SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

APRIL 28, 2017

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. HENRY J. SCUDDER, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

1363/15

CA 14-01860

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

KAREN COLLINS, AS EXECUTOR OF THE ESTATE OF
WILLIAM ALLEN COLLINS, DECEASED,
PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

MILLENNIUM DEVELOPMENT, LLC, VISION
DEVELOPMENT, INC., AND EAGLE BUILDERS LLC,
DEFENDANTS-RESPONDENTS-APPELLANTS.

EAGLE BUILDERS LLC, THIRD-PARTY
PLAINTIFF-APPELLANT,

V

JOSEPH BARONE CONSTRUCTION CORP., THIRD-PARTY
DEFENDANT-RESPONDENT.

JOSEPH BARONE CONSTRUCTION CORP., FOURTH-PARTY
PLAINTIFF-RESPONDENT,

V

SUPERIOR STEEL, INC., FOURTH-PARTY
DEFENDANT-APPELLANT.

CHERUNDOLO LAW FIRM, PLLC, SYRACUSE (JOHN C. CHERUNDOLO OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (DANIEL P. FLETCHER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS AND THIRD-PARTY PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR FOURTH-PARTY DEFENDANT-APPELLANT.

SMITH, SOVIK, KIENDRICK & SUGNET, P.C., SYRACUSE (EDWARD J. SMITH, III, OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT AND FOURTH-PARTY PLAINTIFF-RESPONDENT.

Appeal and cross appeals from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered December 26, 2013. The order, among other things, denied plaintiff's motion for summary judgment, denied in part defendants' motion for summary judgment,

denied in part third-party defendant's motion for summary judgment, and denied fourth-party defendant's motion for summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on November 6, 2016, and filed in the Oneida County Clerk's Office on December 5, 2016,

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

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

832

CA 15-02176

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

IN THE MATTER OF VICTORIA KNAVEL, PATRICIA LENOX, WILLIAM K. MAY AND SUSAN DRABIK, ON BEHALF OF THEMSELVES AND CERTAIN OTHER RETIRED EMPLOYEES OF WEST SENECA CENTRAL SCHOOL DISTRICT FORMERLY IN CSEA BARGAINING UNIT, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

WEST SENECA CENTRAL SCHOOL DISTRICT, DR. MARK J. CRAWFORD, SUPERINTENDENT OF SCHOOLS, AND WEST SENECA CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, RESPONDENTS-RESPONDENTS.

STEVEN A. CRAIN AND DAREN J. RYLEWICZ, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., ALBANY (AARON E. KAPLAN OF COUNSEL), FOR PETITIONERS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (AARON M. SAYKIN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (John L. Michalski, A.J.), entered April 13, 2015 in a proceeding pursuant to CPLR article 78. The judgment granted the pre-answer cross motion of respondents to dismiss the petition and dismissed as moot the motion of petitioners for leave to amend the petition.

It is hereby ORDERED that the judgment so appealed from is reversed on the law without costs, the cross motion is denied, the petition is reinstated, respondents are granted 20 days from service of the order of this Court with notice of entry to serve and file an answer, and the matter is remitted to Supreme Court, Erie County, for a determination of the motion for leave to amend the petition.

Memorandum: Petitioners, who are retired employees of respondent West Seneca Central School District (District) and under the age of 65 years old, commenced this CPLR article 78 proceeding seeking to annul respondents' determination to discontinue the practice of offering "Under Age 65 retirees" the option of carrying their health insurance through the District's active employee Blue Cross/Blue Shield plan. During their employment with the District, petitioners were covered under a collective bargaining agreement between the District and the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA), which allowed petitioners to enroll in the same Blue

Cross/Blue Shield health insurance and Guardian dental insurance plans available to the District's current employees, at their own expense. On June 5, 2014, the District mailed to "Retirees Under age 65 carrying BlueCross BlueShield Health Insurance" an undated letter stating "that effective July 1, 2014, West Seneca Central School District will no longer offer Under Age 65 retirees the option of carrying their health insurance through the active employee Blue Cross Blue Shield plan." On June 18, 2014, following a meeting with affected retirees, the District issued to "retirees under age 65 Carrying BlueCross BlueShield Health Insurance" a letter stating that "the District has decided to extend your ability to participate in the CSEA Health Insurance Plan until August 1, 2014." On July 31, 2014, the District cancelled insurance coverage for retirees under age 65. According to petitioners, the District's actions violated the "Retiree Health Insurance Moratorium Law" (L 2009, ch 504, § 1, part B, § 14).

Petitioners moved for leave to amend the petition and, in lieu of filing an answer, respondents cross-moved to dismiss the petition on the ground that it was barred by the four-month statute of limitations (*see* CPLR 217 [1]). Supreme Court granted the cross motion and dismissed the petition, further concluding that petitioners' motion to amend was moot. We reverse.

Initially, we and our dissenting colleagues agree that the "determination to be reviewed" in this proceeding is the decision embodied in the undated letter sent on June 5, 2014 (CPLR 217 [1]). We note that respondents correctly concede that they bear the burden of establishing in the first instance that the proceeding was not timely commenced within the applicable four-month statute of limitations (*see id.*; *Matter of Bill's Towing Serv., Inc. v County of Nassau*, 83 AD3d 698, 699).

Respondents contend that the date of mailing, rather than the date of receipt by petitioners, of the undated letter to petitioners notifying them of the discontinuance of their participation in the District's health insurance plan, was the event which began the running of the statute of limitations. In order to apply the date of mailing to the analysis, which involves a constructive notice test, it is necessary to make the legal conclusion, as a threshold matter, that the determination at issue was "quasi-legislative" in nature (*see Matter of Owners Comm. on Elec. Rates v Public Serv. Commn. of State of N.Y.*, 76 NY2d 779, 780, *revg on dissenting op of Levine, J.*, 150 AD2d 45, 51-54). Respondents contend that the undated letter is properly characterized as a "quasi-legislative" decision, that actual notice is not required, and that constructive notice by mailing was sufficient to commence the four-month limitations period. We recognize that at oral argument of this appeal petitioners' counsel joined in the legal conclusion that the determination was "quasi-legislative." However, this Court is not bound by an erroneous concession of counsel or the parties with respect to a legal principle and such "concession does not . . . relieve us from the performance of our judicial function and does not require us to adopt the proposal urged upon us" (*People v Berrios*, 28 NY2d 361, 366-367). "When an issue or claim is properly before the court, the court is not limited

to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law" (*Kamen v Kemper Fin. Servs.*, 500 US 90, 99). We simply cannot turn a blind eye to the unsubstantiated and patently erroneous legal conclusion offered by the parties on this record (*see generally Arcadia, Ohio v Ohio Power Co.*, 498 US 73, 77, *reh denied* 498 US 1075). We have no quarrel with a litigant conceding an issue of fact (*see Elston v Canty*, 15 AD3d 990, 990), or conceding that a bill of particulars is sufficiently specific (*see Griswold v Kurtz*, 80 AD2d 983, 983), or waiving a beneficial right (*see Mitchell v New York Hosp.*, 61 NY2d 208, 214). Those types of concessions do not intrude upon the judicial function of correctly identifying and applying the law to the facts.

A quasi-legislative-type administrative determination is one having an impact far beyond the immediate parties at the administrative stage (*see Owners Comm. on Elec. Rates*, 150 AD2d at 53 [Levine, J.]; *Matter of Plainview-Old Bethpage Congress of Teachers v New York State Health Ins. Plan*, 140 AD3d 1329, 1331). Thus, where a quasi-legislative determination is challenged, "actual notice of the challenged determination is not required in order to start the statute of limitations clock" (*Matter of School Adm'rs Assn. of N.Y. State v New York State Dept. of Civ. Serv.*, 124 AD3d 1174, 1176, *lv denied* 26 NY3d 904). The policy underlying the rule is that actual notice to the general public is not practicable (*see Owners Comm. on Elec. Rates*, 150 AD2d at 53). Instead, the statute of limitations begins to run once the administrative agency's quasi-legislative determination of the issue becomes "readily ascertainable" to the complaining party (*Matter of Riverkeeper, Inc. v Crotty*, 28 AD3d 957, 962).

On the other hand, where the public at large is not impacted by a determination, actual notice, commonly in the form of receipt of a letter or other writing containing the final and binding determination, is required to commence the statute of limitations (*see Matter of Essex County v Zagata*, 91 NY2d 447, 453; *New York State Assn. of Counties v Axelrod*, 78 NY2d 158, 165-166).

Here, the only evidence submitted by respondents with respect to the determination to discontinue the practice of permitting "Under Age 65 retirees" the option of carrying their health insurance through the District's Blue Cross/Blue Shield plan was the undated letter that was signed by the "Assistant Superintendent, Human Resources." That letter makes no mention of any meeting of, or resolution by, respondent West Seneca Central School District Board of Education (Board of Education) at which the participation of "Under Age 65 retirees" in the health insurance plan was discussed or voted upon. The Assistant Superintendent does not mention the authority, if any, upon which he issued the letter. The undated letter does not identify when the determination was made or by whom it was made. The letter does not indicate that it was the Assistant Superintendent's decision to make or that he was acting at the direction of the Board of Education or respondent Dr. Mark J. Crawford, Superintendent of Schools (Superintendent).

In other words, respondents wholly failed to submit any evidence establishing *the process* that resulted in the issuance of the undated letter, and the record is otherwise devoid of any evidence of the nature of the process giving rise to the determination. In our view, all of those facts and factual shortcomings are critical to the analysis. Moreover, respondents do not explain how dropping the letter in the mailbox made the determination "readily ascertainable" to anyone—and more particularly to the individual petitioners/retirees.

The determination clearly had no impact upon the public at large, and respondents have wholly failed to establish that actual notice to the affected persons would be impracticable or unduly burdensome. Indeed, in their moving papers, respondents failed to quantify the number of affected "Under Age 65 retirees." Even assuming, arguendo, that a District resident or taxpayer sought to challenge the determination, we note that respondents fail to explain how the undated letter, privately addressed and mailed only to "Under Age 65 retirees," would be "readily ascertainable" to a resident or taxpayer in the District so as to commence the running of the statute of limitations with respect to such a challenge. Nor do respondents explain how an "Under Age 65 retiree" would be expected to know that he or she was aggrieved by the undated letter when nothing further in the way of notice was given by respondents other than dropping the letter in a mailbox (*cf. School Adm'rs Assn. of N.Y. State*, 124 AD3d at 1177-1178).

We thus conclude that respondents failed to meet their burden of establishing that the challenged determination was "quasi-legislative" and, therefore, that the "readily ascertainable" constructive notice test should be applied herein (*Riverkeeper, Inc.*, 28 AD3d at 962; *see School Adm'rs Assn. of N.Y. State*, 124 AD3d at 1176-1177).

We further conclude that our decision in *Matter of Jones v Board of Educ. of Watertown City Sch. Dist.* ([appeal No. 2], 30 AD3d 967), is inapplicable to the facts presented here. In *Jones*, the Board of Education passed a resolution that required retirees to contribute to their health insurance premiums. The impacted retirees were informed of the resolution in a letter from the Superintendent of the subject school district that was mailed to and received by the petitioners. *Jones* concluded that the mailing of the letter—not receipt—was the triggering event for commencing the limitations period (*id.* at 968-969). Nonetheless, *Jones* did not address the issue whether the determination was "quasi-legislative." Nor did it resolve the question of why the subject school board's resolution was not the triggering event in that case. Even assuming, arguendo, that the *Jones* Court considered the determination to be of a "quasi-legislative" nature, in our view it may very well have been that the *Jones* Court concluded that a school board's public meeting, published resolution, and mailing—*in combination*—made the determination "readily ascertainable" (*see School Adm'rs Assn. of N.Y. State*, 124 AD3d at 1176-1177). However, inasmuch as *Jones* neither explicitly addressed nor resolved those issues, we conclude that it has no precedential value toward the resolution of this appeal on the facts before us.

Lastly, inasmuch as respondents, in our view, failed to meet their burden to establish when the four-month statute of limitations commenced, the burden did not shift to petitioners to establish any particular date of individual receipt of the undated letter. In any event, respondents failed to establish any dates of receipt by petitioners in their moving papers.

Finally, we further conclude that "[t]he grant of an extension of time to comply with the final determination was merely incidental to that determination and did not affect" the time at which the statute of limitations began to run (*Matter of S.S. Canadiana Preserv. Socy. v Boardman*, 262 AD2d 961, 962 [internal quotation marks omitted]; *see Matter of Metropolitan Package Store Assn. v Duffy*, 143 AD2d 832, 833, *lv denied* 73 NY2d 705).

CARNI and DEJOSEPH, JJ., concur; PERADOTTO, J.P., concurs in the following memorandum: I agree with petitioners that Supreme Court erred in granting respondents' pre-answer cross motion to dismiss the petition as time-barred and denying as moot petitioners' motion for leave to amend the petition. However, inasmuch as my rationale for reaching that conclusion differs from the plurality, I concur in the result only.

There is no dispute that this CPLR article 78 proceeding is governed by the statute of limitations period set forth in CPLR 217 (1), which requires that a petitioner commence the proceeding " 'within four months after the determination to be reviewed becomes final and binding upon the petitioner' " (*Walton v New York State Dept. of Corr. Servs.*, 8 NY3d 186, 194). "An administrative determination becomes 'final and binding' when two requirements are met: completeness (finality) of the determination and exhaustion of administrative remedies. 'First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be . . . significantly ameliorated by further administrative action or by steps available to the complaining party' " (*id*. at 194). Here, the undated letter indicating that respondent West Seneca Central School District (District) would no longer offer retirees under age 65 the option of carrying health insurance through the active employee Blue Cross/Blue Shield plan constituted respondents' definitive position on that issue, which could not have been " 'significantly ameliorated by further administrative action or by steps available to [petitioners]' " (*id.*; *see Matter of School Adm'rs Assn. of N.Y. State v New York State Dept. of Civ. Serv.*, 124 AD3d 1174, 1177, *lv denied* 26 NY3d 904). Contrary to petitioners' contention, the District's subsequent action in granting an extension to affected retirees with respect to the effective date of the final determination "was merely incidental to that determination" and did not affect its finality (*Matter of S.S. Canadiana Preserv. Socy. v Boardman*, 262 AD2d 961, 962; *see School Adm'rs Assn. of N.Y. State*, 124 AD3d at 1177-1178; *Matter of Metropolitan Package Store Assn. v Duffy*, 143 AD2d 832, 833, *lv denied* 73 NY2d 705).

I nonetheless agree with petitioners that respondents failed to

meet their initial burden of establishing that the petition was untimely because the time to commence the proceeding had expired, which required that respondents establish, inter alia, when the statute of limitations began to run (*see generally Matter of Village of Westbury v Department of Transp. of State of N.Y.*, 75 NY2d 62, 73; *Larkin v Rochester Hous. Auth.*, 81 AD3d 1354, 1355). Initially, the nature of the determination must be ascertained in order to resolve when the statute of limitations began to run. I agree with the parties and the dissent that respondents' decision to no longer offer retirees under age 65 the option of carrying health insurance through the active employee plan was a quasi-legislative determination (*see Matter of Owners Comm. on Elec. Rates v Public Serv. Commn. of State of N.Y.*, 76 NY2d 779, 780, *revg on dissenting op of Levine, J.*, 150 AD2d 45, 51-54; *see generally School Adm'rs Assn. of N.Y. State*, 124 AD3d at 1175-1176). The nature of the determination, i.e., the decision of a school district to discontinue offering certain of its retirees enrollment access to a particular health insurance plan, has none of the hallmarks of quasi-judicial decision-making (*see* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C7801:2).

"In the context of quasi-legislative determinations . . . , actual notice of the challenged determination is not required in order to start the statute of limitations clock; rather, the statute of limitations begins to run once the administrative agency's 'definitive position on the issue [becomes] readily ascertainable' to the complaining party" (*School Adm'rs Assn. of N.Y. State*, 124 AD3d at 1176-1177; *see Owners Comm. on Elec. Rates*, 150 AD2d at 53 [Levine, J., dissenting]). Thus, a quasi-legislative determination becomes binding, and the statute of limitations begins to run, on the date that the aggrieved party is constructively notified of the challenged determination, i.e., when that determination becomes readily ascertainable to the aggrieved party (*see School Adm'rs Assn. of N.Y. State*, 124 AD3d at 1176-1177; *see generally Village of Westbury*, 75 NY2d at 72).

Respondents assert that the statute of limitations began to run on June 5, 2014, when they mailed the undated letter to the affected retirees, and that the proceeding was commenced on October 10, 2014 after expiration of the four-month statute of limitations period. While respondents established that they mailed the undated letter, both their submissions and the case upon which they rely, *Matter of Jones v Board of Educ. of Watertown City Sch. Dist.* (30 AD3d 967, 968-969), fail to explain how that action alone, i.e., placing the letter in the custody of the United States Postal Service on June 5, 2014 for regular delivery, could have rendered the determination contained in that letter readily ascertainable to the affected retirees on that same date. The record does not establish that respondents undertook any other notification procedures to disseminate the subject information that would have adequately provided petitioners with constructive notice of the District's determination on that date (*cf. Owners Comm. on Elec. Rates*, 150 AD2d at 52 [Levine, J., dissenting]; *School Adm'rs Assn. of N.Y. State*, 124 AD3d at 1177-

1178). The email received by the District's personnel supervisor from a Blue Cross/Blue Shield representative on June 9, 2014, which was submitted by respondents in support of their cross motion, contained only hearsay statements from unidentified retirees that they were going to lose coverage after June 30, 2014. Those hearsay statements are insufficient to establish that the determination was readily ascertainable to petitioners by the date of the email, which would also render the petition untimely (*see generally Feis v A.S.D. Metal & Mach. Shop*, 234 AD2d 504, 505; *R. Bernstein Co. v Popolizio*, 97 AD2d 735, 735). Inasmuch as respondents failed to meet their initial burden on the cross motion in that regard, I conclude that the court erred in dismissing the petition as time-barred. It is on that basis alone that I agree with the plurality to reverse the judgment, deny respondents' cross motion, reinstate the petition, and grant respondents 20 days from service of the order of this Court with notice of entry to serve and file an answer. I likewise agree with the plurality that the matter must be remitted to Supreme Court to determine petitioners' motion for leave to amend the petition.

NEMOYER and CURRAN, JJ., dissent and vote to affirm in the following memorandum: We respectfully dissent. We agree with our colleagues that the "determination to be reviewed" is the decision of respondent West Seneca Central School District (District) embodied in the undated letter sent by the District to petitioners on June 5, 2014 (CPLR 217 [1]). We disagree with our colleagues, however, on the issue whether the record demonstrates that the determination became "final and binding" upon petitioners when the letter was sent (*id.*). In our view, inasmuch as the nature of the action taken by the District was quasi-legislative, the undisputed date of the determination's mailing is, as a matter of public policy, the accrual date (*see Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34; *Matter of Owners Comm. on Elec. Rates v Public Serv. Commn. of State of N.Y.*, 150 AD2d 45, 53-54 [Levine, J., dissenting], *revd on dissenting op of Levine, J.*, 76 NY2d 779). Accordingly, the four-month statute of limitations applicable to the instant CPLR article 78 proceeding began to run when the District sent the undated letter on June 5, 2014, notifying petitioners of the District's determination (*see Matter of Jones v Board of Educ. of Watertown City Sch. Dist.*, 30 AD3d 967, 968-969; *see generally Matter of Village of Westbury v Department of Transp. of State of N.Y.*, 75 NY2d 62, 72-73). Inasmuch as this proceeding was commenced on October 10, 2014, we conclude that the petition is time-barred (*see Jones*, 30 AD3d at 969; *see also Matter of Paterson v New York State Teachers' Retirement Sys.*, 25 AD3d 899, 899-900).

We respectfully disagree with the plurality's conclusion that the nature of the action taken was something other than quasi-legislative. That conclusion is of the plurality's own making inasmuch as it was not raised in any of the parties' briefs, and petitioners conceded at oral argument of this appeal that the determination is quasi-legislative. The plurality relies in part upon the case *People v Berrios* (28 NY2d 361, 366-367), which is rooted in principles of criminal and constitutional law safeguarding "[t]he public interest

that a result be reached which promotes a well-ordered society . . . in every criminal proceeding" (*Young v United States*, 315 US 257, 259*)*. We respectfully submit that the plurality's application of such principles to civil cases overlooks our long-established precedent in civil cases excluding from consideration issues conceded at oral argument (*see Elston v Canty*, 15 AD3d 990, 990; *Griswold v Kurtz*, 80 AD2d 983, 983), or in a party's brief (*see De Lang v Doctors Hosp.*, 29 AD2d 735, 735), as well as precedent that otherwise allows the parties in a civil case to chart their own litigation course, including by circumscribing the issues presented (*see Hasselback v 2055 Walden Ave., Inc.*, 139 AD3d 1385, 1387; *Quilty v Cormier*, 115 AD3d 1229, 1230*; see also Mitchell v New York Hosp.*, 61 NY2d 208, 214*)*. The plurality also relies on the case *Kamen v Kemper Fin. Servs.* (500 US 90, 99), in which an issue was raised only in a reply brief and was argued to have been waived. That is not the situation here inasmuch as none of the parties has raised the issue addressed by the plurality.

We agree with our concurring colleague that there is nothing about the District's determination that fits the quasi-judicial category (*see New York City Health & Hosps. Corp. v McBarnette*, 84 NY2d 194, 203 n 2, *rearg denied* 84 NY2d 865; *Matter of Town of Waterford v Water Pollution Control Bd.*, 5 NY2d 171, 183; *see also Matter of Venes v Community Sch. Bd. of Dist. 26*, 43 NY2d 520, 525; *Matter of Halperin v City of New Rochelle*, 24 AD3d 768, 770, *appeal dismissed* 6 NY3d 890, *lv denied* 7 NY3d 708), and we conclude that the determination fits comfortably within precedent holding that similar actions are quasi-legislative in nature (*see Owners Comm. on Elec. Rates*, 150 AD2d at 52 [Levine, J., dissenting]; *see also Lenihan v City of New York*, 58 NY2d 679, 681; *Jones*, 30 AD3d at 968-969). We respectfully disagree with the plurality's speculative basis for distinguishing *Jones*, which expressly measured the statute of limitations from when the letter was "sent" (*Jones*, 30 AD3d at 968), and which thereby did not require actual notice as would be necessary for quasi-judicial action.

While our concurring colleague agrees that the District need show only that petitioners had constructive notice, as opposed to actual notice, of the District's decision, she concludes that the District did not meet its burden. She concludes that the District needed to show that it undertook other notification procedures to disseminate the information. That, too, is a point of view that has not been raised by the parties. Even if we assume for the sake of argument that the law requires other notification procedures, we conclude that the accrual date for the statute of limitations still would be the undisputed date of the final determination under review, i.e., June 5, 2014 (*see Matter of School Adm'rs Assn. of N.Y. State v New York State Dept. of Civ. Serv.*, 124 AD3d 1174, 1178, *lv denied* 26 NY3d 904).

For the reasons given, we would affirm the judgment.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

857/16

CA 15-01921

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

ALEX C. MILLER, PLAINTIFF-RESPONDENT,

V ORDER

KIRK HOWARD, ET AL., DEFENDANTS,
AND AMORE'S USED CARS & REPAIRS, INC.,
DEFENDANT-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (WILLIAM K. KENNEDY OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANCIS M. LETRO, ESQ., BUFFALO (FRANCIS M. LETRO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

PILARZ LAW FIRM, BUFFALO (MICHAEL PILARZ OF COUNSEL), FOR DEFENDANTS CHARLES HARBEL POST NO. 892 AMERICAN LEGION OF ALLEGANY, N.Y. AND AUDREY J. WILLIAMS.

NASH CONNORS, BUFFALO (DANIEL CONNORS OF COUNSEL), FOR DEFENDANTS KIRK HOWARD, MARI L. HOWARD AND WILLIAM C. HOWARD, JR.

Appeal from an order of the Supreme Court, Cattaraugus County (Paula L. Feroleto, J.), entered January 26, 2015. The order, among other things, denied in part the motion of defendant Amore's Used Cars & Repairs, Inc. seeking to compel plaintiff to respond to its Notice to Admit.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on August 10, 2016, and filed in the Cattaraugus County Clerk's Office on January 10, 2017,

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

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

1130/16

CA 16-00719

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

KENNETH ZIOLKOWSKI, PLAINTIFF-RESPONDENT,

V ORDER

HAN-TEK, INC., AND ZYNERGY SOLUTIONS, INC.,
DEFENDANTS-APPELLANTS.

LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (DESTIN C. SANTACROSE OF COUNSEL), FOR DEFENDANT-APPELLANT HAN-TEK, INC.

TREVETT CRISTO SALZER & ANDOLINA, P.C., ROCHESTER (DANIEL P. DEBOLT OF COUNSEL), FOR DEFENDANT-APPELLANT ZYNERGY SOLUTIONS, INC.

LAW OFFICE OF THOMAS C. PARES, BUFFALO (THOMAS C. PARES OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered February 26, 2016. The order denied the motions of defendants to dismiss the complaint pursuant to CPLR 3216.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on February 13, 2017, and filed in the Erie County Clerk’s Office on March 14, 2017,

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

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

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KA 14-01340

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEON C. BLOOM, JR., ALSO KNOWN AS LEON BLOOM,
DEFENDANT-APPELLANT.

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (MELISSA CIAFRINI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered July 21, 2014. The judgment convicted defendant, after a nonjury trial, of burglary in the second degree and criminal obstruction of breathing or blood circulation.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by amending the order of protection to delete the no contact provisions with respect to defendant's son and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him after a nonjury trial of burglary in the second degree (Penal Law § 140.25 [2]) and criminal obstruction of breathing or blood circulation (§ 121.11). County Court issued stay away and no contact orders of protection against defendant with respect to both the victim and defendant's son, to remain effective until October 9, 2031. Defendant failed to preserve for our review his contention that the People committed a *Brady* violation by failing to disclose the notes of a police officer who interviewed the victim (*see People v Tobias*, 273 AD2d 925, 926, *lv denied* 95 NY2d 908), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). By failing to seek a sanction or raise the issue again after the court deferred discussion of the failure to disclose the notes, "any claim for relief defendant might have as a result of a possible violation of his *Rosario* rights must be deemed abandoned" (*People v Graves*, 85 NY2d 1024, 1027).

We reject defendant's contention that he was denied effective assistance of counsel. Although defense counsel did not understand the necessity and procedure for laying a foundation for the admission of Facebook messages exchanged between defendant and the victim, that

error did not deprive defendant of effective assistance of counsel (*see People v Newton*, 138 AD2d 415, 416*, lv denied* 72 NY2d 864). Defense counsel was not ineffective with respect to the failure to preserve defendant's *Rosario* and *Brady* claims for appellate review inasmuch as deprivation of appellate review does not establish ineffective assistance of counsel in the absence of a showing that the underlying contention "would be meritorious upon appellate review" (*People v Bassett*, 55 AD3d 1434, 1438, *lv denied* 11 NY3d 922). Here, defendant failed to demonstrate that his underlying contention would be meritorious because he failed to establish that there was a "reasonable possibility" that the officer's personal interview notes would have changed the result of the proceedings (CPL 240.75; *see People v Fuentes*, 12 NY3d 259, 263, *rearg denied* 13 NY3d 766; *People v Gayden* [appeal No. 2], 111 AD3d 1388, 1389). We have considered defendant's remaining claims of ineffective assistance of counsel and conclude that they are without merit, and that defendant received "meaningful representation" (*People v Baldi*, 54 NY2d 137, 147).

Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant contends that the court abused its discretion with respect to the stay away, no contact and durational provisions of the order of protection regarding his son born of the marriage with the victim. Defendant's contentions with respect to the stay away and durational provisions of the order are not preserved for our review because defendant failed to make a specific objection thereto at the time of sentencing (*see People v Nieves*, 2 NY3d 310, 315). We agree with defendant, however, that the no contact provisions of the order with respect to his son are unwarranted under the circumstances. We therefore modify the judgment by amending the order of protection to delete the provisions prohibiting defendant from communicating with or contacting the subject child by mail, telephone, email, voicemail or other electronic means.

Finally, the sentence is not unduly harsh or severe.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

74

KA 14-00793

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN R. SIMMONS, DEFENDANT-APPELLANT.

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered June 18, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that Supreme Court erred in refusing to suppress physical evidence, including a handgun, and statements made by defendant to the police following his arrest. We reject that contention.

At the suppression hearing, the arresting officer testified that he had personal knowledge that the location of the arrest was a "very dangerous street" in a high-crime area known for gang activity and trafficking of crack cocaine. The day before defendant's arrest, there had been a report of an assault as well as a "shots fired call" at that location, and the officer had made three recent arrests at that location for gun possession.

On the evening of defendant's arrest, the officer was patrolling the area in a marked police vehicle. At approximately 10:00 p.m., the officer observed defendant and five other men in the middle of the street. As the police vehicle approached them, three men disbanded from the group and began to walk away. The officer exited the vehicle and defendant, who was wearing a T-shirt and shorts, walked past the officer while looking down and holding the center of his waistband underneath his T-shirt. The officer, who had made over 150 gun arrests, and had "been involved in numerous gun arrests where individuals holding the center of their waistband [were] wearing a

belt [and had] a weapon," found this to be "[s]uspicious activity." He thus walked "slowly" toward defendant and asked him to show his hands. As defendant complied by lifting his hands to the side, his shirt lifted and revealed "what appeared to be a buttstock or a handle of a weapon." The officer immediately grabbed the weapon and placed defendant under arrest.

In *People v De Bour* (40 NY2d 210, 223), the Court of Appeals provided a "graduated four-level test for evaluating street encounters initiated by the police" (*People v Moore*, 6 NY3d 496, 498). Here, there is no dispute that the officer's command to "show your hands," in a public setting, with gun holstered, and without any physical restraint on defendant's freedom of movement, did not constitute a seizure (*see generally People v Bora*, 83 NY2d 531, 534-536; *People v Hollman*, 79 NY2d 181, 184-185; *People v Hicks*, 68 NY2d 234, 240). Rather, defendant contends that the officer lacked the requisite founded suspicion for a *De Bour* level two encounter.

Under *De Bour*, "level one permits a police officer to request information from an individual and merely requires that the request be supported by an objective, credible reason, not necessarily indicative of criminality; level two, the common-law right of inquiry, permits a somewhat greater intrusion and requires a founded suspicion that criminal activity is afoot" (*Moore*, 6 NY3d at 498). In determining whether the officer had the requisite "founded suspicion" for a level two encounter, the suppression court must consider the totality of circumstances (*see People v Mercado*, 120 AD3d 441, 442, *affd* 25 NY3d 936), and "must undertake a dual inquiry: 'whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place' " (*People v William II*, 98 NY2d 93, 98).

It is well settled that the "nature and location of the area where a suspect is detained may be one of the factors considered in determining whether, in a given case, the police acted reasonably" (*People v Bronston*, 68 NY2d 880, 881; *see People v Oden*, 36 NY2d 382, 385). An officer's experience and training may also be considered a relevant factor in evaluating the weight to be given his or her observations (*see People v McRay*, 51 NY2d 594, 601; *People v Sylvain*, 33 AD3d 330, 331, *lv denied* 7 NY3d 904).

Here, we conclude that the location of this encounter in a high-crime area, the officer's training and his experience in investigating weapons possession crimes at this location, together with defendant's grabbing of his waistband with his hand concealed under his shirt, provided the requisite founded suspicion for the officer to command defendant to show his hands. Under the totality of the circumstances, we conclude that it is of no consequence that the officer did not observe a gun before commanding defendant to show his hands. Indeed, defendant's hand was concealed under his shirt while simultaneously grabbing his waistband. The Court of Appeals has noted that "a handgun is often carried in the waistband" (*People v Benjamin*, 51 NY2d 267, 271; *see De Bour*, 40 NY2d at 221), and that it would be "absurd to suggest that a police officer has to await the glint of steel

before he can act to preserve his safety" (*Benjamin*, 51 NY2d at 271).

We recognize that a founded suspicion may not rest upon innocuous behavior that is susceptible of an innocent as well as a culpable interpretation (*see generally People v Brannon*, 16 NY3d 596, 602). Viewed in isolation by an untrained observer, defendant's actions might not appear to be suspicious but, "when viewed collectively and in the light of the officer's expertise," we conclude that the officer had a founded suspicion of criminal activity warranting a level two inquiry (*People v Wilson*, 52 AD3d 239, 240, *lv denied* 11 NY3d 743; *see generally People v Pines*, 281 AD2d 311, 311-312, *affd* 99 NY2d 525; *De Bour*, 40 NY2d at 220-221; *People v Hernandez*, 3 AD3d 325, 325, *lv denied* 2 NY3d 741).

All concur except LINDLEY and TROUTMAN, JJ., who dissent and vote to reverse in accordance with the following memorandum: We respectfully dissent. While we agree with the majority that the officer's request to have defendant show his hands was a level two encounter under *People v De Bour* (40 NY2d 210, 223), thus requiring the officer to have "a founded suspicion that criminal activity is afoot" (*People v Moore*, 6 NY3d 496, 498; *see Matter of Shakir J.*, 119 AD3d 792, 794, *lv denied* 24 NY3d 916; *People v Fernandez*, 87 AD3d 474, 475), we disagree with the majority that the officer in this case had such a founded suspicion. Therefore, we would reverse the judgment, vacate defendant's plea, grant those parts of his omnibus motion seeking to suppress tangible property and statements, dismiss the indictment, and remit the matter to Supreme Court for proceedings pursuant to CPL 470.45.

As the majority points out, the nature and location of the area as well as the officer's experience and training may be considered in determining whether the officer acted reasonably (*see People v Bronston*, 68 NY2d 880, 881; *People v McRay*, 51 NY2d 594, 601). Nevertheless, "[t]he fact that defendant was located in a high[-]crime area does not by itself justify the police conduct where . . . there were no other objective indicia of criminality" (*People v Stevenson*, 273 AD2d 826, 827; *see People v Ingram*, 114 AD3d 1290, 1293, *appeal dismissed* 24 NY3d 1201), because "innocuous behavior alone will not generate a founded . . . suspicion that a crime is at hand" (*De Bour*, 40 NY2d at 216; *see People v Mobley*, 120 AD3d 916, 918).

This case puts before us one very simple question, to wit, does grabbing one's waistband alone, without any other evidence that there is an object in that waistband, constitute innocuous behavior or evidence of criminality? We answer that question in the negative. Although "[i]t is quite apparent to an experienced police officer, and indeed it may almost be considered common knowledge, that a handgun is often carried in the waistband" (*People v Benjamin*, 51 NY2d 267, 271), the cases in which evidence of criminality has been found involve situations where the officers testified that the defendants were grabbing or cupping an object in the waistband (*see e.g. People v Pines*, 281 AD2d 311, 311-312, *affd* 99 NY2d 525; *People v Corona*, 142 AD3d 889, 889, *lv denied* 28 NY3d 1144; *People v Feliz*, 45 AD3d 437,

437, *lv denied* 9 NY3d 1033), or situations where the officers testified that they personally observed an actual bulge in the waistband (*see e.g. De Bour*, 40 NY2d at 221; *People v Gerard*, 94 AD3d 592, 592-593; *People v Crisler*, 81 AD3d 1308, 1309, *lv denied* 17 NY3d 793; *People v Stevenson*, 7 AD3d 820, 820-821). Here, there was no such testimony (*cf. People v Robbins*, 83 NY2d 928, 930).

Inasmuch as the Court of Appeals has held that grabbing one's waistband, without more, "provide[s] . . . no information regarding criminal activity" (*id.*), we conclude that the officer did not have the requisite founded suspicion of criminality necessary to order defendant to show his hands. Moreover, there was no testimony from the sole officer to testify at the suppression hearing that he had any fear for his safety.

We thus conclude that " 'the handgun seized by the police should have been suppressed . . . , and the statements made by defendant to the police following the unlawful seizure should have been suppressed as fruit of the poisonous tree' " (*Mobley*, 120 AD3d at 919).

Frances E. Cafarell

Entered: April 28, 2017

Clerk of the Court

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

188

CA 16-00859

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

JAMES PIRRITANO AND JACQUELYN PIRRITANO,
CLAIMANTS-APPELLANTS-RESPONDENTS,

V ORDER

NEW YORK STATE THRUWAY AUTHORITY,
DEFENDANT-RESPONDENT-APPELLANT,
AND STATE OF NEW YORK, DEFENDANT-RESPONDENT.

CHIACCHIA & FLEMING, LLP, HAMBURG (DANIEL J. CHIACCHIA OF COUNSEL), FOR CLAIMANTS-APPELLANTS-RESPONDENTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (WILLIAM K. KENNEDY OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Court of Claims (Michael E. Hudson, J.), entered June 11, 2015. The order, among other things, denied claimant's motion for partial summary judgment and denied in part defendants' cross motion for summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on January 20, 2017, and filed in the Court of Claims on February 27, 2017,

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

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

252

CAF 16-00650

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

IN THE MATTER OF CLIFFORD E. DRAKE, JR.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BELLE ROSE RILEY, RESPONDENT-APPELLANT.

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

COLE & VALKENBURGH, P.C., BATH (CHRISTINE M. VALKENBURGH OF COUNSEL), FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Steuben County (Gerard J. Alonzo, J.H.O.), entered April 6, 2016 in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to refrain from having any contact with petitioner.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, and the matter is remitted to Family Court, Steuben County, for further proceedings in accordance with the following memorandum: Respondent mother appeals from an order of protection entered upon a finding that she committed two family offenses (*see* Family Ct Act § 812 [1]), i.e., disorderly conduct (Penal Law § 240.20) and harassment in the second degree (§ 240.26), against petitioner father. In his amended petition, the father alleged that the mother yelled at him and called him names. The matter proceeded to a trial, after which Family Court issued a "stay away" order of protection ordering the mother to refrain from contact with the father and the parties' two children.

We agree with the mother that the court abused its discretion in denying her attorney's motion to adjourn the hearing because the mother was unable to attend. We therefore reverse the order on appeal and remit the matter to Family Court for further proceedings on the amended petition. In Family Court Act article 8 proceedings, the court "may adjourn a fact-finding hearing or a dispositional hearing for good cause shown on its own motion or on motion of either party" (Family Ct Act § 836 [a]). Although the court does not abuse its discretion in denying a request for an adjournment where the party making the request gives no reason for his or her absence (*see Matter of Tyler W. [Stacey S.]*, 121 AD3d 1572, 1573), here, the mother

explained her absence. Moreover, the proceedings were not protracted, and the mother made no prior requests for an adjournment (*see id.*).

In light of our determination, we do not reach the mother's remaining contentions.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

254

CA 16-01395

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

JACOB MARTINEZ, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, CITY OF BUFFALO DEPARTMENT OF PUBLIC WORKS, PARKS AND STREETS, AND THOMAS ALAN GILL, DEFENDANTS-RESPONDENTS-APPELLANTS.

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

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

Appeal and cross appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered November 9, 2015. The order denied that part of the motion of plaintiff seeking summary judgment on the issue of negligence, granted that part of the motion of plaintiff seeking summary judgment on the issue of serious injury and determined that the reckless disregard standard of Vehicle and Traffic Law § 1103 (b) applies in this case.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the second ordering paragraph and by denying plaintiff's motion with respect to the 90/180-day category of serious injury, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he was struck by a snowplow while he was operating his own motor vehicle in the lane adjacent to the snowplow. The snowplow was operated by defendant Thomas Alan Gill, who was employed by defendant City of Buffalo (City). In attempting to make a U-turn with the snowplow, Gill proceeded into plaintiff's lane of travel, and the two vehicles collided. Plaintiff moved for partial summary judgment on the issues of negligence and serious injury. Supreme Court granted plaintiff's motion with respect to the issue of serious injury, determined that the "reckless disregard for the safety of others" standard contained in Vehicle and Traffic Law § 1103 (b) applied to the operation of the snowplow, and denied plaintiff's motion with respect to the issue of negligence. Plaintiff appeals with respect to the issue of reckless disregard, and defendants cross-appeal with respect to the issue of serious injury. We conclude that there are issues of fact with respect to whether the reckless

disregard standard applies, and that plaintiff did not meet his initial burden with respect to the 90/180-day category of serious injury, and we therefore modify the order accordingly.

We begin by observing that, although defendants did not move for summary judgment on the issue of reckless disregard, it is well settled that a court deciding a motion for summary judgment is empowered to search the record and may, even in the absence of a cross motion, grant summary judgment to a nonmoving party (*see generally* CPLR 3212 [b]; *Horst v Brown*, 72 AD3d 434, 437, *appeal dismissed* 15 NY3d 743). Although the court's search of the record is limited to those causes of action or issues that are the subject of the motion (*see Mercedes-Benz Credit Corp. v Dintino*, 198 AD2d 901, 901-902), here plaintiff's motion sought to have the court apply the ordinary negligence standard. Thus, we conclude that the court was authorized to reach the reckless disregard issue and grant summary judgment in favor of the nonmoving party. However, we conclude that issues of fact with respect to whether the snowplow was a vehicle "actually engaged in work on a highway" at the time of the accident preclude summary judgment on that issue (Vehicle and Traffic Law § 1103 [b]; *see O'Keeffe v State of New York*, 40 AD3d 607, 608). Although Gill testified at his examination before trial that he was "done checking the area" and was not plowing, salting, or sanding the roadway at the time of the accident, plaintiff testified at his General Municipal Law § 50-h hearing that, shortly before the accident, the snowplow was salting the road and had its hazard lights engaged. At another point in his testimony, Gill stated that, shortly before the accident, he was checking the road for ice build-up, but that he could not recall if he was salting the road at the time of the accident. Gill also testified that his destination at the time of the accident was a local park where he would "take a break," but the record fails to establish if the snowplow was actually on a City street or a town road at the time of the accident and also fails to establish the precise route that Gill was assigned to service that day. In light of those conflicting descriptions of the circumstances surrounding the accident, we conclude that it cannot be determined as a matter of law on this record that the snowplow was "actually engaged in work on a highway" at the time of the accident (Vehicle and Traffic Law § 1103 [b]).

