harsh or severe.

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

838

KAH 17-01631

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
DAVID A. BROWN, PETITIONER-APPELLANT,

V ORDER

HAROLD D. GRAHAM, SUPERINTENDENT, AUBURN
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

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

DAVID A. BROWN, PETITIONER-APPELLANT PRO SE.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered August 3, 2017 in a habeas corpus proceeding. The judgment denied the petition.

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

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

839

TP 18-00272

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

IN THE MATTER OF MARQUIS STANLEY, PETITIONER,

V ORDER

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

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

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered February 13, 2018) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated an inmate rule.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996, 996 [4th Dept 1996]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

840

KA 15-01998

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHANEQUA J. CROCKETT, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered July 9, 2015. The judgment convicted defendant, upon her plea of guilty, of criminal possession of a weapon in the second degree, reckless endangerment in the first degree, and criminal possession of a firearm.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]). Contrary to defendant's contention, we conclude that her valid waiver of the right to appeal with respect to both the conviction and the sentence forecloses her challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255 [2006]; *People v Lassiter*, 149 AD3d 1579, 1579-1580 [4th Dept 2017], *lv denied* 29 NY3d 1092 [2017]; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]; *People v Joubert*, 158 AD3d 1314, 1315 [4th Dept 2018], *lv denied* 31 NY3d 1014 [2018]). Defendant further contends that County Court misapprehended its sentencing discretion and thus was unaware that it had the discretion to impose a shorter period of postrelease supervision. Although that contention survives the valid waiver of the right to appeal and does not require preservation (*see People v Davis*, 115 AD3d 1239, 1239 [4th Dept 2014]), we conclude that it is without merit (*see People v Moore*, 59 AD3d 983, 984 [4th Dept 2009], *lv denied* 12 NY3d 857 [2009]; *People v Burgess*, 23 AD3d 1095, 1095 [4th Dept 2005], *lv denied* 6 NY3d 810 [2006]; *cf. Davis*, 115 AD3d at 1239-1240).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

841

KA 16-01500

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARISELA ORNELAS, DEFENDANT-APPELLANT.

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

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (HANNAH STITH LONG OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered April 14, 2015. The judgment convicted defendant, upon her plea of guilty, of attempted criminal sale of a controlled substance in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of attempted criminal sale of a controlled substance in the second degree (Penal Law §§ 110.00, 220.41 [1]). Contrary to defendant's contention, the record establishes that she knowingly, intelligently, and voluntarily waived her right to appeal (*see People v Morales*, 148 AD3d 1638, 1639 [4th Dept 2017], *lv denied* 29 NY3d 1083 [2017]). The valid waiver of the right to appeal encompasses defendant's challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255 [2006]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

842

KA 16-00729

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARY CURTIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered March 1, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal sexual act in the first degree (Penal Law § 130.50 [4]). Contrary to defendant's contention, the record establishes that he validly waived his right to appeal (*see People v Lopez*, 6 NY3d 248, 256-257 [2006]; *see also People v Pope*, 129 AD3d 1389, 1391 [3d Dept 2015] [Devine, J., concurring]). Defendant's valid waiver of his right to appeal forecloses his challenge to the severity of his sentence (*see Lopez*, 6 NY3d at 255-256). Finally, we note that both the uniform sentence and commitment sheet and the certificate of conviction incorrectly recite that the offense was committed on January 1, 2015, and thus both must be amended to reflect the correct date of March 3, 2015 (*see generally People v Bradley*, 52 AD3d 1261, 1262 [4th Dept 2008], *lv denied* 11 NY3d 734 [2008]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

843

KA 17-00451

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY GARDNER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered October 14, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sexual act in the first degree, sexual abuse in the first degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted criminal sexual act in the first degree (Penal Law §§ 110.00, 130.50 [1]), sexual abuse in the first degree (§ 130.65 [1]), and endangering the welfare of a child (§ 260.10 [1]). We affirm. Although defendant's contention that County Court failed to apprehend the extent of its sentencing discretion survives his waiver of the right to appeal and does not require preservation for our review (*see People v Dunham*, 83 AD3d 1423, 1424-1425 [4th Dept 2011], *lv denied* 17 NY3d 794 [2011]), we conclude that defendant's contention lacks merit (*see id.*). The sentence imposed, a 3½-year determinate term of incarceration with an eight-year period of postrelease supervision, is in accordance with defendant's plea agreement and the court's sentence promise. Furthermore, the record establishes that, before defendant entered the guilty plea, the court properly advised him that the minimum sentence that it could impose was a 3½-year term of incarceration with a five-year period of postrelease supervision (*see* §§ 70.45 [2-a] [e]; 70.80 [4] [a] [ii]), and that, both before the plea was entered and before the imposition of sentence, defendant was repeatedly advised by the court that his sentence would include an eight-year period of postrelease supervision (*cf. People v Davis*, 115 AD3d 1239, 1239-1240

[4th Dept 2014]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

844

KA 16-01708

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID MOSCA, DEFENDANT-APPELLANT.

TRACY L. PUGLIESE, CLINTON, FOR DEFENDANT-APPELLANT.

JEFFREY S. CARPENTER, DISTRICT ATTORNEY, HERKIMER (ROBERT R. CALLI, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Herkimer County Court (Patrick L. Kirk, J.), rendered February 7, 2011. Defendant was resentenced upon his conviction of sodomy in the first degree.

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

Memorandum: On defendant's prior appeal from a judgment convicting him following a jury trial of two counts of sodomy in the first degree (Penal Law former § 130.50 [3]), five counts of sodomy in the second degree (former § 130.45 [1]) and one count of endangering the welfare of a child (§ 260.10 [1]), all in connection with his sexual abuse of four boys, we modified the judgment by vacating the sentence on the conviction of sodomy in the first degree under count three of the indictment, and we remitted the matter for resentencing on that count (*People v Mosca*, 294 AD2d 938, 939 [4th Dept 2002], *lv denied* 99 NY2d 538 [2002]). Defendant now appeals from a further resentence imposing a mandatory period of postrelease supervision with respect to the conviction of sodomy in the first degree under count one of the indictment.

Defendant failed to preserve for our review his contention that County Court was deprived of jurisdiction to resentence him by its failure to comply with the time limits set forth in Correction Law § 601-d (*see People v Manor*, 134 AD3d 1400, 1401 [4th Dept 2015], *lv denied* 27 NY3d 967 [2016]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). The resentence is not unduly harsh or severe.

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

845

KA 16-01234

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUIS OLIVERAS-ARVELO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered June 2, 2016. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily, and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]). That valid waiver of the right to appeal encompasses defendant's contention that the sentence is unduly harsh and severe (*see People v Hidalgo*, 91 NY2d 733, 737 [1998]; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]). Defendant's further contention that Supreme Court erred in failing to apprehend the extent of its discretion in imposing a period of postrelease supervision survives the waiver of the right to appeal (*see People v Burgess*, 23 AD3d 1095, 1095 [4th Dept 2005], *lv denied* 6 NY3d 810 [2006]), but we conclude that it is without merit. "The court's statement at the plea proceeding with respect to the imposition of a five-year period of postrelease supervision does not, without more, indicate that the court erroneously believed that it lacked discretion to impose a shorter period" (*People v Porter*, 9 AD3d 887, 887 [4th Dept 2004], *lv denied* 3 NY3d 710 [2004]; *see People v Tyes*, 9 AD3d 899, 899 [4th Dept 2004], *lv denied* 3 NY3d 682 [2004]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

846

KA 18-00246

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V ORDER

LEONARD THOMPSON, DEFENDANT-RESPONDENT.

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

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (PATRICK J. MARTHAGE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Oneida County Court (Michael L. Dwyer, J.), entered March 2, 2017. The order granted the motion of defendant to suppress physical evidence and oral statements.

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

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

847

KA 17-01340

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DIANA M. FLINN, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (THERESA L. PREZIOSO OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered June 5, 2017. The judgment convicted defendant, upon her plea of guilty, of vehicular assault in the first degree, aggravated unlicensed operation of a motor vehicle in the first degree and misdemeanor driving while intoxicated.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of, inter alia, vehicular assault in the first degree (Penal Law § 120.04 [4]). We reject defendant's contention that her waiver of the right to appeal is invalid. Contrary to defendant's contention, Supreme Court " 'did not improperly conflate the waiver of the right to appeal with those rights automatically forfeited by a guilty plea' " (*People v Mills*, 151 AD3d 1744, 1745 [4th Dept 2017], *lv denied* 29 NY3d 1131 [2017]), and "the court engaged defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*id.* [internal quotation marks omitted]). Defendant's valid waiver of the right to appeal encompasses her contention that the sentence imposed is unduly harsh and severe (*see People v Lopez*, 6 NY3d 248, 255 [2006]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

848

KA 12-01982

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

FABIAN RANDALL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered June 20, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the first degree.

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

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

849

KA 16-01773

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

QUENTIN HILL, ALSO KNOWN AS QUINTON HILL,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered August 2, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [1]). Contrary to defendant's contention, we conclude that "[t]he plea colloquy and the written waiver of the right to appeal signed [and acknowledged in County Court] by defendant demonstrate that [he] knowingly, intelligently and voluntarily waived the right to appeal, including the right to appeal the severity of the sentence" (*People v Pierce*, 151 AD3d 1964, 1965 [4th Dept 2017], *lv denied* 30 NY3d 952 [2017] [internal quotation marks omitted]). Defendant's valid waiver of the right to appeal forecloses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255 [2006]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]).