Even though the court granted plaintiff's motion on the issue of serious injury, it failed to specify under which category of serious injury plaintiff is entitled to recover. According to plaintiff, he sustained a serious injury under the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories set forth in Insurance Law § 5102 (d). Defendants do not challenge plaintiff's assertion that he met his initial burden with respect to the categories of permanent consequential limitation of use and significant limitation of use. Rather, defendants contend that they raised issues of fact with respect to those categories by submitting the report of a chiropractor who conducted an independent medical examination of plaintiff approximately five months after the accident. In his report, the chiropractor opined that plaintiff was suffering from only cervical and lumbar "strain/sprain," and that

plaintiff "is able to return to pre-loss activity levels" and "capable of working and performing all of his usual activities of daily living without restrictions." We note, however, that the chiropractor failed to address or reconcile his opinions with the cervical MRI studies that reveal a small central C3-4 disc herniation, a right paracentral C5-6 disc herniation, and a left paracentral C6-7 disc herniation, all of which impinge in varying degrees on the anterior aspect of the thecal sac. The chiropractor also failed to address in his report the cervical spine surgery that plaintiff underwent in 2014, and failed to address or reconcile his opinions with the EMG study that established right C6 radiculopathy in plaintiff's upper extremity. We conclude that such deficiencies in the report of defendants' expert chiropractor render the opinions therein conclusory, speculative, and insufficient to raise an issue of fact with respect to the serious injury categories of permanent consequential limitation of use and significant limitation of use (*see Corcione v John Dominick Cusumano, Inc*., 84 AD3d 1010, 1011; *Frias v James*, 69 AD3d 466, 467).

With respect to the 90/180-day category, it is undisputed that plaintiff's medical providers were unanimous in their opinions that all of plaintiff's injuries are permanent in nature. Thus, on this record, plaintiff failed to meet his initial burden of demonstrating "a medically determined injury or impairment of a non-permanent nature" with respect to the 90/180-day category (Insurance Law § 5102 [d]). This is not to say that a 90/180-day category injury cannot coexist with a permanent consequential limitation of use injury, but rather that the medical evidence submitted by plaintiff establishes that none of his injuries are of a nonpermanent nature.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

260

CA 16-01329

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

AIDEN GONZALEZ, BY HIS PARENT AND NATURAL GUARDIAN ELIZABETH SNOW, INDIVIDUALLY, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

TAMMY POVOSKI, DEFENDANT-RESPONDENT, VILLAGE OF ADDISON, DEFENDANT-APPELLANT-RESPONDENT, AND CORNING NATIONAL GAS CORPORATION, DEFENDANT-RESPONDENT-APPELLANT.

CORNING NATURAL GAS CORPORATION, SUED HEREIN AS CORNING NATIONAL GAS CORPORATION, THIRD-PARTY PLAINTIFF-RESPONDENT-APPELLANT,

V

SULLIVAN TRAIL CONSTRUCTION CO., INC., THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT.

COUGHLIN & GERHART, L.L.P., BINGHAMTON, CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER, UNIONDALE (CHRISTINE GASSER OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

VARVARO, COTTER & BENDER, WHITE PLAINS (PATRICIA A. MOONEY OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT AND THIRD-PARTY PLAINTIFF-RESPONDENT-APPELLANT.

CRAMER, SMITH & MILLER, P.C., JAMESVILLE (LAUREN M. MILLER OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT.

CHRISTOPHER G. JOHNSON, ROCHESTER, FOR PLAINTIFFS-RESPONDENTS.

Appeal and cross appeals from an order of the Supreme Court, Steuben County (Joseph W. Latham, A.J.), entered November 4, 2015. The order denied the respective motion and cross motions of the parties for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the complaint and any cross claims against defendant Corning Natural Gas Corporation, sued herein as Corning National Gas Corporation, and by granting the cross motion of defendant Village of Addison insofar as it sought dismissal of the second cause of action

against it, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action to recover damages for injuries sustained by the infant plaintiff upon being struck by a car in the vicinity of some excavation work being carried out by defendant Village of Addison (Village). To perform that work, the Village was using a mini-excavator borrowed from third-party defendant Sullivan Trail Construction Co., Inc. (Sullivan), which had contracted with defendant Corning Natural Gas Corporation, incorrectly sued as Corning National Gas Corporation (Corning), and which recently had been engaged in laying new natural gas lines for Corning in that vicinity. The infant plaintiff had crossed the street with an adult in order to watch the excavation work, and he was struck by the vehicle when he allegedly emerged from behind a pile of dirt placed partially in the street and attempted to cross back over to his own yard. Insofar as relevant herein, Corning moved for summary judgment dismissing the complaint and any cross claims against it on the ground that it had no involvement in the excavation work being carried out at the site and thus no duty to prevent the infant plaintiff's injury. Alternatively, Corning sought an order granting it contractual "indemnification and defense costs" from Sullivan pursuant to its third-party complaint against Sullivan. The Village cross-moved for summary judgment dismissing the complaint and all cross claims against it. Additionally, Sullivan cross-moved for partial summary judgment dismissing Corning's third-party complaint against it to the extent that Corning sought contractual indemnification and damages for breach of an agreement to procure insurance policies naming Corning as an additional insured. Supreme Court denied the motion and cross motions.

With respect to its motion, we conclude that Corning is entitled to summary judgment dismissing the complaint and any cross claims against it, and we therefore modify the order accordingly. "In order to prevail on a negligence claim, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom . . . In the absence of a duty, as a matter of law, there can be no liability" (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825, *rearg denied* 28 NY3d 956 [internal quotation marks omitted]). Here, Corning had no duty to prevent the infant plaintiff's accident and thus cannot be held liable for its occurrence. In any event, Corning established its "prima facie entitlement to summary judgment by demonstrating that [it] had no involvement with the subject accident," and plaintiffs and the other defendants failed to raise a triable question of fact (*Farrulla v Happy Care Ambulette Inc.*, 125 AD3d 529, 530; *see Pina v Merolla*, 34 AD3d 663, 663-664; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). In view of our determination with respect to Corning's entitlement to dismissal of the complaint and any cross claims against it, we do not address Corning's "alternative[]" contentions with respect to its third-party action, and we likewise do not address the contentions raised by Sullivan on its cross appeal.

With respect to the Village's cross motion, we conclude that the Village demonstrated its entitlement to summary judgment dismissing

the second cause of action against it on the ground that the derivative claim asserted therein was not set forth in the notice of claim served upon the Village. We therefore further modify the order accordingly. It is a condition precedent to, and indeed an essential element of, any cause of action for personal injury against a village that the plaintiff have served upon the village a notice of claim setting forth, inter alia, the nature of the claim and the items of damage or injuries claimed to have been sustained (*see* General Municipal Law §§ 50-e [1], [2]; 50-i [1]; CPLR 9801, 9802). A claimant "need not state 'a precise cause of action in haec verba in a notice of claim' " (*Crew v Town of Beekman*, 105 AD3d 799, 800), but "a claimant may not raise in the complaint causes of action or legal theories that were not directly or indirectly mentioned in the notice of claim and that change the nature of the earlier claim or assert a new one" (*Moore v County of Rockland*, 192 AD2d 1021, 1023; *see Finke v City of Glen Cove*, 55 AD3d 785, 786; *see also Clare-Hollo v Finger Lakes Ambulance EMS, Inc.*, 99 AD3d 1199, 1201). Thus, under the circumstances herein, the plaintiffs are "foreclosed from asserting a derivative claim against the [Village]" (*Martin v Village of Freeport*, 71 AD3d 745, 746; *see Adam H. v County of Orange*, 66 AD3d 739, 740).

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

Frances E. Cafarell

Entered: April 28, 2017

Clerk of the Court

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

279

CA 16-00118

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN,

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LYNN LIKOS, AS ADMINISTRATRIX OF THE ESTATE OF TYLER A. LIKOS, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NIAGARA FRONTIER TRANSIT METRO SYSTEM, INC., DEFENDANT-RESPONDENT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (STEPHEN R. FOLEY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DAVID J. STATE, GENERAL COUNSEL, BUFFALO (VICKY-MARIE J. BRUNETTE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), entered October 30. 2015. The judgment dismissed the complaint upon a jury verdict of no cause of action.

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

Memorandum: Plaintiff commenced this action seeking to recover damages on behalf of decedent, who was killed when the motorcycle he was operating collided with a bus owned by defendant. Prior to trial, defendant disclosed an expert toxicologist who proposed to testify at trial that decedent was intoxicated on marihuana at the time of the accident; that such intoxication presented an "unreasonable scenario" to the bus driver; and that the marihuana in decedent's system impaired his reaction time and ability to control his motorcycle and avoid the collision. In response, plaintiff sought an order precluding the testimony of defendant's toxicologist on the grounds that his proposed testimony was mere speculation and lacked foundation, and that it would invade the province of the jury. Plaintiff also argued that the studies relied upon by the expert were irrelevant and hearsay, and a *Frye* hearing should be held if Supreme Court allowed the expert to testify. The court denied plaintiff's motion to preclude the expert's testimony, but determined that defendant's expert "[would] not be permitted to testify as to the decedent's 'poor judgment, lack of planning in advance, or impaired response (in connection with decedent's alleged failure to timely engage the motorcycle brakes)'; or upon matters outside his area of expertise." After trial, the jury returned a verdict in favor of defendant. Plaintiff appeals, and we affirm.

It is well established that "[t]he determination whether to permit expert testimony 'is a mixed question of law and fact addressed primarily to the discretion of the trial court' " (*Kettles v City of Rochester*, 21 AD3d 1424, 1426). Initially, we conclude under the circumstances of this case that plaintiff failed to establish her entitlement to a *Frye* hearing. She submitted the affirmation of counsel, who took issue with the scientific studies relied upon by defendant's expert and concluded with no expert support that those opinions lacked foundation and were speculative. Because counsel did not establish the basis of the opinions he offered in challenging defendant's expert, he failed to make "a credible challenge to the underpinning of the expert theory" and his affirmation therefore is of no probative value (*Frye v Montefiore Med. Ctr.*, 100 AD3d 28, 38). In any event, we note that counsel's affirmation did not expressly challenge the proposed opinions of the defense expert as being based on novel science, and counsel instead argued that the expert's opinions lacked foundation, were speculative, and invaded the province of the jury. We thus conclude that a *Frye* hearing was not warranted here, inasmuch as plaintiff failed even to contend that the theory espoused by defendant's expert was based on novel scientific principles (*see Johnson v Guthrie Med. Group, P.C.*, 125 AD3d 1445, 1447; *Page v Marusich*, 51 AD3d 1201, 1202-1203; *Amodio v Bianco*, 15 AD3d 979, 980).

We further conclude that the court did not abuse its discretion in refusing to preclude the testimony of defendant's expert toxicologist. " 'The *Frye* inquiry is separate and distinct from the admissibility question applied to all evidence—whether there is a proper foundation—to determine whether the accepted methods were appropriately employed in a particular case' " (*Muhammad v Fitzpatrick*, 91 AD3d 1353, 1354). On this point, plaintiff contends that "a study involving no more than twenty subjects is not an adequate foundation for [the expert's] opinion that [decedent] had smoked mari[h]uana 15 minutes before the subject accident." The fact that a particular study may be inadequate is relevant to the weight to be given to the testimony concerning the study, but it does not preclude its admissibility (*see Johnson*, 125 AD3d at 1447). Furthermore, this was not the only study or test addressed in the expert disclosure, and we therefore cannot conclude that the court abused its discretion in denying the preclusion motion based on, inter alia, an apparent lack of foundation for the opinion or relevancy to the issues of causation and decedent's negligence (*see id.*; *see also Tinao v City of New York*, 112 AD2d 363, 364, *lv denied* 67 NY2d 603).

To the extent that plaintiff contends that the verdict should be set aside as inconsistent, plaintiff failed to preserve that contention for our review inasmuch as plaintiff " 'failed to object to the verdict on that ground before the jury was discharged' " (*Krieger v McDonald's Rest. of N.Y., Inc.*, 79 AD3d 1827, 1828, *lv dismissed* 17 NY3d 734). Similarly, plaintiff failed to preserve for our review her contention that the verdict was against the weight of the evidence because there is no indication in the record that she made a posttrial motion to set aside the verdict pursuant to CPLR 4404 (a) (*see Mazella v Beals*, 124 AD3d 1328, 1329). In any event, the jury could have

reasonably found that the bus driver's negligence was not a proximate cause of the collision between the two vehicles upon determining that the bus driver could not have anticipated that decedent's motorcycle would travel toward him at 90 to 150 miles per hour and thereafter collide with the bus before it completed its turn. Thus, " 'the preponderance of the evidence in favor of the plaintiff[] [was not] so great that the verdict could not have been reached upon any fair interpretation of the evidence' " (*Barnes v Dellapenta*, 111 AD3d 1287, 1288).

Finally, plaintiff's contentions that the expert disclosure of defendant's accident reconstructionist was inadequate and that his testimony materially deviated from his expert disclosure are unpreserved for our review inasmuch as plaintiff's pretrial motion did not challenge the expert's disclosure as inadequate and counsel, during trial, did not object to the expert's testimony on the ground that it deviated from his expert disclosure (*see Shoemaker v State of New York*, 247 AD2d 898, 898; *McClain v Lockport Mem. Hosp.*, 236 AD2d 864, 865, *lv denied* 89 NY2d 817). In any event, we conclude that plaintiff's contentions lack merit.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

286

CA 16-01579

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN,

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MICHELLE SWIATOWY TUTTLE, INDIVIDUALLY, AND AS ASSIGNEE OF GEOFFREY TUTTLE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, DEFENDANT-RESPONDENT.

PETER M. JASEN, P.C., BUFFALO (PETER M. JASEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HAGELIN SPENCER LLC, BUFFALO (SEAN SPENCER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Mark Grisanti, A.J.), entered December 29, 2015. The order, inter alia, granted the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, a declaration that defendant is obligated to provide coverage under the policy issued to her former boyfriend, who fell asleep while operating a vehicle in which plaintiff was a passenger. The vehicle was owned by plaintiff and insured under a policy issued by a nonparty insurance company. Plaintiff's boyfriend owned a separate vehicle, which was insured under the policy issued by defendant. Plaintiff commenced the underlying action to recover damages for injuries that she sustained in the accident and obtained a judgment in the amount of $332,187. The nonparty insurer paid plaintiff the policy limit of $25,000, and plaintiff thereafter sought to recover the excess judgment from defendant on the theory that her boyfriend was operating a "non-owned car" under the policy issued by defendant. Initially, defendant reserved its right to disclaim on the grounds that plaintiff's vehicle was not a "non-owned car" under the policy and that defendant was not given notice of the accident within a reasonable time. Thereafter, defendant issued a disclaimer only on the ground that plaintiff's vehicle was not a "non-owned car" under the policy, and plaintiff commenced this action seeking, inter alia, a declaration that the policy provided coverage.

We agree with plaintiff that Supreme Court erred in granting defendant's motion for summary judgment dismissing the complaint on the ground that defendant did not receive notice of the accident within a reasonable time. It is undisputed that defendant did not disclaim coverage on that ground, and defendant thus "is precluded from relying upon that defense" (*Henner v Everdry Mktg. & Mgt., Inc.*, 74 AD3d 1776, 1777). Although we agree with defendant that plaintiff failed to preserve her contention for our review by failing to raise it in opposition to the motion, we conclude that "the issue . . . is one of law appearing on the face of the record that [defendant] could not have countered had it been raised in the court of first instance, and thus the issue may be raised for the first time on appeal" (*id.* at 1777-1778 [internal quotation marks omitted]).

We further agree with plaintiff that the court erred in granting defendant's motion for summary judgment on the additional ground that plaintiff's vehicle was not a "non-owned car" under the policy, inasmuch as defendant failed to meet its burden of establishing its entitlement to judgment as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). The insurance policy defined a "non-owned car" as "a *car* not . . . furnished or available for the regular or frequent use of" the insured. "In determining whether a vehicle was furnished or available for the regular use of the named insured, '[f]actors to be considered . . . are the availability of the vehicle and frequency of its use by the insured' " (*Newman v New York Cent. Mut. Fire Ins. Co.*, 8 AD3d 1059, 1060; *see Konstantinou v Phoenix Ins. Co.*, 74 AD3d 1850, 1851-1852, *lv denied* 15 NY3d 712). "The applicability of the policy exclusion to a particular case must be determined in light of the 'purpose of [the] provision [of coverage] for a nonowned vehicle not [furnished or available] for the regular use of the insured[, which] is to provide protection to the insured for the occasional or infrequent use of [a] vehicle not owned by him or her[,] and [which coverage] is not intended as a substitute for insurance on vehicles furnished for the insured's regular use' " (*Newman*, 8 AD3d at 1060).

In support of its motion, defendant submitted the deposition testimony of the boyfriend and plaintiff, both of whom testified that the boyfriend had a set of keys to the vehicle but drove it only on rare occasions. Furthermore, both of them testified that they had separate vehicles insured under separate policies and that they did not use those vehicles interchangeably. Thus, defendant failed to establish as a matter of law that plaintiff's vehicle was furnished or available for her boyfriend's regular use. We therefore conclude that the court erred in granting defendant's motion for summary judgment on the issue whether plaintiff's vehicle was a "non-owned car" under the policy, because there are issues of fact with respect thereto, and we modify the order accordingly. We likewise conclude that the court properly denied plaintiff's cross motion for summary judgment on that issue (*see generally Winegrad*, 64 NY2d at 853).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

293

KA 15-01839

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KATHLEEN M. PRITCHARD, DEFENDANT-APPELLANT.

GANGULY BROTHERS, PLLC, ROCHESTER (ANJAN K. GANGULY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered September 9, 2015. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, a new trial is granted, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of burglary in the first degree (Penal Law § 140.30 [2]). The conviction arises from an incident in which defendant allegedly allowed her brother into a home in which she resided, whereupon he entered another resident's bedroom and assaulted that resident. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). Furthermore, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We agree with defendant, however, that Supreme Court erred in instructing the jury on the elements of the crime, and we therefore reverse the judgment and grant a new trial. Initially, we reject the People's contention that defendant failed to preserve her contention for our review. Although the codefendant's attorney made most of the defense arguments during the charge conference, defense counsel also objected to the court's proposed charge on the ground now advanced on appeal. Thus, because defendant " 'without success has either expressly or impliedly sought or requested a particular . . . instruction, [she] is deemed to have thereby protested the court's . . . failure to . . . instruct accordingly sufficiently to raise a

question of law with respect to such . . . failure' " (*People v Medina*, 18 NY3d 98, 103-104, quoting CPL 470.05 [2]).

"It is well settled that, '[i]n evaluating a challenged jury instruction, we view the charge as a whole in order to determine whether a claimed deficiency in the jury charge requires reversal' " (*People v Walker*, 26 NY3d 170, 174). A person is guilty of burglary in the first degree, in pertinent part, when he or she "knowingly enters or remains unlawfully in a dwelling with intent to commit a crime therein" (Penal Law § 140.30 [2]). " 'Dwelling' means a building which is usually occupied by a person lodging therein at night" (§ 140.00 [3]), and "the definition of 'building' includes the following: 'Where a building consists of two or more units separately secured or occupied, each unit shall be deemed both a separate building in itself and a part of the main building' " (*People v McCray*, 23 NY3d 621, 626, *rearg denied* 24 NY3d 947, quoting § 140.00 [2]).

Here, the court instructed the jurors that a "dwelling is a building which is usually occupied by a person lodging therein at night. A bedroom in a home, where there is more than one tenant, may be considered independent of the rest of the house and may be considered a separate dwelling within a building." The court, however, failed to include the part of the definition of building that would require the jury to determine whether the house at issue consisted of "two or more units" and whether the bedroom at issue was a unit that was "separately secured or occupied" (Penal Law § 140.00 [2]). Consequently, "given the omission of the definition of ['unit'] and/or ['separately secured or occupied,'] the instruction did not adequately convey the meaning of ['building'] to the jury and instead created a great likelihood of confusion such that the degree of precision required for a jury charge was not met" (*Medina*, 18 NY3d at 104).

Defendant further contends that the court erred in denying her motion to suppress the evidence seized after a sheriff's deputy stopped her vehicle. Defendant moved to suppress that evidence and, although the court held a hearing on the motion and issued findings of fact, it did not issue a ruling on the motion. The Court of Appeals "has construed CPL 470.15 (1) as a legislative restriction on [this Court's] power to review issues either decided in an appellant's favor, or not ruled upon, by the trial court" (*People v LaFontaine*, 92 NY2d 470, 474, *rearg denied* 93 NY2d 849), and thus " 'the court's failure to rule on the motion cannot be deemed a denial thereof' " (*People v Dark*, 104 AD3d 1158, 1159). Inasmuch as we are reversing the judgment and granting a new trial, we further direct that the matter be remitted to Supreme Court to rule on defendant's motion prior to that trial.

In light of our determination, we do not address defendant's remaining contention.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

295

KA 13-00427

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE J. HUITT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered February 14, 2013. The judgment convicted defendant, upon a jury verdict, of assault in the first degree and criminal possession of a weapon 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 a jury verdict, of assault in the first degree (Penal Law § 120.10 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). We reject defendant's contention that County Court erred in denying his motion to set aside the verdict pursuant to CPL 330.30. The issues raised in that motion are based upon facts outside the record and thus must be raised by way of a motion pursuant to CPL 440.10 (*see People v Miller*, 68 AD3d 1135, 1135, *lv denied* 14 NY3d 803; *see also People v Evans*, 137 AD3d 1683, 1683-1684, *lv denied* 27 NY3d 1131).

Contrary to defendant's further contention, the court did not abuse its discretion in denying his motion for a mistrial after the jury sent out a second note that it was unable to come to a unanimous verdict. The jury had been deliberating for only about two days when the court received the second note, and nothing in that note "was indicative of a 'hopeless deadlock' " (*People v Hardy*, 26 NY3d 245, 252). Moreover, we conclude that nothing about the second *Allen* charge issued by the court was coercive. Indeed, "[t]he court's *Allen* charges were appropriately balanced and informed the jurors that they did not have to reach a verdict and that none of them should surrender a conscientiously held position in order to reach a unanimous verdict" (*id.* at 252). Additionally, we reject defendant's contention that the court abused its discretion in denying his motion for a mistrial,

which defendant sought in light of the upcoming Thanksgiving holiday, inasmuch as there is nothing in the record to indicate that the holiday had any impact on the jury deliberations (*see generally People v Michael*, 48 NY2d 1, 9-10).

Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence inasmuch as he failed to renew his motion for a trial order of dismissal after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678; *People v Brown*, 120 AD3d 1545, 1546, *lv denied* 24 NY3d 1082). In any event, we conclude that the evidence is legally sufficient to establish that defendant committed the crimes charged. The People presented the testimony of an eyewitness who observed defendant fire a handgun at the victim, as well as testimony establishing that the handgun used in the crime was recovered and operable (*see generally People v Hailey*, 128 AD3d 1415, 1416, *lv denied* 26 NY3d 929; *People v Spears*, 125 AD3d 1401, 1402, *lv denied* 25 NY3d 1172). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We see no reason to disturb the credibility determinations of the jury (*see People v Brown*, 145 AD3d 1483, 1484; *People v Lawrence*, 141 AD3d 1079, 1082, *lv denied* 28 NY3d 1029).

"By failing to object to the court's ultimate *Sandoval* ruling, defendant failed to preserve for our review his contention that the ruling constitutes an abuse of discretion" (*People v Tolliver*, 93 AD3d 1150, 1151, *lv denied* 19 NY3d 968), and we decline to exercise our power as a matter of discretion in the interest of justice to address that contention (*see* CPL 470.15 [6] [a]). We likewise decline to exercise our power as a matter of discretion in the interest of justice to vacate defendant's conviction with respect to one of the counts for criminal possession of a weapon in the second degree (*see* CPL 470.15 [3] [c]; *see generally People v Carter*, 63 NY2d 530, 536; *People v White*, 75 AD3d 109, 125-126, *lv denied* 15 NY3d 758).

Finally, the sentence is not unduly harsh or severe.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

302

CA 16-01473

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

THOMAS E. PIEKUNKA, JOHN A. HINSMAN, JR., AND GLENDA L. HINSMAN, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

C. ROBERT STRAUBING AND CORINNE V. STRAUBING, DEFENDANTS-RESPONDENTS.

LACY KATZEN, LLP, ROCHESTER (MICHAEL J. WEGMAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

JOHN L. BULGER, ROCHESTER, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Wayne County (Dennis M. Kehoe, A.J.), entered January 8, 2016. The order denied in part the motion of plaintiffs for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of plaintiffs' motion seeking declaratory relief and granting judgment in favor of plaintiffs as follows:

> It is ADJUDGED and DECLARED that the construction on defendants' property violates restrictive covenants in the deeds to the parties' properties,

and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Wayne County, for further proceedings in accordance with the following memorandum: The parties own residential waterfront properties on Greig Street in the Village of Sodus Point. In the spring of 2014 defendants obtained a building permit for the construction, inter alia, of a roof over a portion of the deck in the front of their house, i.e., facing Sodus Bay, and a fireplace on the deck with privacy walls on each side. When the project was substantially complete, plaintiffs commenced this action seeking judgment declaring that the construction on defendants' property violates restrictive covenants in the parties' deeds and seeking injunctive relief ordering defendants, inter alia, to dismantle and remove the structures erected pursuant to the building permit. Supreme Court granted in part plaintiffs' motion for summary judgment, dismissing two affirmative defenses asserted by defendants, but otherwise denied the motion. We agree with plaintiffs that the court erred in denying plaintiffs' motion insofar as it sought summary judgment granting declaratory relief, and we therefore modify the

order accordingly.

Plaintiffs allege that defendants' construction violates covenants in the parties' deeds that restrict the location of structures, including "porch[es]" or "building[s]," that extend from the front of the residence in the direction of the bay. The covenants at issue provide, inter alia, that such structures "shall be not more than 90 (ninety) feet southerly distant from and parallel to the southern curb of road-way as designated on" a survey map created in 1894 (the 90-foot line).

Plaintiffs met their initial burden on that part of the motion seeking declaratory relief by submitting the affidavit of their expert surveyor, along with survey maps and related documents supporting his opinion that, within a reasonable degree of professional certainty, defendants' construction extends beyond the 90-foot line, in violation of the restrictive covenants burdening their property (*see Bergstrom v McChesney*, 92 AD3d 1125, 1126). Plaintiffs' expert concluded that the curb line referenced in the 1894 survey map was in the same location as the street line depicted in the survey map he created as well as survey maps created by other surveyors in 2004, 1984 and 1953. Measuring the distance from the street line to the front of defendants' dwelling, plaintiffs' expert determined that the entirety of defendants' construction extended beyond the 90-foot line. He acknowledged that there is a 7.4 foot discrepancy between his survey map and two other survey maps created for defendants' property in 2006 and 1993 respectively, but added that, even if he relied on those maps, the majority of defendants' construction extends beyond the 90-foot line, in violation of the restrictive covenant.

In opposition to the motion, defendants submitted, inter alia, the affidavit of their expert surveyor. Unlike plaintiffs' expert, defendants' expert did not conduct an instrument survey, nor did he offer an opinion with respect to the location of the 90-foot line. We conclude that the conclusory assertions of defendants' expert were insufficient to rebut the opinion of plaintiffs' expert that, under any view of the facts, defendants' construction is in violation of the restrictive covenants burdening their property (*see id.* at 1127).

We agree with defendants, however, that even if the evidence established that the construction violated the restrictive covenants at issue, plaintiffs' own submissions raise issues of fact with regard to the extent of the violation and the appropriate remedy therefor. Thus, we conclude that the court properly denied that part of plaintiffs' motion seeking injunctive relief. Inasmuch as the enforcement of the restrictive covenants implicates the equitable powers of the court, we further conclude that the matter should be remitted to Supreme Court for the court to fashion an appropriate remedy (*see generally Meadow Run Dev. Corp. v Atlantic Ref. & Mktg. Corp.*, 155 AD2d 752, 754).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

303

CA 16-01457

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

MAA-SHARDA, INC., AND HINABEN P. PATEL, ALSO KNOWN AS H.P. PATEL, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

FIRST CITIZENS BANK & TRUST CO., J. BARRY DUMSER, INDUS PVR, LLC, AND GOONJIT "JETT" MEHTA, DEFENDANTS-RESPONDENTS.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (ROBERT J. LUNN OF COUNSEL), AND FRANK A. ALOI, FOR PLAINTIFFS-APPELLANTS.

NIXON PEABODY LLP, ROCHESTER (MEGHAN K. MCGUIRE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS FIRST CITIZENS BANK & TRUST CO. AND J. BARRY DUMSER.

WOODS OVIATT GILMAN LLP, ROCHESTER (JOHN C. NUTTER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS INDUS PVR, LLC AND GOONJIT "JETT" MEHTA.

Appeal from an order of the Supreme Court, Ontario County (Matthew A. Rosenbaum, J.), entered November 17, 2015. The order, inter alia, granted the motions of defendants to dismiss the amended complaint and dismissed the amended complaint.

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

Memorandum: Previously, Indus PVR, LLC, a defendant in this matter, commenced a foreclosure proceeding against, inter alia, MAA-Sharda, Inc., a plaintiff in this matter. A judgment of foreclosure was granted, and was later affirmed by this Court (*Indus PVR LLC v MAA-Sharda, Inc.*, 140 AD3d 1666, *lv denied in part and dismissed in part* 28 NY3d 1059). After the judgment in the foreclosure action was granted but before this Court affirmed it, plaintiffs commenced this action asserting, inter alia, a cause of action for "fraud on the court" based upon allegations that defendants committed fraud in the prior foreclosure proceeding. Plaintiffs now appeal from an order that, inter alia, dismissed the amended complaint. We affirm. "To the extent that the [amended] complaint alleged fraud, misrepresentation, or other misconduct of an adverse party committed during the course of the prior litigation, plaintiff[s'] sole remedy was a motion to vacate the court's prior order pursuant to CPLR 5015 (a) (3). A litigant's remedy for alleged fraud in the course of a legal proceeding lies exclusively in that lawsuit itself, i.e., by

moving pursuant to CPLR 5015 to vacate the [judgment] due to its fraudulent procurement, not a second plenary action collaterally attacking the" judgment (*Kai Lin v Department of Dentistry, Univ. of Rochester Med. Ctr.*, 120 AD3d 932, 932, *lv denied* 24 NY3d 916 [internal quotation marks omitted]; *see Stewart v Citimortgage, Inc.*, 122 AD3d 721, 722).

Contrary to plaintiffs' further contention, this case does not fit within the exception set forth in *Newin Corp. v Hartford Acc. & Indem. Co.* (37 NY2d 211, 217), which applies when the alleged fraud or perjury "is merely a means to the accomplishment of a larger fraudulent scheme," i.e., one "greater in scope than [that] in the prior proceeding" (*Retina Assoc. of Long Is. v Rosberger*, 299 AD2d 533, 533, *appeal dismissed and lv denied* 99 NY2d 624 [internal quotation marks omitted]; *see Pieroni v Phillips Lytle LLP*, 140 AD3d 1707, 1709, *lv denied* 28 NY3d 901; *cf. Specialized Indus. Servs. Corp. v Carter*, 68 AD3d 750, 751-752). We agree with Supreme Court that "plaintiff[s'] conclusory allegation of a larger fraudulent scheme appears to be 'a transparent and patently insufficient attempt to bring this action within the *Newin* exception' " (*Cattani v Marfuggi*, 74 AD3d 553, 555, *lv dismissed* 15 NY3d 900, *lv denied* 18 NY3d 806).

We have considered plaintiffs' remaining contentions and conclude that none requires reversal or modification of the order.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

311

KA 15-00075

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT J. SAMPSON, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (HARMONY A. HEALY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered August 5, 2013. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of grand larceny in the fourth degree (Penal Law § 155.30 [8]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of burglary in the third degree (§ 140.20). In 2010, defendant pleaded guilty to burglary in the third degree in appeal No. 2 and signed a drug court contract providing that, if he completed a drug court program, he would be allowed to withdraw his plea and instead plead guilty to a misdemeanor. The contract further provided that, if defendant was terminated from the program, he would be sentenced to a term of imprisonment. Defendant's progress in the program did not prove fruitful and, ultimately, he absconded from the program and relapsed into drug use. During March of 2013, while still avoiding apprehension by the authorities, defendant entered his uncle's property and stole an antique tractor. Defendant was returned to custody on a bench warrant later that month, pleaded guilty to grand larceny, admitted that he had violated the drug court contract, and was sentenced as a second felony offender to an indeterminate term of incarceration on the burglary conviction in appeal No. 2 and to an indeterminate term of imprisonment on the grand larceny conviction in appeal No. 1, running consecutively to his sentence in appeal No. 2.

Defendant contends in appeal No. 2 that the appeal waiver in his

drug court contract is invalid because there was no corresponding oral colloquy. We agree. "Although the drug court contract contained a written waiver of the right to appeal, County Court did not conduct any colloquy concerning that waiver at the plea proceeding in 2010, and we conclude that the contract alone is insufficient to establish a valid waiver" in appeal No. 2 (*People v Mason*, 144 AD3d 1589, 1589; *see People v Myers*, 145 AD3d 1596, 1596-1597; *see generally People v Bradshaw*, 18 NY3d 257, 265). We reject, however, defendant's challenge in appeal No. 1 to his appeal waiver entered at the plea proceeding in 2013. "Even if there were any ambiguity in the . . . court's colloquy, defendant executed a detailed written waiver" (*People v Ramos*, 7 NY3d 737, 738; *cf. Bradshaw*, 18 NY3d at 266-267), and the court's " 'plea colloquy, together with the written waiver of the right to appeal, adequately apprised defendant that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Arney*, 120 AD3d 949, 949; *see People v Bryant*, 28 NY3d 1094, 1096; *People v Buske*, 87 AD3d 1354, 1354, *lv denied* 18 NY3d 882).

Defendant contends in each appeal that his plea was not knowing, voluntary, and intelligent. As a preliminary matter, we note that defendant's challenges to the voluntariness of his plea in appeal No. 1 survive his valid waiver of the right to appeal (*see People v Wisniewski*, 128 AD3d 1481, 1481, *lv denied* 26 NY3d 937). Nonetheless, we conclude that defendant's contentions in each appeal are not preserved for our review because he did not move to withdraw his respective pleas or move to vacate the respective judgments of conviction (*see People v Gerald*, 103 AD3d 1249, 1249). In any event, defendant's contentions have no merit. In each appeal, "[t]he record establishes that defendant's plea was knowingly, voluntarily, and intelligently entered even though some of defendant's responses to the court's inquiries were monosyllabic" (*People v Lewis*, 114 AD3d 1310, 1311, *lv denied* 22 NY3d 1200; *see People v VanDeViver*, 56 AD3d 1118, 1118, *lv denied* 11 NY3d 931, *reconsideration denied* 12 NY3d 788). "[W]e have never held that a plea is effective only if a defendant acknowledges committing every element of the pleaded-to offense . . . , or provides a factual exposition for each element of the pleaded-to offense" (*People v Seeber*, 4 NY3d 780, 781), and "defendant made no statements at the time of [either] plea that cast any doubt on his guilt" (*People v Jeanty*, 41 AD3d 1223, 1223, *lv denied* 9 NY3d 923).

Finally, defendant's valid waiver of the right to appeal with respect to both the conviction and sentence encompasses his contention that the sentence imposed in appeal No. 1 is unduly harsh and severe (*see People v Rodman*, 104 AD3d 1186, 1188, *lv denied* 22 NY3d 1202; *see also People v Lucieer*, 107 AD3d 1611, 1613). The sentence imposed in appeal No. 2 is not unduly harsh or severe.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

312

KA 15-00076

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT J. SAMPSON, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (HARMONY A. HEALY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered August 5, 2013. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

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

Same memorandum as in *People v Sampson* ([appeal No. 1] ___ AD3d ___ [Apr. 28, 2017]).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

322

KA 14-02016

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON SLISHEVSKY, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTEN 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 (Anthony F. Aloi, J.), rendered January 21, 2014. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]), defendant contends that his waiver of the right to appeal is not valid. We reject that contention and conclude that County Court engaged defendant "in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Marshall*, 144 AD3d 1544, 1545 [internal quotation marks omitted]; *see People v Korber*, 89 AD3d 1543, 1543, *lv denied* 19 NY3d 864). "[A] trial court need not engage in any particular litany when apprising a defendant pleading guilty of the individual rights abandoned" (*People v Lopez*, 6 NY3d 248, 256), and "[t]he plea allocution as a whole establishes that defendant's waiver of the right to appeal was knowing, intelligent, and voluntary" (*People v Brown*, 281 AD2d 962, 962, *lv denied* 96 NY2d 899). Here, we conclude that the court "made clear that the waiver of the right to appeal was a condition of [the] plea, not a consequence thereof, and the record reflects that defendant understood that the waiver of the right to appeal was 'separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Graham*, 77 AD3d 1439, 1439, *lv denied* 15 NY3d 920, quoting *Lopez*, 6 NY3d at 256). The valid waiver of the right to appeal forecloses our review of defendant's contention that the sentence is unduly harsh and severe (*see generally Lopez*, 6 NY3d at 255-256; *People v Hidalgo*, 91 NY2d 733, 737), as well as his constitutional challenges, which in any

event we have already determined to be without merit (*see People v Slishevsky*, 97 AD3d 1148, 1151, *lv denied* 20 NY3d 1015).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

324

CA 16-01042

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

LANDSMAN DEVELOPMENT CORP., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RLI INSURANCE COMPANY, GARY MILITELLO,
DEFENDANTS-RESPONDENTS,
AND TECHNOLOGY INSURANCE COMPANY,
DEFENDANT-APPELLANT.

RLI INSURANCE COMPANY, THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

TECHNOLOGY INSURANCE COMPANY, THIRD-PARTY
DEFENDANT-APPELLANT.

RUSSO & TONER, LLP, NEW YORK CITY (STEVEN R. DYKI OF COUNSEL), FOR DEFENDANT-APPELLANT AND THIRD-PARTY DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (TIMOTHY E. DELAHUNT OF COUNSEL), FOR DEFENDANT-RESPONDENT AND THIRD-PARTY PLAINTIFF-RESPONDENT RLI INSURANCE COMPANY.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered August 13, 2015. The order, inter alia, denied the motion of defendant-third-party defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting defendant-third-party defendant's motion insofar as it sought a declaration and granting judgment in favor of defendant-third-party defendant as follows:

> It is ORDERED, ADJUDGED AND DECLARED that defendant-third-party defendant has no obligation to defend or indemnify plaintiff in the underlying action,

and as modified the order is affirmed without costs.

Memorandum: Plaintiff Landsman Development Corp. (Landsman) and defendant-third-party plaintiff RLI Insurance Company (RLI) commenced their respective actions seeking, inter alia, a declaration that defendant-third-party defendant Technology Insurance Company

(Technology) is obligated to defend and indemnify Landsman as an additional insured in the underlying personal injury action. Technology moved for summary judgment, asserting that it has no obligation to defend or indemnify Landsman because Landsman does not qualify as an additional insured under the policy. Supreme Court granted the motion. RLI subsequently moved for leave to reargue the motion, which the court granted. Upon reargument, the court reinstated the amended complaint and the third-party complaint against Technology. We conclude that Technology is entitled to a declaratory judgment, and we therefore modify the order accordingly.

In the underlying action, on September 2, 2010, Gary Militello was injured in a scaffold collapse at property owned by Landsman during the course of his employment with Landsman Building Services Group, Inc. (BSG). Landsman had hired BSG to perform certain interior renovations to part of a building known as the Former Bond Clothing Plant, which had been leased to the Rochester City School District. Militello thereafter commenced an action against Landsman, which was insured by RLI. BSG was insured by Technology, and the Technology policy had an additional insured endorsement, which provided that an insured shall include as an additional insured the persons or organizations shown in the schedule. The schedule stated: "[b]lanket as required by written contract."

Here, there was no "written contract" between BSG and Landsman at the time of the accident on September 2, 2010, and we therefore agree with Technology that Landsman does not qualify as an additional insured under the Technology policy (*see Nicotra Group, LLC v American Safety Indem. Co.*, 48 AD3d 253, 253-254; *National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 33 AD3d 570, 571). The only "written contract" relating to additional insured coverage was executed on December 8, 2014, almost four years after the underlying accident. RLI contends that the written contract dated December 8, 2014, simply memorialized a preaccident mutual understanding between Landsman and BSG. We reject that contention inasmuch as any such oral mutual understanding does not constitute a written contract in effect at the time of the accident (*see Nicotra Group, LLC*, 48 AD3d at 253-254; *National Abatement Corp.*, 33 AD3d at 571).

We also agree with Technology that the certificates of insurance in Landsman's possession in February 2010 did not confer additional insured status. "It is well established that a certificate of insurance, by itself, does not confer insurance coverage, particularly [where, as here,] the certificate expressly provides that it 'is issued as a matter of information only and confers no rights upon the certificate holder [and] does not amend, extend or alter the coverage afforded by the policies' " (*Sevenson Envtl. Servs., Inc. v Sirius Am. Ins. Co.*, 74 AD3d 1751, 1753). " 'A certificate of insurance is only evidence of a carrier's intent to provide coverage but is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists' " (*id.*). "Nevertheless, an insurance company that issues a certificate of insurance naming a particular party as an additional insured may be estopped from denying

coverage to that party where the party reasonably relies on the certificate of insurance to its detriment" (*id.*). "For estoppel based upon the issuance of a certificate of insurance to apply, however, the certificate must have been issued by the insurer itself or by an agent of the insurer" (*id.*).

Here, Technology established on its motion that neither it nor an authorized agent issued the certificates of insurance, and RLI failed to raise a triable issue of fact (*see Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200-201).

In view of the foregoing, Technology's remaining contention is moot.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

326

CA 16-00146

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

IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE INTERMEDIATE ACCOUNT OF HSBC BANK USA, N.A., AS TRUSTEE OF THE TRUST UNDER AGREEMENT DATED JANUARY 21, 1957, SEYMOUR H. KNOX, GRANTOR, FOR THE BENEFIT OF THE ISSUE OF SEYMOUR H. KNOX, III FOR THE PERIOD JANUARY 21, 1957 TO NOVEMBER 3, 2005.
(PROCEEDING NO. 1.)

ORDER

IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE ACCOUNT OF HSBC BANK USA, N.A., AS TRUSTEE OF THE TRUST UNDER AGREEMENT DATED JANUARY 21, 1957, SEYMOUR H. KNOX, GRANTOR, FOR THE BENEFIT OF THE ISSUE OF SEYMOUR H. KNOX, III FOR THE PERIOD NOVEMBER 4, 2005 TO JUNE 25, 2012.
(PROCEEDING NO. 2.)

IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE ACCOUNT OF W.A. READ KNOX, SUCCESSOR TRUSTEE, JEAN R. KNOX, AND HSBC BANK USA, N.A., AS TRUSTEES OF THE TRUST UNDER ARTICLE THIRD OF THE WILL OF SEYMOUR H. KNOX, III, DECEASED, FOR THE PERIOD JULY 16, 1998 TO NOVEMBER 3, 2005.
(PROCEEDING NO. 3.)

IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE ACCOUNT OF W.A. READ KNOX, SUCCESSOR TRUSTEE, JEAN R. KNOX, AND HSBC BANK USA, N.A., AS TRUSTEES OF THE TRUST UNDER ARTICLE THIRD OF THE WILL OF SEYMOUR H. KNOX, III, DECEASED, FOR THE PERIOD NOVEMBER 4, 2005 TO SEPTEMBER 4, 2012.
(PROCEEDING NO. 4.)

IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE INTERMEDIATE ACCOUNT OF W.A. READ KNOX, SUCCESSOR TRUSTEE, JEAN R. KNOX AND HSBC BANK USA, N.A., AS TRUSTEES OF THE TRUST UNDER ARTICLE SEVENTH OF THE WILL OF SEYMOUR H. KNOX, III, DECEASED, FOR THE BENEFIT OF JEAN R. KNOX (MARITAL TRUST) FOR THE PERIOD JUNE 3, 1996 TO NOVEMBER 3, 2005.
(PROCEEDING NO. 5.)

IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE ACCOUNT OF W.A. READ KNOX, SUCCESSOR TRUSTEE, JEAN R. KNOX AND HSBC BANK USA, N.A., AS TRUSTEES OF THE TRUST UNDER ARTICLE SEVENTH OF THE WILL OF SEYMOUR H.

KNOX, III, DECEASED, FOR THE BENEFIT OF JEAN R. KNOX (MARITAL TRUST) FOR THE PERIOD NOVEMBER 4, 2005 TO JANUARY 31, 2013.
(PROCEEDING NO. 6.)

HSBC BANK USA, N.A., PETITIONER-APPELLANT;

W.A. READ KNOX, SEYMOUR H. KNOX, IV, AVERY KNOX, HELEN KNOX KEILHOLTZ AND JEAN READ KNOX, OBJECTANTS-RESPONDENTS.
(APPEAL NO. 1.)

HARRIS BEACH PLLC, BUFFALO (RICHARD T. SULLIVAN OF COUNSEL), FOR PETITIONER-APPELLANT.

HOGAN WILLIG PLLC, AMHERST (LINDA LALLI STARK OF COUNSEL), FOR OBJECTANTS-RESPONDENTS.

MOSEY ASSOCIATES, LLP, BUFFALO (ACEA M. MOSEY OF COUNSEL), FOR RESPONDENT AURORA KNOX.

Appeal from an order of the Surrogate's Court, Erie County (Barbara Howe, S.), entered July 13, 2015. The order denied in part the petition of HSBC Bank USA, N.A., to modify a decree of May 18, 2011.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

329

CA 16-00724

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

IN THE MATTER OF FREDERICK MCMILLIAN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JOHN B. LEMPKE, SUPERINTENDENT, WENDE CORRECTIONAL
FACILITY, ET AL., RESPONDENTS-RESPONDENTS.

FREDERICK MCMILLIAN, PETITIONER-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), entered April 5, 2016 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated various inmate rules, including 102.10 (7 NYCRR 270.2 [B] [3] [i] [threats]), 106.10 (7 NYCRR 270.2 [B] [7] [i] [refusing a direct order]), and 107.10 (7 NYCRR 270.2 [B] [8] [i] [interference with an employee]). Supreme Court denied the petition and confirmed respondents' determination. We note at the outset that the court erred in failing to transfer this proceeding to this Court pursuant to CPLR 7804 (g). "[W]here a substantial evidence issue is raised, 'the court shall first dispose of such other objections as could terminate the proceeding[,] . . . [but i]f the determination of the other objections does not terminate the proceeding,' the court shall transfer the proceeding to this Court" (*Matter of Murphy v Graham*, 98 AD3d 833, 833-834, quoting CPLR 7804 [g]). We conclude that, "[b]ecause the petition raises—albeit inartfully—a question of substantial evidence, [the court] should have transferred the matter to this Court after it disposed of other objections that 'could terminate the proceeding' " (*Matter of Argentina v Fischer*, 98 AD3d 768, 768). "Nonetheless, because the record is now before us, we will 'treat the proceeding as if it had been properly transferred here' " (*Matter of Quintana v City of Buffalo*, 114 AD3d 1222, 1223, *lv denied* 23 NY3d 902).

Contrary to petitioner's contention, the court's denomination of its paper as an order rather than a judgment is "merely an inconsequential and nonprejudicial error which should be disregarded" (*Matter of De Paula v Memory Gardens*, 90 AD2d 886, 886; *see CRP/Extell Parcel I, L.P. v Cuomo*, 27 NY3d 1034, 1037). We reject petitioner's further contention that the hearing disposition is not supported by substantial evidence. "It is well established that a written misbehavior report may constitute substantial evidence of an inmate's misconduct" (*Murphy*, 98 AD3d at 834-835; *see Matter of Foster v Coughlin*, 76 NY2d 964, 966) and, here, "[t]he misbehavior report, together with the testimony of the author of the report who observed the incident, 'constitutes substantial evidence supporting the determination that petitioner violated [the] inmate rule[s]' at issue" (*Matter of Jones v Annucci*, 141 AD3d 1108, 1108-1109). Moreover, "[a]lthough the version of events relayed by the petitioner and his inmate witnesses conflicted with that of the correction officer who authored the report," that conflict merely "presented a credibility question to be resolved by the [H]earing [O]fficer" (*Matter of Jackson v Prack*, 137 AD3d 1133, 1134).

Petitioner further contends that his hearing was not timely concluded. We reject that contention. "[I]t is well settled that, '[a]bsent a showing that substantial prejudice resulted from the delay, the regulatory time limits are construed to be directory rather than mandatory' " (*Matter of Sierra v Annucci*, 145 AD3d 1496, 1497; *see Matter of Al-Matin v Prack*, 131 AD3d 1293, 1293, *lv denied* 26 NY3d 913; *Matter of Edwards v Fischer*, 87 AD3d 1328, 1329). We note, too, that the inmate disciplinary regulations permit the use of reasonable extensions where "authorized by the commissioner or his designee" (7 NYCRR 251-5.1 [b]; *see Matter of Sanders v Goord*, 47 AD3d 987, 987-988; *Matter of Taylor v Coughlin*, 135 AD2d 992, 993). Here, "the delay was authorized and reasonable [and] the extensions were proper[,] and we thus conclude that the delay did not prejudice petitioner, nor did it deny him due process" (*Taylor*, 135 AD2d at 993).

We reject petitioner's contention that he was deprived of his regulatory rights to call certain witnesses and present certain documentary evidence in support of his defense of retaliation. " 'The additional testimony [and documentary evidence] requested by petitioner would have been either redundant or immaterial' " (*Matter of Jackson v Annucci*, 122 AD3d 1288, 1288; *see Matter of Sanchez v Irvin*, 186 AD2d 996, 996-997, *lv denied* 81 NY2d 702). Furthermore, it was proper for the Hearing Officer to exclude the testimony of witnesses who did not have personal knowledge of the alleged disciplinary violations (*see Jackson*, 137 AD3d at 1134-1135; *Matter of Pilet v Annucci*, 128 AD3d 1198, 1198-1199; *Matter of Tafari v Rock*, 96 AD3d 1321, 1321, *lv denied* 19 NY3d 810). Moreover, petitioner cannot now complain about the propriety of the explanations appearing on the inmate witness refusal forms, where he never "request[ed] that the . . . inmates be interviewed or that the Hearing Officer ascertain the reason for their refusal to testify and made no objections with regard to any [of those] requested witnesses" (*Matter of Torres v Annucci*,

144 AD3d 1289, 1290; *see Matter of Dotson v Coughlin*, 191 AD2d 912, 914, *lv denied* 82 NY2d 651; *Matter of Crowley v O'Keefe*, 148 AD2d 816, 817, *appeal dismissed* 74 NY2d 780, *lv denied* 74 NY2d 613).

Although petitioner also raises a due process challenge to the Hearing Officer's failure to procure the testimony of the correction officer who escorted petitioner to his cell just prior to the incident, petitioner failed to raise that challenge in his administrative appeal and therefore failed to exhaust his administrative remedies with respect thereto, and this Court has no discretionary power to reach it (*see Matter of Nelson v Coughlin*, 188 AD2d 1071, 1071, *appeal dismissed* 81 NY2d 834; *see also Matter of Godwin v Goord*, 270 AD2d 881, 881). Additionally, to the extent that petitioner contends that the Hearing Officer failed to make sufficient efforts to secure inmate witnesses on his behalf, we reject that contention and conclude that the Hearing Officer acted reasonably (*see Matter of Shepherd v Commissioner of Corr. & Community Supervision*, 123 AD3d 1283, 1283; *see generally Matter of Guzman v Coughlin*, 90 AD2d 666, 666).

Finally, "[w]e reject petitioner's further contention that the Hearing Officer was biased or that the determination flowed from the alleged bias" (*Jones*, 141 AD3d at 1108-1109).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

331

CA 16-01627

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

IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE INTERMEDIATE ACCOUNTS OF HSBC BANK USA, N.A., AS TRUSTEE OF THE TRUST UNDER AGREEMENT DATED JANUARY 21, 1957, SEYMOUR H. KNOX, GRANTOR, FOR THE BENEFIT OF THE ISSUE OF SEYMOUR H. KNOX, III, FOR THE PERIOD JANUARY 21, 1957 TO NOVEMBER 3, 2005, AND NOVEMBER 4, 2005 TO JUNE 25, 2012.

HSBC BANK USA N.A., PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

SEYMOUR H. KNOX, IV, W.A. READ KNOX, AVERY KNOX, HELEN KNOX KEILHOLTZ, OBJECTANTS-RESPONDENTS, AND AURORA KNOX, RESPONDENT.
(APPEAL NO. 2.)

HARRIS BEACH PLLC, BUFFALO (RICHARD T. SULLIVAN OF COUNSEL), FOR PETITIONER-APPELLANT.

HOGAN WILLIG PLLC, AMHERST (LINDA LALLI STARK OF COUNSEL), FOR OBJECTANTS-RESPONDENTS.

MOSEY ASSOCIATES, LLP, BUFFALO (ACEA M. MOSEY OF COUNSEL), FOR RESPONDENT AURORA KNOX.

Appeal from an order of the Surrogate's Court, Erie County (Barbara Howe, S.), entered January 28, 2016. The order, upon reargument, adhered to a prior order denying in part the petition of HSBC Bank USA, N.A.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the petition insofar as it sought a determination that the amount of the damages to the Trust Under Agreement Dated January 21, 1957, Seymour H. Knox, Grantor, For the Benefit of the Issue of Seymour H. Knox, III, with respect to the stock petitioner retained in the F.W. Woolworth Company beyond March 1, 1995, are $641,494.00 through June 30, 2012, and a determination that the amount of $6.5 million paid by petitioner to the Trust pursuant to a high/low agreement is in complete satisfaction of the damages sustained by the Trust with respect to the F.W. Woolworth stock and with respect to damages that may be awarded to the Trust as a result of pending objections to accounting by an infant contingent beneficiary unless the Trust is awarded damages in excess of $6.5

million and as modified the order is affirmed without costs, and the matter is remitted to Surrogate's Court, Erie County, for further proceedings in accordance with the following memorandum: On a prior appeal, we modified Surrogate Court's determination sustaining objections, by both the income beneficiaries and the guardian ad litem (GAL) for the three minor remainder beneficiaries, to the petition seeking a judicial settlement of an intermediate account of the Trust Under Agreement Dated January 21, 1957, Seymour H. Knox, Grantor, For the Benefit of the Issue of Seymour H. Knox, III (Trust) (*Matter of HSBC Bank, USA N.A. [Knox]*, 98 AD3d 300, *lv dismissed* 20 NY3d 1056). We concluded that the Surrogate erred in sustaining the objections, with the exception of the objections by both the income beneficiaries and the GAL concerning the retention of the stock of F.W. Woolworth Company (Woolworth) (*id.* at 307), which was cofounded by the Knox family (*id.* at 304). We remitted the matter to the Surrogate for a recalculation of the amount of surcharges regarding the Woolworth stock, using the lost capital methodology, i.e., the formula validated by the Court of Appeals (*id.* at 320; *see Matter of Janes*, 90 NY2d 41, 55, *rearg denied* 90 NY2d 885). Before our decision was released, petitioner and the GAL, as the representative for the then two minor remainder beneficiaries and the remainder beneficiary who had reached majority, orally agreed to a "high/low" agreement, which was thereafter executed and approved by the Surrogate. Pursuant to that agreement, petitioner paid the Trust $6.5 million within days of the Surrogate's approval.

In 2014, petitioner sought, inter alia, to amend its petition and supplemental petition for judicial settlement of its interim account to include as an interested party an additional minor remainder beneficiary, who was born approximately two weeks before the initial petition in 2006, and to appoint a GAL for that additional minor remainder beneficiary. As part of that application, petitioner also sought an order determining the recalculated surcharges pursuant to our remittal as determined by its expert, and for a determination that the high/low agreement insofar as it applied to the recalculated surcharges was binding upon the income beneficiaries and the additional minor remainder beneficiary. The Surrogate granted that part of the petition seeking to open the decree and to amend the petition and supplemental petition in order to add the minor remainder beneficiary as an interested person, appointed a GAL for the additional minor remainder beneficiary, and otherwise denied the petition.

In 2015, by petition and motion, petitioner again sought an order determining the recalculated surcharge pursuant to our remittal and also determining that both the income beneficiaries and the additional minor beneficiary are bound by the high/low agreement to the extent that damages to the Trust are subsumed in the amount paid by petitioner pursuant to the high/low agreement. The Surrogate treated the application as a motion for leave to reargue her prior order, granted leave to reargue, but again denied the relief requested.

The record establishes that both petitioner and the income

beneficiaries retained experts to calculate the damages to the Trust as a result of the retention of the Woolworth stock, using the *Janes* formula as this Court directed on remittal, and including an interest calculation to June 30, 2012. The record also establishes that petitioner's attorney agreed to accept the calculation of the expert retained by the income beneficiaries that the Trust sustained damages in the amount of $641,494.00, which was slightly more than the amount calculated by petitioner's expert. We therefore conclude that the Surrogate erred in denying the petition to the extent that it sought approval for the recalculation of the surcharge, and we modify the order accordingly by determining that, with respect to the objections related to the Woolworth stock, the Trust was damaged in the amount of $641,494.00 as of June 30, 2012. Indeed, as we made clear on the prior appeal, "the purpose of damages is to replace capital that has been lost by the Trust, not by the beneficiaries" (*Knox*, 98 AD3d at 321). In other words, the surcharge is assessed "to put the [T]rust in no worse—but no better—position than the one it would have occupied if the trustee had duly sold [the Woolworth stock]" (*Matter of Lasdon*, 32 Misc 3d 1245 [A], 2011 NY Slip Op 51710[U], *3 [Sur Ct, New York County 2011]). Although the beneficiaries may "enforce the [T]rust," they do not take "any legal estate in the property" (EPTL 7-2.1 [a]).

We conclude that the Trust has been made whole with respect to the Woolworth stock. Indeed, an amount approximately 10 times that of the assessed surcharge has been paid to the Trust in accordance with the high/low agreement. We further conclude that the high/low agreement, insofar as it resolves the issue of damages sustained by the Trust as a result of petitioner's retention of the Woolworth stock, applies to both the income beneficiaries and the additional minor remainder beneficiary to the extent that her pending objections to the interim accounts concern the Woolworth stock. We therefore further modify the order accordingly. We further conclude that the Trust has been made whole with respect to any additional surcharges that may be imposed as a result of the pending objections up to the amount of $6.5 million inasmuch as the additional minor remainder beneficiary is "simply entitled to be put in the position . . . she would have occupied had no breach occurred" (*Matter of Saxton*, 274 AD2d 110, 121). We therefore further modify the order accordingly. Finally, we remit the matter to Surrogate's Court for a determination whether additional interest shall be added to the recalculated surcharge up to the date the Trust was made whole (*see generally Knox*, 98 AD3d at 321).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

336

KA 15-00922

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MAURICE R. HOWIE, ALSO KNOWN AS “QUELL”,
DEFENDANT-APPELLANT.

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (ASHLEY R. LOWRY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered June 4, 2014. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts) and robbery in the first degree (two counts).

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 one count of robbery in the first degree (Penal Law § 160.15 [4]), arising from an incident that occurred on February 9, 2013, as well as two counts of murder in the second degree (§ 125.25 [1], [3]) and one count of robbery in the first degree (§ 160.15 [2]), arising from an incident that occurred on March 6, 2013. The 10-count indictment charged defendant with only the four counts of which he was convicted, but he proceeded to a joint trial with a codefendant who was charged in all 10 counts, which arose from six separate robberies. Before trial, the other individuals charged in the indictment successfully moved to sever their trials. Defense counsel, however, opted against moving for severance for “strategic” reasons, even after being made aware of potential *Bruton* issues (*Bruton v United States*, 391 US 123). At trial, the codefendant’s statements implicating defendant in the two incidents for which he was charged were admitted in evidence, without objection. Defendant now contends that the admission of those statements was erroneous.

While we agree with defendant that the admission of those statements violated *Bruton* and that Supreme Court’s curative instruction did not alleviate the prejudice (*see People v Cedeno*, 27 NY3d 110, 117, *cert denied* ___ US ___, 137 S Ct 205), we consider defense counsel’s strategic decisions to proceed with a joint trial

and to consent to the admission of the codefendant's statements to constitute a waiver of any *Bruton* violation (*see People v Reid*, 71 AD3d 699, 700, *lv denied* 15 NY3d 756; *see also People v Serrano*, 256 AD2d 175, 176, *lv denied* 93 NY2d 878). Indeed, when the codefendant's statements were offered in evidence, defense counsel specifically stated that he had "[n]o objection" to their admission in evidence.

Defendant further contends that the court erred in precluding defense counsel from cross-examining two witnesses concerning the relocation of one of the witnesses as the result of threats made to that witness by the codefendant's family and the prosecution's payment to that witness to assist with the relocation. On the penultimate day of testimony in this month-long trial, defense counsel moved for severance when the trial court precluded him from cross-examining two witnesses concerning alleged threats made to one of the two witnesses by members of the codefendant's family. Those threats had prompted the witness to relocate, with financial assistance from the prosecution. Before trial, the People sought to introduce evidence of the threats and relocation during the direct examination of those witnesses. The codefendant's attorney agreed to forgo any cross-examination concerning the financial assistance provided by the prosecution, and defense counsel informed the court that he took no position on the issue at that time. The court thereafter denied the People's request. It is well established that the court has discretion to determine the scope of the cross-examination of a witness (*see generally People v Corby*, 6 NY3d 231, 234-235) and, contrary to defendant's contention, we conclude that the court did not abuse its discretion in limiting defendant's cross-examination of those two witnesses (*see People v Gong*, 30 AD3d 336, 336, *lv denied* 7 NY3d 812; *cf. People v Gross*, 71 AD3d 1526, 1527, *lv denied* 15 NY3d 774).

Although defendant moved for severance based on the "single issue" of the court's limitation on the cross-examination of those two witnesses, he now contends that the court should have granted his motion for severance because of the *Bruton* violation "coupled with mutually exclusive defenses." "Because defendant on appeal raises a different ground for severance than that set forth in his [midtrial] motion for that relief, defendant failed to preserve for our review his present contention in support of severance" (*People v Ott*, 83 AD3d 1495, 1496, *lv denied* 17 NY3d 808; *see People v Osborne*, 88 AD3d 1284, 1285, *lv denied* 19 NY3d 999, *reconsideration denied* 19 NY3d 1104). We decline to exercise our power to review defendant's contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Moreover, insofar as defendant contends that severance was warranted based on the *Bruton* violation, we conclude that defendant affirmatively waived that contention (*see People v Pugh*, 236 AD2d 810, 811, *lv denied* 89 NY2d 1099).

We reject defendant's contention that he was denied effective assistance of counsel based on defense counsel's strategy in declining to move for severance before trial and in consenting to the admission of the codefendant's statements. It is well settled that "a reviewing

court must avoid confusing 'true ineffectiveness with mere losing tactics' " (*People v Benevento*, 91 NY2d 708, 712). Indeed, it "is not for [the] court to second-guess whether a course chosen by defendant's counsel was the best trial strategy, or even a good one, so long as defendant was afforded meaningful representation" (*People v Satterfield*, 66 NY2d 796, 799-800). "To 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 Rivera*, 71 NY2d 705, 709). Here, defense counsel specifically stated on the record that he made a decision for strategic reasons, and we conclude that defendant has not established that counsel's strategy "was inconsistent with the actions of a reasonably competent attorney" (*People v Henderson*, 27 NY3d 509, 514). Defendant raises one additional ground as a basis for his claim of ineffective assistance of counsel, i.e., the failure to object to a misstatement made by a prosecution witness. 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).

Contrary to defendant's further contention, the evidence is legally sufficient to support the conviction of robbery in the first degree under Penal Law § 160.15 (4) (*see generally People v Bleakley*, 69 NY2d 490, 495). The surveillance photographs "provided legally sufficient evidence from which the jury could reasonably conclude that defendant was the male in the [photographs]" (*People v Lukens*, 107 AD3d 1406, 1408, *lv denied* 22 NY3d 957). Viewing the evidence in light of the elements of that crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict on that count is not against the weight of the evidence (*see Bleakley*, 69 NY2d at 495).

Finally, we are not persuaded that we should exercise our authority to modify the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]). As the dissent acknowledges, defendant committed heinous crimes, one of which resulted in an innocent man's death. According to the presentence report (PSR), moreover, defendant failed to appreciate the consequences of his conduct or to exhibit any remorse. Indeed, the PSR recounts that the officer who arrested defendant for the murder and related robbery counts stated that defendant was smiling and laughing both during questioning and while being arrested. In view of the severity of the crimes and defendant's callousness, we do not consider this to be an appropriate case in which to exercise our discretionary authority to reduce the sentence.

All concur except LINDLEY, and NEMOYER, JJ., who dissent in part and vote to modify in accordance with the following memorandum: We respectfully dissent in part inasmuch as we conclude that the sentence imposed on this adolescent offender is unduly harsh and severe. Defendant was 16 years old at the time of the commission of the instant crimes and had no prior criminal record. With respect to the robbery that occurred on February 9, 2013, defendant was sentenced to

a determinate term of incarceration of 10 years. With respect to the robbery and murder that occurred on March 6, 2013, defendant received sentences of 7 years and 25 years to life, respectively. It should be noted that defendant thus received the maximum possible sentence for his conviction of murder (*see* Penal Law § 70.00 [2] [a]; [3] [a]), and we would not disturb that sentence. The sentences related to the March 6 crimes were ordered to run consecutively to the sentence imposed on the February 9 crime. Supreme Court considered but rejected youthful offender adjudication for the two robbery convictions.

"As the United States Supreme Court has recognized, 'developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence' " (*People v Rudolph*, 21 NY3d 497, 506 [Graffeo, J., concurring], quoting *Graham v Florida*, 560 US 48, 67; *see J.D.B. v North Carolina*, 564 US 261, 272). The Supreme Court has "[t]ime and again" addressed those differences, "observ[ing] that children generally are less mature and responsible than adults . . . ; that they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them . . . ; [and] that they are more vulnerable or susceptible to . . . outside pressures than adults" (*J.D.B.*, 564 US at 272 [internal quotation marks omitted]).

In her concurring opinion in *Rudolph*, Judge Graffeo addressed the fact that "sociological studies [have] establish[ed] that young people often possess 'an underdeveloped sense of responsibility,' which can 'result in impetuous and ill-considered actions and decisions' " (*id.*, quoting *Johnson v Texas*, 590 US 350, 367, *reh denied* 509 US 941). Judge Graffeo further wrote that "[y]oung people who find themselves in the criminal courts are not comparable to adults in many respects–and our jurisprudence should reflect that fact" (*id.*). In our view, this is one case where we should exercise our discretion and reduce the sentence.

Here, as noted, defendant was only 16 years old when he committed the crimes, and he was known by his coaches and teachers to be a polite and respectful high school student. His "downward spiral" happened so fast that neither his coaches nor his father could stop it. We note that the two crimes occurred within a one-month span; that defendant was not the actual shooter; and that defendant received the maximum possible sentence for the murder convictions. We do not dispute the fact that the crimes of which defendant was convicted are heinous crimes and that his actions contributed to the death of an innocent man. In our view, however, the sentence imposed on this defendant, under the circumstances of this case, is unduly harsh and severe, and we would modify the judgment by directing that all of the sentences run concurrently with each other, which would still leave defendant serving 25 years to life in prison.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

340

CAF 15-02107

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

IN THE MATTER OF CAMERON B.

CHAUTAUQUA COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, PETITIONER-RESPONDENT;

NICOLE C., RESPONDENT-APPELLANT.

MEMORANDUM AND ORDER

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

REBECCA L. DAVISON-MARCH, MAYVILLE, FOR PETITIONER-RESPONDENT.

RACHEL L. MITCHELL, ATTORNEY FOR THE CHILD, GOWANDA.

Appeal from an order of the Family Court, Chautauqua County (Jeffrey A. Piazza, J.), entered December 1, 2015 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, and the matter is remitted to Family Court, Chautauqua County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from a fact-finding and dispositional order issued after an inquest following the mother's failure to personally appear at the hearing on the petition. The mother's counsel appeared at the hearing and requested an adjournment. Petitioner's counsel and the Attorney for the Child objected to an adjournment. The mother's counsel participated in the inquest after Family Court denied the adjournment.

We agree with the mother that the court erred in disposing of the matter on the basis of her purported default. "As we have repeatedly held, a respondent who fails to appear personally in a matter but nonetheless is represented by counsel who is present when the case is called is not in default in that matter" (*Matter of Daniels v Davis*, 140 AD3d 1688, 1688; *see Matter of Manning v Sobotka*, 107 AD3d 1638, 1638-1639; *Matter of Erie County Dept. of Social Servs. v Thompson*, 91 AD3d 1327, 1328). Moreover, inasmuch as the mother's counsel objected on ten occasions during the inquest, this is not a situation where a default could be found based, at least in part, upon counsel's " 'election to stand mute' " during the inquest (*Matter of Lastanzea L. [Lakesha L.]*, 87 AD3d 1356, 1356, *lv dismissed in part and denied in part* 18 NY3d 854). In any event, even if we were to conclude that the court properly determined the mother to be in default, we

nonetheless could reach and address the issue of the court's denial of the request for an adjournment inasmuch as it was the subject of contest below (*see Matter of Daija K.P. [Danielle P.]*, 129 AD3d 1087, 1087).

We further agree with the mother that the court abused its discretion in denying her counsel's request to adjourn the hearing. The request was based on the fact that the mother was unable to attend the hearing owing to illness. It is well settled that the grant or denial of a request for an adjournment for any purpose is a matter resting within the sound discretion of the trial court (*see Matter of Steven B.*, 6 NY3d 888, 889). Here, the record demonstrates that the mother contacted her counsel and petitioner prior to the hearing to report her illness, that the proceedings in this matter were not protracted, that the mother personally appeared at all prior proceedings, and that the request for an adjournment was the mother's first (*see Matter of Nicole J.*, 71 AD3d 1581, 1582). We therefore reverse the order, and we remit the matter to Family Court for a new fact-finding hearing and, if necessary, a new dispositional hearing.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

347

CA 16-00971

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

LINDA SCHNEIDER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CORPORATE PLACE, LLC, AND THE CABOT GROUP, INC., DEFENDANTS-APPELLANTS.

HURWITZ & FINE, P.C., BUFFALO (MARC A. SCHULZ OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

FINUCANE AND HARTZELL, LLP, PITTSFORD (LEO G. FINUCANE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Debra A. Martin, A.J.), entered March 15, 2016. The order denied the motion of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when she tripped and fell on a speed bump in an alleyway at premises owned by defendant Corporate Place, LLC, and managed by defendant The Cabot Group, Inc. Plaintiff alleged in her amended complaint that defendants were negligent, inter alia, in installing the speed bump directly adjacent to a marked pedestrian crosswalk and then painting the speed bump the same color as the crosswalk pavement markings, thus making it difficult for pedestrians to visually distinguish the elevated speed bump from the crosswalk. Supreme Court denied defendants' motion for summary judgment dismissing the amended complaint, and we affirm.

Contrary to defendants' contention, we conclude that they failed to establish as a matter of law that the hazard posed by the speed bump was open and obvious and thus that they had no duty to warn plaintiff of a tripping hazard. It is well established that there is no duty to warn of an open and obvious dangerous condition "because 'in such instances the condition is a warning in itself' " (*Mazurek v Home Depot U.S.A.*, 303 AD2d 960, 962; *see Tagle v Jakob*, 97 NY2d 165, 169). "Whether a hazard is open and obvious cannot be divorced from the surrounding circumstances . . . A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted" (*Calandrino v Town of Babylon*, 95 AD3d 1054,

1056 [internal quotation marks omitted]; *see Hayes v Texas Roadhouse Holdings, LLC*, 100 AD3d 1532, 1533-1534). "Some visible hazards, because of their nature or location, are likely to be overlooked . . . , and the facts here simply do not warrant concluding as a matter of law that the [speed bump] was so obvious that it would necessarily be noticed by any careful observer, so as to make any warning superfluous" (*Juoniene v H.R.H. Constr. Corp.*, 6 AD3d 199, 200-201; *see Grizzell v JQ Assoc., LLC*, 110 AD3d 762, 764).

We further conclude that the affidavit of defendants' engineering expert is insufficient to satisfy defendants' initial burden on the issue whether the premises were maintained in a reasonably safe condition. There is no indication in the affidavit that defendants' engineering expert visited the site of the accident (*see generally Kasner v Pathmark Stores, Inc.*, 18 AD3d 440, 441), and he addressed in only conclusory fashion the visibility of the speed bump under the conditions in the alleyway at the relevant time of day with respect to the crosswalk markings of identical color (*see generally Costanzo v County of Chautauqua*, 110 AD3d 1473, 1473). Contrary to defendants' further contention, compliance with regulations or a building code is not dispositive on the issue of negligence (*see Bamrick v Orchard Brooke Living Ctr.*, 5 AD3d 1031, 1032). Although plaintiff may have been aware of the existence of the speed bump prior to her fall, her alleged failure to keep a known danger in mind is but one of the factors to be considered by the trier of fact in determining the existence of culpable conduct, if any, attributable to plaintiff within the meaning of the comparative negligence statute (*see generally* CPLR 1411; *Flynn v City of New York*, 103 AD2d 98, 100-101).

Defendants' failure to make a prima facie showing of their entitlement to judgment as a matter of law requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853), and we therefore do not reach defendants' remaining contentions with respect to the opposing papers.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

348

CA 16-01296

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

CAITLIN WESTON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOSE MARTINEZ, DEFENDANT-RESPONDENT,
AND CIANCIANA PROPERTY MANAGEMENT, LLC,
DEFENDANT-APPELLANT.

GALLO & IACOVANGELO, LLP, ROCHESTER (BRIAN P. RILEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

LORI ROBB MONAGHAN, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered December 17, 2015. The order denied the motion of defendant Cianciana Property Management, LLC for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted and the complaint and cross claim against defendant Cianciana Property Management, LLC are dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when the bicycle on which she was riding collided with a vehicle owned and operated by defendant Jose Martinez (Martinez). The collision occurred as Martinez was exiting the driveway of an apartment building owned by Cianciana Property Management, LLC (defendant). According to plaintiff, her view of Martinez and his view of her were blocked by a stone fence next to the sidewalk abutting defendant's property. Martinez filed a cross claim against defendant, seeking contribution and indemnification.

Defendant moved for summary judgment dismissing the complaint and cross claim against it. We conclude that Supreme Court erred in denying that motion. Contrary to plaintiff's contention, defendant established that it owed no duty to plaintiff, a user of the public way (*see Echorst v Kaim*, 288 AD2d 595, 596; *see also Clementoni v Consolidated Rail Corp.*, 8 NY3d 963, 965; *Cook v Suitor*, 81 AD3d 1452, 1452-1453). Although plaintiff contends that a duty arose because defendant made a special use out of the sidewalk by virtue of the fact that the driveway passed over the sidewalk, we conclude that the special use doctrine is inapplicable where, as here, there is no alleged defect in the sidewalk or driveway itself (*see Capretto v City of Buffalo*, 124 AD3d 1304, 1306; *see generally Kaufman v Silver*, 90

NY2d 204, 207-208). "In the absence of a special feature constructed in the sidewalk, the special use doctrine will not be applied even if the defendant makes continual, heavy use of the sidewalk" (Kreindler, Rodriguez, Beekman and Cook, New York Law of Torts § 12:9 [15 West's NY Prac Series August 2016 Update]).

We thus conclude that defendant established that it owed no duty of care to plaintiff. "In the absence of duty, there is no breach and without a breach there is no liability" (*Pulka v Edelman*, 40 NY2d 781, 782). We therefore reverse the order, grant the motion, and dismiss the complaint and cross claim against defendant.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

349

CA 16-01168

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

TOWN OF AURORA, A MUNICIPAL CORPORATION,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

VILLAGE OF EAST AURORA, A MUNICIPAL CORPORATION,
DEFENDANT-RESPONDENT.

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

BARTLO, HETTLER, WEISS & TRIPI, KENMORE (PAUL D. WEISS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (John A. Michalek, J.), entered October 20, 2015. The judgment denied the motion of plaintiff for summary judgment, dismissed the complaint, and declared that plaintiff is responsible for the expenses of repairing the Brooklea Drive bridge in the Village of East Aurora and any other bridge in the Village of East Aurora of which defendant has not assumed control, care and maintenance.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the complaint is reinstated, the motion is granted, the cross motion is denied, and judgment is granted in favor of plaintiff as follows:

> It is ADJUDGED AND DECLARED that the Village of East Aurora is responsible for the supervision, control, care, and maintenance of the Brooklea Drive bridge located within its boundaries.

Memorandum: In May 2010, the New York State Department of Transportation identified the Brooklea Drive bridge in the Village of East Aurora as in need of repair. Plaintiff, Town of Aurora (Town), commenced this action seeking a declaration that defendant, Village of East Aurora (Village), is responsible for the costs of repair of the Brooklea Drive bridge, and the Village asserted a counterclaim seeking a declaration that the Town is responsible for such costs. The Town moved for summary judgment on its complaint. The Village cross-moved for summary judgment on its counterclaim but further asserted that the Town is responsible for the care of bridges within the Village in addition to the Brooklea Drive bridge. Supreme Court denied the motion, dismissed the complaint, granted the cross motion, and

declared that the Town is responsible for the costs of repairing the Brooklea Drive bridge. In response to the Village's assertion with respect to additional bridges, the court further declared that the Town "is responsible for the expenses of repairing any other bridge located within the boundaries of the Village . . . with respect to which the Village . . . has not assumed control, care and maintenance under Section 6-606 of the Village Law."

We conclude that the Town is entitled to judgment, and we therefore reverse. As a preliminary matter, we note that, although the court declared the rights of the parties, it erred in dismissing the complaint (*cf. Pless v Town of Royalton*, 185 AD2d 659, 660, *affd* 81 NY2d 104; *see generally Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954).

It is undisputed that the Village planned, financed, and constructed the Brooklea Drive bridge more than 40 years ago and did not advise the Town of the Town's alleged maintenance and repair responsibility until 2010. The record establishes that the Village has exclusive supervision and control over the bridge, and indeed, was the only entity ever to exercise such supervision and control (*see* Village Law § 6-604). The record also establishes that there was no contract between the Village and the Town, nor any negotiation about the Brooklea Drive bridge, nor any board resolution, made pursuant to Village Law § 6-608 by which the Town assumed maintenance and repair responsibility. We therefore conclude that responsibility for the Brooklea Drive bridge properly rests with the Village.

Contrary to the assertion of the Village and the conclusion of the court, it was not necessary for the Village to pass a resolution pursuant to Village Law § 6-606 in order to assume the control, care, and maintenance of the bridge. Village Law § 6-604 provides in part that, "[i]f the board of trustees of a village has the supervision and control of a bridge therein, it shall continue to exercise such control under this chapter." Although Village Law § 6-606 provides that a village "may" obtain control of a bridge by a resolution of its board, it does not provide that a village "may only" obtain control by that method (*see* § 6-606). "[W]here a statute describes the particular situations in which it is to apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded" (*Village of Webster v Town of Webster*, 270 AD2d 910, 912, *lv dismissed in part and denied in part* 95 NY2d 901; *see Golden v Koch*, 49 NY2d 690, 694; *see also* McKinney's Cons Laws of NY, Book 1, Statutes § 240; *Matter of 1605 Book Ctr. v Tax Appeals Tribunal*, 83 NY2d 240, 245-246, *cert denied* 513 US 811). We therefore reject the Village's statutory interpretation, i.e., that a village could unilaterally construct and maintain a bridge only to later disclaim responsibility when repair costs arose. Such an interpretation invites objectionable, unreasonable, or absurd results (*see Matter of Monroe County Pub. Sch. Dists. v Zyra*, 51 AD3d 125, 130).

The court further erred in declaring the rights of the parties with respect to bridges besides the Brooklea Drive bridge. Any issues

concerning those other bridges were not properly before the court, because they were not raised in the pleadings (*see generally Richardson v Bryant*, 66 AD3d 1411, 1412). The declaration with respect to those other bridges therefore constitutes an improper advisory opinion (*see Becker-Manning, Inc. v Common Council of City of Utica*, 114 AD3d 1143, 1143).

In light of our resolution above, we see no need to address the Town's remaining contentions.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

350

CA 15-02034

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

IN THE MATTER OF KAMALA D. HARRIS, ATTORNEY GENERAL OF STATE OF CALIFORNIA, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SENECA PROMOTIONS, INC., RESPONDENT.

NATIVE WHOLESALE SUPPLY COMPANY, APPELLANT.

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

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

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered December 2, 2015. The order denied the motion of appellant Native Wholesale Supply Company for a protective order and directed respondent Seneca Promotions, Inc., to comply with the disclosure demands of petitioner.

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

Memorandum: Petitioner commenced this special proceeding seeking to compel respondent to comply with an out-of-state subpoena that was signed by a judge of the Sacramento County Superior Court in the State of California. The subpoena seeks documents and testimony from respondent relating to petitioner's investigation into the distribution and promotion of contraband cigarettes in California. Attached to the subpoena are lists of the documents to be produced and the matters on which a witness provided by respondent is to be examined. Among the matters on which respondent's witness is to be examined is respondent's relationship with nonparty Native Wholesale Supply Company (NWSC).

NWSC appeals from an order that denied its motion for a protective order and directed respondent to comply fully with the subpoena by producing the documents specified by petitioner and a witness qualified to testify on all of the topics listed in the subpoena. This Court denied NWSC's motion to stay the order pending appeal, and respondent produced documents and witnesses in response to the subpoena. Nothing produced by respondent concerned NWSC, and the

witnesses produced by respondent offered no testimony with respect to respondent's relationship with NWSC. Petitioner thereafter moved for an order compelling respondent to produce a further witness. After that motion was denied and no appeal was taken, petitioner moved to dismiss the instant appeal as moot. This Court denied that motion without prejudice.

We reject petitioner's contention, renewed in her brief on appeal, that the appeal should be dismissed as moot. There is no question that "[t]he jurisdiction of this Court extends only to live controversies . . . [, and w]e are thus prohibited from giving advisory opinions or ruling on 'academic, hypothetical, moot, or otherwise abstract questions' " (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 810-811, *cert denied* 540 US 1017). Contrary to petitioner's contention, we conclude that a live controversy remains with respect to petitioner's authority under the subpoena to obtain information from respondent concerning its relationship with NWSC. Petitioner's investigation is ongoing, petitioner did not withdraw the subpoena or supply an affidavit averring that no further enforcement measures would be undertaken, and the representation of petitioner's counsel that petitioner will not seek further enforcement of the subpoena does not "constitute an enforceable guarantee" (*Matter of Sabol v People*, 203 AD2d 369, 370). In any event, we agree with NWSC that, even if the appeal has been rendered moot, the factors triggering the exception to the mootness doctrine are present, i.e., "(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues" (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

On the merits of the appeal, however, we agree with petitioner that Supreme Court properly exercised its discretion in denying NWSC's motion for a protective order. At the outset, we note that NWSC, as an entity "about whom discovery is sought," has standing to move for a protective order (CPLR 3103 [a]). Also at the outset, we conclude that NWSC is not judicially estopped from taking the position that CPLR 3119 does not apply to the subpoena, inasmuch as the record does not support petitioner's contention that NWSC took a contrary position in its papers supporting the motion.

Nevertheless, we agree with petitioner that CPLR 3119 applies to this out-of-state subpoena issued in connection with an investigation undertaken by petitioner as Attorney General of the State of California (*see Hyatt v State of Cal. Franchise Tax Bd.*, 105 AD3d 186, 199-201). Contrary to the contention of NWSC, nothing in the language of the statue limits its scope to subpoenas issued in civil litigation, and NWSC may not rely upon the title of the bill and statements of its sponsor to create ambiguity where the statutory language is clear and unambiguous. " 'Where words of a statute are free from ambiguity and express plainly, clearly and distinctly the legislative intent, resort may not be had to other means of interpretation' . . . , and the intent of the Legislature must be discerned from the language of the statute . . . without resort to

extrinsic material such as legislative history or memoranda" (*Matter of Rochester Community Sav. Bank v Board of Assessors of City of Rochester*, 248 AD2d 949, 950, *lv denied* 92 NY2d 811).

The record does not support NWSC's contention that it was not afforded an opportunity to challenge the subpoena, inasmuch as the court considered NWSC's position when it entertained NWSC's application for a protective order pursuant to CPLR 3119 (e). We reject NWSC's further contention that it had no obligation to specify the information that it sought to protect from disclosure in making that application. To the contrary, as the entity resisting compliance with the subpoena, NWSC had the burden of demonstrating that the information sought was irrelevant to petitioner's investigation (*see Matter of Kapon v Koch*, 23 NY3d 32, 38-39), and NWSC made no attempt to meet that burden.