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

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

855

KA 16-01947

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

EARL J. WILSON, DEFENDANT-APPELLANT.

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

BARRY L. PORSCH, DISTRICT ATTORNEY, WATERLOO, FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Dennis F. Bender, J.), rendered August 19, 2016. The appeal was held by this Court by order entered March 23, 2018, decision was reserved and the matter was remitted to Seneca County Court for further proceedings (159 AD3d 1600). The proceedings were held and completed (Dennis F. Bender, J.).

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 25 and 26, 2018,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Entered: June 29, 2018

Mark W. Bennett
Clerk of the Court

MOTION NO. (1008/08) KA 04-02863. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHARLES E. HATHAWAY, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, CENTRA, DEJOSEPH, AND CURRAN, JJ. (Filed June 29, 2018.)

MOTION NO. (1251/15) KA 14-00785. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DONALD W. REINARD, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND CURRAN, JJ. (Filed June 29, 2018.)

MOTION NO. (1252/15) KA 15-00527. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DONALD W. REINARD, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND CURRAN, JJ. (Filed June 29, 2018.)

MOTION NO. (1368/15) KA 14-01975. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DAVID M. DAVEY, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, CARNI, DEJOSEPH, AND WINSLOW, JJ. (Filed June 29, 2018.)

MOTION NO. (1369/15) KA 14-02089. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DAVID M. DAVEY, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, CARNI, DEJOSEPH, AND WINSLOW, JJ. (Filed June 29, 2018.)

MOTION NO. (976/17) CA 17-00289. -- COUNTY OF MONROE AND MONROE COUNTY AIRPORT AUTHORITY, PLAINTIFFS-RESPONDENTS-APPELLANTS, V CLOUGH HARBOUR & ASSOCIATES, LLP, DEFENDANT-APPELLANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., DEJOSEPH, CURRAN, TROUTMAN, AND WINSLOW, JJ. (Filed June 29, 2018.)

MOTION NO. (1285/17) CA 17-00210. -- ROGER D. ELWELL AND KATHLEEN J. ELWELL, PLAINTIFFS-APPELLANTS, V ROBERT SHUMAKER AND MARJORIE SHUMAKER, DEFENDANTS-RESPONDENTS. -- Motion for reargument denied. PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND CURRAN, JJ. (Filed June 29, 2018.)

MOTION NO. (1303/17) CA 17-00160. -- DAVID PHILLIPS, PLAINTIFF-APPELLANT, V BUFFALO HEART GROUP, LLP AND RICHARD JENNINGS, M.D., DEFENDANTS-RESPONDENTS. -- Motion for reargument denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, DEJOSEPH, AND WINSLOW, JJ. (Filed June 29, 2018.)

MOTION NO. (237/18) CA 17-01764. -- FEDERICO C. GONZALEZ-DOLDAN, M.D., PLAINTIFF-RESPONDENT, V KALEIDA HEALTH, INC., MARGARET PAROSKI, GEORGE NARBY, KEVIN J. GIBBONS, JOHN KOELMEL, STEPHANIE SAUNDERS AND DEGRAFF MEMORIAL HOSPITAL, DEFENDANTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, LINDLEY, DEJOSEPH, AND NEMOYER, JJ. (Filed June 29, 2018.)

MOTION NO. (364/18) CA 17-01744. -- IN THE MATTER OF TOWN OF CONCORD, PETITIONER-RESPONDENT, V KRISTINE EDBAUER, RESPONDENT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND WINSLOW, JJ. (Filed June 29, 2018.)

MOTION NO. (468/18) CA 17-00855. -- DURHAM COMMERCIAL CAPITAL CORP., PLAINTIFF-APPELLANT, V WADSWORTH GOLF CONSTRUCTION COMPANY OF THE MIDWEST, INC., ALSO KNOWN AS WADSWORTH GOLF CONSTRUCTION COMPANY, DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, NEMOYER, AND WINSLOW, JJ. (Filed June 29, 2018.)

MOTION NO. (546/18) CA 17-02122. -- IN THE MATTER OF ARBITRATION BETWEEN TOWN OF TONAWANDA, PETITIONER-RESPONDENT, AND TOWN OF TONAWANDA SALARIED WORKERS ASSOCIATION, L. EDWARD ALLEN, PRESIDENT, TOWN OF TONAWANDA SALARIED WORKERS ASSOCIATION, AND MARK KOCHER, TREASURER, TOWN OF TONAWANDA SALARIED WORKERS ASSOCIATION, RESPONDENTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ. (Filed June 29, 2018.)