Finally, NWSC did not request a hearing on the issue whether sovereign immunity bars enforcement of the subpoena, and thus failed to preserve for our review its present contention that the matter should be remitted for that purpose (*see Sharlow v Sharlow*, 77 AD3d 1430, 1432). Nor did NWSC allege facts sufficient to warrant the court to determine, sua sponte, that a hearing was warranted (*see generally Sue/Perior Concrete Paving, Inc. v Lewiston Golf Course*, 24 NY3d 538, 546-547, *rearg denied* 25 NY3d 960).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

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CA 16-01570

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

DOLORES A. DEPCZYNSKI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES MERMIGAS AND LYNDA MERMIGAS,
DEFENDANTS-APPELLANTS.

LAW OFFICES OF JOHN TROP, ROCHESTER (TIFFANY D'ANGELO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CELLINO & BARNES, P.C., BUFFALO (ELLEN B. STURM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered June 23, 2016. The order denied defendants' motion for summary judgment dismissing plaintiff's complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she tripped and fell on property owned by defendants. Defendants moved for summary judgment dismissing the complaint, contending that they neither created the dangerous condition nor had actual or constructive notice of it. In opposing the motion, plaintiff submitted no evidence but, rather, contended that defendants had failed to meet their initial burden of proof (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We conclude that Supreme Court properly denied defendant's motion, but our reasoning differs from that of the court.

It is well settled that defendants seeking summary judgment dismissing a complaint in a premises liability case have the " 'initial burden of establishing that [they] did not create the [allegedly] dangerous condition that caused plaintiff to fall and did not have actual or constructive notice thereof' " (*Ferguson v County of Niagara*, 49 AD3d 1313, 1314; *see Seferagic v Hannaford Bros. Co.*, 115 AD3d 1230, 1230-1231). We note at the outset that defendants have "abandoned any issue with respect to actual notice by failing to raise any such issue on appeal" (*Mullaney v Royalty Props., LLC*, 81 AD3d 1312, 1313; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984). With respect to the remaining grounds for premises liability, we conclude that defendants failed to meet their initial burden.

"To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant[s] . . . to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837). Here, the evidence submitted by defendants established that the condition was visible and apparent to at least one person and that the condition had existed for a sufficient length of time for defendants to have discovered and remedied it.

Defendants contend that the court erred in considering a theory of recovery that defendants assert was not pleaded in the complaint, as amplified by the bill of particulars (*see generally Stewart v Dunkleman*, 128 AD3d 1338, 1341, *lv denied* 26 NY3d 902). In her complaint, plaintiff alleged that she fell after she stepped in a hole in the ground that was covered by grass, and that defendants knew or should have known that the dangerous condition existed on their property. In her bill of particulars, plaintiff alleged, inter alia, that defendants were negligent "in creating the subject hole." In opposition to defendants' motion and on appeal, plaintiff contends, inter alia, that defendants created the hole "by allowing water to run off from the gutter in the back of [the] home toward the creek and thus creating a small ditch that ultimately became a tripping hazard." In determining that defendants were not entitled to summary judgment, the court rejected defendants' contention that it could not consider that theory of recovery. Even assuming, arguendo, that plaintiff's opposition to the motion set forth a theory of recovery that was "not readily discernible from the allegations in the complaint and the original bill of particulars" (*Rosse-Glickman v Beth Israel Med. Ctr.-Kings Hwy. Div.*, 309 AD2d 846, 846), we nevertheless conclude that defendants' motion was properly denied inasmuch as defendants failed to establish as a matter of law that they did not create the allegedly dangerous condition or that they lacked constructive notice of it.

Moreover, while we agree with defendants that the court erred in imposing a duty to inspect the property where, as here, there was nothing to arouse defendants' suspicions (*see Anderson v Justice*, 96 AD3d 1446, 1447-1448), that error does not affect our determination that there are triable issues of fact precluding summary judgment.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

354

CA 16-01626

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

JOSEPH W. ROCHE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KATHLEEN LORENZO-ROCHE, DEFENDANT-RESPONDENT.

BRENON LIPMAN & ZARCONE, LLP, WILLIAMSVILLE (KELLY V. ZARCONE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SPADAFORA & VERRASTRO, LLP, BUFFALO (KATIE M. POLEON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered May 25, 2016. The order, among other things, granted defendant's motion and adjudged that defendant is entitled to the entry of a Domestic Relations Order awarding her the right to receive $833 per month from plaintiff's New York State Teachers Retirement System pension benefit commencing as of the date of his retirement.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: In this postdivorce dispute, plaintiff husband appeals from an order granting the motion of defendant wife, by which she sought a Domestic Relations Order (DRO) entitling her to receive $833 from plaintiff's monthly pension benefit retroactive to the date of his retirement, and awarding her $750 in counsel fees. The order also denied plaintiff's cross motion, in which plaintiff sought a DRO precluding defendant from receiving any share of the pension until plaintiff had attained the age of 67, and also sought an award of counsel fees.

We conclude that Supreme Court erred in granting the motion, and we modify the order accordingly. It is well established that a separation agreement that is incorporated but not merged into a judgment of divorce "is a contract subject to the principles of contract construction and interpretation" (*Matter of Meccico v Meccico*, 76 NY2d 822, 823-824, *rearg denied* 76 NY2d 889; *see Anderson v Anderson*, 120 AD3d 1559, 1560, *lv denied* 24 NY3d 913). Where such an agreement is clear and unambiguous on its face, the intent of the parties must be gleaned from the four corners of the instrument and not from extrinsic evidence (*see Meccico*, 76 NY2d at 824; *see also*

W.W.W. Assoc. v Giancontieri, 77 NY2d 157, 162), and the agreement in that instance " 'must be enforced according to the plain meaning of its terms' " (*Anderson*, 120 AD3d at 1560, quoting *Greenfield v Philles Records*, 98 NY2d 562, 569). Where an agreement is ambiguous, however, the parties may submit to the court extrinsic evidence in support of their respective interpretations (*see Colella v Colella*, 129 AD3d 1650, 1651; *see also St. Mary v Paul Smith's Coll. of Arts & Sciences*, 247 AD2d 859, 860). Whether an agreement is ambiguous is a question of law for the court to resolve (*see Kass v Kass*, 91 NY2d 554, 566; *W.W.W. Assoc.*, 77 NY2d at 162). In making that determination, the proper inquiry is "whether the agreement on its face is reasonably susceptible of more than one interpretation" (*Chimart Assoc. v Paul*, 66 NY2d 570, 573). Moreover, in deciding whether an agreement is ambiguous, the court " 'should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed' " (*Kass*, 91 NY2d at 566).

We conclude that the pertinent provision of the parties' modification agreement is ambiguous inasmuch as it is reasonably susceptible of more than one interpretation (*see Colella*, 129 AD3d at 1651; *Walker v Walker*, 42 AD3d 928, 928-929, *lv dismissed* 9 NY3d 947; *see also St. Mary*, 247 AD2d at 859). We conclude that a hearing is required to enable the court to determine the intent of the parties with respect to the date on which defendant was or is to begin receiving her share of plaintiff's pension, and we remit the matter to Supreme Court for such a hearing (*see Colella*, 129 AD3d at 1651; *Walker*, 42 AD3d at 929; *Gentile v Gentile*, 31 AD3d 1158, 1159).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

370

CA 16-01302

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

CHRISTOPHER J. BURKE AND KAREN ANN BURKE,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ARCADIS G&M OF NEW YORK ARCHITECTURAL AND ENGINEERING SERVICES, P.C., ARCADIS OF NEW YORK, INC., ARCADIS U.S., INC., NIAGARA MOHAWK ENERGY, INC., NIAGARA MOHAWK HOLDINGS, INC., NIAGARA MOHAWK POWER CORPORATION, NATIONAL GRID ENGINEERING AND SURVEY INC., AEROTEK, INC., ROI STAFFING OF MASSACHUSETTS LLC, RESOURCE OPTIONS, INC., DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

LAWRENCE, WORDEN, RAINIS & BARD, P.C., MELVILLE (GAIL J. MCNALLY OF COUNSEL), FOR DEFENDANTS-APPELLANTS ARCADIS G&M OF NEW YORK ARCHITECTURAL AND ENGINEERING SERVICES, P.C., ARCADIS OF NEW YORK, INC., AND ARCADIS U.S., INC.

THORN GERSHON TYMANN & BONANNI, LLP, ALBANY (MARSHALL BROAD OF COUNSEL), FOR DEFENDANTS-APPELLANTS NIAGARA MOHAWK ENERGY, INC., NIAGARA MOHAWK HOLDINGS, INC., NIAGARA MOHAWK POWER CORPORATION, NATIONAL GRID ENGINEERING AND SURVEY INC., AEROTEK, INC., ROI STAFFING OF MASSACHUSETTS LLC, AND RESOURCE OPTIONS, INC.

ROSSI & ROSSI, NEW YORK MILLS (VINCENT J. ROSSI, JR., OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered October 2, 2015. The order, among other things, granted plaintiffs' motion to compel discovery.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by directing in the third ordering paragraph that discovery responses from defendants-appellants are required within 30 days of service of a copy of the order of this Court with notice of entry, by striking from the fourth ordering paragraph the language relating to privilege, and by vacating the fifth ordering paragraph and as modified the order is affirmed without costs.

Memorandum: Defendants Arcadis G&M of New York Architectural and Engineering Services, P.C., Arcadis of New York, Inc. and Arcadis

U.S., Inc. (Arcadis defendants) and defendants Niagara Mohawk Energy, Inc., Niagara Mohawk Holdings, Inc., Niagara Mohawk Power Corporation, National Grid Engineering and Survey Inc., Aerotek, Inc., ROI Staffing of Massachusetts LLC, and Resource Options, Inc. (Niagara Mohawk defendants) appeal from an order that, inter alia, granted plaintiffs' motion to compel discovery.

This action arises out of an injury sustained by Christopher J. Burke (plaintiff) while he was working in the Utica Harbor on a project to excavate hazardous materials. Plaintiffs contend that the project was overseen by various entities, including defendants, and that the Arcadis and Niagara Mohawk defendants (collectively, defendants) were negligent in creating and implementing an unreasonably dangerous work plan and violated Labor Law § 200 by failing to provide plaintiff with a reasonably safe place to work, thereby causing injury to plaintiff's legs.

In August 2014, plaintiffs served their first set of discovery demands, which broadly requested materials that included "all correspondence" relating to the Utica Harbor project on which plaintiff was injured. In October 2014, plaintiffs served a second set of discovery demands requesting additional documents, which were equally broad in scope.

In November 2014, the Arcadis defendants responded to plaintiffs' first and second set of discovery demands by producing some documents but objecting to many of plaintiffs' demands, including the demand for correspondence, as "overbroad, unduly burdensome, and not calculated to obtain discoverable material." In response, plaintiffs sent a letter to all defendants noting that they received objections to the "breadth" of the demand for correspondence, and requesting that defendants supply them with a description of the correspondence that each defendant had in its possession. On December 3, 2014, the attorney for the Arcadis defendants noted that they were under no obligation to provide plaintiffs with the material requested, and she declined to "correct a palpably bad discovery demand."

On December 30, 2014, plaintiffs sent defendants a notice to take the deposition of a person knowledgeable of the location, organization, identification, and form of defendants' records concerning the Utica Harbor project. In early January 2015, defendants advised that they would not appear for depositions prior to plaintiff's deposition being taken. Thereafter, plaintiffs sent a letter to the court on January 9, 2015, asking it to intervene and resolve the discovery dispute. On February 4, 2015, the court sent a letter stating that defendants were correct concerning the priority of depositions and the breadth of plaintiffs' discovery demands and advising plaintiffs to tailor their demands to specify what was being sought.

On February 23, 2015, plaintiffs served a third set of discovery demands, wherein they requested 168 disclosures. The Arcadis defendants responded to the third set of discovery demands on March 19, 2015, objecting to each demand as overbroad and unduly burdensome,

among other things, and indicating, in response to some of the demands, that they were searching their records to determine if any responsive documents existed.

On March 23, 2015, plaintiffs sent the Arcadis defendants a letter asking them to explain why their request was overbroad and unduly burdensome. On April 18, 2015, plaintiffs sent defendants a letter indicating that responses to the third set of discovery demands were overdue, and requesting that defendants provide a response to the demands by May 1, 2015 "to avoid a motion."

On May 4, 2015, plaintiffs filed the instant motion to compel defendants to respond to the third set of discovery demands. On May 22, 2015, the Arcadis defendants submitted a supplemental response to the third set of discovery demands, noting, where relevant, that they did not have any responsive documents in their possession, and attaching, where relevant, the responsive documents in their possession. In response to plaintiffs' motion, the Arcadis defendants asserted that they had fully complied with and responded appropriately to all of plaintiffs' "onerous, overbroad, over-reaching, and improper demands."

In response to the motion, the Niagara Mohawk defendants argued that plaintiffs did not make a good faith effort to confer with counsel for the Niagara Mohawk defendants to resolve the discovery issues raised by the motion. Shortly thereafter, the Niagara Mohawk defendants served plaintiffs with a number of documents in response to the discovery demands.

The matter was heard on August 5, 2015 and plaintiffs sent a proposed order to the court that granted plaintiffs' motion to compel discovery and indicated that, in the event that defendants did not comply with the discovery order by September 5, 2015, plaintiffs would be entitled to inspect defendants' records, among other things. On August 11, 2015, the Arcadis defendants sent a letter to the court objecting to the proposed order as beyond the scope of the discussions held at the court conference, and beyond the scope of the remedy requested in plaintiffs' motion. The Niagara Mohawk defendants also sent a letter to the court echoing the objections of the Arcadis defendants. On September 29, 2015, the court issued an order granting plaintiffs' motion and adopting the language in plaintiffs' proposed order in its entirety, and defendants appealed.

We agree with defendants that the court abused its discretion in ordering them to deliver their discovery materials to plaintiffs' attorney on a date that preceded the date on which the order was issued (*see generally Adams v Deloreto*, 272 AD2d 875, 875-876). We therefore modify the third ordering paragraph by requiring discovery responses from defendants within 30 days of service of a copy of the order of this Court with notice of entry.

We further agree with defendants that the court abused its discretion in ordering them to provide discovery without regard to privilege, inasmuch as "[t]he determination whether a particular

document is shielded from disclosure by the attorney-client privilege 'is necessarily a fact-specific determination' " (*Sevenson Envtl. Servs., Inc. v Sirius Am. Ins. Co.*, 64 AD3d 1234, 1236, *lv dismissed* 13 NY3d 893), and defendants have not engaged in any conduct that waived the attorney-client privilege (*cf. Banach v Dedalus Found., Inc.*, 132 AD3d 543, 544; *Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust*, 43 AD3d 56, 63-64). We therefore further modify the order by striking the language concerning privilege from the fourth ordering paragraph.

The court further abused its discretion in awarding plaintiffs unfettered access to defendants' documents inasmuch as plaintiffs did not request such relief in their motion to compel and the relief granted is dramatically different from that which was actually sought (*see Tirado v Miller*, 75 AD3d 153, 158). The court also erred in awarding plaintiffs attorney's fees, inasmuch as there is nothing in the record to suggest that defendants or their attorneys willfully refused to comply with plaintiffs' discovery demand or that defendants or their attorneys acted frivolously (*see Accent Collections, Inc. v Cappelli Enters., Inc.*, 84 AD3d 1283, 1284; *Davoli v New York State Elec. & Gas Corp.* [appeal No. 1], 248 AD2d 989, 989; *see also* 22 NYCRR 130-1.1). We therefore further modify the order by vacating the fifth ordering paragraph.

Finally, we note that the Niagara Mohawk defendants failed to respond to plaintiffs' third set of discovery demands or otherwise produce documents in response until after the motion was made, and we therefore see no reason to address their contention that plaintiffs did not make a good faith effort to resolve the discovery dispute prior to the motion.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

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KA 14-01561

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CANDACE J. CARTAGENA, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. FLAHERTY, JR., ACTING 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 26, 2014. The judgment convicted defendant, upon a nonjury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her, upon a nonjury verdict, of murder in the second degree (Penal Law § 125.25 [1]). Although defendant failed to preserve for our review her challenge to the legal sufficiency of the evidence, we "necessarily review the evidence adduced as to each of the elements of the crime[] in the context of our review of defendant's challenge regarding the weight of the evidence" (*People v Stephenson*, 104 AD3d 1277, 1278, *lv denied* 21 NY3d 1020, *reconsideration denied* 23 NY3d 1025 [internal quotation marks omitted]).

It is well established that " '[i]ntent to kill may be inferred from defendant's conduct as well as the circumstances surrounding the crime' " (*People v Badger*, 90 AD3d 1531, 1532, *lv denied* 18 NY3d 991). The People presented evidence through expert testimony that the victim's cause of death was asphyxia by neck or chest compression. That determination was based on the medical evidence as well as the fact that the victim was found: (1) face up with her shirt raised up half way; (2) with only one sock on half way; and (3) next to a pillow on bedding that appeared to be disheveled. In addition, the People presented evidence that defendant was the only person with the victim at the time of the victim's death and that defendant provided widely inconsistent accounts of her whereabouts and actions leading up to, and following, the victim's death. Although circumstantial in nature, when viewed in the light most favorable to the People, we conclude that the evidence is sufficient to establish that defendant

intentionally killed the victim (*see Stephenson*, 104 AD3d at 1278-1279; *People v Thibeault*, 73 AD3d 1237, 1239-1240, *lv denied* 15 NY3d 810, *cert denied* 562 US 1293).

Viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). While " 'a finding that defendant did not intend to kill the victim[] would not have been unreasonable . . . , it cannot be said that County Court, which saw and heard the witnesses and thus was able to assess their credibility and reliability in a manner that is far superior to that of reviewing judges who must rely on the printed record, failed to give the evidence the weight it should be accorded' " (*Badger*, 90 AD3d at 1532). The court in this nonjury trial "was free to credit the opinion expressed by the People's expert[s] and reject that of defendant's expert" (*People v Costa*, 256 AD2d 809, 809, *lv denied* 93 NY2d 872; *see People v Benson*, 119 AD3d 1145, 1148, *lv denied* 24 NY3d 1118; *People v Stein*, 306 AD2d 943, 944, *lv denied* 100 NY2d 599, *reconsideration denied* 1 NY3d 581).

Defendant also contends that defense counsel was ineffective for failing to preserve for our review his challenge to the legal sufficiency of the evidence. We note, however, that we have reviewed the sufficiency of the evidence in determining whether the verdict is against the weight of the evidence.

Contrary to defendant's further contention, we conclude that the court did not err in refusing to suppress statements she made to two police officers en route to the Erie County Medical Center (ECMC) and at the emergency room of the ECMC. When the police arrived at defendant's house, they were informed that a young girl was found dead in a bedroom and that defendant was inside a shed in the backyard. Defendant was removed from the shed and placed in an ambulance, where she indicated that she had tried to commit suicide. Defendant was then transported to the ECMC. In our view, defendant was not in police custody when defendant made the statements during that time period and, in any event, we conclude that the questions asked of her were investigatory rather than accusatory in nature (*see People v Carbonaro*, 134 AD3d 1543, 1547, *lv denied* 27 NY3d 994, *reconsideration denied* 27 NY3d 1149). Furthermore, while a defendant's involuntary commitment under Mental Hygiene Law § 9.41 is a relevant factor in determining whether he or she is in custody for *Miranda* purposes (*see People v Turkenich*, 137 AD2d 363, 366-367; *cf. People v Ripic*, 182 AD2d 226, 232-233, *appeal dismissed* 81 NY2d 776, *rearg denied* 81 NY2d 955; *see generally People v Heck*, 103 AD3d 1140, 1142, *lv denied* 21 NY3d 1074), we conclude that it is not dispositive in this case.

Defendant failed to preserve for our review her contention that she was deprived of a fair trial by prosecutorial misconduct on summation inasmuch as counsel failed to challenge any of those comments during summation and raised those contentions for the first time in a postsummations mistrial motion (*see People v Romero*, 7 NY3d 911, 912). In any event, we conclude that "the prosecutor's isolated

remarks were not so egregious as to deprive defendant of a fair trial . . . , particularly considering that this was a bench trial" (*People v King*, 111 AD3d 1345, 1346, *lv denied* 23 NY3d 1022).

The sentence is not unduly harsh or severe.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

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CA 16-01345

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

THOMAS P. JOUSMA AND ELLENE PHUFAS-JOUSMA,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

DR. VENKATESWARA R. KOLLI AND KALEIDA HEALTH,
DOING BUSINESS AS DEGRAFF MEMORIAL HOSPITAL,
DEFENDANTS-APPELLANTS.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (JOHN P. DANIEU OF COUNSEL), FOR DEFENDANT-APPELLANT DR. VENKATESWARA R. KOLLI.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (VICTOR A. OLIVERI OF COUNSEL), FOR DEFENDANT-APPELLANT KALEIDA HEALTH, DOING BUSINESS AS DEGRAFF MEMORIAL HOSPITAL.

FRANCIS M. LETRO, BUFFALO (CAREY C. BEYER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an amended order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered March 2, 2016. The amended order compelled disclosure of various documents and ordered a second deposition of defendant Dr. Venkateswara R. Kolli.

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

Memorandum: Defendants appeal from an amended order compelling disclosure of various documents and ordering a second deposition of defendant Dr. Venkateswara R. Kolli. At Dr. Kolli's first deposition, his attorney directed him not to answer certain questions relating to alleged prior instances of malpractice on his part. Plaintiffs thereafter moved for disclosure of Dr. Kolli's credentialing and personnel files, held by defendant Kaleida Health, doing business as DeGraff Memorial Hospital, and for leave to conduct a second deposition of Dr. Kolli with regard to the information contained in those files. Supreme Court granted plaintiffs' motion over defendants' objections that the documents are privileged. We now reverse.

Concerning the discoverability of Dr. Kolli's credentialing file, we note that such files "fall squarely within the materials that are made confidential by Education Law § 6527 (3) and article 28 of the

Public Health Law" (*Logue v Velez*, 92 NY2d 13, 18; *see Lamacchia v Schwartz*, 94 AD3d 712, 714; *Scinta v Van Coevering*, 284 AD2d 1000, 1001-1002). That privilege shields from disclosure " 'the proceedings [and] the records relating to performance of a medical or a quality assurance review function or participation in a medical . . . malpractice prevention program' " (*Logue*, 92 NY2d at 16-17). Here, defendants established that the credentialing file was "generated in connection with a quality assurance review function pursuant to Education Law § 6527 (3) or a malpractice prevention program pursuant to [article 28 of the] Public Health Law" (*Matter of Coniber v United Mem. Med. Ctr.*, 81 AD3d 1329, 1330 [internal quotation marks omitted]). We therefore conclude that the credentialing file is privileged and that the court improperly ordered defendants to disclose it (*see id.*).

Although there is an exception to the privilege, the exception is limited to those statements made by a doctor to his or her employer-hospital concerning the subject matter of a malpractice action and pursuant to the hospital's quality-control inquiry into the incident underlying that action (*see Logue*, 92 NY2d at 18; *Bryant v Bui*, 265 AD2d 848, 849; *Swartzenberg v Trivedi*, 189 AD2d 151, 152-154, *appeal dismissed* 82 NY2d 749). Contrary to plaintiffs' contention, that exception does not apply here because the injury underlying this action was never the subject of such an inquiry. *Byork v Carmer* (109 AD2d 1087, 1088), relied upon by plaintiffs, is distinguishable. In that case, plaintiff sought to question a hospital employee about the hospital's knowledge of prior alleged incidents of malpractice by a particular doctor. We rejected the defendant hospital's invocation of the privilege accorded by Education Law § 6527 (3) inasmuch as "information regarding [the hospital's] knowledge of alleged prior incidents of negligence by [the doctor]" does not fall under that privilege (*Byork*, 109 AD2d at 1088). Here, in contrast, plaintiffs do not seek to question Dr. Kolli merely about "information"; they seek access to his entire credentialing file, and that file is privileged (*see* § 6527 [3]).

Concerning the discoverability of Dr. Kolli's personnel file, we conclude that plaintiffs' general request for that entire file is overly broad (*see Haga v Pyke*, 19 AD3d 1053, 1055; *Conway v Bayley Seton Hosp.*, 104 AD2d 1018, 1019-1020), and we therefore deny that request in its entirety. We thus have no occasion to decide whether any privilege might apply to specific documents in the personnel file (*see generally Conway*, 104 AD2d at 1020).

In light of our determination to reverse the amended order compelling disclosure of the above documents, a second deposition of Dr. Kolli to explore the issues raised in the documents is unneccessary. We have reviewed defendants' remaining contentions and conclude that they are without merit.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

393

CA 16-01572

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

MILDRED LINGENFELTER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DELEVAN TERRACE ASSOCIATES, ET AL., DEFENDANTS,
AND WILLIAM KROTZ CONTRACTING, DEFENDANT-APPELLANT.

BROWN & KELLY, LLP, BUFFALO (PAUL CALLAHAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

STAMM LAW FIRM, BUFFALO (BRIAN TOWEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Cattaraugus County (Jeremiah J. Moriarty, III, J.), entered May 9, 2016. The order denied the motion of defendant William Krotz Contracting for summary judgment dismissing the amended complaint and all cross claims 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 amended complaint and the cross claim against defendant William Krotz Contracting are dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when she slipped and fell on ice and snow between parking spaces in the parking lot of an apartment complex owned and operated by defendants Delevan Terrace Associates, Cattaraugus Community Action, Inc., and Cattaraugus Rural Housing Corporation (collectively, apartment defendants). The apartment defendants contracted with defendant William Krotz Contracting (Krotz) to provide snowplowing services for the property. On appeal, Krotz contends that Supreme Court erred in denying its motion for summary judgment seeking dismissal of the amended complaint and any cross claims against it. We agree.

Inasmuch as "a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138). Here, any duty that Krotz had with respect to snowplowing on the subject property arose exclusively out of its contract with the apartment defendants (*see Church v Callanan Indus.*, 99 NY2d 104, 111). It is well settled, however, that " 'a contractual obligation, standing alone, will impose

a duty only in favor of the promisee and intended third-party beneficiaries' " (*Espinal*, 98 NY2d at 140), and "will generally not give rise to tort liability in favor of a third party," i.e., a person who is not a party to the contract (*id.* at 138; *see Church*, 99 NY2d at 111). There are "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care—and thus be potentially liable in tort—to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launche[s] a force or instrument of harm' . . . ; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties . . . and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Espinal*, 98 NY2d at 140).

Even assuming, arguendo, that the allegations in the pleadings are sufficient to require Krotz to negate the possible applicability of the first *Espinal* exception in establishing its prima facie entitlement to summary judgment (*cf. Baker v Buckpitt*, 99 AD3d 1097, 1099; *Sniatecki v Violet Realty, Inc.*, 98 AD3d 1316, 1320; *Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 214), we conclude that Krotz met its initial burden of establishing that it did not launch a force or instrument of harm by creating or exacerbating a dangerous condition (*see generally Espinal*, 98 NY2d at 142-143). Krotz's submissions, including the contract, the deposition testimony of the property manager for the apartment complex, and the deposition testimony and affidavit of Krotz's owner, established that Krotz plowed the center driving lane of the parking lot in accordance with its responsibilities under the contract and did not undertake any snow removal operations with respect to the condition between the parking spaces that caused plaintiff's injury. "[B]y merely plowing the snow, as required by the contract, [Krotz's] actions could not be said 'to have created or exacerbated a dangerous condition' " (*Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 361; *see Espinal*, 98 NY2d at 142; *cf. Rak v Country Fair, Inc.*, 38 AD3d 1240, 1241).

Plaintiff failed to raise an issue of fact whether Krotz negligently created or exacerbated a dangerous condition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Moreover, even assuming, arguendo, that Krotz was negligent in failing to plow the parking spaces as alleged by plaintiff, we conclude that "such negligence would amount[] to a finding that [Krotz] may have merely failed to become an instrument for good, which is insufficient to impose a duty of care upon a party not in privity of contract with the injured party" (*Mesler v PODD LLC*, 89 AD3d 1533, 1535 [internal quotation marks omitted]; *see Church*, 99 NY2d at 112; *Foster*, 76 AD3d at 215).

It is undisputed that plaintiff did not detrimentally rely on Krotz's continued performance of its contractual obligations, and thus the second *Espinal* exception cannot form a basis for liability (*see Foster*, 76 AD3d at 215).

In establishing its prima facie entitlement to summary judgment, Krotz was not required to negate the third *Espinal* exception inasmuch

as there are no allegations in the pleadings that would establish the applicability of that exception, i.e., that Krotz entirely displaced the apartment defendants' duty to maintain the premises safely (*see Sniatecki*, 98 AD3d at 1320). Defendant nonetheless negated that exception, and plaintiff failed to raise an issue of fact (*see Zuckerman*, 49 NY2d at 562). Here, while the contract provided Krotz with some discretion in fulfilling its snowplowing obligations, its terms made Krotz directly responsible to the property manager who had the right to request additional services and oversaw maintenance of the property, including snowplowing (*see Torella v Benderson Dev. Co.*, 307 AD2d 727, 728). We thus conclude that "the contract between [Krotz] and the [apartment defendants] was not so comprehensive and exclusive that it entirely displaced the [apartment defendants'] duty to maintain the premises safely, such that [Krotz] owed a duty to plaintiff" (*Eisleben v Dean*, 136 AD3d 1306, 1307; *see Espinal*, 98 NY2d at 141).

Finally, we agree with Krotz that the court erred in denying its motion insofar as it sought dismissal of the apartment defendants' cross claim for contribution and indemnification (*see generally Peters v United Ref. Co. of Pa.*, 57 AD3d 1512, 1512-1513).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

403

KA 16-01415

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT.

V MEMORANDUM AND ORDER

JERRY MASSEY, DEFENDANT-APPELLANT,

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO 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 June 12, 2015. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]). We reject defendant's contention that his waiver of the right to appeal was not knowingly, voluntarily, and intelligently entered (*see generally People v Lopez*, 6 NY3d 248, 256). County Court "did not conflate that right with those automatically forfeited by a guilty plea" (*People v McCrea*, 140 AD3d 1655, 1655, *lv denied* 28 NY3d 933 [internal quotation marks omitted]), and we conclude that "the court engaged defendant 'in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Marshall*, 144 AD3d 1544, 1545). Defendant's contention that his plea was not knowingly, voluntarily, and intelligently entered because he did not recite the elements of the crime and only agreed with the court's description of the incident is actually a challenge to the factual sufficiency of the plea allocution, which is foreclosed by defendant's valid waiver of the right to appeal (*see People v Dale*, 142 AD3d 1287, 1288, *lv denied* 28 NY3d 1144).

Defendant further contends that his guilty plea was not knowingly, intelligently, and voluntarily entered and that the court abused its discretion in denying his motion to withdraw his plea on that ground without first conducting a hearing. Although that contention survives defendant's waiver of the right to appeal (*see id.*), the record establishes that defendant withdrew his motion to withdraw his guilty plea and thereby waived any contention with

respect to that motion (*see People v Harris*, 97 AD3d 1111, 1112, *lv denied* 19 NY3d 1026; *People v Gilliam*, 96 AD3d 1650, 1651, *lv denied* 19 NY3d 1026).

To the extent that defendant's contention that he was denied effective assistance of counsel survives his valid waiver of the right to appeal (*see People v Rausch*, 126 AD3d 1535, 1535, *lv denied* 26 NY3d 1149), we conclude that it lacks merit. Defendant has not shown that his motion to withdraw his guilty plea would have been successful if not withdrawn (*see Harris*, 97 AD3d at 1112). Moreover, defendant "receive[d] an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of [defense] counsel" (*Dale*, 142 AD3d at 1290 [internal quotation marks omitted]).

Finally, the valid waiver of the right to appeal forecloses defendant's challenge to the severity of his sentence (*see generally Lopez*, 6 NY3d at 255-256).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

407

KA 15-00129

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES D. MINCKLER, DEFENDANT-APPELLANT.

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

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (COURTNEY E. HAVILAND OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (James M. Metcalf, A.J.), rendered March 7, 2014. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, a new trial is granted, and the matter is remitted to Oswego County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of burglary in the second degree (Penal Law § 140.25 [2]). The conviction arises from the victims' report that they returned to their home one night and saw a pickup truck backed into their driveway, defendant standing on the back deck of the home, and another individual exiting the home. At trial, the victims testified that they did not see defendant in the house and that nothing was stolen.

Defendant failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence inasmuch as he failed to make a sufficiently specific motion for a trial order of dismissal at the close of the People's case (*see People v Gray*, 86 NY2d 10, 19). In any event, that contention is without merit (*see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). The jury was entitled to resolve issues of credibility in favor of the People, and we see no reason to disturb the jury's resolution of such issues (*see People v Henley*, 145 AD3d 1578, 1579).

We agree with defendant, however, that he was denied his right to counsel when County Court permitted him, rather than defense counsel,

to decide whether to request a jury charge on a lesser included offense. "It is well established that a defendant, 'having accepted the assistance of counsel, retains authority only over certain fundamental decisions regarding the case' such as 'whether to plead guilty, waive a jury trial, testify in his or her own behalf or take an appeal' " (*People v Colon*, 90 NY2d 824, 825-826; *see Henley*, 145 AD3d at 1580; *People v McKenzie*, 142 AD3d 1279, 1280). "[D]efense counsel has ultimate decision-making authority over matters of strategy and trial tactics, such as whether to seek a jury charge on a lesser included offense" (*Henley*, 145 AD3d at 1580; *see People v Colville*, 20 NY3d 20, 23). Here, defense counsel requested a charge on the lesser included offense of criminal trespass. After defendant stated that he did not want such a charge, the court noted that defendant's consent was not required. Nevertheless, defense counsel stated that he was not requesting the charge based on defendant's decision not to follow his advice. Although defense counsel unequivocally and repeatedly stated that the charge was in defendant's best interest, and indicated that defendant was declining the charge against defense counsel's advice, the court abided defendant's choice and thus "denied [defendant] the expert judgment of counsel to which the Sixth Amendment entitles him" (*Colville*, 20 NY3d at 32; *see People v Brown*, 117 AD3d 1536, 1536-1537). Moreover, the error is not harmless beyond a reasonable doubt (*see Colville*, 20 NY3d at 32-33). Viewing the evidence in the light most favorable to defendant (*see People v Martin*, 59 NY2d 704, 705), there is a reasonable view of the evidence to support a finding that defendant was guilty of criminal trespass, and not burglary in the second degree (*see id.*). We therefore reverse the judgment and grant defendant a new trial on the indictment (*see generally Colville*, 20 NY3d at 32-33; *Brown*, 117 AD3d at 1537-1538).

We further agree with defendant that the court erred in failing to order an examination pursuant to CPL article 730 to determine defendant's competency. Throughout the proceedings, including during jury selection, trial, and various hearings and conferences, defendant made numerous interjections and inappropriate outbursts pertaining to, among other things, a preoccupation with his codefendant's case, his belief that the government was infecting prisoners with MRSA and other diseases, his belief that his life was in danger from "rainbow hunters," a preoccupation with radiation leaking from a nearby power plant, and his belief that he was Santa Claus. Although a defendant is presumed to be competent (*see People v Tortorici*, 92 NY2d 757, 765, *cert denied* 528 US 834), whenever a court has a " 'reasonable ground for believing that a defendant is in such state of idiocy, imbecility or insanity that he is incapable of understanding the charge, indictment or proceedings or of making his defense, it is the duty of the court to direct him to be examined in these respects' " (*id.*). Here, in light of the nature and frequency of defendant's outbursts, and the People's expressed concern about defendant's competency prior to trial, we conclude that the court abused its discretion in failing to insure that defendant was competent to stand trial (*see People v Moore*, 101 AD3d 1780, 1781; *People v Galea*, 54 AD3d 686, 687, *lv denied* 11 NY3d 854; *see generally Tortorici*, 92 NY2d at 765). We

therefore remit the matter to County Court to direct that, prior to a new trial on the indictment, defendant be examined pursuant to CPL article 730 to determine whether he is presently competent to stand trial.

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

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

408

CAF 15-01737

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

IN THE MATTER OF ANTHONY ALLEN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TAMARA BOSWELL, RESPONDENT-RESPONDENT.

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

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

Appeal from an order of the Family Court, Monroe County (Thomas W. Polito, R.), entered September 2, 2015 in a proceeding pursuant to Family Court Act article 6. The order, among other things, directed that petitioner's visitation with his children be supervised.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by striking the provision requiring petitioner to complete a parenting class as a prerequisite for modification of visitation and substituting therefor a provision directing that petitioner comply with that condition as a component of supervised visitation, and as modified the order is affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner father appeals from an order that, inter alia, modified a prior custody and visitation order by directing that he have supervised visitation with the parties' three children and ordering him to attend a parenting class. We reject the father's contention that respondent mother failed to establish a change in circumstances sufficient to warrant an inquiry into the best interests of the children (*see generally Matter of McClinton v Kirkman*, 132 AD3d 1245, 1245). Although Family Court failed to make an express finding that there was a change in circumstances, we have the authority to "review the record to ascertain whether the requisite change in circumstances existed" (*Matter of Curry v Reese*, 145 AD3d 1475, 1475 [internal quotation marks omitted]). A change in circumstances has been found to exist when an incident of domestic violence occurs in the children's presence (*see Matter of Jeremy J.A. v Carley A.*, 48 AD3d 1035, 1036; *see also Matter of Schieble v Swantek*, 129 AD3d 1656, 1657), or when the parties are so unable to communicate without hostility that custody exchanges "resulted in disagreements that required [the] intervention" of others (*Matter of Kylene FF. v Thomas*

EE., 137 AD3d 1488, 1489-1490). Here, the mother's undisputed testimony established that, the last time she met the father to exchange the children, he physically assaulted her in the children's presence such that persons in a nearby parking lot had to intervene. We therefore conclude that the mother established the requisite change in circumstances (*see generally Curry*, 145 AD3d at 1475).

We reject the father's further contention that the court's determination that supervised visitation was in the best interests of the children lacks a sound and substantial basis in the record (*see generally Matter of Procopio v Procopio*, 132 AD3d 1243, 1244, *lv denied* 26 NY3d 915; *Matter of Creek v Dietz*, 132 AD3d 1283, 1284, *lv denied* 26 NY3d 914). The record establishes that the father committed acts of domestic violence against the mother in the children's presence and that he demonstrated poor impulse control during trial. Thus, although there is no evidence in the record that the father physically harmed the children, "the record provides no basis to disturb Family Court's conclusion that limiting [the father] to supervised visitation was in the child[ren]'s best interest[s]" (*Matter of Chilbert v Soler*, 77 AD3d 1405, 1406, *lv denied* 16 NY3d 701; *see generally Fox v Fox*, 177 AD2d 209, 210).

We agree with the father, however, that the court erred to the extent that it ordered that future modification of the father's visitation is conditioned on completion of a parenting class. "[A]lthough a court may include a directive to obtain counseling as a *component* of a custody or visitation order, the court does not have the authority to order such counseling as a prerequisite to custody or visitation" (*Matter of Ordona v Cothern*, 126 AD3d 1544, 1546 [internal quotation marks omitted]). Thus, "the court lack[s] the authority to condition any future application for modification of [a parent's] visitation on her [or his] participation in . . . counseling" (*id.*). Nevertheless, the court may order that a parent's completion of counseling and compliance therewith "would constitute a substantial change of circumstances for any future petition for modification of the order" (*Matter of Cramer v Cramer*, 143 AD3d 1264, 1265, *lv denied* 28 NY3d 913), provided that "[n]othing in the order prevents the [parent] from supporting a modification petition with a showing of a different change of circumstances" (*id.*). We therefore modify the order by striking the provision requiring the father to complete a parenting class as a prerequisite for modification of visitation and substituting therefor a provision directing that he comply with that condition as a component of supervised visitation.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

412

CA 16-01422

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

JOSHUA JOHNSON AND ANGELA JOHNSON,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JOSHUA W. THOMPSON AND RONALD A. CORNELL,
DEFENDANTS-RESPONDENTS.

GREENE & REID, PLLC, SYRACUSE (EUGENE W. LANE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (ERIC S. BERNHARDT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), dated March 23, 2016. The order, insofar as appealed from, denied those parts of the motion of plaintiffs seeking summary judgment dismissing the affirmative defenses of failure to mitigate damages and culpable conduct.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion seeking to dismiss the affirmative defense of failure to mitigate damages to the extent that it is based on the alleged failure to use a seatbelt in violation of Vehicle and Traffic Law § 1229-c (3), and seeking to dismiss the affirmative defense of culpable conduct except to the extent it alleges that plaintiffs' damages may be diminished based on plaintiff Joshua Johnson's alleged lack of reasonable care in opting to ride in a motor vehicle without a seatbelt available for his use, and dismissing those affirmative defenses to that extent, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Joshua Johnson (plaintiff) in a motor vehicle accident, while he was a passenger in a vehicle outfitted for drag racing that was owned by defendant Ronald A. Cornell and operated by defendant Joshua W. Thompson. Plaintiffs appeal from an order to the extent that it denied those parts of their motion for summary judgment seeking to dismiss two of the affirmative defenses, i.e., culpable conduct and the "seatbelt defense."

We reject plaintiffs' contention that, pursuant to Vehicle and Traffic Law § 1229-c (8), evidence of plaintiff's failure to use a seatbelt is inadmissible with respect to the issues of his culpable

conduct or proximate cause, inasmuch as that statute is inapplicable where, as here, no seatbelt was available to the plaintiff in the vehicle. Nevertheless, because Vehicle and Traffic Law § 1229-c (8) is inapplicable, we modify the order by granting that part of plaintiffs' motion seeking to dismiss the affirmative defense of failure to mitigate damages insofar as it is based upon plaintiff's alleged failure to use a seatbelt in violation of Vehicle and Traffic Law § 1229-c (3).

Contrary to plaintiffs' contention, we conclude that the court properly denied that part of their motion seeking summary judgment dismissing the affirmative defense of culpable conduct to the extent that defendants allege that plaintiffs' damages should be diminished based on plaintiff's breach of an independent common-law duty to exercise reasonable care for his own safety (*see Nelson v Nygren*, 259 NY 71, 75; *see generally* PJI 2:87), by opting to ride in a motor vehicle without a seatbelt available for his use. We agree with plaintiffs, however, that there is no evidence that plaintiff's conduct contributed to the occurrence of the accident, and thus we conclude that the affirmative defense of culpable conduct should be dismissed to that extent. We therefore further modify the order accordingly.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

415

CA 16-01390

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

FRANK P. CZERESZKO,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

STEVE A. PROCOPIO, JR., D.D.S., AND STEVE A. PROCOPIO, JR., D.D.S., P.C.,
DEFENDANTS-RESPONDENTS-APPELLANTS.

SNYDER LAW FIRM, PLLC, SYRACUSE (DAVID B. SNYDER OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

NAPIERSKI, VANDENBURGH, NAPIERSKI & O'CONNOR, LLP, ALBANY (JOHN W. VANDENBURGH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered November 13, 2015. The order, among other things, granted in part and denied in part the motion of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this dental malpractice action seeking damages for injuries allegedly arising from, inter alia, the perforation of one of plaintiff's teeth and the failure of Steve A. Procopio, Jr., D.D.S. (defendant) to recognize and treat the perforation. Defendants moved for summary judgment dismissing the complaint, and plaintiff cross-moved pursuant to CPLR 3126 for sanctions for the alleged spoliation of evidence and for partial summary judgment. Plaintiff appeals and defendants cross-appeal from an order that granted defendants' motion in part and dismissed the complaint with respect to three specific claims underlying plaintiff's malpractice cause of action, and denied plaintiff's cross motion in its entirety. We affirm.

We note at the outset that plaintiff appealed from only that part of the order "awarding [defendants] partial summary judgment." Thus, we agree with defendants that plaintiff waived his right to appeal from that part of the order that denied his cross motion. " 'An appeal from only part of an order constitutes a waiver of the right to appeal from the other parts of that order' " (*Johnson v Transportation Group, Inc.*, 27 AD3d 1135, 1135; *see Shumway v Kelley*, 60 AD3d 1457, 1459).

We reject plaintiff's contention that Supreme Court erred in granting defendants' motion for summary judgment in part because plaintiff raised issues of fact with the submission of an expert affidavit in opposition. As the proponent of a motion for summary judgment in this dental malpractice action, defendants had the initial burden of establishing as a matter of law that there was no departure from accepted standards of care or that plaintiff was not injured thereby (*see Terranova v Finklea*, 45 AD3d 572, 572; *Starr v Rogers*, 44 AD3d 646, 647-648). Defendants did so by submitting plaintiff's medical records and defendant's own affidavit, which was " 'detailed, specific and factual in nature' " (*Webb v Scanlon*, 133 AD3d 1385, 1386). In his affidavit, defendant described his treatment of plaintiff's tooth and explained the absence of any deviations from accepted standards of care with respect to the manner in which he performed such treatment (*see id.*; *Starr*, 44 AD3d at 648). The affidavit of plaintiff's dental expert offered in opposition set forth only generalized, conclusory and speculative opinions with respect to three specific claims at issue, and thus it was insufficient to raise a triable issue of fact with respect to those claims (*see Snyder v Simon*, 49 AD3d 954, 956).

We reject defendants' contention on their cross appeal that the court should have granted their motion in its entirety. We conclude that the conflicting expert affidavits raise issues of fact with respect to whether defendant deviated from the accepted standards of care by failing to take an X ray after the February 23, 2007 post and crown placement procedure; failing to recommend X ray studies to plaintiff between February 23, 2007 and March 3, 2011 and failing to document plaintiff's refusal of those studies; and failing to identify and treat, or refer for treatment, a perforation of plaintiff's tooth that was allegedly depicted in an X ray film taken on March 3, 2011, and which allegedly caused plaintiff to sustain bone loss requiring multiple subsequent procedures (*see generally Florio v Kosimar*, 79 AD3d 625, 626).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

416

CA 16-01604

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

DAVID VIDEAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NRG ENERGY, INC., NRG HUNTLEY OPERATIONS, INC., AND HUNTLEY POWER, LLC, DEFENDANTS-RESPONDENTS.

KAMMHOLZ MESSINA, LLP, VICTOR (BRADLEY P. KAMMHOLZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA, LLP, SYRACUSE (KENNETH M. ALWEIS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Livingston County (Dennis S. Cohen, A.J.), entered January 28, 2016. The order granted defendants' motion for summary judgment dismissing plaintiff's complaint and denied plaintiff's cross motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint with respect to the Labor Law § 240 (1) claim, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries that he sustained when he stepped on the midrail of a scaffold, began to fall, and grabbed onto a pipe to stop his fall. At the time of the incident, he was working for API Construction Services (API), which had been subcontracted to perform insulation work on property allegedly owned by defendants. The scaffold was supplied by another subcontractor, Patton Construction (Patton), and only employees of Patton were authorized to assemble, modify or adjust the scaffolds.

Defendants moved for summary judgment dismissing the complaint in its entirety. Plaintiff opposed the motion only insofar as it sought dismissal of the Labor Law §§ 240 (1) and 241 (6) claims, and cross-moved for partial summary judgment on liability on the section 240 (1) claim. Supreme Court granted defendants' motion in its entirety and denied plaintiff's cross motion. We agree with plaintiff that the court erred in granting that part of defendants' motion with respect to the section 240 (1) claim, and we therefore modify the order accordingly.

Contrary to defendants' contention, they failed to establish as a matter of law that plaintiff's actions were the sole proximate cause of the accident, i.e., that "plaintiff had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40; *see Fazekas v Time Warner Cable, Inc.*, 132 AD3d 1401, 1403).

Defendants' submissions establish that, on the day of the accident, there were planks missing from the scaffold that plaintiff needed to use for his work, and the scaffold itself was too low for plaintiff to reach the area where he needed to work. Inasmuch as only Patton employees could modify the scaffolds, a request was made for the scaffold to be adjusted or modified for plaintiff's use. Several hours later, during plaintiff's afternoon break, he was informed that the scaffold was being modified. Upon returning to his work area following his break, plaintiff observed that a green tag had been placed on the scaffold, which meant that the scaffold was ready for use. When plaintiff climbed the scaffold, he realized that it was still too short to reach the area of his work, i.e., the scaffold was inadequate for the work plaintiff needed to perform. Although two of plaintiff's supervisors had directed him to wait until the required modifications could be performed, plaintiff testified during his deposition that a third supervisor subsequently told him, " 'It's got to be done. Get up there and get it done. Do what you have to do to get it done. . . Do whatever to get it done.' "

Inasmuch as a modification to the scaffold was required and could have taken hours to be performed, we conclude that there are triable issues of fact whether an adequate safety device was "readily available" for plaintiff's use (*Montgomery v Federal Express Corp.*, 4 NY3d 805, 806; *see Miro v Plaza Constr. Corp.*, 9 NY3d 948, 949; *cf. Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554-555). Moreover, based on plaintiff's testimony describing the third supervisor's instructions, we conclude that there are triable issues of fact whether plaintiff chose "for no good reason" not to wait for the scaffold to be modified (*Cahill*, 4 NY3d at 40; *see DeRose v Bloomingdale's Inc.*, 120 AD3d 41, 45-47). Although the third supervisor denied making such a comment, that denial merely establishes that neither party is entitled to summary judgment on the Labor Law § 240 (1) claim.

With respect to the dismissal of plaintiff's Labor Law § 241 (6) claim, we note that, in his bills of particulars, plaintiff asserted numerous violations of the Industrial Code (12 NYCRR 23-1.1 *et seq.*) in support of that claim. In opposition to defendants' motion, however, plaintiff relied on only sections 23-5.1 (e) (1), 23-5.1 (e) (5) and 23-5.1 (f). On this appeal, plaintiff contends that the court erred in dismissing the Labor Law § 241 (6) claim only insofar as it was based on the violation of sections 23-5.1 (e) (1) and (5). We thus conclude that plaintiff has abandoned any reliance on the sections cited in his bills of particulars, except for sections 23-5.1 (e) (1) and (5) "by failing to address them either in the motion court

or on appeal" (*Cardenas v One State St., LLC*, 68 AD3d 436, 438; *see Roosa v Cornell Real Prop. Servicing, Inc.*, 38 AD3d 1352, 1354; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Contrary to plaintiff's contention, the court properly dismissed his Labor Law § 241 (6) claim insofar as it was based on the alleged violations of 12 NYCRR 23-5.1 (e) (1) and (5) because defendants established as a matter of law that any alleged violation of those sections was not a proximate cause of plaintiff's accident (*see generally Schroeder v Kalenak Painting & Paperhanging, Inc.*, 27 AD3d 1097, 1099, *affd* 7 NY3d 797; *Carroll v County of Erie*, 48 AD3d 1076, 1077). Those Industrial Code sections concern the size and placement of planks on a scaffold, and plaintiff admitted at his deposition that his accident did not occur because of any problems with the planks on the scaffold. Rather, his accident occurred because the scaffold was not high enough to enable him to reach his work area. We thus conclude that, even if there are triable issues of fact whether planks were missing at the time the accident occurred, which would render those sections applicable to the facts of this case (*see Klimowicz v Powell Cove Assoc., LLC*, 111 AD3d 605, 607), defendants established as a matter of law that plaintiff's accident did not result from any violation of those sections. Plaintiff, in opposition to the motion, failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

417

CA 16-00863

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

CARLOS M. SUAREZ ALFONSO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

EDWIN R. LOPEZ, ET AL., DEFENDANTS,
AND UNITED PARCEL SERVICE, INC.,
DEFENDANT-RESPONDENT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (STEVEN WILLIAMS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ANSA ASSUNCAO, LLP, WHITE PLAINS (THOMAS O. O'CONNOR OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Hugh A. Gilbert, J.), entered February 9, 2016. The order granted the motion of defendant United Parcel Service, Inc., to dismiss the complaint against it.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained in an accident that occurred while he was working on the premises of United Parcel Service, Inc. (defendant). Plaintiff alleged that he was hired by a nonparty to this action to perform work at defendant's facility. After the accident, however, plaintiff filed a workers' compensation claim that listed defendant as his employer, and the Workers' Compensation Board (Board) issued five decisions that listed defendant as plaintiff's employer and ordered that defendant pay benefits to plaintiff. In lieu of answering, defendant moved to dismiss the complaint against it on the ground that plaintiff's claims are barred by the Workers' Compensation Law. Supreme Court granted the motion, and we affirm.

The Court of Appeals has long held that, "as to an employer, where workmen's compensation provides a remedy, the remedy that it provides, save for the rare case, is exclusive. Where liability is imposed upon an employer to provide workmen's compensation and compensation is provided, that liability is exclusive and in the stead of any other employer liability whatsoever" (*O'Rourke v Long*, 41 NY2d 219, 221; *see Weiner v City of New York*, 19 NY3d 852, 854; *O'Connor v Midiria*, 55 NY2d 538, 540-541). When there are questions of fact concerning the availability of workers' compensation benefits, " 'the

plaintiff may not choose the courts as the forum for the resolution of such questions.' The Workers' Compensation Board . . . has primary jurisdiction over the issue of the availability of coverage . . . , and a plaintiff has no choice but to litigate this issue before the Board" (*Liss v Trans Auto Sys.*, 68 NY2d 15, 20-21). Thus, the issue whether a plaintiff was acting as an employee of a defendant at the time of the injury is a question of fact to be resolved by the Board (*see Besaw v St. Lawrence County Assn. for Retarded Children*, 301 AD2d 949, 949-950; *Matter of Hofsiss v Board of Educ. of Mamaroneck Union Free Sch. Dist.*, 287 AD2d 566, 567-568; *Corp v State of New York*, 257 AD2d 742, 743).

Here, plaintiff initiated a workers' compensation claim against defendant and has continually received benefits from defendant since March 2015. We therefore conclude that the court properly dismissed plaintiff's complaint against defendant because the workers' compensation benefits that he is receiving are his sole remedy against defendant at this juncture (*see generally Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 560; *Tomushunas v Designcrete of Am., LLC*, 113 AD3d 1142, 1142; *Degruchy v Xerox Corp.*, 188 AD2d 1003, 1003). Moreover, should the Board ultimately decide that defendant was not plaintiff's special employer, plaintiff's remedy would be either to move to vacate the order dismissing the complaint against defendant pursuant to CPLR 5015 (a) (5) (*see Dupkanicova v James*, 17 AD3d 627, 628), or to commence a new action against defendant within six months of the Board's decision pursuant to CPLR 205 (c) (*see Cunningham v State of New York*, 60 NY2d 248, 253; *Corp*, 257 AD2d at 743).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

420

KA 14-01881

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KALIL T. WALKER, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (KELLY CHRISTINE WOLFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered June 25, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and assault in the second degree (§ 120.05 [3]), defendant contends that Supreme Court erred in refusing to suppress evidence resulting from an unlawful pursuit. We reject that contention.

While patrolling in a high-crime area known for gang activity, drugs and weapons, officers effectuated a traffic stop of a vehicle in which defendant was a passenger. Defendant immediately exited the vehicle, positioning his body so that his back was to the officers and they could not observe his right hand. When directed to return to the vehicle, defendant refused and, instead, turned to face the police officers. At that moment, the officers observed that defendant had his right hand at his waistband. The officers "recognized that as a possible threat" because their training and experiences had taught them that individuals "keep their weapons tucked inside their waistband right where [defendant] was reaching." Notably, there was no innocuous explanation for such hand positioning because defendant's pants were not "sagging or being anywhere other than at his waist." One of the officers drew his weapon, at which point defendant immediately fled. During the ensuing chase, the officers saw defendant drop a "dark heavy object" that was later recovered and identified as a firearm.

Contrary to defendant's contention, the officers' conduct "was justified in its inception and at every subsequent stage of the encounter" (*People v Nicodemus*, 247 AD2d 833, 835, *lv denied* 92 NY2d 858). "[I]t is well settled that the police may pursue a fleeing defendant if they have a reasonable suspicion that defendant has committed or is about to commit a crime . . . While flight alone is insufficient to justify pursuit, defendant's flight in response to an approach by the police, *combined with other specific circumstances indicating that the suspect may be engaged in criminal activity*, may give rise to reasonable suspicion, the necessary predicate for police pursuit" (*People v Rainey*, 110 AD3d 1464, 1465 [internal quotation marks omitted]; *see People v Sierra*, 83 NY2d 928, 929). "In determining whether a pursuit was justified by reasonable suspicion, the emphasis should not be narrowly focused on . . . any . . . single factor, but [rather should be based] on an evaluation of the totality of circumstances, which takes into account the realities of everyday life unfolding before a trained officer" (*People v Bachiller*, 93 AD3d 1196, 1197, *lv dismissed* 19 NY3d 861 [internal quotation marks omitted]).

Here, we conclude that defendant's positioning and his refusal to comply with the officer's request to return to the vehicle, while not alone indicative of criminal behavior, could be "considered in conjunction with other attendant circumstances" to establish the requisite reasonable suspicion of criminal activity (*People v Martinez*, 80 NY2d 444, 448). In our view, once defendant refused the officer's request to return to the vehicle and turned toward the officers, the officers could "reasonably suspect[] that defendant was armed and posed a threat to their safety because his actions were directed to the area of his waistband, which was concealed from their view" (*People v Fagan*, 98 AD3d 1270, 1271, *lv denied* 20 NY3d 1061, *cert denied* ___ US ___, 134 S Ct 262). The officer who drew his weapon was justified in doing so out of a concern for his own safety (*see People v James*, 272 AD2d 75, 75, *lv denied* 95 NY2d 866, *reconsideration denied* 95 NY2d 965; *People v Wright*, 100 AD2d 523, 525; *see generally People v Benjamin*, 51 NY2d 267, 271). We thus conclude that defendant's flight, "in conjunction with the attendant circumstances, gave rise to the requisite reasonable suspicion justifying police pursuit" (*People v Brown*, 67 AD3d 1439, 1440, *lv denied* 14 NY3d 798; *see Bachiller*, 93 AD3d at 1197-1198; *cf. People v Robbins*, 83 NY2d 928, 930).

Inasmuch as "the pursuit of the defendant was justified, the gun he discarded during the pursuit was not subject to suppression as the product of unlawful police conduct" (*People v Williams*, 120 AD3d 1441, 1442, *lv dismissed* 24 NY3d 1089; *see People v Gayden*, 126 AD3d 1518, 1518-1519, *affd* 28 NY3d 1035; *People v Feliciano*, 140 AD3d 1776, 1777, *lv denied* 28 NY3d 1027). Moreover, for the same reason, defendant's statements to the police are "not subject to suppression as fruit of the poisonous tree" (*Feliciano*, 140 AD3d at 1777; *see People v Sims*,

106 AD3d 1473, 1474, *appeal dismissed* 22 NY3d 992).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

429

CAF 16-01476

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

IN THE MATTER OF ERIN J. SMITH,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES,
RESPONDENT-APPELLANT.

DAVID J. PAULSEN, COUNTY ATTORNEY, WATERTOWN (JOSEPH P. HUGHSON OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Jefferson County (Eugene J. Langone, Jr., J.), entered November 6, 2015 in a proceeding pursuant to Family Court Act article 4. The order, among other things, denied respondent's written objections to the order of the Support Magistrate.

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

Memorandum: Petitioner father commenced this Family Court Act article 4 proceeding seeking to terminate an order of support with respect to his daughter, who had been released to his custody on a trial basis but remained in legal custody of respondent (*see* § 1055 [b] [i] [E]). Respondent opposed the petition, contending that it was entitled to reimbursement for foster care maintenance payments that it had expended on the daughter's behalf during the one-month trial discharge period. After a hearing, the Support Magistrate determined, inter alia, that, given the father's financial resources and the expenses he had incurred as a result of the child residing with him during the trial discharge period, he was entitled to a deviation from the level of child support calculated under the Child Support Standards Act (CSSA) (*see* § 413 [1] [f]), and that it would be "unjust and inappropriate" to require him to pay support during that period. Respondent appeals from an order that denied its objections to the Support Magistrate's order, and we affirm.

When a child is placed in foster care, the child's parent has a continuing obligation to provide financial support (*see* Social Services Law § 398 [6] [d]; Family Ct Act §§ 415, 422). That obligation is governed by the guidelines delineated in the CSSA (*see Matter of Dutchess County Dept. of Social Servs. v Day*, 96 NY2d 149, 151-155), which apply "even in residential or foster care reimbursement contexts" (*id.* at 155). Under the circumstances of this

case, we conclude that Family Court properly denied respondent's objections inasmuch as the Support Magistrate properly applied the CSSA guidelines, analyzed the relevant factors and made specific findings on the record concerning why it would be "unjust or inappropriate" to require the father to pay the amount of child support calculated under the CSSA formula (*see* Family Ct Act § 413 [1] [f]).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

433

CA 16-01577

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

DYLAN DEUSER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PRECISION CONSTRUCTION & DEVELOPMENT, INC.,
DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (MELISSA A. FOTI OF COUNSEL), FOR DEFENDANT-APPELLANT.

MARCUS & CINELLI, LLP, WILLIAMSVILLE (BRIAN L. CINELLI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered April 13, 2016. The order, insofar as appealed from, denied the motion of defendant Precision Construction & Development, Inc. for summary judgment dismissing the complaint against it.

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

Memorandum: Precision Construction & Development, Inc. (defendant) appeals from an order that, inter alia, denied its motion for summary judgment dismissing the complaint. "The right to appeal from an intermediate order terminates with the entry of a final judgment" (*City of Syracuse v COR Dev. Co., LLC*, 147 AD3d 1510, 1510 [internal quotation marks omitted]; *see Matter of Aho*, 39 NY2d 241, 248; *see generally* CPLR 5501 [a] [1]). Because a final judgment in this action was entered on January 17, 2017, defendant's appeal from the intermediate order must be dismissed. Defendant may raise its contentions in an appeal from the final judgment (*see generally Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

434

CA 15-02091

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

IN THE MATTER OF THOMAS HILL,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (NORMAN P. EFFMAN OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (WILLIAM E. STORRS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered November 13, 2015 in a CPLR article 78 proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his CPLR article 78 petition seeking to annul the Parole Board's determination denying his request for release to parole supervision. The Attorney General has advised this Court that, subsequent to that denial and during the pendency of this appeal, petitioner reappeared before the Parole Board in December 2016, at which time he was given an " 'open date' " for release. "In view of his reappearance, the appeal must be dismissed as moot," regardless whether that open date has since been suspended (*Matter of Dobranski v Alexander*, 69 AD3d 1091, 1091; *see Matter of Brockington v Fischer*, 119 AD3d 1372, 1373). Contrary to petitioner's contention, the exception to the mootness doctrine does not apply (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

438

TP 16-02001

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

IN THE MATTER OF AKEEM A. BRENSON, PETITIONER,

V ORDER

DONALD VENETTOZZI, DIRECTOR, SPECIAL HOUSING,
NEW YORK STATE DEPARTMENT OF CORRECTIONS AND
COMMUNITY SUPERVISION, RESPONDENT.

AKEEM A. BRENSON, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, 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, Seneca County [Dennis F. Bender, A.J.], entered October 27, 2016) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

439

KA 16-00370

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARWIN ZUNIGA-ROCHA, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS P. DIFONZO OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Genesee County Court (Robert C. Noonan, J.), dated August 21, 2015. 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 the People failed to establish his risk level by clear and convincing evidence. We reject that contention. Defendant was convicted upon his *Alford* plea of sexual abuse in the first degree (Penal Law § 130.65 [1]). During the plea colloquy, County Court placed on the record the conditions upon which the plea was entered, including the need for defendant to be classified as a sex offender, and the prosecutor placed on the record the proof that the People intended to offer at trial. We reject defendant's contention that, inasmuch as he did not admit guilt during the plea colloquy, the court erred in relying upon the evidence set forth by the prosecutor. "Although defendant did not admit guilt as part of the *Alford* plea, the evidence was elicited at the time of the entry of the plea of guilty, [and thus] it was deemed established for the purposes of SORA classification" (*People v Jones*, 15 AD3d 929, 930). We note in any event that the court also relied upon the victim's grand jury testimony and her supporting deposition. It is well settled that, in making a SORA determination, "a court may consider reliable hearsay, including grand jury testimony" (*People v Jewell*, 119 AD3d 1446, 1447, *lv denied* 24 NY3d 905), and a victim's sworn deposition (*see People v Witherspoon*, 140 AD3d 1674, 1675, *lv*

denied 28 NY3d 905).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

440

KA 14-01365

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES GREFER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered January 9, 2014. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the order of restitution with respect to Geico and reducing the surcharge on the remaining orders of restitution to 5% of the amount of restitution, and as modified the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of grand larceny in the second degree (Penal Law § 155.40 [1]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of criminal tax fraud in the third degree (Tax Law § 1804). The guilty pleas were entered in one plea proceeding. We agree with defendant that the waiver of the right to appeal is invalid because "the minimal inquiry made by County Court was insufficient to establish that the court engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Hassett*, 119 AD3d 1443, 1443-1444, *lv denied* 24 NY3d 961 [internal quotation marks omitted]). In addition, "there is no basis upon which to conclude that the court ensured 'that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Jones*, 107 AD3d 1589, 1590, *lv denied* 21 NY3d 1075, quoting *People v Lopez*, 6 NY3d 248, 256).

Defendant contends with respect to appeal No. 1 that the court

erred in ordering restitution to Geico because, as the People concede, it did not sustain any out-of-pocket loss (*see* Penal Law § 60.27 [1]; *People v Horne*, 97 NY2d 404, 412). Although defendant failed to preserve that contention for our review, we nevertheless exercise our power to address it as a matter of discretion in the interest of justice (*see People v Anderson*, 70 AD3d 1320, 1320, *lv denied* 14 NY3d 885; *see generally Horne*, 97 NY2d at 414 n 3), and we modify the judgment in appeal No. 1 by vacating that order of restitution.

Defendant further contends with respect to appeal No. 1 that the court erred in imposing a 10% surcharge on the restitution orders. An additional surcharge of 5% is authorized only "[u]pon the filing of an affidavit of the official or organization designated pursuant to [CPL 420.10 (8)] demonstrating that the actual cost of the collection and administration of restitution . . . in a particular case exceeds [5%] of the entire amount of the payment" (Penal Law § 60.27 [8]). "There is no affidavit in the record supporting the imposition of a 10% surcharge on the amount of restitution ordered in this case" (*People v Whitmore*, 234 AD2d 1008, 1008; *see People v Huddleston*, 134 AD3d 1458, 1459, *lv denied* 27 NY3d 966). Although defendant failed to preserve his contention for our review (*see People v Kirkland*, 105 AD3d 1337, 1338-1339, *lv denied* 21 NY3d 1043), we again exercise our power to review it as a matter of discretion in the interest of justice (*see People v Parker*, 137 AD3d 1625, 1626-1627; *Huddleston*, 134 AD3d at 1459). We therefore further modify the judgment in appeal No. 1 by reducing the surcharge on the remaining orders of restitution to 5%.

Finally, we reject defendant's contention in appeal Nos. 1 and 2 that the sentence is unduly harsh and severe.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

441

KA 14-01366

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES GREFER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered January 9, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal tax fraud in the third degree.

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

Same memorandum as in *People v Grefer* ([appeal No. 1] ___ AD3d ___ [Apr. 28, 2017]).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

442

KA 15-01726

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN T. TUMOLO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oswego County Court (Donald E. Todd, J.), rendered August 18, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), defendant challenges the severity of his sentence. As a preliminary matter, we conclude that the waiver of the right to appeal is invalid because the perfunctory inquiry made by County Court was "insufficient to establish that the court engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Howington*, 144 AD3d 1651, 1652 [internal quotation marks omitted]; *see People v Shaw*, 133 AD3d 1312, 1313, *lv denied* 26 NY3d 1150). Nevertheless, we conclude that the sentence is not unduly harsh or severe. We note, however, that the certificate of conviction incorrectly reflects that defendant was sentenced to three years of postrelease supervision, and it must therefore be amended to reflect that he was sentenced to two years of postrelease supervision (*see e.g. People v Saxton*, 32 AD3d 1286, 1286-1287).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

443

KA 14-01662

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES D. HILLYARD, JR., DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (WILLIAM G. PIXLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (KELLY CHRISTINE WOLFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered September 3, 2014. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree (two counts), attempted robbery in the first degree, attempted robbery in the second degree and criminal possession of a weapon 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 to the entire indictment charging him with, inter alia, two counts of murder in the second degree (Penal Law § 125.25 [1], [3]) and one count of attempted robbery in the first degree (§§ 110.00, 160.15 [4]), in exchange for a sentence of 20 years to life. To the extent that defendant contends that the waiver of the right to appeal is not valid, we reject that contention and conclude that defendant knowingly and intelligently waived his right to appeal (*see generally People v Sanders*, 25 NY3d 337, 341-342), and thus defendant's challenge to the factual sufficiency of the plea is encompassed by his waiver of the right to appeal (*see People v McCrea*, 140 AD3d 1655, 1655, *lv denied* 28 NY3d 933). Moreover, defendant failed to preserve that challenge for our review inasmuch as he failed to move to withdraw the plea or vacate the judgment of conviction on that ground (*see People v Lopez*, 71 NY2d 662, 665). In any event, defendant's challenge is without merit. Although defendant's initial statements may have negated essential elements of those crimes, i.e., that he lacked knowledge that his codefendants attempted to rob the victim and that he did not intend to kill the victim, "his subsequent statements removed any doubt" that he was aware that his codefendants attempted to rob the victim after he was shot by defendant and that, by firing the gun at the victim, he was intentionally causing his

death (*People v DeMarco*, 117 AD3d 1522, 1523, *lv denied* 23 NY3d 1061; *see People v Davoy*, 142 AD3d 1301, 1302, *lv denied* 28 NY3d 1144).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

444

KA 14-01562

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PABLO W. LOPEZ, DEFENDANT-APPELLANT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (BRIAN SHIFFRIN 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 (Joanne M. Winslow, J.), rendered February 25, 2014. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, that part of defendant's motion seeking to suppress tangible evidence is granted, the indictment is dismissed, and the matter is remitted to Supreme Court, Monroe County, for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of two counts of criminal possession of a weapon in the second degree, defendant contends that Supreme Court erred in denying his motion to suppress two semi-automatic pistols recovered by Rochester police officers following the stop and subsequent chase of defendant's vehicle. We agree.

The evidence at the suppression hearing established that police officers responded to two calls, approximately an hour apart, concerning an address on North Goodman Street. The first call was for "family trouble," and the second was for "shots fired." The complainant provided a detailed description of the suspect in both incidents, her children's father, which was broadcast by the police dispatcher following the second incident. The suspect was described as an Hispanic male, five foot seven, with tattoos on his neck and arms, dark clothing, including a Yankees baseball cap, and crossed, "Asian-type" eyes. Approximately half an hour after the second call, an officer spotted an Hispanic man with tattoos on his neck and arms walking on North Goodman Street. Although there were several police cars at the scene, the man "had . . . a straight ahead stare, would not look towards [the officer], would not look at any of the police

cars sitting on the street, just walked ahead and looked straight ahead." After the man passed him, the officer observed him get into the rear seat of a vehicle, which proceeded in the officer's direction. The officer stopped the vehicle and, when he looked inside, he saw that "the front seat passenger was a male Hispanic with tattoos on his neck, and he also had Asian style eyes which were also crossed." The front seat passenger, who turned out to be the suspect involved in the two incidents, also had a handgun in his waistband. The officer drew his service weapon and instructed defendant, the driver, to turn the car off. Defendant did not comply, but instead drove away with several police cars in pursuit. After a short chase, defendant stopped his vehicle and the occupants were arrested. The rear seat passenger was wearing a white T-shirt and pajama pants. Officers thereafter recovered two pistols on the route taken by defendant. The court denied defendant's motion to suppress the handguns, concluding that the officer was justified in stopping defendant's vehicle.

"Although the determination of the suppression court is entitled to great weight (*see People v Prochilo*, 41 NY2d 759, 761 [1977]), we have the fact-finding authority to determine whether the police conduct was justified (*see People v McRay*, 51 NY2d 594, 605 [1980])" (*People v Noah*, 107 AD3d 1411, 1412), and we conclude that the weapons should have been suppressed as the fruit of an illegal stop. The necessary predicate for the stop of defendant's vehicle was "at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime" (*People v Spencer*, 84 NY2d 749, 753, *cert denied* 516 US 905; *see People v Brooks*, 266 AD2d 864, 864). Here, the stop was premised upon the officer's belief that the man who got into the rear seat of defendant's vehicle was the suspect in the two incidents on North Goodman Street. The man the officer observed walking past him matched the most general part of the complainant's description, i.e., an Hispanic male, and he also had tattoos on his neck and arms. The officer could not tell, however, whether the man had the most distinctive feature in that description, i.e., crossed, "Asian style" eyes (*cf. People v Rodriquez*, 144 AD3d 498, 498, *lv denied* 28 NY3d 1188; *People v Cash J.Y.*, 60 AD3d 1487, 1488-1489, *lv denied* 12 NY3d 913; *People v Johnson*, 207 AD2d 806, 807, *lv denied* 84 NY2d 1033). Moreover, the clothing worn by the man did not in any way match the description of the suspect's clothing provided by the complainant, and the discrepancies cannot be characterized as slight (*cf. People v Brujan*, 104 AD3d 481, 481, *lv denied* 21 NY3d 1014; *Matter of Dominique W.*, 84 AD3d 657, 658; *People v Smalls*, 292 AD2d 213, 214, *lv denied* 98 NY2d 681). Rather, the inconsistencies between the suspect's clothing as described by the complainant and the clothing worn by the man who walked past the officer on North Goodman Street rendered the officer's suspicion that the man was the suspect less than reasonable (*see People v Thompson*, 127 AD3d 658, 661; *Noah*, 107 AD3d at 1412; *People v Polhill*, 102 AD3d 988, 989; *People v Beckett*, 88 AD3d 898, 900). Contrary to the People's contention, moreover, we conclude that the man's conduct in staring straight ahead as he walked among the police cars was "innocuous and readily susceptible of an innocent interpretation" and, as such, did not generate a reasonable suspicion

of criminality (*People v Powell*, 246 AD2d 366, 369, *appeal dismissed* 92 NY2d 886).

Given that the stop of defendant's vehicle was not supported by a reasonable suspicion of criminality, the officer's observation of the actual suspect in the front seat with a weapon in his waistband was "the unattenuated by-product of the [illegal] stop" (*People v Smith*, 1 AD3d 965, 966) and, inasmuch as the disposal of the weapons during the ensuing chase was precipitated by that illegality, the weapons should have been suppressed (*see People v Carmichael*, 92 AD3d 687, 688, *lv dismissed* 19 NY3d 958; *People v McFadden*, 136 AD2d 934, 935). In addition, because our determination results in the suppression of all evidence supporting the crimes charged, the indictment must be dismissed (*see People v Freeman*, 144 AD3d 1650, 1651).

We therefore reverse the judgment and grant defendant's motion insofar as it sought suppression of tangible evidence, dismiss the indictment, and remit the matter to Supreme Court for proceedings pursuant to CPL 470.45. In light of our decision, we do not address defendant's remaining contentions.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

446

KA 09-01272

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ELVIRA M. PUSKAR, DEFENDANT-APPELLANT.

REBECCA L. WITTMAN, UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered December 8, 2008. The judgment convicted defendant, upon her plea of guilty, of criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Oneida County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting her, upon her plea of guilty, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). As the People correctly concede, County Court failed to advise defendant, a noncitizen, of the deportation consequences of her felony guilty plea, as required by *People v Peque* (22 NY3d 168). We therefore hold the case, reserve decision and remit the matter to County Court to afford defendant the opportunity to move to vacate her plea based upon a showing that there is a "reasonable probability" that she would not have pleaded guilty had she known that she faced the risk of being deported as a result of the plea (*id.* at 176; *see People v Odle*, 134 AD3d 1132, 1133; *People v Medina*, 132 AD3d 1363, 1363-1364).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

447

KA 15-00654

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL H. CELI, DEFENDANT-APPELLANT.

THEODORE W. STENUF, MINOA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oswego County Court (Donald E. Todd, J.), rendered December 15, 2014. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of murder in the second degree (Penal Law § 125.25 [3]). Defendant's valid waiver of the right to appeal forecloses our review of his challenge to County Court's suppression ruling (*see People v Kemp*, 94 NY2d 831, 833), and his challenge to the severity of the sentence (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

448

KA 14-02169

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDRE NORWOOD, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DANIEL GROSS 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, Monroe County (Daniel J. Doyle, J.), entered October 29, 2014. The order denied the motion of defendant to vacate a judgment of conviction.

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

Memorandum: Defendant appeals from an order denying his motion pursuant to CPL 440.10 (1) (h) seeking to vacate the judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [2]), based upon the alleged denial of effective assistance of counsel. Specifically, defendant alleged that, when he discussed a plea offer of 15 years to life, defense counsel failed to advise him that the maximum sentence, if convicted after trial, was 25 years to life. Following a hearing, Supreme Court determined that defendant's self-serving testimony to that effect was not credible and that he therefore failed to meet the requisite burden of proving by a preponderance of the evidence that he was denied effective assistance of counsel (*see* CPL 440.30 [6]). "The court's credibility determination is entitled to great weight . . . , and we perceive no basis for reversal on the record before us" (*People v Smith*, 16 AD3d 1081, 1082, *lv denied* 4 NY3d 891; *see People v Campbell*, 106 AD3d 1507, 1508, *lv denied* 21 NY3d 1002).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

449

CA 16-00451

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

IN THE MATTER OF THE APPLICATION FOR DISCHARGE
OF CHRISTOPHER J., CONSECUTIVE NO. 545846,
FROM CENTRAL NEW YORK PSYCHIATRIC CENTER PURSUANT
TO MENTAL HYGIENE LAW SECTION 10.09,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (GIGI E. MYERS OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (Louis P. Gigliotti, A.J.), entered January 29, 2016 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, adjudged that petitioner is a sex offender who suffers from a mental abnormality and that petitioner be placed on strict and intensive supervision and treatment.

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

Memorandum: Petitioner appeals from an order pursuant to Mental Hygiene Law article 10 in which Supreme Court determined, following a nonjury trial, that he has a mental abnormality that predisposes him to committing sex offenses (*see* § 10.03 [i]) and that he is a sex offender requiring strict and intensive supervision. Contrary to petitioner's contention, we conclude that the evidence is legally sufficient to support the court's determination that he has a mental abnormality within the meaning of Mental Hygiene Law § 10.03 (i). Respondents' expert psychologist "presented '[a] detailed psychological portrait' that enabled [her] to determine the level of control [petitioner] had over his conduct" (*Matter of State of New York v Dennis K.*, 27 NY3d 718, 734, *cert denied* ___ US ___, 137 S Ct 579, quoting *Matter of State of New York v Donald DD.*, 24 NY3d 174, 188). That portrait included petitioner's diagnoses of pedophilic disorder and personality disorder with antisocial and narcissistic

traits, which in combination created "the perfect storm" that predisposes petitioner to commit sexual offenses and causes him difficulty in controlling his pedophilic urges. In addition, respondents' expert relied upon petitioner's "prolific offending history" to support her conclusion that petitioner has serious difficulty in controlling his sexual conduct. Respondents thereby sustained their burden of establishing by clear and convincing evidence that petitioner suffers from "a congenital or acquired condition, disease or disorder that affects [his] emotional, cognitive, or volitional capacity . . . in a manner that predisposes him . . . to the commission of conduct constituting a sex offense and that results in [him] having serious difficulty in controlling such conduct" (§ 10.03 [i]; *see Matter of State of New York v Gierszewski*, 81 AD3d 1473, 1473, *lv denied* 17 NY3d 702).

We further conclude that the court's determination that petitioner suffers from a mental abnormality within the meaning of the statute is not against the weight of the evidence. The testimony of petitioner's expert that petitioner demonstrated control over his offending behavior by exhibiting patience in his pattern of grooming his child victims and their adult caretakers raised a credibility issue that the court was entitled to resolve against him. The court's determination is entitled to great deference, given the court's "opportunity to evaluate the weight and credibility of conflicting expert testimony" (*Matter of State of New York v Chrisman*, 75 AD3d 1057, 1058).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

450

CA 16-02009

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

ORCHARD EARTH AND PIPE CORPORATION,
PLAINTIFF-APPELLANT,

V ORDER

CONCRETE SLIPFORM, INC., DEFENDANT-RESPONDENT.

TADDEO & SHAHAN, LLP, SYRACUSE (STEVEN C. SHAHAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BYRNE, COSTELLO & PICKARD, P.C., SYRACUSE (GREGORY P. BAZAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Spencer J. Ludington, A.J.), entered July 18, 2016. The order, insofar as appealed from, granted those parts of the motion of defendant seeking summary judgment dismissing plaintiff's first and second causes of action.

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

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

451

CA 16-01499

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

RONALD L. ALLEN, PLAINTIFF-RESPONDENT,

V ORDER

DAWN E. ALLEN, DEFENDANT-APPELLANT.

GERALD J. VELLA, SPRINGVILLE, FOR DEFENDANT-APPELLANT.

CARR SAGLIMBEN LLP, OLEAN (JAY CARR OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Allegany County (Terrence M. Parker, A.J.), entered November 9, 2015 in a divorce action. The judgment equitably distributed the property of the parties.

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

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

452

CA 16-00373

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

WELLS FARGO BANK, N.A., SUCCESSOR BY MERGER TO WELLS FARGO BANK MINNESOTA, N.A., AS TRUSTEE, FORMERLY KNOWN AS NORWEST BANK MINNESOTA, N.A., AS TRUSTEE FOR CERTIFICATE HOLDERS OF SACO1 SERIES, 1999-2, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BONNIE M. DYSINGER, DEFENDANT-APPELLANT, ET AL., DEFENDANTS.

GARY B. STORM, GLORIETA, NEW MEXICO, OF THE NEW MEXICO BAR, ADMITTED PRO HAC VICE, FOR DEFENDANT-APPELLANT.

PARKER IBRAHIM & BERG LLC, NEW YORK CITY (SCOTT W. PARKER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Mark J. Grisanti, A.J.), dated November 4, 2015. The order denied the motion of defendant Bonnie M. Dysinger to vacate a default judgment.

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

Memorandum: In this residential foreclosure action, Bonnie M. Dysinger (defendant) appeals from an order that denied her motion pursuant to CPLR 5015 (a) (1) to vacate the default judgment of foreclosure on the ground of excusable default. We affirm. A party seeking to vacate an order or judgment on the ground of excusable default must offer a reasonable excuse for its default and a meritorious defense to the action (*see Wells Fargo Bank, NA v Besemer*, 131 AD3d 1047, 1049; *Calaci v Allied Interstate, Inc.* [appeal No. 2], 108 AD3d 1127, 1128). With respect to the reasonable excuse prong, the determination whether the moving party's excuse is reasonable lies within the trial court's sound discretion (*see Wells Fargo Bank, NA*, 131 AD3d at 1049; *Abbott v Crown Mill Restoration Dev., LLC*, 109 AD3d 1097, 1099). Although defendant averred that she previously had received other documents from plaintiff and mistakenly believed that the summons and complaint likewise required no response, the summons contained language mandated by statute warning her that the failure to serve an answer to the complaint may result in default judgment and advising her to speak to an attorney (*see generally* RPAPL 1320). We thus conclude that defendant failed to proffer a reasonable excuse for her default (*see U.S. Bank N.A. v Brown*, 147 AD3d 428, 429; *U.S. Bank*

N.A. v Ahmed, 137 AD3d 1106, 1109; *Chase Home Fin., LLC v Minott*, 115 AD3d 634, 634-635), and we need not consider whether she established a potentially meritorious defense (*see Wells Fargo Bank, N.A. v Stewart*, 146 AD3d 921, 922-923; *Abbott*, 109 AD3d at 1100).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

453

CA 14-01560

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

KONDAUR CAPITAL CORPORATION, AS SEPARATE TRUSTEE
OF MATAWIN VENTURES TRUST SERIES 2012-3,
PLAINTIFF-RESPONDENT,

V ORDER

DIANNE L. LUNN, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

DIANNE L. LUNN, DEFENDANT-APPELLANT PRO SE.

JOHN PINCUS, NEW YORK CITY, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered July 10, 2014 in a mortgage foreclosure action. The order, among other things, granted plaintiff's motion for summary judgment.

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

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

454

CA 15-00733

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

NNPL TRUST SERIES 2012-1, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DIANNE L. LUNN, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

DIANNE L. LUNN, DEFENDANT-APPELLANT PRO SE.

JOHN PINCUS, NEW YORK CITY, FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered March 11, 2015 in a mortgage foreclosure action. The judgment, among other things, ordered that the mortgaged premises be sold.

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

Memorandum: Kondaur Capital Corporation, as Separate Trustee of Matawin Ventures Trust Series 2012-3 (Kondaur), the predecessor in interest to plaintiff, NNPL Trust Series 2012-1 (NNPL), commenced this action seeking to foreclose a mortgage secured by residential property owned by Dianne L. Lunn (defendant). Defendant executed a note with Access National Mortgage on February 23, 2006, and the mortgage was executed and delivered to Mortgage Electronic Registration Systems, Inc., solely as nominee for Access National Mortgage. It is undisputed that defendant defaulted on the note on January 1, 2008. The note was indorsed from Access National Mortgage to Countrywide Bank, NA; from Countrywide Bank, NA to Countrywide Home Loans Servicing, LP; from Countrywide Home Loans Servicing, LP to Bank of America, NA, which commenced a foreclosure action that it later withdrew; from Bank of America, NA to the Secretary of the Department of Housing and Urban Development (HUD); and by allonge to the note by HUD to Kondaur. Kondaur commenced the instant action in December 2013. Kondaur thereafter moved, inter alia, for summary judgment on the complaint and to amend the caption, and defendant cross-moved to dismiss the complaint based upon, inter alia, Kondaur's alleged lack of standing to commence the action. Supreme Court granted Kondaur's motion, and defendant appeals.

Contrary to defendant's contention, the court properly determined that Kondaur had standing to commence the foreclosure action, and

granted that part of Kondaur's motion for summary judgment and entered a judgment of foreclosure. " 'In an action to foreclose a mortgage, the plaintiff has standing where, at the time the action is commenced, it is the holder or assignee of both the subject mortgage and the underlying note' " (*JPMorgan Chase Bank, N.A. v Kobee*, 140 AD3d 1622, 1623-1624; *see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 360-361; *PennyMac Corp. v Chavez*, 144 AD3d 1006, 1007). It is well established that " 'physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident' " (*JPMorgan Chase Bank, N.A. v Weinberger*, 142 AD3d 643, 645; *see Aurora Loan Servs., LLC,* 25 NY3d at 361). Contrary to defendant's contention, Kondaur established that it possessed the note at the time it commenced the action by providing the affidavit of a foreclosure specialist, in which he concluded that, based upon the business records he reviewed, the original note was delivered to Kondaur on December 10, 2012 and Kondaur had maintained possession of the note since that time (*see PennyMac Corp.*, 144 AD3d at 1007; *Kobee*, 140 AD3d at 1624; *cf. JPMorgan Chase Bank, N.A. v Hill*, 133 AD3d 1057, 1059).

Contrary to defendant's further contention, the court did not abuse its discretion in granting that part of Kondaur's motion seeking to amend the caption to substitute NNPL as plaintiff (*see* CPLR 1018). Kondaur established that it had transferred its interest in the note and mortgage to NNPL, and that NNPL had physical possession of the note and mortgage, thereby conferring standing to proceed with the foreclosure action against defendant. We have reviewed defendant's remaining contentions and conclude that they are without merit.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

457

CA 16-01638

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

NICHOLAS DOMINICK AND LORRAINE J. DOMINICK,
PLAINTIFFS-RESPONDENTS,

V ORDER

CHARLES MILLAR & SON CO., CHARLES MILLAR SUPPLY, INC., MILLAR SUPPLY, INC., PACEMAKER MILLAR STEEL & INDUSTRIAL SUPPLY COMPANY, INC., INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO CHARLES MILLAR & SON SUPPLY, INC., PACEMAKER MILLAR STEEL & INDUSTRIAL SUPPLY OF BINGHAMTON, INC., PACEMAKER STEEL & ALUMINUM OF BINGHAMTON CORP., PACEMAKER STEEL AND PIPING CO., INC., INDIVIDUALLY AND AS SUCCESSOR TO CHARLES MILLAR, PACEMAKER STEEL WAREHOUSE INC., DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

BOIES, SCHILLER & FLEXNER LLP, ALBANY (GEORGE F. CARPINELLO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BELLUCK & FOX, LLP, NEW YORK CITY (SETH A. DYMOND OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Charles C. Merrell, J.), entered December 3, 2015. The order denied the motion of defendants-appellants to set aside the 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; *see also* CPLR 5501 [a] [1], [2]).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

458

CA 16-02017

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

NICHOLAS DOMINICK AND LORRAINE J. DOMINICK,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CHARLES MILLAR & SON CO., CHARLES MILLAR SUPPLY, INC., MILLAR SUPPLY, INC., PACEMAKER MILLAR STEEL & INDUSTRIAL SUPPLY COMPANY, INC., INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO CHARLES MILLAR & SON SUPPLY, INC., PACEMAKER MILLAR STEEL & INDUSTRIAL SUPPLY OF BINGHAMTON, INC., PACEMAKER STEEL & ALUMINUM OF BINGHAMTON CORP., PACEMAKER STEEL AND PIPING CO., INC., INDIVIDUALLY AND AS SUCCESSOR TO CHARLES MILLAR, PACEMAKER STEEL WAREHOUSE INC., DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

BOIES, SCHILLER & FLEXNER LLP, ALBANY (GEORGE F. CARPINELLO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BELLUCK & FOX, LLP, NEW YORK CITY (SETH A. DYMOND OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Oneida County (Charles C. Merrell, J.), entered March 22, 2016. The judgment, among other things, awarded plaintiff money damages.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Nicholas Dominick (plaintiff) from his exposure to asbestos. Plaintiff Lorraine J. Dominick abandoned her loss of consortium claim at the ensuing trial. Defendants-appellants (Millar defendants) appeal from a judgment entered upon a jury verdict finding that plaintiff was exposed to asbestos from products supplied by the Millar defendants, that they failed to exercise reasonable care by not providing a warning about the hazards of exposure to asbestos with respect to their products, and that their failure to warn was a substantial contributing factor in causing plaintiff’s injuries.

Contrary to the contention of the Millar defendants, the evidence is sufficient to establish that asbestos in products they supplied was

a substantial factor in causing or contributing to plaintiff's injuries (*see Barnhard v Cybex Intl., Inc.*, 89 AD3d 1554, 1555). There is a valid line of reasoning and permissible inferences that could lead rational persons to the conclusion reached by the jury based upon the evidence presented at trial (*see Cohen v Hallmark Cards*, 45 NY2d 493, 499). Plaintiff testified that he was exposed to asbestos dust from asbestos boards and cement supplied by the Millar defendants that were used in the heat treat area of a pneumatic-tool making plant. The hypothetical question that plaintiff asked his expert was based on plaintiff's testimony or was otherwise "fairly inferable from the evidence" (*Tarlowe v Metropolitan Ski Slopes*, 28 NY2d 410, 414; *see Czerniejewski v Stewart-Glapat Corp.*, 269 AD2d 772, 772-773).

With respect to specific causation, the Court of Appeals held in *Parker v Mobil Oil Corp.* (7 NY3d 434, 448, *rearg denied* 8 NY3d 828) that the expert opinion must set forth that the plaintiff "was exposed to sufficient levels of the toxin to cause the [injuries]" (*see Sean R. v BMW of N. Am., LLC*, 26 NY3d 801, 808). However, as the Court of Appeals later wrote, "*Parker* explains that 'precise quantification' or a 'dose-response relationship' or 'an exact numerical value' is not required to make a showing of specific causation" (*Cornell v 360 W. 51st St. Realty, LLC*, 22 NY3d 762, 784, *rearg denied* 23 NY3d 996). There simply " 'must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of [the] agent that are known to cause the kind of harm that the plaintiff claims to have suffered' " (*id.*). Here, plaintiff's expert opined that, if a worker sees asbestos dust, that is a "massive exposure . . . capable of causing disease." Contrary to the Millar defendants' contention, the expert's opinion, considered along with the rest of her testimony, was sufficient to establish specific causation (*see Matter of New York City Asbestos Litig.*, 143 AD3d 483, 484; *Matter of New York City Asbestos Litig.*, 143 AD3d 485, 486; *Penn v Amchem Prods.*, 85 AD3d 475, 476).

We reject the Millar defendants' contention that Supreme Court abused its discretion in precluding them from calling certain witnesses. Plaintiff moved in limine to preclude the testimony of eight of plaintiff's former coworkers on the ground that the Millar defendants' disclosure of those witnesses was untimely. The court exercised its sound discretion in limiting the Millar defendants to calling just two of the witnesses inasmuch as the testimony of the remaining coworkers would be cumulative (*see Cor Can. Rd. Co., LLC v Dunn & Sgromo Engrs., PLLC*, 34 AD3d 1364, 1365). The court also properly denied the motion of the Millar defendants for leave to renew or reargue their opposition to the motion in limine inasmuch as they again failed to show that the testimony of the remaining coworkers would not be cumulative.

We reject the Millar defendants' contention that the jury's apportionment of fault is against the weight of the evidence (*see Matter of Eighth Jud. Dist. Asbestos Litig.* [appeal No. 4], 141 AD3d 1127, 1128). Indeed, they "did not meet [their] burden of

establishing the equitable shares of fault attributable to other tortfeasors in order to reduce [their] own liability for damages" (*id.*; *see Matter of New York Asbestos Litig.*, 28 AD3d 255, 256). Finally, we reject the Millar defendants' contention that the award of $3 million for future pain and suffering for one year deviates materially from what is reasonable compensation (*see* CPLR 5501 [c]; *New York City Asbestos Litig.*, 143 AD3d at 483, 485).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

459

CA 15-01713

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

IN THE MATTER OF THE APPLICATION OF STATE OF NEW YORK, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM D., AN INMATE IN CUSTODY OF THE NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, FOR CIVIL MANAGEMENT PURSUANT TO ARTICLE 10 OF THE MENTAL HYGIENE LAW, RESPONDENT-APPELLANT.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (MICHAEL H. MCCORMICK OF COUNSEL), FOR RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (James C. Tormey, J.), entered August 26, 2015 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, denied respondent's motion to vacate an order dated January 14, 2015.

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

Memorandum: Respondent appeals from an order denying his motion to vacate an order pursuant to CPLR 5015 (a) or, alternatively, pursuant to Supreme Court's inherent power to vacate its own orders. We note at the outset that respondent's attorney acknowledged in his supporting affirmation that relief is not available under any of the grounds set forth in CPLR 5015 (a), and thus respondent relies only upon the court's inherent power to vacate its own orders.

The underlying order, entered pursuant to Mental Hygiene Law article 10, sets forth that respondent currently suffers from a mental abnormality as defined by Mental Hygiene Law § 10.03 (i) and directs that he be confined to a secure treatment facility (*see* § 10.09 [f]). Respondent did not appeal from the underlying order. Contrary to respondent's contention, we conclude that the court properly denied his motion. Respondent sought vacatur of the underlying order on the ground that the evidence presented at the jury trial was not legally sufficient to show "a congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity

of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense" (§ 10.03 [i]; *see generally Matter of State of New York v Donald DD.*, 24 NY3d 174, 190-191). Although it is well settled that "a court may vacate its own judgment for sufficient reason and in the interests of substantial justice" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68), under the circumstances of this case we cannot say that the court abused its discretion in denying his motion for discretionary vacatur. Respondent's confinement is subject to annual review pursuant to Mental Hygiene Law § 10.09 (b) (*see generally Matter of Groves v State of New York*, 124 AD3d 1213, 1214), and he may petition for discharge or release under a regimen of strict and intensive supervision pursuant to Mental Hygiene Law § 10.09 (f). In our view, those provisions "provide a more appropriate remedy for any of respondent's substantive claims" (*Matter of State of New York v C.B.*, 147 AD3d 499, 500).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

460

CA 16-00970

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

CARMEN BRITT AND CARMEN BRITT, AS EXECUTOR OF
THE ESTATE OF LULA BAITY, DECEASED,
PLAINTIFF-APPELLANT,

V ORDER

BUFFALO MUNICIPAL HOUSING AUTHORITY, ET AL.,
DEFENDANTS,
GRACE MANOR HEALTH CARE FACILITY, INC.,
NELDA LAWLER, M.D., AND TERESA CHAU, M.D.,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

TIMOTHY R. LOVALLO, BUFFALO, FOR PLAINTIFF-APPELLANT.

FELDMAN KIEFFER, LLP, BUFFALO (ADAM C. FERRANDINO OF COUNSEL), FOR DEFENDANT-RESPONDENT GRACE MANOR HEALTH CARE FACILITY, INC.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS NELDA LAWLER, M.D., AND TERESA CHAU, M.D.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered August 11, 2015. The order denied the motion of plaintiff to amend the complaint, granted the cross motions of defendants Grace Manor Health Care Facility, Inc., Nelda Lawler, M.D., and Teresa Chau, M.D., for costs, and enjoined plaintiff from initiating further proceedings without prior leave of the court.

It is hereby ORDERED that said appeal is unanimously dismissed with costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567; *see also* CPLR 5501 [a] [1]).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

461

CA 16-01382

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

CARMEN BRITT AND CARMEN BRITT, AS EXECUTOR OF
THE ESTATE OF LULA BAITY, DECEASED,
PLAINTIFF-APPELLANT,

V ORDER

BUFFALO MUNICIPAL HOUSING AUTHORITY, ET AL.,
DEFENDANTS,
NELDA LAWLER, M.D., AND TERESA CHAU, M.D.,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

TIMOTHY R. LOVALLO, BUFFALO, FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered June 7, 2016. The order, among other things, granted the motion of defendants Teresa Chau, M.D. and Nelda Lawler, M.D. to dismiss the 2004 action bearing Index No. I2004-9897, against them with prejudice.

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

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

462

CA 16-00668

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

CARMEN BRITT AND CARMEN BRITT, AS EXECUTOR OF
THE ESTATE OF LULA BAITY, DECEASED,
PLAINTIFF-APPELLANT,

V ORDER

BUFFALO MUNICIPAL HOUSING AUTHORITY, ET AL.,
DEFENDANTS,
NELDA LAWLER, M.D. AND TERESA CHAU, M.D.,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 3.)

TIMOTHY R. LOVALLO, BUFFALO, FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered July 22, 2015. The order denied the motion of plaintiff for a default judgment against defendants Nelda Lawler, M.D., and Teresa Chau, M.D.

It is hereby ORDERED that said appeal is unanimously dismissed with costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567; *see also* CPLR 5501 [a] [1]).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

463

CA 16-01679

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

ARCHIE MCCORMICK, PLAINTIFF-RESPONDENT,

V ORDER

DERICKA THOMPSON, DEFENDANT,
AND BENNETT GOLDSTEIN, DEFENDANT-APPELLANT.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (JEFFREY C. SENDZIAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

HILARY C. BANKER, BUFFALO, FOR DEFENDANT.

Appeal from an amended order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered June 16, 2016. The amended order denied the motion of defendant Bennett Goldstein for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 21, 2017,

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

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

464

TP 16-00040

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

IN THE MATTER OF DAVID READ, PETITIONER,

V ORDER

JAMES THOMPSON, SUPERINTENDENT, COLLINS CORRECTIONAL FACILITY, AND P.J. KWIATKOWSKI, CORRECTION OFFICER, COLLINS CORRECTIONAL FACILITY, RESPONDENTS.

DAVID READ, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Penny M. Wolfgang, J.], dated January 6, 2016) to review a determination of respondents. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

465

KA 15-00852

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CODY TESTERMAN, DEFENDANT-APPELLANT.

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered April 17, 2014. 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]). We agree with defendant that his waiver of the right to appeal does not encompass his challenge to the severity of the sentence. First, " 'no mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal his conviction' that he was also waiving his right to appeal any issue concerning the severity of the sentence" (*People v Lorenz*, 119 AD3d 1450, 1450, *lv denied* 24 NY3d 962; *see People v Maracle*, 19 NY3d 925, 928). Second, " '[a]lthough the record establishes that defendant executed a written waiver of the right to appeal, there was no colloquy between [Supreme] Court and defendant regarding the waiver of the right to appeal to ensure that' defendant was aware that it encompassed his challenge to the severity of the sentence" (*People v Avellino*, 119 AD3d 1449, 1449-1450; *see generally People v Bradshaw*, 18 NY3d 257, 264-266). We nevertheless conclude that the negotiated sentence is not unduly harsh or severe. We note that defendant stabbed the victim more than 20 times, including 18 times in his face, throat, and stomach, thereby causing his death. Although charged with murder in the second degree, defendant was allowed to plead guilty to manslaughter in the first degree with the understanding that he would

receive the agreed-upon sentence.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

466

KA 15-00474

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY N. MORGAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered October 14, 2014. 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]). We agree with defendant that his waiver of the right to appeal does not encompass his challenge to the severity of the sentence. " '[N]o mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal his conviction that he was also waiving his right to appeal the harshness of his sentence' " (*People v Grucza*, 145 AD3d 1505, 1506). We nevertheless reject defendant's contention that the bargained-for sentence is unduly harsh and severe.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

467

KA 15-01034

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLAUDIE V. GOODENOW, JR., DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Allegany County Court (Thomas P. Brown, J.), rendered April 23, 2015. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the third degree, criminal possession of a controlled substance in the seventh degree and conspiracy in the fifth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by reducing the surcharge to 5% of the amount of restitution and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, grand larceny in the third degree (Penal Law § 155.35), defendant contends only that County Court erred in assessing a 10% restitution collection surcharge pursuant to Penal Law § 60.27 (8). Although defendant's contention is unpreserved for our review (*see People v Parker*, 137 AD3d 1625, 1626; *People v Kirkland*, 105 AD3d 1337, 1338, *lv denied* 21 NY3d 1043), we note that the People do not contest defendant's assertion that the People failed to file the requisite affidavit from an official listed in CPL 420.10 (8) (*see Parker*, 137 AD3d at 1626-1627; *People v Huddleston*, 134 AD3d 1458, 1459, *lv denied* 27 NY3d 966; *People v Perez*, 130 AD3d 1496, 1497). We exercise our power to review the issue as a matter of discretion in the interest of justice, and we modify the judgment by reducing the surcharge from 10% to 5% of the amount of the ordered restitution (*see Parker*, 137 AD3d at 1627; *Huddleston*, 134 AD3d at 1459; *Perez*, 130 AD3d at 1497).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

471

KA 15-00114

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHEMARIAH L. OWENS, DEFENDANT-APPELLANT.

CHARLES J. GREENBERG, AMHERST, 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 January 12, 2015. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree (two counts) and endangering the welfare of a child (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of two counts of sexual abuse in the first degree (Penal Law § 130.65 [3]) and two counts of endangering the welfare of a child (§ 260.10 [1]). Contrary to defendant's contention, County Court did not abuse its discretion in permitting a child witness to testify even though her name had not been included on the witness list. Inasmuch as a witness list is required only in situations involving alibi witnesses and witnesses called to rebut an alibi (*see* CPL 250.20), and it is indisputable that the child witness was neither an alibi witness nor a witness called to rebut an alibi, we conclude that the court did not abuse its discretion in permitting the child witness to testify (*see People v Stacchini*, 108 AD3d 866, 867). To the extent that defendant claims he needed more time to prepare to cross-examine the child witness, that issue is unpreserved for our review because defendant never requested an adjournment or continuance (*see People v Jornov*, 65 AD3d 363, 370; *see also People v Ressler*, 302 AD2d 921, 921; *see generally* CPL 470.05 [2]).

Defendant further contends that the court erred in permitting that child witness to testify concerning prior bad acts or uncharged crimes without first holding a *Ventimiglia* hearing, and that he was thereby denied a fair trial. Inasmuch as defendant raised that contention for the first time in a posttrial CPL 330.30 motion, it is not preserved for our review (*see generally People v Padro*, 75 NY2d 820, 821, *rearg denied* 75 NY2d 1005, *rearg dismissed* 81 NY2d 989), and we decline to exercise our power to review it as a matter of

discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant contends that the court erred in permitting the prosecutor to use leading questions when examining various child witnesses. With the exception of one question, that contention is not preserved for our review (*see People v Boyd*, 50 AD3d 1578, 1578, *lv denied* 11 NY3d 785) and, in any event, the contention lacks merit. It is well settled that " '[l]eading questions may be permitted of a child victim in a sexual abuse case so the child's testimony can be clarified or expedited if the child is apparently unwilling to testify freely' " (*id.*). Moreover, " 'whether to permit the use of leading questions on direct examination is a matter within the sound discretion of the trial court and [the court's ruling on that issue] will not be disturbed absent a clear demonstration of an abuse of discretion' " (*People v Martina*, 48 AD3d 1271, 1272, *lv denied* 10 NY3d 961; *see People v Cuttler*, 270 AD2d 654, 655, *lv denied* 95 NY2d 795). Here, "particularly in view of the intimate and embarrassing nature of the crime[s]," we conclude that the court did not abuse its discretion (*People v Cordero*, 110 AD3d 1468, 1470, *lv denied* 22 NY3d 1137 [internal quotation marks omitted]; *see Martina*, 48 AD3d at 1272).

We agree with the People that defendant's challenges to the legal sufficiency of the evidence, to the extent that they are preserved, lack merit. Addressing first defendant's contention that the evidence is legally insufficient with respect to the dates of the alleged crimes, we conclude that defendant failed to preserve that contention for our review inasmuch as he failed to make a motion to dismiss that was "specifically directed" at that alleged error (*People v Gray*, 86 NY2d 10, 19). In any event, that contention lacks merit (*see People v Erle*, 83 AD3d 1442, 1444, *lv denied* 17 NY3d 794).

We have reviewed defendant's remaining challenges to the legal sufficiency of the evidence and conclude that they lack merit (*see generally People v Bleakley*, 69 NY2d 490, 495). The evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), establishes that defendant subjected both child victims to sexual contact as that term is defined in Penal Law § 130.00 (3) (*see People v Hoffert*, 125 AD3d 1386, 1387-1388, *lv denied* 25 NY3d 990; *see also Matter of Daniel R. [Lucille R.]*, 70 AD3d 839, 841). Moreover, "[i]t is well settled that, '[b]ecause the question . . . whether a person was seeking sexual gratification is generally a subjective inquiry, it can be inferred from the conduct of the perpetrator' " (*Hoffert*, 125 AD3d at 1388; *see People v Chrisley*, 126 AD3d 1495, 1496, *lv denied* 26 NY3d 1007; *People v Anthony D.*, 259 AD2d 1011, 1011, *lv denied* 93 NY2d 1001). The inference that defendant was seeking sexual gratification is " 'clearly appropriate' " where, as here, a nonrelative touches the intimate parts of a child (*People v Watson*, 281 AD2d 691, 698, *lv denied* 96 NY2d 925; *see* § 130.00 [3]; *People v Fuller*, 50 AD3d 1171, 1175, *lv denied* 11 NY3d 788). Inasmuch as the evidence is legally sufficient to support the conviction of sexual abuse in the first degree, "it necessarily also [is] legally sufficient with respect to the conviction of endangering the welfare of a child" (*People v Scerbo*, 74 AD3d 1730, 1732, *lv*

denied 15 NY3d 757). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see Bleakley*, 69 NY2d at 495).

Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

472

KA 16-01961

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NATHAN J. ROSEKRANS, DEFENDANT-APPELLANT.

ANDREW MANCILLA, NEW YORK CITY, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JAMES B. RITTS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered May 4, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [4]). The charges arose from allegations that defendant injected a mixture of drugs into his girlfriend, who thereby overdosed. Defendant contends that County Court abused its discretion in denying his motion to withdraw his plea of guilty, which was premised largely on his subsequent claim of innocence during his presentence interview. We reject that contention.

" 'Permission to withdraw a guilty plea rests solely within the court's discretion . . . , and refusal to permit withdrawal does not constitute an abuse of that discretion unless there is some evidence of innocence, fraud, or mistake in inducing the plea' " (*People v Davis*, 129 AD3d 1613, 1614, *lv denied* 26 NY3d 966). Here, defendant failed to substantiate his own claim of innocence with a sworn affidavit (*see People v Watkins*, 107 AD3d 1416, 1417, *lv denied* 22 NY3d 959). Instead, defendant based his motion on his statement of innocence during his presentence interview, as supported by his alleged "prior consistent statement" regarding his innocence in a police report. We conclude that neither statement constitutes the requisite "evidence" that would permit us to determine that the court abused its discretion in denying defendant's motion (*Davis*, 129 AD3d at 1614). It is well settled that a court may deny a motion to withdraw a plea based on "unsubstantiated assertions of innocence during the course of the presentence investigation" (*People v Gleen*, 73 AD3d 1443, 1444, *lv denied* 15 NY3d 773; *see also People v Gomez*,

114 AD3d 701, 702, *lv denied* 23 NY3d 963; *People v Campeau*, 300 AD2d 1082, 1082, *lv denied* 99 NY2d 613). Moreover, the police report does not support a claim of innocence. Defendant initially gave the police two conflicting accounts that his girlfriend had injected herself with drugs but, after he received his *Miranda* warnings, he confessed to compounding the mixture of drugs himself and injecting his girlfriend with them. We cannot conclude that defendant's initial, contradictory, and self-serving attempts to evade responsibility for his criminal actions fall within the category of a prior consistent statement (*see generally People v Buie*, 86 NY2d 501, 509-511; *People v Green*, 122 AD3d 1342, 1344), especially given that " 'nothing in the plea colloquy casts significant doubt on defendant's guilt or the voluntariness of the plea' " (*People v Brinson*, 130 AD3d 1493, 1493, *lv denied* 26 NY3d 965). We therefore further conclude that defendant's motion was based solely on an unsupported claim of innocence, and thus that the court did not abuse its discretion in denying it (*see People v Haffiz*, 19 NY3d 883, 884-885; *see generally People v Dixon*, 29 NY2d 55, 57). Finally, given the nature of the materials submitted in support of the motion, the court did not abuse its discretion in denying the motion without conducting a fact-finding hearing (*see People v Manor*, 27 NY3d 1012, 1014; *Davis*, 129 AD3d at 1614).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

480

CA 16-01942

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

JOSEPH MELI, PLAINTIFF-RESPONDENT,

V ORDER

SAFWAY SERVICES, LLC, FORMERLY KNOWN AS SAFWAY SCAFFOLDING, LLC, FORMERLY KNOWN AS THYSSENKRUPP, DEFENDANT-APPELLANT.

BARCLAY DAMON, LLP, BUFFALO (NICHOLAS J. DICESARE OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (DONYELLE E. CRAPSI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), entered April 15, 2016. The order, insofar as appealed from, denied the motion of defendant for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 6 and 10, 2017,

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

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

484

TP 16-00608

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

IN THE MATTER OF KRISTEN PONICHTERA, PETITIONER,

V MEMORANDUM AND ORDER

STATE UNIVERSITY OF NEW YORK AT BUFFALO, RESPONDENT.

FRANK M. BOGULSKI, BUFFALO, FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU 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 [Frederick J. Marshall, J.], entered April 14, 2016) to review a determination of respondent. The determination dismissed petitioner from the Doctor of Nursing Practice program.

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

Memorandum: In this CPLR article 78 proceeding transferred to this Court pursuant to CPLR 7804 (g), petitioner seeks to annul a determination dismissing her from respondent's Doctor of Nursing Practice program for her violation of respondent's admissions integrity standards. "[W]hen a university has adopted a rule or guideline establishing the procedure to be followed in relation to suspension or expulsion[,] that procedure must be substantially observed" (*Tedeschi v Wagner Coll.*, 49 NY2d 652, 660; *see Matter of McConnell v Le Moyne Coll.*, 25 AD3d 1066, 1068-1069). " 'Judicial scrutiny of the determination of disciplinary matters between a university and its students . . . is limited to determining whether the university substantially adhered to its own published rules and guidelines for disciplinary proceedings so as to ascertain whether its actions were arbitrary or capricious' " (*Matter of Nawaz v State Univ. of N.Y. Univ. at Buffalo Sch. of Dental Medicine*, 295 AD2d 944, 944; *see Matter of Budd v State Univ. of N.Y. at Geneseo*, 133 AD3d 1341, 1342, *lv denied* 26 NY3d 919). In a case such as this involving a public university, "[d]ue process requires that the petitioner[] be given the name of the witnesses against [her], the opportunity to present a defense, and the results and finding of the hearing" (*Nawaz*, 295 AD2d at 944). Here, we conclude that those basic requirements of due process were met (*see Budd*, 133 AD3d at 1342-1343; *Matter of Schwarzmueller v State Univ. of N.Y. at Potsdam*, 105 AD3d 1117, 1119).

Moreover, where, as here, "a university, in expelling a student, acts within its jurisdiction, not arbitrarily but in the exercise of an honest discretion based on facts within its knowledge that justify the exercise of discretion, a court may not review the exercise of its discretion" (*Matter of Carr v St. John's Univ., N.Y.*, 17 AD2d 632, 634, *affd* 12 NY2d 802). We conclude that the determination of respondent, which found petitioner guilty of omitting from her applications for admission into respondent's program information concerning her prior enrollment at and dismissal from a graduate degree program at Gannon University, is not arbitrary and capricious or an abuse of discretion and is rationally supported by the record (*see Matter of Katz v Board of Regents of Univ. of the State of N.Y.*, 85 AD3d 1277, 1281, *lv denied* 17 NY3d 716; *see generally Matter of Susan M. v New York Law Sch.*, 76 NY2d 241, 246; *Matter of Hyman v Cornell Univ.*, 82 AD3d 1309, 1310; *Matter of Warner v Elmira Coll.*, 59 AD3d 909, 910-911; *Matter of Lusardi v State Univ. of N.Y. at Buffalo*, 284 AD2d 992, 992, *lv denied* 97 NY2d 608).

We further conclude that the penalty of dismissal from the academic program was not "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness" (*Matter of Pell v Board of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233; *see Matter of Quercia v New York Univ.*, 41 AD3d 295, 297). In light of our determination, we do not consider petitioner's remaining contentions.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

485

CAF 16-01279

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

IN THE MATTER OF OLIVIA S.

WYOMING COUNTY DEPARTMENT OF SOCIAL SERVICES, ORDER
PETITIONER-RESPONDENT;

DAWN S., RESPONDENT-APPELLANT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (ADAM W. KOCH OF COUNSEL), FOR RESPONDENT-APPELLANT.

JAMES WUJCIK, COUNTY ATTORNEY, ATTICA (JANET L. BENSMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

PETER M. CASEY, ATTORNEY FOR THE CHILD, BATAVIA.

Appeal from an order of the Family Court, Wyoming County (Michael F. Griffith, J.), entered July 15, 2016 in a proceeding pursuant to Family Court Act article 10. The order, among other things, transferred respondent's guardianship and custody rights with respect to the subject child to petitioner.

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

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

488

TP 16-01007

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

IN THE MATTER OF SHANNON V. CAMPBELL, PETITIONER,

V ORDER

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

SHANNON V. CAMPBELL, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, 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, Seneca County [Dennis F. Bender, A.J.], entered June 9, 2016) 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).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

489

KA 14-00634

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TYSHAWN S. PARKER, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS 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 (James J. Piampiano, J.), rendered March 4, 2014. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree.

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

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

490

KA 15-01843

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRANCE GIBSON, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Christopher S. Ciaccio, J.), entered October 13, 2015. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.), defendant contends that County Court erred in assessing points for his criminal history based upon a prior juvenile delinquency adjudication. We agree. Defendant was assessed 15 points under risk factor 9 for a prior crime as a juvenile delinquent, and the court, relying on *People v Catchings* (56 AD3d 1181, 1182, *lv denied* 12 NY3d 701), rejected defendant's challenge to the assessment of points under risk factor 9. As we recently held in *People v Brown* (148 AD3d 1705, ___), however, a juvenile delinquency adjudication may not be considered a crime for purposes of assessing points in a SORA determination, and *Catchings* should no longer be followed to that extent. Consequently, we conclude that the court erred in considering defendant's juvenile delinquency adjudication in assessing 15 points under risk factor 9.

Removing the improperly assessed points under risk factor 9 renders defendant a presumptive level two risk. Under the circumstances of this case, we remit the matter to County Court for further proceedings to determine whether an upward departure is warranted (*see Brown*, 148 AD3d at ___).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

491

KA 16-00069

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PHILIP B. MCARTHUR, 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 March 18, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal mischief in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal mischief in the third degree (Penal Law § 145.05 [2]). Defendant's challenge to the severity of his sentence is encompassed by his valid waiver of the right to appeal. Although no mention was made on the record during the plea colloquy that defendant was waiving his right to appeal any issue concerning the severity of the sentence (*see People v Peterson*, 111 AD3d 1412, 1412), here the oral waiver was accompanied by a written plea agreement that provided that defendant was waiving his right to appeal his "conviction, sentence, and any proceedings that may result from this prosecution." Moreover, County Court conducted an extensive inquiry that established that defendant had reviewed and understood the written plea agreement, including its waiver-of-appeal provision, had discussed it with his lawyer, and had agreed to its terms, and defendant signed the document in open court during the course of the plea colloquy (*see People v Bryant*, 28 NY3d 1094, 1096; *People v Ramos*, 7 NY3d 737, 738; *cf. People v Bradshaw*, 18 NY3d 257, 264-267). Therefore, defendant may not challenge the severity of the sentence.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

492

KA 15-01891

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BENJAMIN SHEPPARD, DEFENDANT-APPELLANT.

SESSLER LAW PC, GENESEO (STEVEN D. SESSLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered September 3, 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: On appeal from a judgment convicting him upon a plea of guilty of assault in the second degree (Penal Law § 120.05 [7]), defendant contends that his plea was not voluntarily, knowingly, or intelligently entered. Defendant failed to preserve his contention for our review inasmuch as he did not move to withdraw his plea or to vacate the judgment of conviction pursuant to CPL article 440 (*see People v Hill*, 128 AD3d 1479, 1480, *lv denied* 26 NY3d 930). Contrary to defendant's contention, this case does not fall within the rare exception to the preservation doctrine inasmuch as nothing in the plea colloquy "casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea" (*People v Lopez*, 71 NY2d 662, 666; *see Hill*, 128 AD3d at 1480). To the extent that defendant's contention is based upon matters outside the record, he may raise his contention in a motion pursuant to CPL 440.10 (*see People v Medina*, 132 AD3d 1363, 1364).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

493

KA 15-00029

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN DAWSON, ALSO KNOWN AS "SHOOTER STEVE,"
DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered December 3, 2014. The judgment convicted defendant, upon a jury verdict, of kidnapping in the first degree and robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of kidnapping in the first degree (Penal Law § 135.25 [2] [a]) and robbery in the first degree (§ 160.15 [4]). As we noted in the appeal by a codefendant, "[t]he charges arose from an incident in which the victim was held captive, pistol whipped, and then repeatedly humiliated, including being forced to lick his own blood from a boot of one of the perpetrators. The perpetrators made a video recording of parts of the incident and posted the recording on social media" (*People v Woods*, 142 AD3d 1356, 1357).

Contrary to defendant's contention, Supreme Court properly refused to suppress his statements to the police. The evidence from the suppression hearing established that police officers were searching for the victim after viewing the video recording of him being beaten, and his family members reported to the police that defendant, who was riding a bicycle in a certain location, knew where the victim was being detained. Based on that information, an officer stopped defendant, and said that defendant needed to speak to a detective who was on his way to that location. Defendant immediately said that he could find the missing person on his own if the officer would let him go. Shortly thereafter, a detective arrived and told defendant that they were searching for the victim, and the detective questioned defendant about the victim's whereabouts. Defendant

indicated that he would have to walk by the house in which the victim was detained so he could show the officers where it was but, after they indicated that he would not be released, he agreed to allow the initial officer to drive him in the patrol vehicle. As they drove, he pointed out a house and said that the victim was in it.

As the People correctly concede, defendant was in custody at the time that he spoke to the officers (*see generally People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US 851) and, "[a]s a general rule, a person who is in custody cannot be questioned without first receiving *Miranda* warnings" (*People v Doll*, 21 NY3d 665, 670, *rearg denied* 22 NY3d 1053, *cert denied* ___ US ___, 134 S Ct 1552, *affg* 98 AD3d 356). Nevertheless, we agree with the court that the initial statement, i.e., the one defendant made before the detective arrived, was spontaneous, inasmuch as it was "in no way the product of an interrogation environment [or] the result of express questioning or its functional equivalent" (*People v Harris*, 57 NY2d 335, 342, *cert denied* 460 US 1047 [internal quotation marks omitted]; *see People v Rivers*, 56 NY2d 476, 480, *rearg denied* 57 NY2d 775; *People v Wearen*, 19 AD3d 1133, 1134, *lv denied* 5 NY3d 834). Thus, the court properly refused to suppress that statement.

Furthermore, the court also properly refused to suppress defendant's next set of statements, in which he identified the house in which the victim was being held. At that time, the police were aware that the victim was being held and were seeking information from defendant regarding the victim's location in order to rescue him. "Given the legitimate concern of the police for the safety of the victim, the questioning of the defendant regarding the victim's . . . whereabouts, without first advising him of his *Miranda* rights . . . , was lawful" (*People v Boyd*, 3 AD3d 535, 536, *lv denied* 2 NY3d 737; *see Doll*, 98 AD3d at 364; *People v Zalevsky*, 82 AD3d 1136, 1138, *lv denied* 19 NY3d 978, *reconsideration denied* 19 NY3d 1106).

We reject defendant's contention that the evidence is not legally sufficient to support the conviction. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), and affording them the benefit of every favorable inference (*see People v Bleakley*, 69 NY2d 490, 495), we conclude that the evidence is legally sufficient to establish the elements of the crimes of which defendant was convicted (*see id.*). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Finally, the sentence is not unduly harsh or severe.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

494

KA 14-01973

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER WHEELER, DEFENDANT-APPELLANT.

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered March 10, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting defendant upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that Supreme Court erred in refusing to suppress evidence located during a compliance check by his parole officer, as well as statements that he made to the parole officer and to the police after his arrest. We reject that contention.

"[G]reat deference should be given to the determination of the suppression court, which had the opportunity to observe the demeanor of the witnesses and to assess their credibility, and its findings should not be disturbed unless clearly erroneous" (*People v Layou*, 134 AD3d 1510, 1511, *lv denied* 27 NY3d 1070, *reconsideration denied* 28 NY3d 932; *see People v Daniels*, 147 AD3d 1392, 1392-1393; *People v Hogan*, 136 AD3d 1399, 1400, *lv denied* 27 NY3d 1070). Contrary to defendant's contention, nothing about the parole officer's testimony is " 'unbelievable as a matter of law, manifestly untrue, physically impossible, contrary to experience, or self-contradictory' " (*Layou*, 134 AD3d at 1511).

The record supports the court's determination that the search of defendant's residence was " 'rationally and reasonably related to the performance of the parole officer's duty' and was therefore lawful" (*People v Johnson*, 94 AD3d 1529, 1532, *lv denied* 19 NY3d 974). The

parole officer testified that he searched defendant's residence for the purpose of determining if defendant was in violation of the conditions of his parole because he "received credible information from law enforcement sources that defendant possessed a [gun] in his" residence (*People v Escalera*, 121 AD3d 1519, 1520, *lv denied* 24 NY3d 1083; *see People v Nappi*, 83 AD3d 1592, 1593-1594, *lv denied* 17 NY3d 820). The assistance of the police at defendant's residence did not render the search a police operation (*see People v Johnson*, 54 AD3d 969, 970).

Defendant concedes that he improperly moved pursuant to CPL 330.30 (1) to set aside the verdict in this plea case, but he contends that the court was required to convert the motion to one under either CPL article 440 or CPL 220.60 and to grant it. We reject that contention. Even assuming, arguendo, that the court had any such obligation, we conclude that a motion under CPL article 440 would have been premature (*see People v Spirles*, 294 AD2d 810, 811, *lv denied* 98 NY2d 713, *reconsideration denied* 99 NY2d 540). Furthermore, the motion, even if addressed under CPL 220.60, lacks merit because the issues raised therein would not be appropriately argued in the context of a motion to withdraw a plea of guilty (*see People v Anderson*, 63 AD3d 1617, 1618, *lv denied* 13 NY3d 858). Finally, to the extent that defendant's contention that his counsel was ineffective in failing to move to withdraw the guilty plea survives his plea (*see People v Dixon*, 147 AD3d 1518, 1519), we conclude that his contention lacks merit (*see generally People v Ford*, 86 NY2d 397, 404).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

496

KA 15-01590

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DURELL BLUNT, DEFENDANT-APPELLANT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (ADAM W. KOCH OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered September 16, 2015. The judgment convicted defendant, after a jury trial, of promoting prison contraband in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of promoting prison contraband in the first degree (Penal Law § 205.25 [2]). Contrary to defendant's contention, we conclude that the evidence is legally sufficient to support the conviction (*see People v Mansilla*, 143 AD3d 1263, 1263; *People v Davey*, 134 AD3d 1448, 1449). Viewed in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621), the evidence provided a "valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial" (*People v Bleakley*, 69 NY2d 490, 495), i.e., that defendant possessed a flat, sharpened piece of metal that he wielded during a prison fight. Moreover, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see People v Hood*, 145 AD3d 1565, 1565-1566; *Mansilla*, 143 AD3d at 1263; *see generally Bleakley*, 69 NY2d at 495). We have considered defendant's challenge to the severity of his sentence and conclude that it is without merit.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

501

CA 16-01789

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

LISA T. SNOW, AS ADMINISTRATOR OF THE ESTATE
OF SALVATORE S. TRUSELLO, DECEASED,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DEPAUL ADULT CARE COMMUNITIES, INC., DOING
BUSINESS AS KENWELL, DEFENDANT-RESPONDENT.

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

GOLDBERG SEGALLA, LLP, BUFFALO (ARLOW M. LINTON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered December 21, 2015. The order, inter alia, denied in part the cross motion of plaintiff to compel responses to nonparty subpoenas.

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

Memorandum: Plaintiff appeals from an order that granted only in part her cross motion to compel responses to nonparty subpoenas seeking psychiatric records of Chester Rusek, who assaulted and caused the death of plaintiff's decedent while they were both residents at the Kenwell DePaul Adult Care Center (Kenwell), an assisted living facility operated by defendant. In the course of a criminal proceeding commenced against Rusek, both prosecution and defense experts conducted psychiatric examinations of Rusek. Rusek died during the pendency of that proceeding, and the charges were dismissed. By the nonparty subpoenas, plaintiff seeks the reports of those psychiatric experts and the documents upon which they relied. Defendant moved to quash the subpoenas, and plaintiff cross-moved to compel compliance with them. Following an in camera review, Supreme Court denied the motion in part and granted the cross motion in part, directing the production of seven of those documents relied upon by the prosecution's expert, all of which predated or concerned the assault. The court did not direct the production of the reports themselves. Plaintiff appeals.

CPLR 3101 (a) (4) allows a party to obtain discovery from a nonparty, and provides that "[t]here shall be full disclosure of all

matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." The phrase "material and necessary" in section 3101 "must 'be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity' " (*Matter of Kapon v Koch*, 23 NY3d 32, 38, quoting *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406). A movant seeking to quash a subpoena has the burden of establishing that "the futility of the process to uncover anything legitimate is inevitable or obvious . . . or . . . the information sought is utterly irrelevant to any proper inquiry" (*id.* [internal quotation marks omitted]). Contrary to plaintiff's contention, we conclude that defendant met its burden with respect to all but the seven documents in the file of the prosecution's expert.

The complaint herein alleges that defendant breached its duty to keep plaintiff's decedent safe. As the operator of the assisted living facility, defendant owed plaintiff's decedent a duty to protect him from Rusek only to the extent that Rusek's violence was foreseeable (*see Schnorr v Emeritus Corp.*, 118 AD3d 1307, 1307). Thus, we agree with the court that the only "proper inquiry" was defendant's actual or constructive notice of Rusek's violent nature prior to the assault (*Kapon*, 23 NY3d at 38 [internal quotation marks omitted]). Having reviewed the submitted documents in camera, we conclude that the only documents relevant to that inquiry were the seven documents that the court released to plaintiff.

Given our conclusion that the remaining documents are not material and necessary to the prosecution or defense of the action, we do not reach plaintiff's further contentions that those documents are not privileged and were not sealed pursuant to CPL 160.50.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

510

TP 16-02057

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

IN THE MATTER OF JUNIOR COLLINS, PETITIONER,

V MEMORANDUM AND ORDER

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

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. LANDERS 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 November 14, 2016) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by annulling that part of the determination finding that petitioner violated inmate rule 104.13 (7 NYCRR 270.2 [B] [5] [iv]) and as modified the determination is confirmed without costs and respondent is directed to expunge from petitioner's institutional record all references to the violation of that inmate rule.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, after a tier II disciplinary hearing, that he violated inmate rules 104.13 (7 NYCRR 270.2 [B] [5] [iv] [creating a disturbance]), 107.10 (7 NYCRR 270.2 [B] [8] [i] [interference with employee]), and 107.11 (7 NYCRR 270.2 [B] [8] [ii] [harassment]). As respondent correctly concedes, the determination that petitioner violated inmate rule 104.13 is not supported by substantial evidence. We therefore modify the determination and grant the petition in part by annulling that part of the determination finding that petitioner violated inmate rule 104.13 (*see Matter of Vasquez v Goord*, 284 AD2d 903, 903-904), and we direct respondent to expunge from petitioner's institutional record all references to the violation of that inmate rule (*see Matter of Stewart v Fischer*, 109 AD3d 1122, 1123, *lv denied* 22 NY3d 858). Inasmuch as the record establishes that petitioner has served his administrative penalty and

there was no recommended loss of good time, there is no need to remit the matter to respondent for reconsideration of the penalty (*see Matter of Anderson v New York State Dept. of Corr. & Community Supervision*, 142 AD3d 1369, 1370; *Matter of Maybanks v Goord*, 306 AD2d 839, 840).

Contrary to petitioner's further contention, the determination that he violated the remaining inmate rules is supported by substantial evidence, including the misbehavior report, the testimony of the correction officers, and a videotape of the incident (*see Matter of Holmes v Fischer*, 114 AD3d 1158, 1159; *see generally People ex rel. Vega v Smith*, 66 NY2d 130, 140). Petitioner failed to exhaust his administrative remedies with respect to his remaining contention that he was improperly punished for violating an unpublished rule, and this Court has no discretionary authority to reach that contention (*see Matter of Polanco v Annucci*, 136 AD3d 1325, 1325; *Matter of McFadden v Prack*, 93 AD3d 1268, 1269).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

511

KA 14-01961

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DAMIAN MACHADO-RODRIGUEZ, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB 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 April 11, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the first degree (two counts).

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

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

512

KA 08-02358

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MELCHI N. JONES, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered May 15, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree, improper lane: right turn, no seat belt and operating a motor vehicle without an inspection certificate.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [5]) and various violations of the Vehicle and Traffic Law, defendant contends that County Court failed to make an appropriate inquiry into defendant's allegations of a potential conflict with his assigned counsel and thereby deprived defendant of his right to counsel of his choosing. We reject that contention.

"It is well settled that an indigent defendant is guaranteed the right to counsel by both the Federal and New York State Constitutions (*see* US Const 6th Amend; NY Const, art I, § 6), but this entitlement does not encompass the right to counsel of one's own choosing . . . While a court has a duty to investigate complaints concerning counsel, 'this is far from suggesting that an indigent's request that a court assign new counsel is to be granted casually' . . . Whether counsel is substituted is within the 'discretion and responsibility' of the trial judge . . . and a court's duty to consider such a motion is invoked only where a defendant makes a 'seemingly serious request[ ]' . . . Therefore, it is incumbent upon a defendant to make specific factual allegations of 'serious complaints about counsel' . . . If such a showing is made, the court must make at least a 'minimal inquiry,' and

discern meritorious complaints from disingenuous applications by inquiring as to 'the nature of the disagreement or its potential for resolution' " (*People v Porto*, 16 NY3d 93, 99-100; *see generally People v Sides*, 75 NY2d 822, 824-825; *People v Medina*, 44 NY2d 199, 207).

Here, on the day trial was scheduled to begin, defendant informed the court that, while he did not wish to represent himself, he also did not want to be represented by his assigned counsel. Defendant faulted defense counsel for failing to communicate with him, failing to provide him with certain paperwork, and failing to obtain a more favorable plea offer.

We agree with the People that defendant's complaints were not " 'serious complaints about counsel' " (*Porto*, 16 NY3d at 100). Rather, defendant "made only vague assertions that defense counsel was not in frequent contact with him and did not aid in his defense" (*People v MacLean*, 48 AD3d 1215, 1217, *lv denied* 10 NY3d 866, *reconsideration denied* 11 NY3d 790; *see People v Velasquez*, 66 AD3d 1460, 1461, *lv denied* 13 NY3d 942). Even assuming, arguendo, that defendant's complaints about defense counsel "suggest[ed] a serious possibility of good cause for the substitution [of counsel]" and thereby established a need for further inquiry (*People v Faeth*, 107 AD3d 1426, 1427, *lv denied* 21 NY3d 1073 [internal quotation marks omitted]), we conclude that "the court afforded defendant the opportunity to express his objections concerning defense counsel, and the court thereafter reasonably concluded that defendant's objections were without merit" (*People v Bethany*, 144 AD3d 1666, 1669; *see Faeth*, 107 AD3d at 1427).

Contrary to defendant's further contention, the court did not improperly focus on the timeliness of the request. The constitutional right to counsel "does not bestow upon a criminal defendant the absolute right to demand that his trial be delayed while he selects another attorney to represent him at trial" (*People v Arroyave*, 49 NY2d 264, 271; *see Porto*, 16 NY3d at 101).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

513

KA 16-00085

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHANE R. HARESIGN, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Oswego County Court (Donald E. Todd, J.), dated November 2, 2015. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). Contrary to defendant's contention, County Court did not err in assessing 10 points based on defendant's failure to accept responsibility. In his statements in the presentence report and during his testimony at the SORA hearing, defendant denied that he attempted to have sexual contact with one of the two victims. Those statements, however, are contradicted by defendant's plea allocution, wherein he expressly acknowledged his guilt (*see People v Kyle*, 64 AD3d 1177, 1178, *lv denied* 13 NY3d 709; *People v Noriega*, 26 AD3d 767, 767, *lv denied* 6 NY3d 713). Additionally, defendant blamed his conduct with respect to the other victim on his drug use. Defendant's statements "do not reflect a 'genuine acceptance of responsibility' as required by the risk assessment guidelines developed by the Board [of Examiners of Sex Offenders]" (*People v Mitchell*, 300 AD2d 377, 378, *lv denied* 99 NY2d 510).

Contrary to defendant's further contention, the court properly assessed 20 points under risk factor 4, for "engaging in a continuing course of sexual misconduct with at least one victim." Pursuant to the risk assessment guidelines, "an offender has engaged in a continuing course of sexual contact when he engages in either (i) two or more acts of sexual contact, at least one of which is an act of sexual intercourse, oral sexual conduct, anal sexual conduct, or aggravated sexual contact, which acts are separated in time by at

least 24 hours, or (ii) three or more acts of sexual contact over a period of at least two weeks" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 10 [2006]). Here, the statements by the two victims and defendant are sufficient to establish that defendant committed three or more acts of sexual contact over a period of at least two weeks (*see generally People v Scott*, 71 AD3d 1417, 1417-1418, *lv denied* 14 NY3d 714). In light of our determination, we do not address defendant's contention that the court erred in determining, in the alternative, that 20 points could be assessed under risk factor 4 based upon defendant's unlawful surveillance of the two victims.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

514

KA 14-00868

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALPHONSE B. LASSITER, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (KELLY CHRISTINE WOLFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered January 31, 2014. The judgment convicted defendant, upon his plea of guilty, 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 his plea of guilty of robbery in the second degree (Penal Law § 160.10 [2] [b]). Contrary to defendant's contention, the record establishes that his waiver of the right to appeal was knowing, intelligent and voluntary (*see People v Lopez*, 6 NY3d 248, 256), and we conclude that the valid waiver encompasses his challenge to the severity of the sentence (*see People v Hidalgo*, 91 NY2d 733, 737; *cf. People v Maracle,* 19 NY3d 925, 928).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

515

KA 14-02275

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RICARDO LANE, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (JOHN J. GILSENAN, OF THE PENNSYLVANIA AND MICHIGAN BARS, ADMITTED PRO HAC VICE, OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered June 23, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed for reasons stated in the decision at suppression court.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

517

KA 08-02360

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MELCHI N. JONES, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered May 15, 2008. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]), defendant contends that the jury failed to weigh the evidence properly in determining that defendant constructively possessed the weapon. We reject that contention. In order to establish that a defendant has constructive possession of tangible property, "the People must show that the defendant exercised 'dominion or control' over the property by a sufficient level of control over the area in which the contraband is found or over the person from whom the contraband is seized" (*People v Manini*, 79 NY2d 561, 573; *see* Penal Law § 10.00 [8]). Here, there was ample evidence from which the jury could conclude that defendant constructively possessed the gun.

The weapon was recovered during the execution of a search warrant for the downstairs apartment of a two-family residence owned by defendant. At the time the warrant was executed, defendant was the sole occupant of the apartment. Defendant was not wearing any shoes and, before he exited the apartment, he asked the police officers to give him a pair of size 11½ shoes that were located in the kitchen. The officers testified that there were at least three other pairs of size 11½ shoes in one of the bedrooms. Multiple documents bearing defendant's name, including a W-2 tax form, were located inside the apartment. Additionally, defendant had been observed entering the downstairs apartment during prior surveillance of the apartment.

Viewing the evidence in light of the elements of this possessory crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see People v Davis*, 101 AD3d 1778, 1779-1780, *lv denied* 20 NY3d 1060; *People v Holley*, 67 AD3d 1438, 1439, *lv denied* 14 NY3d 801; *see generally People v Bleakley*, 69 NY2d 490, 495).

Contrary to defendant's further contention, County Court properly refused to suppress evidence seized by the police inasmuch as the confidential informant's existence and basis of knowledge were sufficiently established at the in camera *Darden* hearing (*see People v Darden*, 34 NY2d 177, 181). Following our review of the sealed transcript of the *Darden* hearing, as well as the court's summary report, we conclude that the court properly determined that "the informant existed and that he provided the information to the police concerning the [presence of a gun] at the specified location" (*People v Wilson*, 48 AD3d 1099, 1100, *lv denied* 10 NY3d 845; *see People v Santiago*, 142 AD3d 1390, 1390-1391, *lv denied* 28 NY3d 1127; *People v Brown* [appeal No. 1], 93 AD3d 1231, 1231, *lv denied* 19 NY3d 958).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

520

CAF 16-00122

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

IN THE MATTER OF JOHN F., JAMES F., AND JANAE F.

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

COMMISSIONER OF ONTARIO COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

JOHN F., JR., RESPONDENT-APPELLANT.

SUSAN GRAY JONES, CANANDAIGUA, FOR RESPONDENT-APPELLANT.

GARY L. CURTISS, COUNTY ATTORNEY, CANANDAIGUA (HOLLY A. ADAMS OF COUNSEL), FOR PETITIONER-RESPONDENT.

SONALI R. SUVVARU, ATTORNEY FOR THE CHILDREN, CANANDAIGUA.

Appeal from an order of the Family Court, Ontario County (Craig J. Doran, J.), entered January 5, 2016 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, adjudged that respondent had abandoned the subject children.

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

Memorandum: Respondent father appeals from an order terminating his parental rights on the ground of abandonment. We agree with the father that petitioner failed to establish by clear and convincing evidence that he abandoned the subject children (*see generally* Social Services Law § 384-b [3] [g] [i]; [4] [b]). "A child is deemed abandoned where, for the period six months immediately prior to the filing of the petition for abandonment . . . , a parent 'evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or [petitioner], although able to do so and not prevented or discouraged from doing so by [petitioner]' " (*Matter of Azaleayanna S.G.-B. [Quaneesha S.G.]*, 141 AD3d 1105, 1105, quoting § 384-b [5] [a]; *see Matter of Anthony C.S. [Joshua S.]*, 126 AD3d 1396, 1396-1397, *lv denied* 25 NY3d 911). Here, the evidence established that the father, who was incarcerated for most of the six-month period immediately prior to the filing of the petition, contacted the children or petitioner every month during that period. The father wrote letters to the children and called, met with, and wrote letters to the children's caseworker. We conclude that the father's contacts were not minimal, sporadic, or insubstantial (*cf.*

Matter of Maddison B. [Kelly L.], 74 AD3d 1856, 1856-1857). Moreover, during that period, the father filed a petition seeking custody or visitation with the children, which indicates that he did not intend to forego his parental rights (*see Matter of Jeffrey M.*, 283 AD2d 974, 975). Although Family Court's finding that the father failed to offer a meaningful plan for the children's future is relevant to a termination proceeding based on permanent neglect (*see* § 384-b [7] [a]), it is not relevant to a termination proceeding based on abandonment (*see generally Matter of Medina Amor S.*, 50 AD3d 8, 15, *lv denied* 10 NY3d 709).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

525

CA 16-00084

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

DAVID WEGMAN, DOING BUSINESS AS ANGELS IN YOUR HOME, PLAINTIFF-RESPONDENT,

V ORDER

MARCO ALTIERI, JEAN PIERRE GARVEY, JAIDY ROSARIO-DELGADO, DANIELA ROSARIO-DELGADO, MOLLY SLIFER, SEAN O'BRIEN, ELISA HECKATHORN, BEYRI PAYAMPS-DELGADO, AND GLIDEDOWAN LLC, DOING BUSINESS AS ALL AMERICAN HOME CARE, DEFENDANTS-APPELLANTS.

WOODS OVIATT GILMAN LLP, ROCHESTER (F. MICHAEL OSTRANDER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LECLAIRRYAN, A PROFESSIONAL CORPORATION, ROCHESTER (RICHARD A. MCGUIRK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered January 15, 2016. The order, insofar as appealed from, granted in part plaintiff's motion for a preliminary injunction and required plaintiff to post an undertaking in the amount of $50,000.

It is hereby ORDERED that the order, as modified by order of this Court entered February 29, 2016, is unanimously affirmed without costs for reasons stated in the amended decision at Supreme Court.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

528

OP 16-01908

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

IN THE MATTER OF STEVEN R. BRANDON, PETITIONER,

V MEMORANDUM AND ORDER

HON. CRAIG J. DORAN, RESPONDENT.

LAW OFFICE OF JAMES L. RIOTTO, II, ROCHESTER (LINDSEY M. PIEPER OF COUNSEL), FOR PETITIONER.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JASON A. MACBRIDE OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to review a determination of respondent. The determination sentenced petitioner to 30 days' incarceration and 5 years' probation.

It is hereby ORDERED that said petition is unanimously granted without costs and judgment is granted in favor of petitioner as follows:

> It is ADJUDGED that Ontario County Court is prohibited from adding a period of probation to petitioner's sentence of incarceration.

Memorandum: On June 1, 2016, petitioner was sentenced in Ontario County Court to a definite term of incarceration of 30 days, along with fines, surcharges and the suspension of his driver's license. Respondent, the sentencing judge (Judge), did not impose a period of probation. Nevertheless, on that same date, but outside of defendant's presence, the Judge signed an order directing that petitioner serve a five-year period of probation. On June 16, 2016, while incarcerated, petitioner was presented with the order, which he signed, indicating that he "agree[d] to comply" with its terms. Petitioner was released from incarceration on June 30, 2016 and, after his time to file a direct appeal had expired, he was directed to report to the probation department to begin his probation supervision. Petitioner then commenced this proceeding seeking an order prohibiting the Judge from adding a period of probation to the sentence. We agree with petitioner that the Judge exceeded his authority in modifying the terms of petitioner's sentence outside of petitioner's presence, and we therefore grant the petition.

While a court possesses the inherent authority to correct a mistake or error in a criminal defendant's sentence (*see People v Gammon*, 19 NY3d 893, 895; *People v Lingle*, 16 NY3d 621, 629; *cf. People v Richardson*, 100 NY2d 847, 849), the process by which a court corrects such an error is by *resentencing* the defendant (*see People v Sparber*, 10 NY3d 457, 469), which must be done in the defendant's presence (*see* CPL 380.40 [1]). We thus conclude that the Judge erred in imposing an additional component to the sentence outside of petitioner's presence (*see People v Johnson*, 19 AD3d 1163, 1164, *lv denied* 5 NY3d 829).

We further conclude that petitioner cannot now be resentenced. It is well settled that, "where 'a defendant is released from custody and returns to the community after serving the period of incarceration that was ordered by the sentencing court, and the time to appeal the sentence has expired or the appeal has been finally determined,' a legitimate expectation of the original sentence's finality arises and double jeopardy precludes the modification of that sentence to include a period of" probation (*People v Cass*, 91 AD3d 978, 978, quoting *People v Williams*, 14 NY3d 198, 219, *cert denied* 562 US 947; *cf. Lingle*, 16 NY3d at 630-631). Here, as in *Williams*, petitioner has completed serving the period of incarceration and has been released from custody. Petitioner did not file a notice of appeal, and the time within which to do so has expired (*see* CPL 460.10 [1] [a]). Although petitioner, as of this writing, could still move for an extension of time to take an appeal (*see* CPL 460.30 [1]), he cannot be forced to do so. We thus conclude that petitioner's sentence is "beyond the court's authority," and an additional component to that sentence cannot be imposed (*Williams*, 14 NY3d at 217).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

534

TP 16-01010

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

IN THE MATTER OF RONNIE COVINGTON, PETITIONER,

V ORDER

JOHN COLVIN, SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY, RESPONDENT.

RONNIE COVINGTON, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, 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, Seneca County [Dennis F. Bender, A.J.], entered June 8, 2016) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

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

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

535

KA 16-00333

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BENANCIO VASQUEZ, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (James J. Piampiano, J.), entered January 14, 2016. 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: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). We reject defendant's contention that County Court erred in assessing 10 points against him for failure to accept responsibility. Although defendant pleaded guilty to the crime of course of sexual conduct against a child in the second degree and completed a sex offender treatment program, he made statements denying his guilt to a probation officer preparing the presentence report, and his statement "I accept responsibility" was suspect given its timing at the SORA hearing (*see generally People v Tilley*, 305 AD2d 1041, 1041-1042, *lv denied* 100 NY2d 588). "[T]he court properly concluded that defendant's statement[s] did not reflect a genuine acceptance of responsibility as required by the risk assessment guidelines developed by the Board [of Examiners of Sex Offenders]" (*People v Jamison*, 137 AD3d 1742, 1743, *lv denied* 27 NY3d 910 [internal quotation marks omitted]; *see People v Hiram*, 142 AD3d 1304, 1305, *lv denied* 28 NY3d 911; *People v Noriega*, 26 AD3d 767, 767, *lv denied* 6 NY3d 713).

We reject defendant's further contentions that the court erred in assessing 20 points against him under risk factor 3, for having two victims, and 30 points against him under risk factor 5, for the victims being under 10 years of age. "[I]t is well settled that, in determining the number [and age] of victims for SORA purposes, the

hearing court is not limited to the crime of which defendant was convicted" (*People v Robertson*, 101 AD3d 1671, 1671). Here, the court properly considered "reliable hearsay evidence" of the case summary and presentence report, which indicated both that defendant admitted sexual contact with his two daughters, and that the victims stated that the abuse occurred when they were between the ages of 4 and 13 (*People v Sincerbeaux*, 27 NY3d 683, 688; *see People v Mingo*, 12 NY3d 563, 573).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

539

KA 15-00671

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SONNY L. SMITH, DEFENDANT-APPELLANT.

WILLIAMS HEINL MOODY BUSCHMAN, P.C., AUBURN (MARIO J. GUTIERREZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered March 17, 2015. The judgment convicted defendant, upon his plea of guilty, of menacing in the second degree (two counts).

It is hereby ORDERED that said appeal is unanimously dismissed (*see People v Mackey*, 79 AD3d 1680, 1681, *lv denied* 16 NY3d 860).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

545

KA 15-01934

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN J. DAVIS, II, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS 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 Erie County Court (Michael F. Pietruszka, J.), dated October 16, 2015. The order denied the motion of defendant to vacate a judgment of conviction.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, and the matter is remitted to Erie County Court for a hearing pursuant to CPL 440.30 (5).

Memorandum: We granted defendant leave to appeal from the order denying his CPL article 440 motion to vacate the judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [2]). Defendant contends that he is entitled to vacatur of the judgment based on newly discovered evidence (CPL 440.10 [1] [g]) and ineffective assistance of trial counsel (CPL 440.10 [1] [h]). We agree with defendant that County Court erred in denying his motion without conducting a hearing.

CPL 440.10 (1) (g) "permits vacatur of a judgment of conviction on the ground that new evidence has been discovered since the entry of a judgment, which could not have been produced at trial with due diligence 'and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant' " (*People v McFarland*, 108 AD3d 1121, 1121, *lv denied* 24 NY3d 1220, quoting CPL 440.10 [1] [g]; *see generally People v Salemi*, 309 NY 208, 215).

Here, as in *McFarland*, information was received following defendant's conviction that a third party had allegedly confessed to the murder, and there are questions of fact whether the statements of that third party would have been admissible at trial as declarations

against penal interest (*see id.* at 1122; *see generally People v Brensic*, 70 NY2d 9, 15; *People v Settles*, 46 NY2d 154, 167). Moreover, as we wrote in *McFarland*, "where, as here, the declarations exculpate the defendant, they are subject to a more lenient standard, and will be found sufficient if [the supportive evidence] establish[es] a reasonable possibility that the statement might be true . . . That is because [d]epriving a defendant of the opportunity to offer into evidence [at trial] another person's admission to the crime with which he or she has been charged, even though that admission may . . . be offered [only] as a hearsay statement, may deny a defendant his or her fundamental right to present a defense" (*id.* at 1122 [internal quotation marks omitted]). We thus conclude that the court should have conducted a hearing to determine, first, whether there is "competent evidence independent of the declaration to assure its trustworthiness and reliability" (*Brensic*, 70 NY2d at 15) and, second, whether the witness who heard the third party's declaration is both available to testify and credible in his or her testimony (*see People v Becoats*, 117 AD3d 1465, 1467).

We further conclude that defendant is entitled to a hearing on his claims that defense counsel was ineffective for failing to investigate potentially exculpatory information. Before trial, a witness informed police that two identified individuals had told the witness that the third party had committed the murder. "A defendant's right to effective assistance of counsel includes defense counsel's reasonable investigation and preparation of defense witnesses . . . Consequently, the failure to investigate witnesses may amount to ineffective assistance of counsel" (*People v Jenkins*, 84 AD3d 1403, 1408-1409, *lv denied* 19 NY3d 1026; *see People v Mosley*, 56 AD3d 1140, 1140-1141). Although we agree with the People that the statements of the witness constitute inadmissible hearsay, it is not apparent from the record and the parties' submissions whether defendant's trial counsel investigated that exculpatory evidence and, if not, whether he had strategic or tactical reasons for not doing so. We thus conclude that the court "erred in denying the motion without first conducting an evidentiary hearing" (*Jenkins*, 84 AD3d at 1409).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

548

CA 16-01385

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

ESTATE OF ROSE S. PELLEGRINO, DECEASED,
PLAINTIFF-APPELLANT,

V ORDER

ERIE INSURANCE COMPANY, DEFENDANT-RESPONDENT.

VINAL & VINAL, P.C., BUFFALO (GREGG S. MAXWELL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARCLAY DAMON, LLP, ROCHESTER (JOSEPH A. WILSON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Orleans County (James P. Punch, A.J.), entered March 18, 2016. The order, insofar as appealed from, denied in part the motion of plaintiff for partial summary judgment and granted in part the cross motion of defendant for summary judgment.

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

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

549

CA 16-01553

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

MERCURY CASUALTY COMPANY, AS SUBROGEE OF RANDY LEE DOLAN, PLAINTIFF-APPELLANT,

V ORDER

LUIS F. REYES, DEFENDANT-RESPONDENT.

THE LAW OFFICE OF JASON TENENBAUM, P.C., GARDEN CITY (JASON TENENBAUM OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (JOHN R. CONDREN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered June 14, 2016. The order denied plaintiff's motion to vacate that portion of a prior order of the court, granted on May 3, 2016, that awarded defendant costs and attorneys' fees from the plaintiff in the amount of $1,215.00.

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

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

551

CA 16-01910

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

BRUCE COLEMAN AND ROCHESTER AUTO MAINTENANCE, INC., PLAINTIFFS-APPELLANTS,

V ORDER

CHEVRON U.S.A., INC. AND TREMARCO CORP., DEFENDANTS-RESPONDENTS.

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

WOODS OVIATT GILMAN LLP, ROCHESTER (BERYL NUSBAUM OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered March 4, 2016. The order granted the motion of defendants for summary judgment dismissing plaintiffs' claims for public nuisance and loss of sale proceeds and dismissing all claims by plaintiff Rochester Auto Maintenance, Inc., and denied the cross motion of plaintiffs for summary judgment.

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

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

556

CA 16-01428

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

IN THE MATTER OF THE APPLICATION FOR DISCHARGE OF CHARADA T., CONSECUTIVE NO. 151015 FROM CENTRAL NEW YORK PSYCHIATRIC CENTER PURSUANT TO MENTAL HYGIENE LAW SECTION 10.09, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (BENJAMIN D. AGATA OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Louis P. Gigliotti, A.J.), entered August 4, 2016 in a proceeding pursuant to Mental Hygiene Law article 10. The order, insofar as appealed from, denied that part of the motion of petitioner seeking a change of venue.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and that part of the motion seeking a change of venue is granted.

Memorandum: In this annual review proceeding pursuant to Mental Hygiene Law § 10.09, petitioner appeals from an order that, inter alia, denied that part of his motion seeking a change of venue to New York County for the convenience of witnesses (*see generally Matter of Tyrone D. v State of New York*, 24 NY3d 661, 666). Petitioner was previously determined to be a dangerous sex offender requiring civil confinement and confined to a secure treatment facility (*see* § 10.01 *et seq*.). He is currently confined at the Central New York Psychiatric Center in Oneida County. We now grant that part of the motion seeking a change of venue.

The court may change the venue of an annual review proceeding " 'to any county for good cause, which may include considerations relating to the convenience of the parties or witnesses or the condition of the [confined sex offender]' " (*Tyrone D.*, 24 NY3d at

666, quoting Mental Hygiene Law § 10.08 [e]). We agree with petitioner that Supreme Court improvidently exercised its discretion in denying his motion inasmuch as the proposed testimony of his mother, who lives in New York County, is "relevant to the issue of whether petitioner remained a dangerous sex offender in need of confinement" (*id.* at 667; *see* § 10.09 [h]). Although respondent correctly notes that the subjects of the mother's proposed testimony also may be the subjects of expert testimony, "[t]he pertinent question is whether a witness—expert or lay—has material and relevant evidence to offer on the issues to be resolved" (*Matter of State of New York v Enrique D.*, 22 NY3d 941, 944). We agree with petitioner that his mother's proposed testimony concerning his stated goals and priorities, likely living arrangements, and the availability and extent of a familial support system in the event of release, is material and relevant to the issue whether he "is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (§ 10.03 [e]; *see Matter of Vega v State of New York*, 140 AD3d 1608, 1609). We therefore conclude that petitioner established the requisite good cause for a change of venue (*see* § 10.08 [e]).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

557

CA 16-01678

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

LIFCARE USA, LLC, PLAINTIFF-RESPONDENT,

V ORDER

FIRST NIAGARA FINANCIAL GROUP,
DEFENDANT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (STEPHEN W. KELKENBERG OF COUNSEL), FOR DEFENDANT-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (ANDREW MILLER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered July 8, 2016. The order denied in part defendant's motion to dismiss plaintiff's amended complaint.

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

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

559

TP 16-01691

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

IN THE MATTER OF TERENCE DAUM, PETITIONER,

V ORDER

ANTHONY J. ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, STEWART ECKERT, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY, AND A. RODRIGUEZ, ACTING DIRECTOR, SPECIAL HOUSING UNIT, RESPONDENTS.

TERENCE DAUM, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [M. William Boller, A.J.], entered September 22, 2016) to review a determination of respondents. 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).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

561

KA 15-00166

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT L. JONES, 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 (James J. Piampiano, J.), rendered October 2, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to defendant's contention, the record establishes that defendant knowingly, voluntarily and intelligently waived the right to appeal (*see People v Taggart*, 124 AD3d 1362, 1362; *see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver by its terms forecloses any challenge by defendant to the severity of the sentence (*see Lopez*, 6 NY3d at 255; *see generally People v Hidalgo*, 91 NY2d 733, 737). Although County Court failed to apprise defendant of the maximum sentence he could receive upon his conviction, " 'the requirement that a defendant be apprised of [the] maximum sentence in order for a waiver to be valid does not apply in a situation such as this[,] where there is a specific sentence promise at the time of the waiver' " (*People v Semple*, 23 AD3d 1058, 1059, *lv denied* 6 NY3d 852; *see People v Brown*, 115 AD3d 1204, 1206, *lv denied* 23 NY3d 1060).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

562

KA 14-02276

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEAN A. RODRIGUEZ, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER 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 November 12, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the second degree and attempted burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [2] [b]) and attempted burglary in the second degree (§§ 110.00, 140.25 [2]). Contrary to defendant's contention, his waiver of the right to appeal encompasses his challenge to the severity of the sentence. The record establishes that he voluntarily, knowingly and intelligently waived the right to appeal from all aspects of his case, including his sentence, and that he was informed of the maximum sentence County Court could impose (*see People v Lococo*, 92 NY2d 825, 827; *cf. People v Maracle*, 19 NY3d 925, 928).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

563

KA 14-01047

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHAUNCEY STEWART, ALSO KNOWN AS CHONICE STEWART,
DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (KELLY C. WOLFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered June 10, 2014. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

Now, upon reading and filing the stipulation of discontinuance signed by defendant on March 30, 2017, and by the attorneys for the parties on April 4, 2017,

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

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

564

KA 15-01002

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN L. MYERS, DEFENDANT-APPELLANT.

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

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (HARMONY A. HEALY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered September 26, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, burglary in the third degree and grand larceny in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16), burglary in the third degree (§ 140.20) and grand larceny in the fourth degree (§ 155.30 [1]). Even assuming, arguendo, that defendant did not knowingly, voluntarily and intelligently waive his right to appeal, we nevertheless conclude that none of defendant's contentions requires reversal or modification of the judgment.

We reject defendant's contention that his plea was involuntary because it was allegedly induced by the false promise that he would be eligible for shock incarceration. Nothing in the record suggests that defendant's eligibility for shock incarceration or his admission to that program was a condition of the plea (*see People v Demick*, 138 AD3d 1486, 1486, *lv denied* 27 NY3d 1150) and, during the plea proceeding, defendant expressly disclaimed any off-the-record promises (*see People v Harmon*, 50 AD3d 318, 319, *lv denied* 10 NY3d 935).

Defendant failed to preserve for our review his challenge to the factual sufficiency of the plea proceeding with respect to the grand larceny count, inasmuch as his motion to withdraw the plea was made on a different ground (*see People v Gibson*, 140 AD3d 1786, 1787, *lv denied* 28 NY3d 1072). This case does not come within the narrow exception to the preservation rule (*see People v Lopez*, 71 NY2d 662,

666).

Finally, defendant's contention that he was denied effective assistance of counsel is based upon matters outside the record and thus must be raised by a motion pursuant to CPL article 440 (*see People v Monaghan*, 101 AD3d 1686, 1686, *lv denied* 23 NY3d 965).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

565

KA 15-00157

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DENNIS TRIPLETT, ALSO KNOWN AS “NANNY,”
DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KRISTIN M. PREVE 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 (Penny M. Wolfgang, J.), rendered January 2, 2015. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree (three counts), assault in the first degree (three counts) and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of three counts each of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and assault in the first degree (§ 120.10 [1]), and one count of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]). Contrary to defendant’s contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see People v Smith*, 138 AD3d 1496, 1497; *see generally People v Lopez*, 6 NY3d 248, 256). We conclude that the valid waiver of the right to appeal encompasses defendant’s challenge to Supreme Court’s disqualification of his original attorney (*see People v Segrue*, 274 AD2d 671, 672, *lv denied* 95 NY2d 908). In any event, defendant failed to preserve that challenge for our review (*see People v Tineo*, 64 NY2d 531, 535-536), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

567

KAH 15-00620

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
JOHN H. HADDOCK, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

SANDRA DOLCE, SUPERINTENDENT, ORLEANS
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from a judgment (denominated order) of the Supreme Court, Orleans County (James P. Punch, A.J.), entered November 19, 2014 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.

Memorandum: Petitioner commenced this proceeding seeking a writ of habeas corpus on the ground that he is being illegally detained on a 2008 conviction in violation of double jeopardy. We conclude that Supreme Court properly denied his petition. "Habeas corpus relief is not an appropriate remedy for asserting claims that were or could have been raised on direct appeal or in a CPL article 440 motion" (*People ex rel. Dilbert v Bradt*, 117 AD3d 1498, 1498, *lv denied* 24 NY3d 902 [internal quotation marks omitted]; *see People ex rel. Collins v New York State Dept. of Corr. & Community Supervision*, 132 AD3d 1234, 1235, *lv denied* 26 NY3d 917). Here, petitioner raised the issue of double jeopardy to the sentencing court and thus could have raised it on his direct appeal, but he failed to do so.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

581

TP 15-02180

PRESENT: CENTRA, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND SCUDDER, JJ.

IN THE MATTER OF RASHEEN MILLS, PETITIONER,

V MEMORANDUM AND ORDER

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

RASHEEN MILLS, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Thomas G. Leone, A.J.], entered December 28, 2015) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated various inmate rules, including inmate rules 100.13 (7 NYCRR 270.2 [B] [1] [iv] [fighting]) and 113.10 (7 NYCRR 270.2 [B] [14] [i] [weapon possession]). Contrary to petitioner's contention, substantial evidence, including the testimony of correction officers who witnessed the fight, supports the determination that he violated the inmate rules (*see Matter of Gray v Annucci*, 144 AD3d 1613, 1614, *lv denied* ___ NY3d ___ [Mar. 23, 2017]; *see generally Matter of Foster v Coughlin*, 76 NY2d 964, 966). Although petitioner was not the initial aggressor, he continued to fight when ordered to stop and used a weapon against the other inmate (*see Matter of Gloster v Goord*, 278 AD2d 568, 568-569, *appeal dismissed* 96 NY2d 825; *Matter of Anderson v Goord*, 262 AD2d 896, 896-897). Petitioner's testimony to the contrary merely raised an issue of credibility for the Hearing Officer to resolve (*see Foster*, 76 NY2d at 966). Contrary to petitioner's further contention, the chain of custody for the weapon was "adequately established" (*Matter of Martinez v Annucci*, 134 AD3d 1380, 1381). Petitioner's contention that he was denied the right to call certain witnesses is without merit inasmuch as he failed to establish that those witnesses would

have provided relevant, noncumulative testimony (*see Matter of Medina v Fischer*, 137 AD3d 1584, 1585-1586; *Matter of Jackson v Annucci*, 122 AD3d 1288, 1288-1289).

Petitioner contends that the hearing was not timely completed (*see* 7 NYCRR 251-5.1 [b]). The record establishes, however, that the hearing was extended upon proper authorization (*see id.*; *Matter of Comfort v Irvin*, 197 AD2d 907, 907-908, *lv denied* 82 NY2d 662). In any event, compliance with that regulation "is directory only and there is no indication of any substantive prejudice to petitioner resulting from the delay" (*Comfort*, 197 AD2d at 908; *see Matter of Dash v Goord*, 255 AD2d 978, 978-979). We reject petitioner's further contention that the Hearing Officer was biased (*see Matter of Colon v Fischer*, 83 AD3d 1500, 1501-1502). We have reviewed petitioner's remaining contentions and conclude that they are without merit.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

582

KA 16-00048

PRESENT: CENTRA, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOUGLAS C. TATNER, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Christopher S. Ciaccio, J.), entered November 10, 2015. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that reversal is required because County Court applied the wrong burden of proof when it determined that the People had "shown, by a preponderance of the evidence, that an upward departure in the risk level classification [was] warranted." We agree with defendant that the court applied the wrong standard inasmuch as it is well settled that "the People cannot obtain an upward departure pursuant to the guidelines unless they prove the existence of certain aggravating circumstances by clear and convincing evidence" (*People v Gillotti*, 23 NY3d 841, 862). Nevertheless, "remittal is not required because the record is sufficient to enable us to determine under the proper standard whether the court erred" in granting the People's request for an upward departure (*People v Loughlin*, 145 AD3d 1426, 1427-1428).

We conclude that the court properly determined that an upward departure was warranted. "A court may make an upward departure from a presumptive risk level when, after consideration of the indicated factors[,] . . . [the court determines that] there exists an aggravating or mitigating factor of a kind, or to a degree, not otherwise adequately taken into account by the [risk assessment] guidelines" (*People v Abraham*, 39 AD3d 1208, 1209 [internal quotation marks omitted]). Here, the People established by clear and convincing

evidence the existence of numerous aggravating factors not adequately taken into account by the risk assessment guidelines, including defendant's "constant masturbation," which was "indicative of hyper-sexuality"; his "self-reported addiction" to child pornography; and the nature of the images, i.e., the sadomasochistic images of child pornography found on his computer (*see People v Sczerbaniewicz*, 126 AD3d 1348, 1349; *see also People v Guyette*, 140 AD3d 1555, 1556-1557; *People v Lashway*, 66 AD3d 662, 662-663).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

583

KA 15-00533

PRESENT: CENTRA, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BERNARD ROBERSON, DEFENDANT-APPELLANT.

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

MICHAEL J. FLAHERTY, JR., DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered February 24, 2015. 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). Defendant's waiver of the right to appeal was a "general unrestricted waiver" that encompasses his contention that the sentence imposed is unduly harsh and severe (*People v Hidalgo*, 91 NY2d 733, 737; *see Lopez*, 6 NY3d at 255-256; *cf. People v Maracle*, 19 NY3d 925, 928).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

584

KA 16-00350

PRESENT: CENTRA, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KASIM SAKINOVIC, DEFENDANT-APPELLANT.

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

JEFFREY S. CARPENTER, DISTRICT ATTORNEY, HERKIMER (JACQUELYN M. ASNOE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Herkimer County Court (John H. Crandall, J.), rendered December 16, 2014. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of burglary in the second degree (Penal Law § 140.25 [2]), defendant contends that County Court abused its discretion in determining that granting defendant youthful offender status would not serve the interest of justice. We reject that contention (*see* CPL 720.20 [1] [a]; *People v Agee*, 140 AD3d 1704, 1704-1705, *lv denied* 28 NY3d 925), and we decline to exercise our interest of justice jurisdiction to adjudicate defendant a youthful offender (*see Agee*, 140 AD3d at 1704-1705). Contrary to defendant's further contention, the agreed-upon sentence is not unduly harsh or severe.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

585

KA 11-02607

PRESENT: CENTRA, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LAWRENCE GAINES, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, TREVETT CRISTO SALZER & ANDOLINA P.C. (ERIC M. DOLAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered October 17, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

586

KA 12-01912

PRESENT: CENTRA, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT G. GILL, DEFENDANT-APPELLANT.

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KIMBERLY J. CZAPRANSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered August 2, 2012. 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: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [1]). Contrary to defendant's contention, he knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Fontaine*, 144 AD3d 1658, 1658). Although defendant's contention that his guilty plea was not knowing, voluntary, and intelligent survives the valid waiver of the right to appeal, defendant failed to preserve that contention for our review inasmuch as he failed to move to withdraw the plea or to vacate the judgment of conviction (*see People v Bizardi*, 130 AD3d 1492, 1492, *lv denied* 27 NY3d 992). This case does not fall within the rare exception to the preservation rule set forth in *People v Lopez* (71 NY2d 662, 666), "inasmuch as nothing in the plea colloquy casts significant doubt on defendant's guilt or the voluntariness of the plea" (*People v Lewandowski*, 82 AD3d 1602, 1602; *see Lopez*, 71 NY2d at 666; *Bizardi*, 130 AD3d at 1492).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

590

KA 15-00658

PRESENT: CENTRA, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AAMONI ROUSE, DEFENDANT-APPELLANT.

TULLY RINCKEY, PLLC, ROCHESTER (PETER J. PULLANO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered March 10, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to defendant's contention, County Court properly refused to suppress the gun found on his person. The evidence presented at the suppression hearing established that a police officer, who was conducting surveillance of a house known to be the site of recent gang activity, observed one of the eight men congregated in front of the house with his hand in the pocket of his shirt holding what appeared to be the handle of a handgun. In addition, the officer observed the outline of what appeared to be a gun. The hearing testimony also established that defendant was recognized as a member of the gang and that the gang was known to be in a feud with another gang at that time. Five officers exited a vehicle, and a police officer conducted a pat search of the man who was observed holding what appeared to be a handgun in his pocket, but no weapon was found. Another officer then engaged in a pat search of another man, who was wearing a large coat on a very warm night and had been standing nearby the man believed to have been holding the gun in his pocket. When a gun was recovered from the pocket of that man's coat, the police conducted pat searches of the remaining members of the group and recovered three additional guns, one of which was from the pocket of defendant's pants. We conclude that the court properly determined that the police had reasonable suspicion to stop defendant because there were " 'specific and

articulable facts . . . , along with any logical deductions, [that] reasonably prompted th[e] intrusion' " (*People v Brannon*, 16 NY3d 596, 602). Furthermore, the court properly determined that the police officers "had a reasonable basis for fearing for [their] safety and [were] not required to await the glint of steel" before conducting a pat search of defendant (*People v Bracy*, 91 AD3d 1296, 1298, *lv denied* 20 NY3d 1060 [internal quotation marks omitted]; *see People v Fletcher*, 130 AD3d 1063, 1065, *affd* 27 NY3d 1177; *see also People v Clay*, 147 AD3d 1499, 1500).

We reject defendant's further contention that the court abused its discretion in denying his request for youthful offender treatment based upon alleged mitigating circumstances, and we decline to exercise our interest of justice jurisdiction to adjudicate him a youthful offender (*see People v Quinones*, 140 AD3d 1693, 1693-1694, *lv denied* 28 NY3d 935). The sentence is not unduly harsh or severe.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

591

CA 16-02047

PRESENT: CENTRA, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND SCUDDER, JJ.

KRISTY CARPENTER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PATRICK T. STEADMAN AND ERICH F. STEADMAN,
DEFENDANTS-APPELLANTS.

HAGELIN SPENCER LLC, BUFFALO (MATTHEW D. PFALZER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (RICHARD A. NICOTRA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered August 18, 2016. The order denied the motion of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the complaint, as amplified by the bill of particulars, with respect to the 90/180-day category of serious injury within the meaning of Insurance Law § 5102 (d) and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when the vehicle she was operating was struck from behind by a vehicle operated by defendant Patrick T. Steadman and owned by defendant Erich F. Steadman. The complaint, as amplified by the bill of particulars, sought recovery under three categories of serious injury, i.e., the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories (*see* Insurance Law § 5102 [d]). Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d).

We agree with defendants that Supreme Court erred in denying the motion with respect to the 90/180-day category, and we therefore modify the order by granting the motion to that extent. Defendants established that plaintiff did not sustain an injury that prevented her "from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury" (*Nitti v Clerrico*, 98 NY2d 345, 357 n 5; *see*

Licari v Elliott, 57 NY2d 230, 238; *Thornton v Husted Dairy, Inc.*, 134 AD3d 1402, 1403). Defendants submitted plaintiff's deposition in which she testified that she did not take any time off from her work in sales after the accident, although she left early on "several occasions" (*see Pastuszynski v Lofaso*, 140 AD3d 1710, 1711). Defendants thus established that plaintiff's activities were not curtailed to a great extent (*see Burns v McCabe*, 17 AD3d 1111, 1111; *see generally Licari*, 57 NY2d at 236). In opposition to the motion, plaintiff failed to raise a triable issue of fact (*see Thornton*, 134 AD3d at 1403; *Jones v Leffel*, 125 AD3d 1451, 1452).

Contrary to defendants' further contention, however, the court properly denied the motion with respect to the permanent consequential limitation of use and significant limitation of use categories. Defendants met their initial burden by submitting the affirmed report of the physician who conducted an examination of plaintiff on behalf of defendants and reviewed her medical reports, including an imaging study that showed preexisting degenerative disc bulging at C5-6. He concluded that plaintiff sustained only a temporary cervical strain and that the diagnostic studies showed no evidence of a traumatic injury as a result of the accident (*see Williams v Jones*, 139 AD3d 1346, 1347; *Jones*, 125 AD3d at 1451-1452; *French v Symborski*, 118 AD3d 1251, 1251, *lv denied* 24 NY3d 904).

We agree with defendants that the court should not have considered the second affidavit submitted by plaintiff's chiropractor in opposition to the motion because it constituted an improper surreply (*see McMullin v Walker*, 68 AD3d 943, 944; *Flores v Stankiewicz*, 35 AD3d 804, 805). Nevertheless, we conclude that plaintiff raised an issue of fact through the submission of the chiropractor's first affidavit. Plaintiff's chiropractor concluded that the disc involvement as shown on the MRI was causally related to the accident. Proof of a herniated or bulging disc, without additional objective evidence, is insufficient to establish a serious injury (*see Pommells v Perez*, 4 NY3d 566, 574; *Clark v Boorman*, 132 AD3d 1323, 1324). Here, however, the MRI showing the bulging disc, together with the quantified limited range of cervical motion found by the chiropractor, is sufficient objective evidence of a serious injury (*see Clark*, 132 AD3d at 1324-1325; *Courtney v Hebeler*, 129 AD3d 1627, 1628; *Ruiz v Cope*, 119 AD3d 1333, 1334). The chiropractor also showed objective evidence of an injury by stating that he detected muscle spasms (*see Marks v Alonso*, 125 AD3d 1475, 1476; *Harrity v Leone*, 93 AD3d 1204, 1206). Contrary to defendants' contention, plaintiff's chiropractor adequately addressed the alleged preexisting condition found by defendants' examining physician (*cf. Franchini v Palmieri*, 1 NY3d 536, 537).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

592

CA 16-01463

PRESENT: CENTRA, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND SCUDDER, JJ.

IN THE MATTER OF ARBITRATION BETWEEN TOWN
OF GREECE, PETITIONER-APPELLANT,

AND ORDER

GREECE GOLD BADGE CLUB, CWA LOCAL 1170,
RESPONDENT-RESPONDENT.

HARRIS BEACH PLLC, PITTSFORD (KARLEE S. BOLANOS OF COUNSEL), FOR PETITIONER-APPELLANT.

CREIGHTON, JOHNSEN & GIROUX, BUFFALO (JONATHAN G. JOHNSEN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Renee Forgensi Minarik, A.J.), entered May 23, 2016. The order and judgment denied the petition to stay arbitration.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 13 and 17, 2017,

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

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

595

CA 16-02026

PRESENT: CENTRA, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND SCUDDER, JJ.

IN THE MATTER OF LAURENCE R. GOODYEAR, DECEASED.

DANIEL M. GOODYEAR AND WENDY GRISWOLD,
PETITIONERS-RESPONDENTS,

MEMORANDUM AND ORDER

V

FREDERICK YOUNG, BEVERLY H. YOUNG, JOHN F. YOUNG, JAMES R. YOUNG, JEFFREY K. YOUNG, F.J. YOUNG COMPANY, JKLM ENERGY, LLC, AND SWEPI, LP,
RESPONDENTS-APPELLANTS.

MEYER UNKOVIC & SCOTT LLP, PITTSBURGH, PENNSYLVANIA (DAVID G. OBERDICK, OF THE PENNSYLVANIA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), LECLAIR RYAN, ROCHESTER (ANDREW P. ZAPPIA OF COUNSEL), AND WOODS OVIATT GILMAN LLP, BUFFALO, FOR RESPONDENTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (KEVIN M. KEARNEY OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Surrogate's Court, Erie County (Barbara Howe, S.), entered August 2, 2016. The order, among other things, denied respondents' motion to dismiss the proceeding.

It is hereby ORDERED that said appeal by respondent SWEPI, LP is unanimously dismissed and the order is affirmed without costs.

Memorandum: Petitioners, decedent's children, were issued letters of administration CTA in order to commence this construction proceeding with respect to a provision in decedent's last will and testament that gave "all of [his] interest in any mineral rights in Pennsylvania or elsewhere to the King Partnership," of which petitioners are members. It is undisputed that subsurface rights owned by decedent in several properties in Pennsylvania were sold at a tax sale in 1994 to respondent Frederick Young (hereafter, Young), before decedent's death in 1995. Following decedent's death, at Young's request and with the understanding based upon Young's assertion that he purchased "all the properties assessed to [decedent]," the executors issued a quit claim deed "covering all oil, gas and mineral properties belonging to the Estate." In this proceeding, petitioners seek a determination that the quit claim deed transferred oil and gas interests that had not been transferred to Young in the tax sale, and that those interests had vested in the King Partnership at the time of decedent's death. Based upon Young's

motion to dismiss the petition for failure to name necessary parties, Surrogate's Court determined that Young's wife, respondent Beverly H. Young, and their children, respondents John F. Young, James R. Young and Jeffrey K. Young (collectively, Young respondents), and certain corporate and partnership entities were necessary parties to the proceeding. It is undisputed that the quit claim deed transferred the interests to Young and his wife, who thereafter transferred their interests to their three sons. Following the filing of an amended petition naming the additional parties, all of which are nondomiciliaries, the Young respondents and respondents F.J. Young Company and JKLM Energy, LLC (Young partnerships), which are managed by certain of the Young respondents, moved to dismiss the petition for lack of subject matter jurisdiction and personal jurisdiction. Those respondents have abandoned on appeal any contention that the Surrogate lacked subject matter jurisdiction (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984), and thus we address only the issue of personal jurisdiction. We note at the outset that respondent SWEPI, LP joined in the motion only with respect to subject matter jurisdiction, which is not at issue on appeal, and thus we dismiss the appeal of that respondent.

With respect to the Young respondents, we conclude that the Surrogate properly determined that, because each of those respondents was in receipt of property interests conveyed by the estate, the Surrogate had personal jurisdiction over them pursuant to SCPA 210 (2) (b) (*see Matter of Casey*, 145 AD2d 632, 633; *Matter of Schreiter*, 169 Misc 2d 706, 711 [Sur Ct, NY County 1996]). Although the Surrogate did not explicitly address whether the exercise of personal jurisdiction over the Young respondents " 'offend[s] traditional notions of fair play and substantial justice' " (*Rushaid v Pictet & Cie*, 28 NY3d 316, 330-331, *rearg denied* 28 NY3d 1161; *see generally Casey*, 145 AD2d at 633; *Schreiter*, 169 Misc 2d at 711), we conclude that it does not (*see Rushaid*, 28 NY3d at 331). Even assuming, arguendo, that the court lacks personal jurisdiction over the Young partnerships and thus that jurisdiction can be obtained only by their consent or appearance, we nevertheless conclude that dismissal of the petition is not warranted (*see generally* CPLR 1001 [b]). We will "not permit the . . . voluntary absence [of the Young partnerships] to deprive these [petitioners]" of the determination sought herein (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 820-821, *cert denied* 540 US 1017).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

596

CA 16-01967

PRESENT: CENTRA, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND SCUDDER, JJ.

RONALD HANSFORD, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL WELLSBY AND WENDY WELLSBY,
DEFENDANTS-RESPONDENTS.

SPADAFORA & VERRASTRO, LLP, BUFFALO (RICHARD E. UPDEGROVE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (ANDREW D. DRILLING OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), dated February 22, 2016. The order denied the motion of plaintiff for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when he fell while stepping down from a porch on property owned by defendants. The porch was approximately 13 inches off the ground, and there were two concrete blocks that were placed next to the porch to act as steps. At his deposition, plaintiff testified that, when he stepped on one of the concrete blocks, it broke and caused him to lose his balance and fall.

Supreme Court properly denied plaintiff's motion seeking summary judgment on the issues of negligence and proximate cause. "A landowner has a duty to maintain its property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to third parties, the potential seriousness of the injury and the burden of avoiding the risk" (*Boderick v R.Y. Mgt. Co., Inc.*, 71 AD3d 144, 147; *see Basso v Miller*, 40 NY2d 233, 241). To establish his entitlement to summary judgment, plaintiff had to establish as a matter of law that defendants created the defective condition or had actual or constructive notice of it (*see Del Carmen Cuque v Amin*, 125 AD3d 1490, 1491; *Sniatecki v Violet Realty, Inc.*, 98 AD3d 1316, 1318; *see also Gaffney v Norampac Indus., Inc.*, 109 AD3d 1210, 1211). In addition, plaintiff also had to establish "that the defendant's negligence was a proximate cause of the injuries. To do so, the negligence must be a substantial cause of the events which produced the injury" (*Boderick*, 71 AD3d at 147, citing *Derdiarian v Felix*

Contr. Corp., 51 NY2d 308, 315, *rearg denied* 52 NY2d 784, *reconsideration denied* 52 NY2d 829).

In support of the motion, plaintiff established that the stairs were in violation of the building codes, which constitutes some evidence of negligence (*see Morreale v Froelich*, 125 AD3d 1280, 1281; *Brigandi v Piechowicz*, 13 AD3d 1105, 1106). However, although the broken block constituted a dangerous condition, plaintiff did not establish as a matter of law that defendants created that dangerous condition or had actual or constructive notice of it (*see Del Carmen Cuque*, 125 AD3d at 1491). Furthermore, plaintiff failed to establish as a matter of law that the violation of the building codes proximately caused the accident (*see generally Morreale*, 125 AD3d at 1281-1282; *Brigandi*, 13 AD3d at 1106).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

599

CA 16-01682

PRESENT: CENTRA, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND SCUDDER, JJ.

REHAB RESOURCES FOR PHYSICAL THERAPY, P.C.,
PLAINTIFF-RESPONDENT,

V ORDER

TENDER TOUCH REHAB SERVICES, LLC, NATIONAL STAFFING SOLUTIONS, INC., ONWARD HEALTHCARE, INC., KATHY CAPENER, SONIA CHAUBAL, ROBIN KUNICKI, KIM MAGUIRE, TAMARA WILBURN, ALYCIA BOLINSKI, NANCY RICHMAN, PAMELA LITTLE, HEATHER WHITEHEAD,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

SILVERMAN SHIN & BYRNE PLLC, NEW YORK CITY (ELANA BEN-DOV OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Onondaga County (Walter W. Hafner, Jr., A.J.), entered November 23, 2015. The order denied the motion of defendants-appellants to dismiss the complaint.

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

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

600

CA 16-01331

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

JOSEPH SKITZKI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MELISSA NEAL, DEFENDANT-APPELLANT.

MELISSA NEAL, DEFENDANT-APPELLANT PRO SE.

FERON POLEON, LLP, AMHERST (KELLY A. FERON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

KELLY L. BALL, ATTORNEY FOR THE CHILDREN, BUFFALO.

Appeal from an order of the Supreme Court, Erie County (Dennis E. Ward, J.), entered November 20, 2015. The order, among other things, granted plaintiff exclusive use and occupancy of real property located at 766 Auburn Avenue, Buffalo, and adjourned the cross motion of defendant for financial relief.

It is hereby ORDERED that said appeal from the fourth ordering paragraph is unanimously dismissed and the order is otherwise affirmed without costs.

Memorandum: Defendant appeals from an order in this divorce action that, inter alia, granted plaintiff's motion seeking a temporary order of exclusive possession of the marital residence (*see* Domestic Relations Law § 234). Contrary to defendant's contention, the record establishes that she was a source of domestic strife, which required police intervention on one occasion, and that, after the commencement of the action, she purchased a home in proximity to the marital residence (*see Annexstein v Annexstein*, 202 AD2d 1062, 1062; *see also Amato v Amato*, 133 AD3d 695, 696). We therefore conclude that Supreme Court did not abuse its discretion in granting plaintiff exclusive possession of the marital residence (*see generally Iuliano v Iuliano*, 30 AD3d 737, 737-738). "In any event, the most expedient and best remedy for any perceived inequities in a temporary order of exclusive occupancy, like any other pendente lite order, is to press for an early trial" (*Annexstein*, 202 AD2d at 1062 [internal quotation marks omitted]).

Contrary to defendant's contention, the court did not deny her cross motion for temporary financial relief but instead adjourned the matter, and thus her contention regarding that requested relief is not properly before us (*see Matter of Lefrak Forest Hills Corp. v Board of*

Stds. & Appeals of City of N.Y., 38 AD2d 979, 979). Defendant's remaining contention with respect to the order is without merit.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

603

KA 14-01249

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PATIQUE DONERLSON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY 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 (James J. Piampiano, J.), rendered May 22, 2014. The judgment convicted defendant, upon her plea of guilty, of criminal possession of a forged instrument 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 her upon her plea of guilty of two counts of criminal possession of a forged instrument in the second degree (Penal Law § 170.25 [1]). Contrary to the contention of defendant, the record establishes that she knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver constitutes a general unrestricted waiver that forecloses any challenge by her to the severity of the sentence (*see id.* at 255-266; *People v Hidalgo*, 91 NY2d 733, 737; *cf. People v Maracle*, 19 NY3d 925, 928). To the extent that defendant contends that the "written waiver of [the right to] appeal is unenforceable because it contained certain nonwaivable rights[, a]ny nonwaivable [rights] purportedly encompassed by the waiver are excluded from the scope of the waiver [and] the remainder of the waiver is valid and enforceable" (*People v Williams*, 132 AD3d 1291, 1291, *lv denied* 26 NY3d 1151 [internal quotation marks omitted]; *see People v Gibson*, 147 AD3d 1507, 1508; *People v Mead*, 133 AD3d 1257, 1258).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

604

KA 16-02041

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL J. BLARR, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

EVAN LUMLEY, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered January 14, 2015. The judgment convicted defendant, upon his plea of guilty, of scheme to defraud in the first degree and grand larceny in the third degree (10 counts).

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of one count of scheme to defraud in the first degree (Penal Law § 190.65 [1] [a]) and 10 counts of grand larceny in the third degree (§ 155.35 [1]). In appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of two counts of scheme to defraud in the first degree (§ 190.65 [1] [a]), and one count each of grand larceny in the third degree (§ 155.35 [1]) and grand larceny in the fourth degree (§ 155.30 [1]). With respect to both appeals, the record establishes that defendant knowingly, intelligently, and voluntarily waived his right to appeal (*see People v Anderson*, 144 AD3d 1614, 1614, *lv denied* 28 NY3d 1181; *People v Carney*, 129 AD3d 1511, 1511, *lv denied* 27 NY3d 994). The valid waivers of the right to appeal with respect to both the conviction and sentence encompass defendant's challenges to the severity of the sentences (*see People v Lopez*, 6 NY3d 248, 255-256; *People v Hidalgo*, 91 NY2d 733, 737; *cf. People v Maracle*, 19 NY3d 925, 928).

Defendant contends that he was denied effective assistance of counsel with respect to both appeals. To the extent that defendant's contention survives his guilty pleas and waivers of the right to appeal (*see People v Collins*, 129 AD3d 1676, 1676-1677, *lv denied* 26 NY3d 1038), it is without merit. We conclude on the record before us that defendant was afforded meaningful representation (*see People v*

Davis, 99 AD3d 1228, 1229, *lv denied* 20 NY3d 1010; *see generally People v Ford*, 86 NY2d 397, 404).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

609

KA 16-02042

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL J. BLARR, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

EVAN LUMLEY, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered January 13, 2015. The judgment convicted defendant, upon his plea of guilty, of scheme to defraud in the first degree (two counts) and one count each of grand larceny in the third degree and grand larceny in the fourth degree.

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

Same memorandum as in *People v Blarr* ([appeal No. 1] ___ AD3d ___ [Apr. 28, 2017]).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

611

CAF 16-00124

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

IN THE MATTER OF DAVID BUSSE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

RUTH VANESSA TOLENTINO HUERTA,
RESPONDENT-APPELLANT.

TIMOTHY R. LOVALLO, BUFFALO, FOR RESPONDENT-APPELLANT.

RANDY S. MARGULIS, WILLIAMSVILLE, FOR PETITIONER-RESPONDENT.

ROSS S. GELBER, ATTORNEY FOR THE CHILD, WILLIAMSVILLE.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered October 26, 2015 in a proceeding pursuant to Family Court Act article 6. The order granted the petition of petitioner for sole custody of the subject child.

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

Memorandum: Respondent mother appeals from an order that granted petitioner father's petition seeking sole custody of the parties' child. We affirm. The determination of Family Court, following a hearing, that the best interests of the child would be served by an award of sole custody to the father is entitled to great deference (*see Eschbach v Eschbach*, 56 NY2d 167, 173), particularly where, as here, the determination is based in part upon the court's " 'superior ability to evaluate the character and credibility of the witnesses' " with respect to, inter alia, allegations regarding domestic violence (*Matter of Joyce S. v Robert W.S.*, 142 AD3d 1343, 1344). Further, the record establishes that the court's determination "is the product of [its] 'careful weighing of [the] appropriate factors' . . . , and it has a sound and substantial basis in the record" (*Matter of Thillman v Mayer*, 85 AD3d 1624, 1625; *see Joyce S.*, 142 AD3d at 1344).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

624

CA 16-01767

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

L.E.M. FINANCIAL INC., PLAINTIFF-APPELLANT,

V ORDER

PENNY WILLIAMS CARDINALE, ALSO KNOWN AS PENNY WILLIAMS, ALSO KNOWN AS PENNY J. WILLIAMS, JPMORGAN CHASE BANK, N.A. DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

DRUCKMAN LAW GROUP PLLC, WESTBURY (LISA M. BROWNE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF BRUCE S. ZEFTEL, BUFFALO (BRUCE S. ZEFTEL OF COUNSEL), FOR DEFENDANT-RESPONDENT JPMORGAN CHASE BANK, N.A.

Appeal from an order of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), entered February 8, 2016. The order granted the motion of defendant JPMorgan Chase Bank, N.A. to dismiss the complaint.

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

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

626.1

CAF 16-00999

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

IN THE MATTER OF MARC D. GSCHWEND,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

LAUREN N. DAVILA, RESPONDENT-RESPONDENT.

BENNETT SCHECHTER ARCURI & WILL LLP, BUFFALO (CAROL A. CONDON OF COUNSEL), PETITIONER-APPELLANT.

COHEN & LOMBARDO, P.C., BUFFALO (MICHELLE M. SCHWACH OF COUNSEL), FOR RESPONDENT-RESPONDENT.

LEIGH E. ANDERSON, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Niagara County (John F. Batt, J.), dated August 21, 2015 in a proceeding pursuant to Family Court Act article 6. The order, among other things, denied the petition of petitioner seeking modification of a prior order of custody by awarding him sole custody of the subject child.

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

Memorandum: By order entered in 2008, Family Court awarded sole custody of the parties' child to respondent mother. Petitioner father now appeals from an order that, inter alia, denied his petition seeking modification of the 2008 order by awarding sole custody of the child to him. Contrary to the father's contention, the court's determination is entitled to great deference (*see Eschbach v Eschbach*, 56 NY2d 167, 173-174), and it will not be disturbed where, as here, it is based upon a comprehensive weighing of the appropriate factors and is supported by a sound and substantial basis in the record (*see Matter of Blair v DiGregorio*, 132 AD3d 1375, 1376, *lv denied* 26 NY3d 914). We see no reason to remit the matter for an expedited hearing, as requested by the Attorney for the Child, based upon allegations of a change of circumstances subsequent to the entry of the order on appeal. We instead conclude that the contentions raised in that regard are more properly considered by the court in a petition to modify its order (*see Matter of Mayes v Laplatney*, 125 AD3d 1488, 1489-1490; *cf. Matter of Kennedy v Kennedy*, 107 AD3d 1625, 1626).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

628

KA 15-01969

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY GALBERTH, DEFENDANT-APPELLANT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (GREGORY A. KILBURN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered August 12, 2015. 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: On appeal from a judgment convicting him upon a plea of guilty of two counts of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [7]), defendant contends that County Court erred in imposing a sentence that was different from the sentence promised in the negotiated plea agreement without first affording him the opportunity to withdraw his plea.

At the time defendant entered his plea, the terms of the plea agreement provided that he would be sentenced to two to four years of incarceration for the two crimes and that the sentences for the two counts would run concurrently with each other as well as with an undischarged term of imprisonment (*see* Penal Law § 70.25 [5] [c]). At sentencing, however, defense counsel requested a conference with the court and, following that off-the-record discussion, a recess was taken. When the case was recalled, defense counsel stated that defendant's "release dates would be shorter, they'd be sooner, if [defendant] were to be sentenced to an indeterminate term of one-and-a-half to three consecutive to his current term." Defense counsel also noted, however, that defendant's parole eligibility date would be extended. At defense counsel's request, the court agreed to sentence defendant to two terms of incarceration of 1½ to 3 years, to run concurrently with each other but consecutively to the undischarged term of imprisonment.

We agree with defendant that, even assuming, arguendo, his waiver of the right to appeal is valid, it would not preclude his challenge to the modified sentence (*see People v Donnelly*, 80 AD3d 797, 798; *People v Baxter*, 302 AD2d 950, 951, *lv denied* 99 NY2d 652). Nevertheless, we agree with the People that defendant is precluded from challenging the modification to the sentence. Defendant, through counsel, requested the change in sentence and, when questioned about that change, did not object to it. In our view, defendant waived his current challenge to the modified sentence. He intentionally relinquished a known right, i.e., the right to be sentenced in accordance with the original terms of the plea agreement (*see generally People v Ahmed*, 66 NY2d 307, 311, *rearg denied* 67 NY2d 647, citing *Johnson v Zerbst*, 304 US 458, 464-465; *People v Simmons*, 167 AD2d 924, 924, *lv denied* 77 NY2d 843).

In any event, we conclude that defendant's contention is not preserved for our review, and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Defendant had ample time and opportunity to preserve his contention, i.e., by objecting or moving to withdraw his plea at the time of sentencing or by thereafter moving to vacate his conviction, but he failed to do so (*see People v Sepulveda*, 198 AD2d 66, 66, *lv denied* 82 NY2d 930; *cf. People v Rivera*, 126 AD3d 728, 729, *lv denied* 25 NY3d 1206).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

631

KA 16-00659

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS C. HALL, DEFENDANT-APPELLANT.

CARR SAGLIMBEN LLP, OLEAN (JAY D. CARR OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered February 1, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal facilitation in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the sentence, and as modified the judgment is affirmed, and the matter is remitted to Cattaraugus County Court for resentencing.

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of criminal facilitation in the second degree (Penal Law § 115.05), defendant contends that he was improperly sentenced as a second felony offender. Defendant failed to preserve that contention for our review (*see People v Smith*, 73 NY2d 961, 962-963), but we exercise our power to reach it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]), and we note that the People correctly concede defendant's point. We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing. It is well settled that, "under New York's 'strict equivalency' standard for convictions rendered in other jurisdictions, a federal conviction for conspiracy to commit a drug crime may not serve as a predicate felony for sentencing purposes" (*People v Ramos*, 19 NY3d 417, 418).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

636

KA 13-02116

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER M. HORR, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER, FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered October 2, 2013. The judgment convicted defendant, upon a jury verdict, of assault in the second degree, false personation and resisting arrest.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of, inter alia, assault in the second degree (Penal Law § 120.05 [3]). Defendant failed to preserve for our review his contention that Supreme Court failed to articulate a sufficient jury instruction with respect to the causation element of Penal Law § 120.05 (3) (*see generally People v Townsley*, 50 AD3d 1610, 1611, *lv denied* 11 NY3d 742), and we decline to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

We reject defendant's contention that the court abused its discretion in denying his request for new counsel. The general assertions of defendant that counsel was "not complying with [his] wishes" and that he was not "being represented properly" were not sufficient to raise a " 'serious complaint' " warranting substitution of counsel (*People v Adger*, 83 AD3d 1590, 1591, *lv denied* 17 NY3d 857). Finally, the court properly granted defendant's request to proceed pro se after inquiring into defendant's education and knowledge of legal matters, making defendant aware of the disadvantages of proceeding without counsel, and appointing standby counsel to assist defendant at trial, if necessary (*see generally*

People v Providence, 2 NY3d 579, 582).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

637

CAF 16-00340

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

IN THE MATTER OF DANYEL J. AND JOHN J.

JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

LEEANN K.-G., RESPONDENT-APPELLANT,
AND ALAN J., RESPONDENT.

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

MICHAEL WERNER, WATERTOWN, FOR PETITIONER-RESPONDENT.

MELISSA L. KOFFS, ATTORNEY FOR THE CHILDREN, CHAUMONT.

Appeal from an order of the Family Court, Jefferson County (Eugene J. Langone, Jr., J.), entered February 23, 2016 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent Leeann K.-G. neglected the subject children.

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

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

638

CAF 15-01832

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

IN THE MATTER OF REFIK AVDIC,
PETITIONER-RESPONDENT,

V ORDER

ZINETA AVDIC, RESPONDENT-APPELLANT.

SUSAN B. MARRIS, ESQ., ATTORNEY FOR THE CHILD,
APPELLANT.

SUSAN B. MARRIS, ATTORNEY FOR THE CHILD, MANLIUS, APPELLANT PRO SE.

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

PETER J. DIGIORGIO, JR., UTICA, FOR PETITIONER-RESPONDENT.

Appeals from an order of the Family Court, Oneida County (Louis P. Gigliotti, A.J.), entered September 4, 2015 in proceedings pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole custody of the subject child.

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

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

644

CA 16-01247

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

DETROY LIVINGSTON, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 127058.)

DETROY LIVINGSTON, CLAIMANT-APPELLANT PRO SE.

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

Appeal from an order of the Court of Claims (Renee Forgensi Minarik, J.), entered May 23, 2016. The order granted the motion of defendant to dismiss the claim and dismissed the claim.

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

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

648

OP 16-01993

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

IN THE MATTER OF THE APPLICATION OF LEON ANDERSON, INTERLAKEN POLICE DEPARTMENT, CHIEF OF POLICE, PETITIONER,

V MEMORANDUM AND ORDER

WILLIAM MCGUIRE, INTERLAKEN VILLAGE BOARD OF TRUSTEES OFFICER, RESPONDENT.

THE LAMA LAW FIRM, LLP, ITHACA (LUCIANO L. LAMA OF COUNSEL), FOR PETITIONER.

DAVID LEE FOSTER, GENEVA, FOR RESPONDENT.

Proceeding pursuant to Public Officers Law § 36 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) for the removal of respondent William McGuire as an officer of the Board of Trustees of the Village of Interlaken.

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

Memorandum: Petitioner commenced this original proceeding pursuant to Public Officers Law § 36 seeking the removal of respondent as an officer of the Board of Trustees of the Village of Interlaken (Board). We conclude that respondent's alleged conduct, accepted as true, "does not rise to the level necessary to justify his removal from office under Public Officers Law § 36" (*Matter of Jones v Filkins*, 238 AD2d 954, 954), and we therefore dismiss the petition.

"Public Officers Law § 36 was enacted to enable a town or village to rid itself of an unfaithful or dishonest public official" (*Matter of Hayes v Avitabile*, 133 AD3d 1184, 1184 [internal quotation marks omitted]; *see Matter of Reszka v Collins*, 109 AD3d 1134, 1134). Removal is appropriate only in instances of "self-dealing, corrupt activities, conflict of interest, moral turpitude, intentional wrongdoing or violation of a public trust" (*Hayes*, 133 AD3d at 1184 [internal quotation marks omitted]; *see Reszka*, 109 AD3d at 1134). Contrary to petitioner's contention, he failed to allege removable conduct insofar as he alleged that respondent overstepped his authority in attempting to micromanage the police department (*see generally Matter of Salvador v Ross*, 61 AD3d 1163, 1164-1165), obtained and disclosed confidential information at Board meetings (*see Matter of Chandler v Weir*, 30 AD3d 795, 796), and held one "special

meeting" of the Board without notifying the public (*see Matter of Hart v Trumansburg Bd. of Trustees*, 41 AD3d 1025, 1026). Those allegations constitute "minor neglect of dut[ies], administrative oversight[s] [and] violation[s] of law" for which removal is unwarranted (*Hayes*, 133 AD3d at 1185 [internal quotation marks omitted]; *see Matter of Hedman v Town Bd. of Town of Howard*, 56 AD3d 1287, 1287-1288).

Finally, we are particularly unpersuaded by petitioner's contention that respondent's stance as a legislator on certain public policy issues warrants his removal. It is well established that "courts do not inquire into the wisdom, reasons or motives for [legislative action] absent fraud, corruption or oppression, but leave such matters to the discretion of the [legislators]" (*Matter of Stetter v Town Bd. of Town of Amherst*, 46 AD2d 1006, 1006-1007).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

649

TP 16-02045

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

IN THE MATTER OF LEONIDAS SIERRA, PETITIONER,

V ORDER

DONALD E. VENETTOZZI, DIRECTOR, INMATE DISCIPLINE, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

LEONIDAS SIERRA, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Mark H. Fandrich, A.J.], entered November 2, 2016) 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 the determination is unanimously confirmed without costs and the petition is dismissed.

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

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

670

CA 16-00227

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

IN THE MATTER OF RUSSELL HOLDER,
PETITIONER-APPELLANT,

V ORDER

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

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered January 20, 2016 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see Matter of Sanchez v Evans*, 111 AD3d 1315).

Entered: April 28, 2017

Frances E. Cafarell
Clerk of the Court

MOTION NO. (1316/06) KA 04-02937. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CONSTANTINE L. JACKSON, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: WHALEN, P.J., SMITH, CENTRA, PERADOTTO, AND CURRAN, JJ. (Filed Apr. 28, 2017.)

MOTION NO. (358/10) KA 07-01557. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHAD T. HOLLOWAY, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, TROUTMAN, AND SCUDDER, JJ. (Filed Apr. 28, 2017.)

MOTION NO. (959/10) KA 09-01166. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TROY L. KENNEDY, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed Apr. 28, 2017.)

MOTION NO. (613/11) KA 09-02049. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MELVIN BOGAR, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND CURRAN, JJ. (Filed Apr. 28, 2017.)

MOTION NO. (1176/11) KA 07-01186. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DON PETERKIN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., PERADOTTO, CURRAN, TROUTMAN, AND SCUDDER, JJ. (Filed Apr. 28, 2017.)

MOTION NO. (250/14) KA 11-01070. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANTWAN MYLES, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CARNI, AND NEMOYER, JJ. (Filed Apr. 28, 2017.)

MOTION NO. (1005/16) KA 14-01971. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DEVON SCOTT, ALSO KNOWN AS "GHOST", DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND SCUDDER, JJ. (Filed Apr. 28, 2017.)

MOTION NO. (1104/16) CA 16-00663. -- INTERNATIONAL UNION OF PAINTERS & ALLIED TRADES, DISTRICT COUNCIL NO. 4, BY ITS SECRETARY-TREASURER, MARK STEVENS, INTERNATIONAL UNION OF PAINTERS & ALLIED TRADES, FINISHING TRADES INSTITUTE OF WESTERN & CENTRAL NEW YORK, BY ITS TRUSTEES MARK STEVENS, GREGORY STONER, ROBERT SINOPOLI, JEFFREY CARROLL, TODD ROTUNNO, MICHAEL DEMS, DANIEL LAFRANCE, DAN JACKSON, DOMINIC ZIRILLI, TIM MCCLUSKEY, JEFF STURTZ, FRANK HOSEK AND MARVIN PAIGE, FORNO ENTERPRISES, INC., TGR ENTERPRISES, INC., HOGAN GLASS, LLC, AJAY GLASS & MIRROR CO., THOMAS A. JERGE, AS A CITIZEN TAXPAYER, PAUL J. LEONE, AS A CITIZEN TAXPAYER, CHRISTOPHER J. POWERS, AS AN APPRENTICE ENROLLED IN PAINTERS DISTRICT COUNCIL NO. 4 GLAZIER APPRENTICESHIP PROGRAM, AND RACHEL TERHART, AS A FORMER APPRENTICE ENROLLED IN PAINTERS DISTRICT COUNCIL NO. 4 GLAZIER APPRENTICESHIP PROGRAM, PLAINTIFFS-APPELLANTS, V NEW YORK STATE DEPARTMENT

OF LABOR, MARIO MUSOLINO, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF LABOR AND CHRISTOPHER ALUND, DIRECTOR, BUREAU OF PUBLIC WORKS, A DIVISION OF NEW YORK STATE DEPARTMENT OF LABOR, DEFENDANTS-RESPONDENTS. -- Motion for leave to appeal to the Court of Appeals granted. PRESENT: WHALEN, P.J., CENTRA, LINDLEY, NEMOYER, AND TROUTMAN, JJ. (Filed Apr. 28, 2017.)

MOTION NO. (1172/16) CA 16-00597. -- GORDON J. KING AND BRENDA KING, CLAIMANTS-RESPONDENTS, V NIAGARA FALLS WATER AUTHORITY AND NIAGARA FALLS WATER BOARD, RESPONDENTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, CURRAN, AND TROUTMAN, JJ. (Filed Apr. 28, 2017.)

MOTION NO. (1176/16) CA 16-01094. -- BRANDI HARDY, ET AL., PLAINTIFFS, V THOMAS KULWICKI, CARLO V. MADONIA, JR., KAREN MADONIA, ET AL., DEFENDANTS. CARLO V. MADONIA, JR., AND KAREN MADONIA, THIRD-PARTY PLAINTIFFS-RESPONDENTS-APPELLANTS, V HARLEYSVILLE WORCESTER INSURANCE COMPANY, THIRD-PARTY DEFENDANT-APPELLANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, AND TROUTMAN, JJ. (Filed Apr. 28, 2017.)

MOTION NO. (1221/16) CA 16-00090. -- IN THE MATTER OF CITY OF ROME, PETITIONER-RESPONDENT, V BOARD OF ASSESSORS AND/OR ASSESSOR OF TOWN OF LEWIS, BOARD OF ASSESSMENT REVIEW, ADIRONDACK CENTRAL SCHOOL DISTRICT AND

COUNTY OF LEWIS, RESPONDENTS-APPELLANTS. (APPEAL NO. 2.) -- Motion for reargument denied. PRESENT: SMITH, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ. (Filed Apr. 28, 2017.)

MOTION NO. (1224.2/16) CA 16-01425. -- IN THE MATTER OF ISKALO 5000 MAIN LLC AND ISKALO 5010 MAIN LLC, PETITIONERS-RESPONDENTS, V TOWN OF AMHERST INDUSTRIAL DEVELOPMENT AGENCY, RESPONDENT-APPELLANT. COUNTY OF ERIE, INTERVENOR-RESPONDENT-APPELLANT. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ. (Filed Apr. 28, 2017.)

MOTION NO. (1308/16) CA 16-00508. -- JOSEPH P. GALLAGHER, JR. AND KELLYANN E. GALLAGHER, PLAINTIFFS-APPELLANTS, V DOMINIC RUZZINE, JR., ANDREA RUZZINE, TIMOTHY R. MALCHOW, LORA L. MALCHOW, ROBITAILLE RELOCATION CENTER, INC., SARAH ROBITAILLE, REALTY USA.COM AND GERALDINE BROSKY, DEFENDANTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., CENTRA, LINDLEY, DEJOSEPH, AND SCUDDER, JJ. (Filed Apr. 28, 2017.)

MOTION NO. (1310/16) CA 16-00548. -- WORKERS' COMPENSATION BOARD OF STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V OLD LAMSON STATION, INC., DEFENDANT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., CENTRA, LINDLEY,

DEJOSEPH, AND SCUDDER, JJ. (Filed Apr. 28, 2017.)

MOTION NO. (32/17) KA 14-00996. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ROMMEL BURDINE, ALSO KNOWN AS ROMELL BURDINE, DEFENDANT-APPELLANT. -- Motion for reargument granted in part and, upon reargument, the memorandum and order entered February 10, 2017 (147 AD3d 1471) is amended by deleting the fourth sentence of the second paragraph of the memorandum, and by deleting the first sentence of the second paragraph of the memorandum, and replacing the first sentence with the following sentence: "We conclude, however, that the error is harmless inasmuch as the evidence of defendant's guilt is overwhelming, and there is no reasonable possibility that the admission of the text messages might have contributed to defendant's conviction (*see generally People v Crimmins*, 36 NY2d 230, 237)." PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND SCUDDER, JJ. (Filed Apr. 28, 2017.)

MOTION NO. (45/17) CA 16-00938. -- ASHLEY B. JONES, PLAINTIFF-APPELLANT, V ERIC R. SWEDE, DEFENDANT, AND DARRYLE R. SWEDE, DEFENDANT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND SCUDDER, JJ. (Filed Apr. 28, 2017.)

MOTION NO. (105/17) CA 16-00833. -- IN THE MATTER OF DIXIE D. LEMMON AND CONCERNED CITIZENS OF SENECA COUNTY, INC., PETITIONERS-APPELLANTS, V SENECA MEADOWS, INC., JAMES CLEERE, SOLELY IN HIS CAPACITY AS TOWN OF WATERLOO CODE ENFORCEMENT OFFICER AND TOWN OF WATERLOO ZONING BOARD OF APPEALS, RESPONDENTS-RESPONDENTS. -- Motions for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed Apr. 28, 2017.)

MOTION NO. (141/17) TP 16-01171. -- IN THE MATTER OF KENNETH JAMES, PETITIONER, V TINA M. STANFORD, CHAIRWOMAN, NEW YORK STATE BOARD OF PAROLE AND SUSAN KICKBUSH, SUPERINTENDENT, GOWANDA CORRECTIONAL FACILITY, RESPONDENTS. -- Motion for reargument denied. PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, TROUTMAN, AND SCUDDER, JJ. (Filed Apr. 28, 2017.)

MOTION NO. (203/17) CAF 15-01632. -- IN THE MATTER OF MEREDITH GORTON, PETITIONER-RESPONDENT, V JEREMY V. INMAN, RESPONDENT-APPELLANT. -- Motion for reargument denied. PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND SCUDDER, JJ. (Filed Apr. 28, 2017.)

KA 16-00857. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BRIDGETTE A. MCGARVIN, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel’s motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38). (Appeal from a Judgment of Niagara County

Court, Honorable Sara Sheldon, J. - Violation of Probation). PRESENT: WHALEN, P.J., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed Apr. 28, 2017.)